Date: 20060106

Docket: IMM-7836-04

Citation: 2006 FC 16

BETWEEN:

DANIEL THAMOTHAREM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

THE CANADIAN COUNCIL FOR REFUGEES

Intervener

REASONS FOR ORDER

BLANCHARD J.

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1. Introduction

[1] The Applicant, Daniel Thamotharem, applies for a judicial review of a decision of the Refugee Protection Division (the Board) of the Immigration and Refugee Board (the IRB), dated August 20, 2004, wherein he was determined to be neither a Convention refugee nor a person in need of protection.

[2] The Applicant seeks an order setting aside the Board's decision, both with regards to the merits of his refugee claim and the validity of the standard-order of questioning procedure set out in a guideline issued by authority of the Chairperson of the IRB (Guideline 7). The Canadian Council for Refugees intervenes in this application to support the Applicant's position that Guideline 7 violates the principles of natural justice and procedural fairness. For the purpose of these reasons the use of "Guideline 7", unless otherwise stated, will reference the Chairperson's standard-order of questioning procedure.

2. Factual Background

[3] The Applicant is Tamil and a citizen of Sri Lanka. He entered Canada on September 12, 2002, on a student visa. He made a claim for refugee protection on January 12, 2004. The Applicant bases his claim upon fear of persecution at the hands of the Liberation Tigers of Tamil Eelam (the LTTE). The Applicant alleges that since the ceasefire agreement between the LTTE and the Sri Lankan government was signed in February 2002, the LTTE has been more openly active in Colombo. The Applicant claims that the LTTE is extorting money from his mother. He

alleges that if returned to Sri Lanka, he faces extortion and threats of kidnapping and physical harm at the hands of the LTTE.

[4] In written arguments submitted prior to his hearing and in oral submissions at the hearing, the Applicant raised objections to Guideline 7, arguing that it violates the principles of natural justice. Under Guideline 7, the Refugee Protection Officer (the RPO) questions the claimant first, and if no RPO is present, the Board member questions first. Guideline 7 allows the Board member to vary the order of questioning in exceptional circumstances.

[5] The Board heard the Applicant's claim on July 5, 2004. After hearing oral submissions from the Applicant's counsel on Guideline 7, the Board proceeded with the RPO questioning first. In its written reasons, the Board dismissed the Applicant's claim that Guideline 7 was contrary to the principles of natural justice, and concluded that the Applicant was not a Convention refugee or a person in need of protection.

3. The Decision under Review

[6] On the issue of Guideline 7, the Board stated that the panel is an independent decision-maker and "in that capacity, the panel does not find that Guideline 7 violates the principles of natural justice". The Board held that having the RPO question the claimant first is consistent with the common-law duty of fairness that claimants be provided with a meaningful opportunity to be heard.

[7] In support of its decision, the Board took guidance from *R.K.N. (Re)*, [2004] R.P.D.D. No. 14 (QL), a decision rendered by the Board on June 16, 2004. In that decision, at page 2, the Board stated:

> In my view, proceeding according to the standard order of questioning is fair and efficient. The hearing is focused; the claimant retains full opportunity to know the case to meet, and to present his or her case in accordance with principles of fairness and natural justice…
>
> …
>
> The Federal Court has never indicated that a fair hearing requires that a claimant lead evidence by way of examination-in-chief. Rather, the Federal Court has recently and repeatedly affirmed that the RPD is the master of its own procedure.

[8] Following those reasons, the Board concluded, in the present case, that Guideline 7 does not give rise to a denial of natural justice.

[9] As for the merits of the Applicant's refugee claim, the Board stated that, while accepting that a durable peace has not been achieved in Sri Lanka, the Applicant could return to Colombo with no more than a mere possibility of serious or persistent harm. The Board made several findings of fact in support of its conclusion that the Applicant was not a Convention refugee or a person in need of protection.

[10] First, the Board was not satisfied that the incident involving the Applicant's mother being extorted by the LTTE ever occurred. Second, the Board found it implausible that in all the years the Applicant had lived with his mother in Colombo while his father was working in Saudi Arabia that the family was never targeted for extortion but *yet now*, after the Applicant came to Canada, the LTTE would *suddenly* extort money from his mother [emphasis in the Board's

decision]. Third, the Board did not accept that the Applicant was at higher risk for extortion because he had spent two years in Canada and the LTTE would therefore consider him to have amassed a certain amount of wealth.

[11] Drawing from the documentary evidence, the Board also found that a number of positive changes in the country conditions made it safe for the Applicant to return to Sri Lanka. The changes cited by the Board include:

(a) that the ceasefire agreement between the Sri Lankan government and the LTTE includes basic proscriptions against harming citizens;

(b) that the Sri Lankan government was reported to have removed all travel restrictions imposed on Tamil civilians in March 2002; and

(c) that Tamils living in Colombo are no longer required to register with the police.

[12] Finally, the Board rejected the Applicant's claim that he was at risk of being recruited by the LTTE on the basis that he had never been approached by the LTTE to join its forces before and there was no reliable evidence that the Applicant would be perceived to be a member of any political group, either pro-government or pro-Tamil.

4. Issues

[13] In this application for judicial review, the Court is asked to determine the following questions:

(A) In respect to the principles of natural justice and procedural fairness:

(i) Does Guideline 7 deny the Applicant the right to be heard?

(ii) Does Guideline 7 fetter the discretion of Board members?

(iii) Does Guideline 7 unlawfully distort the adjudicative role of the Board?

(B) Did the Board err in finding the Applicant not to be a Convention refugee or a person in need of protection?

5. Standard of Review

[14] This judicial review involves consideration of procedural and substantive issues: (1) whether the procedure followed by Board complied with the principles of procedural fairness and natural justice, and (2) whether the Board erred in dismissing the Applicant's claim on its merits.

[15] When the Court is assessing allegations of denial of natural justice or procedural fairness, it is not necessary for the Court to conduct a pragmatic and functional analysis and determine the appropriate standard of review: *Canadian Union of Public Employees 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 adhered to the rules of natural justice and procedural 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.

[16] With respect to substantive decisions of the Board, the Supreme Court of Canada has recently re-affirmed the standard of review applicable to IRB decisions in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40. The Supreme Court stated that paragraph 18.1(4)(*c*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, allows the Federal Court to grant relief when a federal commission errs in law and that such questions of law are reviewable on a standard of correctness. In respect to questions of fact, the Supreme Court at paragraph 38 of its decision, wrote:

> On questions of fact, the reviewing court can intervene only if it considers that the IAD "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (*Federal Court Act*, s. 18.1(4)(*d*)). The IAD is entitled to base its decision on evidence adduced in the proceedings which it considers credible and trustworthy in the circumstances: s. 69.4(3) of the Immigration Act. Its findings are entitled to great deference by the reviewing court. Indeed, the FCA itself has held that the standard of review as regards issues of credibility and relevance of evidence is patent unreasonableness: *Aguebor v. Minister of Employment & Immigration* (1993), 160 N.R. 315 (F.C.A.) at para. 4.

Findings in relation to risk of persecution and country conditions are findings of fact and as such, the appropriate standard of review is patent unreasonableness.

6. Legislative Framework

[17] Before examining the issue of natural justice and procedural fairness, I will review briefly the applicable legislative framework.

[18] The IRB is an administrative tribunal comprised of three Divisions – the Board, the Immigration Division and the Immigration Appeal Division: section 151 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA). The IRB and its Divisions are creatures of statute; whatever power and authority they have must be derived from the IRPA.

[19] In section 107 of the IRPA, Parliament vested in the Board the authority to determine whether a person is a Convention refugee or a person in need of protection. Certain powers of the Board are set out in sections 162 to 169; these powers apply to all Divisions of the IRB. Under subsection 162(2), the Board is required to deal with all proceedings before it "as informally and quickly as the circumstances and the considerations of fairness and natural justice permit". Section 170 sets out additional powers specific to the Board with respect to the conduct of proceedings before it.

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;	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*) 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

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.

[20] The *Refugee Protection Division Rules*, SOR/2002-228 (the Rules) made pursuant to section 161 of the IRPA also set out specific rules concerning the refugee determination process of the Board, including requirements in respect to the Personal Information Form (the PIF), the provision and disclosure of documents, how to become counsel of record, the duties of an RPO, interventions by the Minister, and the reopening and abandoning of refugee claims.

[21] Parliament also vested in the Chairperson of the IRB various powers and responsibilities. Under subsection 159(1), the Chairperson, as the chief executive officer of the IRB, is charged with supervising and directing the work of staff of the IRB; apportioning work among members of the IRB and fixing the place, date and time of proceedings; and taking any action that may be necessary to ensure that the members of the IRB carry out their duties efficiently and without undue delay. The Chairperson also has the authority to issue guidelines in writing to members of the IRB to assist them in 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	159.(1) Le président est le premier dirigeant de la Commission ainsi que membre d'office des quatre sections; à ce titre :
…	[…]
(h) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons and the Director General of the Immigration Division, to assist members in carrying out their duties;	*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;
…	[…]

[22] Section 165 of the IRPA also provides that each member of both the Board and the Immigration Division "…may do any other thing they consider necessary to provide a full and proper hearing."

7. Guideline 7

[23] On October 30, 2003, as part of his Action Plan to reduce the backlog of refugee claims before the Board, the IRB Chairperson issued three procedural guidelines, including Guideline 7 - Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division: see Aterman Affidavit at paragraphs 17 and 18. Guideline 7 addresses procedures for case preparation, hearing preliminaries and the conduct of refugee hearings. Paragraphs 19 to 23 of Guideline 7 set out a standard order for questioning refugee claimants, and the basis and procedure for varying the order of proceeding. Paragraph 24 limits questions to relevant information. I reproduce below the pertinent paragraphs:

19. In a claim for refugee protection, the standard practice will be for the 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. 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.

20. In a claim for refugee protection where the Minister intervenes on an issue other than exclusion, for example, on a credibility issue, the RPO starts the questioning. If there is no RPO at the hearing, the member will start the questioning, followed by the Minister's counsel and then counsel for the claimant.

21. In proceedings where the Minister intervenes on the issue of exclusion, Minister's counsel will start the questioning, followed by the RPO, the member, and counsel for the claimant. Where the Minister's counsel requests another chance to question at the end, the member will allow it if the member is satisfied that new matters were raised during questioning by the other participants.

22. In proceedings where the Minister is making an application to vacate or to cease refugee protection, Minister's counsel will start the questioning, followed by the member, and counsel for the protected person. Where the Minister's counsel requests another chance to question at the end, the member will allow it if the member is satisfied that new matters were raised during questioning by the other participants.

23. The member may vary the order of questioning in exceptional circumstances. For example, a severely disturbed claimant or a very young child might feel too intimidated by an unfamiliar examiner to be able to understand and properly answer questions. In such circumstances, the member could decide that it would be better for counsel for the claimant to start the questioning. A party who believes that exceptional circumstances exist must make an application to change the order of questioning before the hearing. The application has to be made according to the *RPD Rules*.

24. The member will limit the questioning by the RPO and counsel for the parties according to the nature and complexity of the issues. Questioning must bring out relevant information that will help the member make an informed decision. Questions that are answered by the claimant just repeating what is written in the PIF do not help the member.

[24] Guideline 7 was phased in between December 1, 2003 and May 31, 2004, and as of June 1, 2004 became fully implemented.

8. Does Guideline 7 Violate the Principles of Natural Justice and Procedural Fairness?

(1) *Evidence before the Court*

[25] Before I turn to consider the arguments of the parties, I will briefly review the evidence adduced in this application. The Intervener and the Respondent both submitted affidavits from persons knowledgeable in matters related to the refugee determination process conducted by the Board.

[26] The Intervener relies on the evidence of three witnesses.

(a) Raoul Boulakia, who swore his affidavit on July 14, 2005, was called to the Bar of Ontario in 1990 and practices in Toronto in the area of immigration and refugee law. He is also the President of the Refugee Lawyers Association (the RLA), a voluntary association of lawyers practicing refugee law in Ontario. He attests to the context behind the implementation of Guideline 7, and the RLA's belief that Board members are under pressure to apply Guideline 7. Mr. Boulakia also attests to the difficulties inherent in "reverse-order questioning" and the necessity of an "examination-in-chief" because of the unique features of refugee protection proceedings; namely, the appointment process for Board members; the adversarial style commonly adopted by RPOs; the funnelling of the claim by RPOs and Board members into their theory of the case; the incomplete nature of PIF narratives and tight filing deadline; and the particular vulnerabilities of refugee claimants. Mr. Boulakia states that Guideline 7 interferes with the right of

refugee claimants to know the case against them and to present their claims. Finally, he attests that "reverse-order questioning" has not increased the efficiency of hearings before the Board. Annexed to Mr. Boulakia's affidavit are several exhibits, notably a performance appraisal checklist, e-mail correspondence concerning Board members allowing counsel to question first, and an excerpt from the Board's decision in *Baskaran* (Board File: TA1-07530).

On cross-examination, Mr. Boulakia acknowledged that it is possible to amend the PIF up to and at the hearing, but states there are dangers of the Board viewing the late amendment as adverse to the claimant's credibility. While noting the difficulties in getting satisfactory responses as to the issues still outstanding after the RPO and Board member question the claimant, Mr. Boulakia acknowledged that some Board members are quite cooperative and candid with counsel. Mr. Boulakia admitted that where Board members apply the exception provided for under Guideline 7 and allow counsel to question first there is no question about the fairness of the guideline.

(b) James Donald Galloway, who swore his affidavit on May 25, 2005, is a Professor of Law at the University of Victoria, a position he has held since 1994. He was previously a Professor of Law at Queen's University. From 1998 to 2001, Professor Galloway served as a member of the then Convention Refugee Determination Division of the IRB in Vancouver. After his tenure as a Board

member, he provided personal training to Board members in Vancouver, including jurisprudential training. Professor Galloway gives his opinion on why an “examination-in-chief” is fundamental to a just determination of refugee protection claims. He attests to the inaccuracy or incompleteness of the following perceptions used to justify “reverse-order questioning”, namely:

(a) that refugee determination proceedings are non-adversarial;

(b) that the PIF substitutes for an examination-in-chief;

(c) that reverse-order questioning complies with natural justice because there is no abrogation of the right to an oral hearing;

(d) that the expertise of RPOs obviates the need for an examination-in-chief by the claimant’s counsel;

(e) that paragraphs 19 and 23 of Guideline 7 do not fetter the discretion of Board members;

(f) that the exceptional circumstances of Guideline 7 ensure that vulnerable claimants will not be subjected to procedures which may intimidate them; and

(g) that reverse-order questioning promotes efficiency.

In Professor Galloway’s opinion, Guideline 7 prevents a claimant from adequately presenting her or his claim by allowing the RPO to define presumptively the nature of the claim rendering the right to an oral hearing illusory. With regard to fettering discretion, Professor Galloway is also of the

view that Board members would conform to the standard mode of proceeding rather than exercise their discretion on a case-by-case basis, given the strong, mandatory language of Guideline 7 and Board members' loyalty to the Board and the Chairperson.

On cross-examination, Professor Galloway acknowledged that he has not attended any refugee hearings since he left the IRB in 2001. Regarding the nature of questioning during refugee hearings, Professor Galloway agreed that Board members have a responsibility to ask pointed, probing questions and admitted that he sees asking tough questions as being adversarial. With regards to fettering, he stated that even if there are no negative repercussions for not following Guideline 7, that does not mean there are no institutional pressures to conform.

(c) Donald Payne, who swore his affidavit on June 9, 2005, is a medical doctor and has been a certified specialist in psychiatry for over 30 years. He is proffered as an expert on the psychiatric and psychological conditions of refugee claimants who appear before the Board. Dr. Payne has performed psychiatric assessments on more that 1,450 victims of persecution from more than 90 countries, and he has testified before the Board on more than 20 occasions. Dr. Payne comments on the following vulnerabilities faced by refugee claimants that interfere with their ability to accurately testify at their hearings:

(a) Post-Traumatic Stress Disorder (PTSD),

(b) experiences of torture, humiliation and degradation,

(c) psychological suppression and/or repression,

(d) marked anxiety,

(e) marked depression, and

(f) distrust of people and conditioned fear of government officials and police.

Dr. Payne attests that claimants need to feel they are understood and their experiences heard, and that aggressive and repeated questioning by government officials only exacerbates claimants' anxiety. He further comments that it is extremely important that the environment at refugee hearings be made as non-threatening as possible for claimants. In Dr. Payne's opinion, having refugee claimants questioned first by their counsel, a non-government agent whose role is to represent claimants' interests and whom the claimants have previously met and have grown to trust, is more likely to promote effective testimony from refugee claimants who have been subjected to persecution.

On cross-examination, Dr. Payne acknowledged that he has not attended a refugee hearing since Guideline 7 was implemented. He stated that to his knowledge there have been no scientific studies finding that persons suffering from PTSD perform better if examined in chief first. He also admitted that it is the hostile manner of questioning that affects vulnerable refugee claimants most adversely, and that

vulnerable claimants may experience distress even when their counsel questions them first.

[27] The Respondent relies on the evidence of one witness.

(a) Paul Aterman, who swore his affidavit on August 16, 2005, is a lawyer and the Director General, Operations Branch, of the Board. His duties include coordinating initiatives to reform the refugee determination process at the Board. Mr. Aterman attests to the role of RPOs, the responsibility and authority of Board members, and the inquisitorial manner in which refugee protection determination hearings are conducted. He comments on the purpose of Chairperson's guidelines and Guideline 7 specifically. Mr. Aterman states that prior to implementing Guideline 7, there was no standard order of questioning, and that part of the rationale behind Guideline 7 was to foster national consistency. He attests to the greater efficiency that has been realized since the implementation of Guideline 7. Attached to Mr. Aterman's affidivat are a number of exhibits, which include:

(a) the policy on the use of Chairperson's Guidelines and the Chairperson's Guidelines 5, 6 and 7;

(b) issues of the "IRB News" with information on Guideline 7;

(c) manuals used for training RPOs and Board members;

(d) decisions in which Board members have addressed challenges to the general validity of Guideline 7; and

(e) decisions in which Board members have varied the standard order of questioning and allowed counsel to question claimants first.

On cross-examination, Mr. Aterman stated that part of the motivation behind Guideline 7 was to reduce hearing time. Later on though, he stated that the Chairperson did not implement Guideline 7 to reduce the length of hearings but to extend the Board's inquisitorial mandate. He also commented that the reason for RPOs and members to go first is that they are in a better position to know what the Board really needs to determine the claim. He admitted that Board members and RPOs only received a four-hour training session on the manner of questioning prior to the implementation of Guideline 7. However, he denied that RPOs and Board members were trained to funnel the evidence towards a negative conclusion. He acknowledged that prior to June 1, 2004, "reverse-order questioning" was not used at hearings in Toronto without the claimant's consent. He further acknowledged that there is monitoring of the implementation of the guideline through managers in the regional offices, and that some individual members have been asked why they had not followed Guideline 7. However, he stated that monitoring is necessary to find out how effective the change is and whether any professional development needs arise. He stated that Guideline 7 is not a set of directives and that members exercise their discretion. That said, he acknowledged that Board members are expected to apply the Chairperson's guidelines or to justify their reasons for not doing so.

(2) *Positions of the Parties*

[28] On the question of natural justice and procedural fairness, I will summarize the parties' positions.

[29] The Applicant asserts that the person who bears the onus of proof has the right to present her or his case prior to being questioned by other participants at the hearing; that is, the right to conduct an "examination-in-chief". The Applicant contends that this principle is supported by the jurisprudence of the Federal Court.

[30] The Intervener also asserts that Guideline 7 violates the principles of natural justice and procedural fairness by circumscribing a refugee claimant's ability to present her or his case, and as a consequence, rendering the right to an oral hearing illusory. More specifically, the Intervener argues that because of the importance of an "examination-in-chief" in allowing refugee claimants to introduce their claims, to find their voice, and to control the presentation of evidence, principles of natural justice and procedural fairness demand that a refugee claimant have the right to be questioned by her or his counsel first. In support of its contention, the Intervener points to particular features of the refugee determination process that result in Guideline 7 being unfair:

(a) the differing roles of the RPOs, members and counsel;

(b) the adversarial nature of refugee proceedings;

(c) the inadequacy of the PIF in setting out the claim; and

(d) the unique vulnerabilities of refugee claimants.

[31] Both the Applicant and the Intervener refer to the opportunity for counsel of the Applicant to question first as an “examination-in-chief”.

[32] With respect to these allegations, the Respondent asserts that the principles of natural justice and procedural fairness do not stipulate that ensuring that refugee claimants have an adequate opportunity to state their case and to know the case they have to meet requires that refugee claimants be allowed to present their case by way of an “examination-in-chief”. Further, the Respondent argues that the Applicant and Intervener’s contention of a right to an “examination-in-chief” is based on a false analogy between the conduct of criminal and civil proceedings and the Board’s proceedings. Unlike the former proceedings, the Respondent submits that refugee determination proceedings are administrative and non-adversarial.

[33] The Respondent argues that the general validity of Guideline 7 has been upheld in several decisions of the Court. The Respondent also contends that denials of procedural fairness must be considered on a case-by-case basis, and in the present case the Applicant has not presented any evidence that by following Guideline 7, the Board deprived the Applicant of any procedural protection. For these reasons, the Respondent submits that this Court should not entertain the Applicant’s allegations of procedural unfairness.

[34] The Intervener advances two further arguments. First, the Intervener contends that Guideline 7 unlawfully fetters the discretion of Board members because it is *de facto* mandatory and binding. Second, the Intervener argues that Guideline 7 is unlawful because it distorts the adjudicative role of Board members, particularly by adding duties which are incompatible with members' primary responsibility of decision-making.

[35] The Respondent argues that Guideline 7 was issued pursuant to the Chairperson's statutory authority and does not fetter the discretion of Board members as it is not binding and explicitly contemplates Board members varying the order of questioning. In response to the second allegation, the Respondent submits that Guideline 7 is consistent with the Board's inquisitorial mandate and the duty of members to assess the merits of claims in an informal, quick and fair manner.

(3) *Analysis*

(i) Does Guideline 7 deny the Applicant the right to be heard?

[36] The first ground upon which the Applicant and the Intervener challenge Guideline 7 is that it is inherently unfair not to allow a claimant's counsel to question the claimant first, before the RPO or Board member does. The Applicant and the Intervener contend that refugee claimants have a right to conduct "examination-in-chief". The Respondent argues that neither the principles of natural justice nor paragraph 170(e) of the IRPA – the requirement that the Board allow an applicant a reasonable opportunity to present evidence, question witnesses and make representations – gives claimants such a right.

[37] It is useful at the outset to dispose of the following three arguments raised by the Respondent and the Applicant before considering the duty of fairness, namely:

(1) The Respondent asserts that the Federal Court has already confirmed the validity of Guideline 7;

(2) The Respondent argues that the Applicant's allegation of procedural unfairness is hypothetical and therefore should not be entertained by the Court; and

(3) The Applicant contends that the right of refugee claimants to be questioned first by counsel has been established by the Court.

I will deal with each of these arguments in turn.

[38] The Respondent argues that the Court has already upheld the general validity of the Guideline 7 and as a result, this Court should follow those precedents. It is true that the Court has previously concluded that Guideline 7 is not inconsistent with the principles of natural justice and procedural fairness. In *Cortes Silva v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 738 at paragraph 13, Madam Justice Gauthier held that Guideline 7 "does not constitute a breach of the *audi alteram partem* [the right to be heard] rule, because it is evident that the applicant was fully afforded the right to be heard in order to argue the merits of his claim for refugee protection". In the more recent decision of *Zaki v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1066 at paragraph 13, Madam Justice Snider concluded that, "as have numerous of my colleagues", the implementation of Guideline 7 in Board hearings is not, in and

of itself, a breach of procedural fairness. However, Justice Snider continued on to say at paragraph 14 that a claimant may still be able to establish that he or she was denied a meaningful opportunity to make out his or her case.

> The relevant question is whether the procedure, on the facts of this case, resulted in unfairness to the Applicant. That requires an examination of the record on two aspects: (i) whether the RPD fettered its discretion in its refusal to return to the familiar, counsel-first order; and (ii) whether the order of questioning resulted in the Applicant not being afforded the right to be heard.

[39] The Court both in *Cortes Silva* and in *Zaki* held that whether or not a breach of procedural fairness has occurred must be determined on a case-by-case basis and in circumstances that are not hypothetical.

[40] The Court has also upheld the general validity of Guideline 7 in *B.D.L. v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 866; *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1121; and *Fabiano v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1260.

[41] While the previous decisions of the Court considering Guideline 7 are instructive, in my opinion, they are not determinative of the issues before this Court. First, it does not appear that the Court in those cases had the benefit of such extensive arguments and evidence on Guideline 7 as are now before this Court. Second, the Applicant and Intervener contend that the right to be heard in the adjudication of refugee claims includes the right of claimants to have their counsel proceed first in questioning. The Intervener further argues that Guideline 7 in unlawful because it fetters the discretion of Board Members and distorts the adjudicative role of the Board. These

arguments have not yet been comprehensively canvassed and determined by the Court. I will address these issues later in these reasons.

[42] The Respondent also asserts that the Applicant's allegation of procedural unfairness is hypothetical and as such should not be entertained by the Court. The Respondent notes that there is no evidence before the Court that the Applicant was prevented from stating his case, that the Applicant was suffering from PTSD or any other particular vulnerability, or that he was questioned improperly. Indeed, the Applicant does not assert any such improprieties by the RPO or Board member or impediments to his ability to testify at the hearing.

[43] The Applicant does not allege that on the specific facts of the conduct of his refugee hearing that the use of the Chairperson's standard-order questioning procedure led to a breach of natural justice. Rather, his allegation is that, in general, Guideline 7 violates the principles of natural justice. In my opinion, the Applicant's argument is not hypothetical. The Applicant challenged Guideline 7 from the outset. In this instant case, the Court is asked to determine whether the standard order of questioning provided in Guideline 7 is inherently unfair in that it violates the principles of natural justice and procedural fairness. In my view such an argument is appropriately raised in the circumstances. If it is established that the procedure by its very nature violates the principles of fairness in the circumstances of the Applicant's case, then the decision of the Board in unlawful. Therefore, the question of procedural fairness is a proper one for consideration by this Court.

[44] The Applicant contends that the jurisprudence of the Federal Court establishes that refugee claimants must be allowed to be questioned first by their own counsel. Specifically, the Applicant cites four decisions: *Kante v. Canada (Minister of Employment and Immigration)*, [1994] F.CJ. No. 525 (QL)*; Ganji v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1120 (QL); *Atwal v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 169; and *Veres v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 124.

[45] In particular, the Applicant submits that in *Kante* at paragraph 10, the Court established a refugee claimant's right to an "examination-in-chief":

> I would suggest to counsel for Applicants to remember at all times that as the burden of proof is on them they are entitled to present their case as they see fit.

[46] 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.

[47] In *Kante*, the Applicant had not raised any issue of procedural unfairness. Rather, Mr. Justice Nadon, then of this Court, informed both parties that he was troubled by the fact that the Refugee Board had told counsel not to question the claimant regarding certain events. His comment, quoted above by the Applicant, did not concern the validity of the order of

questioning. In fact, it appears that the hearing was conducted with the claimant's counsel questioning first.

[48] In *Ganji*, the Court held that the Refugee Board acted unfairly by proceeding to question a minor claimant first despite the objections of the principal claimant (the child's mother and her designated representative). The Court also found that the counsel for the claimants did not serve their interests well in that he did not object to the Board's conduct or request an adjournment to consult with his clients. The Court concluded that the Board committed a reviewable error by failing to provide the claimants with a fair hearing.

[49] In *Atwal*, the Refugee Board was found to have acted unfairly because it interrupted counsel while he questioned the claimant (during his "examination-in-chief") and instructed him to cease with a line of questioning. The Court held that the Board cannot prevent counsel from representing her or his client unless the representation involves irresponsible undue repetition or irrelevant material. However, the Court did not conclude that claimants have full control over the presentation of their case; rather, the Court acknowledged that the Board controls the procedure at a refugee hearing.

[50] In *Veres*, the Refugee Board had adopted a procedure of directly cross-examining the claimant without having him put his case in chief first. As the Applicant in this case points out, Mr. Justice Pelletier did state that "…one would not think it contentious to say that the person who has the onus of proof must be given a fair chance to meet that onus". However, Mr. Justice

Pelletier did not conclude that in the context of refugee determination hearings that claimants have an inherent right to lead their evidence first, as in civil or criminal court proceedings. Nor did he find that not allowing the claimant to go first was, in itself, a breach of natural justice. Rather, Mr. Justice Pelletier stated that the unfairness arises where the Board in its reasons reproaches claimants for failing to provide some piece of evidence without putting the claimants on notice that they are at risk on that issue. At paragraph 28 of his decision, Mr. Justice Pelletier wrote:

> It is clear that the CRDD is the master of its procedures. It is entitled to take economy of time into account in devising its procedures. It can equally direct which evidence it wishes to hear from the mouth of the witness and which it waives hearing. But when it says it does not need to hear from the witness, it cannot subsequently complain that it has not heard from the witness.

[51] The Intervener, for its part, cites *Herrera v. (Canada) Minister of Citizenship and Immigration)*, 2004 FC 724, as establishing that questioning first by counsel for the claimant is embodied in the right to an oral hearing. In that case, Mr. Justice Campbell called reversing of the order of questioning – that is, having the RPO question first – a "highly unusual" procedure. The Intervener submits that Guideline 7 turns the exceptional way of proceeding into the norm. Even if that were the case, Mr. Justice Campbell did not expressly state that refugee claimants have the right to lead evidence, or that a failure to provide claimants the right to go first violates the principles of procedural fairness. I note that the refugee hearing at issue in *Herrera* was conducted before Guideline 7 was fully implemented. Ultimately, Mr. Justice Campbell allowed the application for judicial review because he found that the questioning by the Board improper; he called it "badgering cross-examination". I agree with Madam Justice Snider in *Zaki, supra*

who held that in *Hererra* the Court found that the type of cross-examination by the Board constituted an error, not the order of questioning *per se*.

[52] I further note that in several other cases that also pre-date Guideline 7, the Court held that starting with questioning by the RPO does not, in itself, constitute a violation of the rules of natural justice: *Del Moral v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 782 (T.D.) (QL); *Cota v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 872 (T.D.) (QL); and *Cruz v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1266 (T.D.) (QL). For instance, in *Cruz*, Mr. Justice Teitelbaum held that the panel member did not commit a reviewable error by allowing the refugee hearing officer to begin his cross-examination first because the panel is the master of its own procedure.

[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.

[54] The Court's jurisprudence has not settled whether a claimant appearing before the Board in a refugee determination hearing has the right to an "examination-in-chief" or whether not allowing the claimant's counsel to question first is inherently unfair. The Applicant and the Intervener must still establish that the principles of natural justice and procedural fairness dictate

a particular order of questioning in refugee determination hearings before the Board in order to succeed on their argument.

[55] In the present case, it is not disputed by the parties that the adjudication of refugee claims by the Board demands a “higher order” of procedural fairness. Where the parties disagree is on the content of that duty of fairness, or more specifically, on the content of the right to an oral hearing.

[56] In summary, on the content of the duty of fairness the parties adopt the following positions. The Applicant submits that as refugee hearings are quasi-judicial proceedings, the Board is required to set up procedures that more closely resemble a judicial, court-like model. The Applicant asserts that, as a result, refugee claimants are entitled to an “examination-in-chief” conducted by her or his counsel. The Intervener submits that a number of unique features in the refugee determination process and of refugee claimants necessitates an “examination-in-chief”. The Respondent argues that proceedings before the Board are administrative and non-adversarial and that natural justice does not require such proceedings to be identical to criminal or civil proceedings. The Respondent asserts that, as a consequence, the Board is not required to afford a claimant the right to an “examination-in-chief” for its proceedings to be fair.

[57] The Supreme Court of Canada provides guidance in determining the content of the duty of fairness in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

In deciding the procedural protections to be afforded in an administrative setting, the Supreme Court stated that the following factors are to be considered:

(1) the nature of the decision being made and the process followed in making it; that is, "the closeness of the administrative process to the judicial process";

(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; and

(5) the choice of procedure made by the agency itself.

[58] I note that Madam Justice L'Heureux-Dubé in *Baker* stated that the five factors set out above are not exhaustive; she acknowledged that other factors may be important in determining the requisite level of procedural fairness in a given set of circumstances. In making such a determination, Madam Justice L'Heureux-Dubé stated at paragraph 22 of *Baker* that it is necessary to keep in mind the values underlying the duty of fairness:

> I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decisions being made in its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[59] It should also be noted that in *Baker* – a case that did not concern a refugee claimant or a refugee – the Supreme Court of Canada decided the case on the basis of the common-law duty of fairness; it declined to examine procedural protections afforded by the *Canadian Charter of*

Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. In other cases, the Supreme Court of Canada has established that because of the potential consequences, the source of procedural protections for refugee claimants is the *Charter*; namely, the principles of fundamental justice guaranteed by section 7 of the *Charter*: see *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177. That said, the Supreme Court of Canada has also held that it is appropriate to apply the common-law duty of fairness factors set out in *Baker* where the source of the duty is the *Charter*: *Suresh v. Canada (Minister of Immigration and Citizenship)*, [2002] 1 S.C.R. 3 at paragraph 113.

[60] In the instant case, neither the Applicant nor the Intervener argues that the Chairperson's standard order of questioning procedure violates the principles of fundamental justice guaranteed under section 7 of the *Charter*. Rather, they base their submissions on the common-law principles of natural justice and procedural fairness. Whatever the source of the duty of fairness in the circumstances of this case, I find it appropriate to proceed with a *Baker* analysis in determining the content of the procedural protections to be afforded to the Applicant.

[61] The question before this Court is whether natural justice and procedural fairness require not only that the Applicant has the right to an oral hearing before the Board, but also that the Applicant has the right to have his counsel question him first at that oral hearing. The question can be succinctly stated as: does natural justice or procedural fairness dictate a particular order of questioning?

[62] Before turning to such an analysis, I wish to set out the context for the right to an oral hearing in the adjudication of refugee claims. The starting point in such a discussion is *Singh*, above. In that case, the Supreme Court of Canada held that the refugee determination process must provide an adequate opportunity for refugee claimants to be heard. Madam Justice Wilson held that, at a minimum, the concept of fundamental justice under section 7 of the *Charter* includes the notion of procedural fairness articulated by Mr. Chief Justice Fauteux in *Duke v. The Queen*, [1972] S.C.R. 917 at 923:

> … Under s. 2(e) of the Bill of Rights no law in Canada shall be construed or applied so as to deprive him or "a fair hearing in accordance with principles of fundamental justice." Without attempting to formulate a final definition for these words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity to adequately state his case.

[63] The applicants in *Singh* had challenged the procedure before the then Immigration Appeal Board which did not provide them with an oral hearing on the merits of their claim. Madam Justice Wilson held that, where a serious question of credibility is involved, an oral hearing is required in the adjudication of refugee claims to accord with principles of fundamental justice but she did not further define the content of the right to an oral hearing.

[64] Where procedural fairness demands a right to a hearing, it also requires that the administrative agency ensure the hearings provide the parties with ample opportunity:

(a) to know the case against them,

(b) to dispute, correct or contradict anything which is prejudicial to their position, and

(c) to present arguments and evidence supporting their own case.

[Robert Macauley and James Sprague, *Practice and Procedure before Administrative Tribunals*, looseleaf, (Toronto: Carswell, 1988-) at page 12-6.]

[65] However, I note that Macauley and Sprague further state at page 12-163 that in the common law there is no standard form of hearing:

> … [E]ven in the context of oral hearings, there does not seem to be any one procedure pursuant to which the right to present arguments must be exercised. This is consistent with the general rule that a tribunal is empowered to determine its own procedure.

[66] The IRPA provides that the Board must hold a hearing in any proceeding before it: paragraph 170(*b*). However, the IRPA does not set out a particular form of the hearing. In fact, the IRPA does not require the Board to always hold an "in person" hearing; section 164 permits the Board to hold the hearing by way of "live telecommunication", such as by videoconferencing.

[67] The key to evaluating the level of procedural content of a refugee determination hearing is whether the available procedures facilitate or frustrate the opportunity of the Applicant to make and informed and effective presentation of his case to the Board. As such, it is useful to set out the way in which the Applicant's refugee protection claim unfolded:

(a) the Applicant made his claim at an inland immigration office; an immigration officer prepared a Record of Examination

(b) the Applicant filed his PIF

(c) the Board sent the Applicant notice of a hearing

(d) the Board sent the Applicant a File Screening Form identifying the issues

(e) the Applicant filed written submissions in response to the File Screening Form

(f) the Applicant filed written submissions opposing the Chairperson's standard-order of questioning procedure as violating the principles of natural justice

(g) the Applicant submitted three packages of evidence

(h) the Board's disclosed its documentary package on Sri Lanka

(i) a one-member Board heard the Applicant's claim, with the Applicant and his counsel present in the hearing room, along with an RPO

(j) the Applicant's counsel made oral submissions at the hearing objecting to proceeding under the Chairperson's standard-order of questioning; the Board dismissed the objection

(k) the Applicant was questioned first by the RPO; the Board member did not ask any questions; and counsel for the Applicant declined to ask questions

(l) the RPO made oral submissions, then counsel for the Applicant made oral submissions

(m) the Board reserved its decision

(n) the Board sent the Applicant its decision and written reasons for its decision

[68] I now turn to a consideration of the *Baker* factors to determine whether the Applicant had the right to be questioned by his counsel first in the circumstances of his case. I note that only the Applicant provided submissions specific to the *Baker* factors:

1) the nature of the decision being made and the process followed in making it; that is, “the closeness of the administrative process to the judicial process”

[69] The Applicant asserts that the Board is a quasi-judicial administrative tribunal and therefore it is required to follow full requirements of natural justice. The Respondent argues that through section 170 of the IRPA, Parliament made a deliberate choice that the Board would conduct refugee determinations in an informal proceeding and not a judicial one. In his affidavit, Paul Aterman states that the Board is a “board of inquiry” and that a hearing into a claim for refugee protection is usually conducted in a non-adversarial manner, in the sense that there is no party adverse in interest to the claimant. In comparison, Mr. Aterman attests that Parliament constituted the Immigration Appeal Division so that its proceedings are adversarial in nature: see the IRPA, section 174.

[70] The Intervener argues that the differing roles between counsel for the claimants and the RPOs and Board members necessitate an “examination in chief”. In support of its contention, the Intervener refers to Professor James Donald Galloway, who at paragraph 12 of this affidavit, states that the role of counsel is to represent the claimant and demonstrate that the claimant “is” a person in need of protection; the role of RPOs and Board members is to flush out any weaknesses in the claimant’s case that might lead to a determination that the claimant “is not” a person in need of protection.

[71] Further, the Intervener argues that although refugee hearings are characterized as “non-adversarial”, in reality they are adversarial. The Intervener contends that RPOs are often aggressive and confrontational and frequently make accusations of falsehood, dissimulation or evasiveness. As well, Board members sometimes adopt an adversarial approach. The Intervener cites Board member Steve Ellis who in a June 2005 decision (Board file: TA4-13810, 13811, 13812) stated that in the “reverse-order questioning” era, it has become “routine” for Board members to cross-examine claimants.

[72] In my view, Parliament intended the refugee determination process to be more inquisitorial and less judicial. The IRPA provides that Board members have the powers and authority of a commissioner under Part I of the *Inquiries Act*, R.S. 1985, c. I-11, and permits members to do “any other thing they consider necessary to provide a full and proper hearing”: section 165. Refugee hearings do not involve opposing parties each arguing their position for or against granting refugee protection to the claimant. In a limited number of cases, the Minister does intervene to oppose the consideration of an applicant’s claim for refugee protection, usually on one of the exclusion grounds (Article 1E or 1F of the *United Nation Geneva Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can T.S. No. 6 incorporated into the IRPA, section 98). These cases can therefore be more adversarial.

[73] There are also differences between refugee determination proceedings before the Board and criminal or civil proceedings before a court. For instance, unlike in a criminal or civil proceeding, the rules of evidence are much more relaxed in refugee proceedings. The IRPA

specifically states that the Board is not bound to any legal or technical rules of evidence (paragraph 170(*g*)), and it also permits the Board to take notice of any information or opinion that is within its specialized knowledge (paragraph 170(*i*)). In the present case, much evidence was proffered by the Applicant, none of which was subjected to verification for its authenticity or reliability before being considered by the Board.

[74] The Respondent's witness, Paul Aterman, attests that the role of the RPO and Board member is to seek the truth, and in doing so, they often have to challenge claimants on their evidence or testimony. One of the Intervener's witnesses, Professor Galloway, acknowledged on cross-examination that Board members have a responsibility to ask pointed or probing questions and that he saw asking such "tough questions" as being adversarial. Another of the Intervener's witnesses, Dr. Payne, also admitted that the problem is with the manner of questioning by an RPO or Board member, not the order of questioning. If the approach is hostile then the vulnerable claimants may experience distress even when their counsel questions them first. The evidence indicates that on several occasions, this Court has indeed intervened when it has found that a Board member has improperly conducted questioning at a hearing: see for example, *Herrera*, above.

[75] In respect to the first *Baker* factor, notwithstanding that the often times aggressive and probing nature of the questioning conducted at hearings before the Board by RPOs and Board members, I would not qualify the administrative refugee determination process provided for by the IRPA as adversarial. However, the nature of the decision calls for the Board to adjudicate

issues that impact on the rights of refugee claimants. In this respect, a higher level of procedural protection is warranted.

2) *The role of the particular decision within the statutory scheme*

[76] The role of the Board's decision within the statutory scheme also suggests the need for strong procedural safeguards. According to *Baker* at paragraph 24, the fact that there is no right to appeal suggests that greater procedural protections should be afforded. An appeal to the Refugee Appeal Division is provided for under sections 110 and 111 of the IRPA; however, those provisions have not come into force. Failed refugee claimants may seek judicial review of a negative decision by the Board if they are able to get leave of the Federal Court to pursue a judicial review. However, as the Federal Court of Appeal noted in *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 at paragraph 55, a judicial review may not provide the claimant with the same outcome as an appeal: "…the scope of the reviewing judge's authority may be limited with respect to the substantive issues of the case, and therefore cannot be equated to an appeal right".

[77] Failed refugee claimants may also have the opportunity to make a Pre-Removal Risk Assessment application: sections 112-115 of the IRPA. However, PRRA applications and refugee protection claims before the Board are different. PRRA applications by failed refugee claimants can only submit "new evidence" – that is, evidence that could not have been adduced to the Board – and an oral hearing is provided in only very limited circumstances. Further, PRRA

decisions are made not by an independent administrative tribunal but by officers of Citizenship and Immigration Canada.

[78] The burden of proving a claim for refugee protection rests with the claimant. Often, the hearing before the Board is the only opportunity a refugee claimant will have to convince a decision-maker of the well-foundedness of her or his claim. The Board's decision is also more often than not determinative of the claim for protection. In my view, the nature of the statutory scheme in respect to the Board's decision therefore warrants a greater degree of procedural protection.

3) *The importance of the decision to the individual affected*

[79] Whether a refugee claimant can remain in Canada as a Convention refugee or person in need of protection is potentially of great significance to the individual. The Applicant claims that his life and safety are in danger because of threats by the LTTE against him and his family. As the Supreme Court of Canada stated in *Singh*, above, refugee determination proceedings pertain to life, liberty and security of the person, and as such, section 7 of the *Charter* is engaged. When such interests are at stake, fairness dictates enhanced procedural safeguards.

4) *The legitimate expectations of the person challenging the decision*

[80] The Board notified refugee lawyers and the public months in advance that the order of questioning, with the RPO or Board member proceeding first, would be fully implemented as of June 1, 2004: see "IRB News," Issue 1 at page 3 in Aterman Affidavit, Exhibit L-1. There can be

no legitimate expectation by claimants that their counsel will begin questioning. Such an argument was not advanced by the Applicant in this case.

5) *The choice of procedure made by the agency itself*

[81] The final factor in *Baker* is the choice of procedure made by the agency itself. An order of proceeding in refugee hearings is not prescribed in the IRPA or the *Refugee Protection Division Rules*. Parliament afforded the Board the authority to determine the procedure it follows provided that it does not run afoul of principles of natural justice:

162(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.	**162(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.

Parliament also equipped the Board with tools to ensure that the requirements of natural justice are met when adjudicating refugee protection claims, including providing for a hearing (paragraph 170(*b*)), the questioning of witnesses (paragraph 170(*e*)), the tendering of evidence (paragraph 170(*e*)), the participation of counsel (section 167), and the giving of reasons (section 169).

[82] The jurisprudence is clear that an administrative tribunal is the master of its own proceedings, and where the enabling legislation is silent on a point of procedure, the tribunal may determine the procedure to be followed: *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at 568-69; *Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 2 F.C. 329 at paragraph 6.

[83] The fifth factor indicates a lesser level of procedural fairness essentially because the Board is the master of its own proceedings. In *Ha*, above at paragraph 64, the Federal Court of Appeal wrote: "… in determining the content of the duty of fairness the Court must guard against imposing a level of procedural formality that would unduly encumber efficient administration".

6) *Other factors*

[84] The Intervener submits that because of the unique features of the refugee determination process and of refugee claimants, an "examination-in-chief" is critically important to ensuring that claimants have a meaningful opportunity to present their cases. I have addressed some of their arguments above, and will now consider two other arguments of the Intervener and their impact on the duty of fairness owed in the context of refugee determination hearings before the Board.

[85] First, the Intervener submits that the PIF is an inadequate substitute for an "examination-in-chief", and that it does not give claimants an adequate opportunity present their case. Specifically, the Intervener points to the tight timeline for filing a PIF and the fact that amending the PIF may be viewed by the Board adversely with respect to the claimant's credibility.

[86] Although I agree with the Intervener that the PIF may be incomplete in telling the full story of the need for refugee protection, I do not accept that this is sufficient to require that a refugee hearing be conducted with counsel questioning the claimant first. The PIF, although

important as it represents the first recitation by a claimant to the Board of the basis of his or her claim for refugee protection, is not the only the way in which the claimant's story is told to the Board. Claimants are also asked to submit documentary evidence in support of their claims, may make further written submissions before the hearing; they also have an opportunity to make oral representations at the hearing, and may have an opportunity to make further written submissions after the hearing. I note that, in the present case, the Applicant provided written submissions to the Board in response to the issues identified on the File Screening Form and that the Applicant's counsel made oral submissions at the hearing.

[87] In consequence, in my opinion, any limitations in respect to the PIF are not sufficient to increase the content of the duty of fairness owed claimants to an extent that would require and dictate that claimants be questioned first by counsel.

[88] Second, the Intervener submits that refugee claimants face particular vulnerabilities, including PTSD, anxiety and panic attacks, depression and a general distrust for government agents. These vulnerabilities, argues the Intervener, compromise claimants' ability to adequately explain their experiences and as a result they may come off as being evasive, at best, or untruthful, at worst. The Intervener relies on the evidence of Dr. Payne who has extensive experience working with refugee claimants. Dr. Payne attests that it is extremely important that the environment at refugee hearings be made as non-threatening as possible for claimant and that aggressive and repeated questioning by government officials only exacerbates claimants' anxiety.

[89] It is uncontradicted that many refugee claimants have experienced severe trauma and that many suffer from PTSD or other psychological difficulties. In fact, Guideline 7 recognizes that in cases involving vulnerable claimants the order of questioning could be changed, in exceptional circumstances, to allow counsel to question first: see paragraph 23. The Board in its training of RPOs and Board members also focuses much attention on the vulnerabilities faced by refugee claimants: see for example, "Questioning Victims of Torture, Sexual Assault and Other Trauma" and "Training Manual on Victims of Torture" in Aterman Affidavit, Exhibits P and Q1. As well, the Chairperson of the IRB has issued guidelines to address the vulnerabilities of particular refugee claimants: see Guideline 3 – Child Refugee Claimants: Procedural and Evidentiary Issues, and Guideline 4 – Women Refugee Claimants facing Gender-Related Persecution (the Gender Guidelines).

[90] In my opinion, the vulnerability of refugee claimants militates in favour of an increased requirement for procedural protections. However, the fact that many, if not most, refugee claimants are vulnerable and as a result have difficulty testifying effectively, does not necessarily make Guideline 7 unfair. As shown, in the instant case, the Applicant does not suggest that he suffers from any psychological problems which would inhibit his testimony before the Board. A refugee claimant's particular vulnerability is therefore a factor to be considered in the circumstances of each case but does not necessarily dictate that the standard order of questioning always be "counsel-first" in order to satisfy procedural fairness requirements and the principles of natural justice.

Conclusion

[91] The Intervener has provided some evidence pointing to the difficulties refugee claimants face and the benefits to them of "counsel-first" questioning. However, in my view, neither the Applicant nor the Intervener has established that the principles of natural justice or procedural fairness require that refugee claimants be afforded an "examination-in-chief" in order for the refugee determination process before the Board to be fair. 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, in my opinion, satisfies the requirements of the participatory rights required by the duty of fairness in this case.

[92] After considering the factors set out in *Baker* and the further factors submitted by the Intervener, I am not persuaded that the principles of natural justice or procedural fairness demand that the Applicant's refugee determination hearing be conducted with a particular order of questioning – that is, with counsel for the Applicant questioning first – in order to ensure the Applicant has a meaningful opportunity to present his case fully and fairly.

(ii) Does Guideline 7 fetter the Board's discretion?

[93] The Court is being asked by the Intervener to determine whether the Chairperson's standard-order of questioning procedure fetters the discretion of the Board, and whether the Chairperson even has the authority to establish such a procedure through a guideline.

[94] The introduction to Guideline 7 contains in part the following two paragraphs:

> 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.

[95] For ease of reference I reproduce at this juncture the pertinent paragraphs of Guideline 7. Paragraph 19 states that the RPO or Board member will question the claimant first:

> In a claim for refugee protection, the standard practice will be for the 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. 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.

[96] Paragraph 23 states that Board members may vary the order of questioning to allow the claimant's counsel to question the claimant first in exceptional circumstances:

> The member may vary the order of questioning in exceptional circumstances. For example, a severely disturbed claimant or a very young child might feel too intimidated by an unfamiliar examiner to be able to understand and properly answer questions. In such circumstances, the member could decide that it would be better for counsel for the claimant to start the questioning. A party who believes that exceptional circumstances exist must made an application to change the order of questioning before the hearing. The application has to be made according to the *RPD Rules*.

[97] The parties are in agreement that the IRB Chairperson has the statutory authority to issue guidelines. However, the Intervener submits that the Chairperson's "reverse-order questioning" procedure is not a guideline; it is *de facto* mandatory and as such takes on the status of a rule which is outside the competence of the Chairperson. The Intervener argues that by requiring

Board members to apply the “reverse-order questioning” guidelines, the Chairperson is fettering the discretion of Members. The Intervener also argues that by automatically following the guideline, individual Board members are fettering their own discretion. The Intervener submits that fettering discretion breaches natural justice and procedural fairness by compromising the independence of the decision-maker.

[98] Specifically, the Intervener asserts that the language of the Chairperson’s “reverse-order questioning” procedure reads as a mandatory requirement, and that paragraph 23 which allows Board members to vary the order of proceeding in “exceptional circumstances” only reinforces the mandatory nature of paragraph 19. Further, the Intervener submits that there is evidence that the IRB is monitoring compliance and that individual Board members are following the guideline without question. The Intervener contends that these are further indications that the Board’s discretion is being fettered.

[99] The Respondent submits that the Chairperson’s standard-order of questioning procedure is not binding on Board members. Ultimately, Board members retain discretion with respect to the most appropriate way of proceeding in any given case. In fact, the Respondent argues, paragraph 23 explicitly contemplates that members will exercise their discretion to vary the order of questioning where they feel it is appropriate, and have indeed done so in numerous cases.

[100] The Respondent argues that the Court has approved the issuance of non-binding guidelines. In support of its contention, the Respondent cites *Fouchong v. Canada (Secretary of*

State), (1994), 88 F.T.R. 37, where the Federal Court of Canada, Trial Division, upheld the legality of the IRB Chairperson's Gender Guidelines. At paragraph 10 of its reasons, the Court recites the Chairperson's policy on the use of guidelines which provides that guidelines are "intended to be followed unless the circumstances of the case are such that a different approach is appropriate".

[101] Finally, the Respondent also challenges the Intervener's assertion that Board members are pressured to conform with the standard-order of questioning procedure. Specifically, the Respondent argues that the evidence does not support the assertion by Raoul Boulakia that there is "top down pressure" on Board members who do not follow "reverse-order questioning". The Respondent further adds that the decision by Board member Steve Ellis, wherein Guideline 7 was not followed, shows that members have the right to disagree with the guideline.

[102] The Oxford English dictionary defines a guideline as "a line for guiding; a directing or standardizing principle laid down as **a guide to procedure**, policy, etc;"[my emphasis]. There is no real dispute between the parties on the above definition. It is accepted that guidelines are not legally binding on Board members as they exercise their independent decision-making authority. Indeed, this is acknowledged by the IRB on its website:

> While not binding on decision makers, the Guidelines present a recommended approach in examining complex issues of national importance, dealing with emerging issues, or resolving an ambiguity in the law.

[103] Paragraph 159(1)(*h*) of the IRPA explicitly authorizes the Chairperson of the Immigration and Refugee Board to make and issue guidelines to assist members in carrying out their duties. Such guidelines, however, cannot be mandatory in the sense that they leave little room for the exercise of discretion of each Board member to conduct a full and proper hearing pursuant to their powers conferred by section 165 of the IRPA. Had the Chairperson intended Guideline 7 to have such a mandatory effect, he could have proceeded by implementing a rule under paragraph 161(1)(*a*) of the IRPA. That provision authorizes the Chairperson to make procedural rules but only with the approval of the Governor in Council. Put differently, the Chairperson is not authorized to make rules which have the force of a statutory instrument in the guise of a guideline.

[104] In the instant case, the Intervener argues that had Parliament intended Guideline 7 to have the effect of a rule it would have done so by a statutory instrument such as through the Rules.

[105] The issue, here, lies in determining whether Guideline 7 presents a recommended non-binding approach to Board members regarding the procedure to be followed in the conduct of a hearing before the Board or, as the Intervener suggests, whether Guideline 7 is serves as a mandatory pronouncement which fetters the discretion of Board members. If found to be the latter, Guideline 7 could then also be said to be elevated to the status of a general rule, unlawful in the circumstances.

[106] At the outset it is useful to consider the state of the jurisprudence on the fettering of discretion. As a general rule, administrative tribunals are considered to be masters in their own house. Absent specific rules laid down by statute or regulation, they control their own procedures provided they comply with the rules of fairness and fundamental justice: *Prassad*, above.

[107] Whether Guideline 7, a procedural guideline, complies with the rules of fairness will depend on a number of factors, not the least of which is the extent to which the guideline restricts the scope of discretion of independent Board members in carrying out their duties under the IRPA. The extent to which a guideline can lawfully restrict discretion was considered in *Yhap v. Canada (Minister of Employment and Immigration)* (1990), 1 F.C.R. 722. Associate Chief Justice Jerome considered what constitutes lawful restrictions on the scope of an immigration officer's discretion in applying specific guidelines in the context of a Humanitarian and Compassionate application under subsection 114(2) of the *Immigration Act*, R.S.C. 1985, c. I-2. He found that the guideline at issue unduly fettered the immigration officer's discretion and found it to be unlawful. However, the learned Judge went on to recognize that guidelines would be permissible so long as they were clearly intended to be a statement of "general policy" or "rough rules of thumb" and not an exhaustive definition, binding on immigration officers. In considering this issue, the learned Judge made the following observations at pages 738 and 739 of his decision, which I find to be particularly applicable to the instant case:

> …The general position of Canadian courts on the structuring of discretion has been articulated in Professor J.M. Evans' *de Smith's Judicial Review of Administrative Action*, Fourth edition, where he states, at page 312:
>
> > …a factor that may properly be taken into account in exercising a discretion may become an unlawful fetter upon discretion if it is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases.

> The importance of flexibility in the adoption of policy or guidelines as a means of structuring discretion is highlighted by D. P. Jones and A. S. de Villars in *Principles of Administrative Law*, where the difference between "general" and "inflexible" policy is described at page 137:
>
> > …the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits. Anything, therefore, which requires a delegate to exercise his discretion in a particular way may illegally limit the ambit of his power. A delegate who thus fetters his discretion commits a jurisdictional error which is capable of judicial review.
> >
> > On the other hand, it would be incorrect to assert that a delegate cannot adopt a general policy. Any administrator faced with a large volume of discretionary decisions is practically acceptable, provided each case is individually considered on its merits.
> >
> > [my emphasis]

[108] These same principles were applied by Mr. Justice Strayer in *Vidal v. Canada*, [1991] F.C.J. No. 63 (T.D.) (QL). He recognized that guidelines were not only permissible but in certain circumstances, highly desirable in order to promote "some sort of consistency throughout the country" in term of how discretion is exercised. He went on to find that, in the circumstances however, an immigration officer was not entitled to reject the case simply because it was not covered by the guidelines. At page 11 of his decision he wrote:

> …Following the principles laid down by Jerome A.C.J. in the *Yhap* case, I can only reiterate that the guidelines must be regarded as stating a "general policy" or "rough rules of thumb" but cannot validly be treated as providing an exhaustive definition of the circumstances in which humanitarian and compassionate considerations can be found.

[109] In *Ainsley Financial Corporation et al. v. Ontario Securities Commission et al.* (1994), 21 O.R. (3d) 104, the Ontario Court of Appeal held that an administrative tribunal can use non-statutory instruments, such as guidelines, to fulfil its mandate, but that there are limits on the use of those instruments. Specifically, the Court stated that:

(1) a non-statutory instrument can have no effect in the face of contradictory statutory provision or regulation;

(2) a non-statutory instrument cannot pre-empt the exercise of a regulator's discretion in a particular case;

(3) a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue *de facto* laws disguised as guidelines.

[110] The Federal Court of Appeal in *Ha*, above, found that *Ainsley* (O.C.A.) offered guidance on how to determine whether a policy is or is not mandatory. In *Ha* the Court dealt with a policy that prohibited applicants from attending visa officer interviews with their counsel. The Court found that, since the policy permitted no consideration of individual circumstances, it fettered the officer's discretion. At paragraph 71 of its reasons, the Court wrote:

> While administrative decision-makers may validly adopt guidelines to assist them in exercising their discretion, they are not free to adopt mandatory policies that leave no room for the exercise of discretion. In each case, the visa officer must consider the particular facts.

[111] The above jurisprudence establishes that guidelines can be important instruments, permissible and even desirable when they are crafted to assist or guide decision-makers in the exercise of their discretion. However, a guideline "…may become an unlawful fetter upon discretion if it is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases." (From Professor J.M. Evans' *de Smith's*

Judicial Review of Administrative Action, Fourth edition, at page 312; cited by Jerome A.C.J. in *Yhap*, above at page 738.)

[112] Guideline 7, unlike guidelines that deal with general policy considerations applicable to substantive decisions, deals essentially with procedure in the conduct of the hearing. As I have determined earlier in these reasons, the guideline, as drafted, does not inherently violate the principles of natural justice or procedural fairness. The guideline may nevertheless be unlawful if it can be shown to fetter the discretion of a Board member. Whether Guideline 7 fetters the discretion of Board members, will depend on whether the Chairperson's standard-order of questioning procedure crosses "the Rubicon between a non-mandatory guideline and a mandatory pronouncement having the same effect as a statutory instrument": *Ainsley* (O.C.A.), above at page 109.

[113] The Trial Court in *Ainsley Financial Corp. v. Ontario Securities Commission*, [1993] O.J. No. 1830 (Ont. Ct.-Gen. Div.) (QL), concluded that the policy statement at issue was actually a set of binding Ontario Securities Commission rules for "penny stock" traders. The Court found the policy 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

(3) the evidence with respect to the expectations of the Commission and staff regarding the implementation of policy

[114] In my view, these factors provide a useful framework within which to conduct my analysis on this issue. I will consequently consider the evidence adduced and the arguments advanced by the parties in relation to these factors.

[115] In *Ainsley*, the Trial Court found that the policy at issue provided that in certain circumstances the contemplated business practices "need not be adopted", which implied that, save for the exceptions the business practices *must* be adopted. The Court held that this language indicates a mandatory requirement and not a general policy statement.

[116] The Ontario Court of Appeal in *Ainsley* subsequently provided some guidance in determining whether the language of a guideline points to a mandatory rule. At page 110 of its reasons the Court stated:

> There is no bright line which always separates a guideline from a mandatory provision having the effect of law. At the centre of the regulatory continuum one shades into the other. Nor is the language of the particular instrument determinative. There is no magic to the use of the word "guideline", just as no definitive conclusion can be drawn from the use of the word "regulate". An examination of the language of the instrument is but a part, albeit an important part, of the characterization process. In analyzing the language of the instrument, the focus must be on the thrust of the language considered in its entirety and not on isolated words or passages.

[117] At the outset I think it useful to acknowledge that the order of questioning a claimant in the context of a refugee hearing, while not a vested right, can be an important factor. By providing for a claimant to be questioned first by his or her counsel, in certain exceptional circumstances, the drafters of Guideline 7 have, by implication, recognized that such a change of

the order of questioning of the claimant, in those exceptional circumstances, may be necessary to comply with the rules of fairness. At the very least there is inherent recognition in the guidelines, that reverting to allowing claimants to be questioned first by their counsel, in "exceptional circumstances", would better serve the claimants in discharging their onus to establish their claim. This view finds support in the uncontroverted evidence of Dr. Donald Payne. He summarizes his evidence as follows:

> 34. It is my opinion that, because of their psychological disturbances resulting from past mistreatment, it is unrealistic to expect that many refugee claimants will be able to make a full and accurate statement of their experiences if, at their refugee hearing, they are questioned first by a Refugee Protection Officer or a Board Member. Many claimants will minimize their experiences due to the distress caused by recalling them. Many claimants will also have great difficulty trusting both the Refugee Protection Officer and the Board Member, since both are agents of the state and neither [is] concerned exclusively with their best interests. If questioned first by individuals who they perceive may be hostile to their claim, claimants may say inaccurate, incomplete or contradictory things as a result of their anxiety and confusion. Furthermore, they may not be able to recover over the course of the hearing from the initial questioning by the Refugee Protection Officer or the Board Member.
>
> 35. This being the case, it is my opinion that to have refugee claimants questioned first by the Refugee Protection Officer or by the Board member will prevent many claimants from effectively testifying on their own behalf.
>
> 36. Conversely, it is my opinion that having refugee claimants questioned first by their Counsel, a non-government agent whose role it is to represent claimants' interests, who the claimants have previously met and have grown to trust, is more likely to promote effective testimony from refugee claimants who have been subject to persecution.

[118] The drafters of Guideline 7 have also, by implication, recognized the importance or the order of examination in other provisions of Guideline 7; for instance, in cases where the onus is on the Minister to establish a basis to exclude a claimant. In such circumstances, paragraph 21 of Guideline 7 provides that the Minister is to proceed first, without exception. Quite apart from the argument that could be made in respect to the fairness of having a different order of questioning

when the onus of proof is on the claimant, it is telling that the drafters of Guideline 7 have obviously recognized the significance of the order of examination of claimants in refugee proceedings in certain circumstances.

[119] I now turn to the language of Guideline 7. Viewed in its entirety, the language of Guideline 7 leaves little doubt that the thrust of the guideline indicates to Board members a mandatory process rather than a recommended but optional process. The language of Guideline 7 – and not just the standard-order of questioning procedure contained in paragraph 19 of the guideline – is imperative. 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. The Respondent contends that paragraph 23 of the guideline provides that the Board member has discretion to change the order of questioning in exceptional circumstances. The Intervener submits that the existence of "exceptional circumstances" in paragraph 23 only reinforces the mandatory nature of the standard order of questioning. The language of paragraph 23 does provide that in "such circumstances" a Board member may vary the order of questioning. In my view, paragraph 23 establishes a high threshold as to the nature of the "exceptional circumstance". In the examples used in paragraph 23, the claimant must be "severely" disturbed and the child must be "very" young for an exception to apply. The paragraph goes on to state that it is in "such circumstances" that an exception "could" be made. By using such language, the guideline appears to limit the member's discretion to only those "exceptional circumstances" contemplated in paragraph 23. It may be argued that the examples offered in paragraph 23 are just that, "examples". However, in my view, these examples restrict the sort of circumstances

that may warrant an exception. 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.

[120] Guideline 7 could have been drafted using clear language indicating that the guideline was not mandatory and that the member was free to determine the order of questioning based on the particular facts of the case in the exercise of discretion. In my view, even a liberal and generous reading of Guideline 7 falls short of such an interpretation. Given the imperative language of Guideline 7, I am also of the view that it is not saved by its introductory paragraphs, which also refer to “exceptional circumstances” and “particularly vulnerable” claimants.

[121] Further, there is an expectation from those responsible for the good administration of the IRB, that the guideline be followed unless the member justifies not doing so within the parameters of exceptions contemplated in the guideline. The testimony of Paul Aterman confirms that this is indeed the position of the IRB. On cross-examination he stated:

> The position of the board has been that if a guideline is issued by the chairperson of the board, then members are expected to follow it in appropriate circumstances or they have to indicate in their view why the guideline is not being followed.

[122] There is evidence on the record to support the Intervener's contention that Guideline 7 appears to have been issued with the presumption that Board members will universally conform to it. The evidence of Professor James Donald Galloway, formerly a Board member, supports this contention. At paragraph 38 of his affidavit Professor Galloway attests as follows:

> 38. As a Board Member, I would not have interpreted the above direction from the IRB administration as leaving me with the discretion to determine if it were appropriate to follow the Guideline on a case by case basis. Paragraphs 19 and 23 of Guideline 7 appear to have been issued with the intent, or the presumption that the Board Members will universally conform to them. I say this because Board Members are instructed that the "*standard*" practice, from henceforth "*will be*" for either the RPO or the Board member to proceed first. Furthermore, although an exceptional circumstances provision in theory exists, only an extremely narrow range of exceptions is provided for. Thus, waiving the standard procedure appears acceptable not for a child, not even for a young child, but only for a *very young child*. Similarly, waiver is acceptable not for a disturbed claimant, but for a *severely disturbed claimant*.

[123] Professor Galloway also attests that there is a significant difference between offering guidelines to be employed in appropriate cases and saying that a guideline shall apply except in exceptional cases. At paragraphs 40 and 41 of his affidavit, he states:

> 40. In the former case, it will up to the Board Member to decide whether the Guideline should be applied. There is no presumption one way or another. Rather, the issue must be determined on a case by case basis, taking into account all relevant factors. A good example of such guidelines are the Board's *Gender Guidelines*. Clearly the *Gender Guidelines* do not fetter the discretion of individual Board members. They merely provide an analytical framework to assist members in conceptualizing gender based claims.
>
> 41. In the case of Guideline 7, however, the guidelines presumptively apply unless the case is shown to be extremely exceptional. The Guideline's restrictive demand for a standard mode of proceeding is inconsistent with

> the exercise of discretion. It deters the decision maker from considering all of the relevant factors and deciding on balance what manner of proceeding is appropriate by requiring that special reasons be provided for straying from the norm. It is, of course, always important to remember that these Guidelines are not legislation, nor are they even regulation. Because they do not have the same status as legislation, or regulation, the manner in which Guideline 7 is being implemented is thus, in my opinion, an inappropriate fettering of the discretion of Board Members.

[124] The Intervener also argues that Board members are remarkably loyal to the Board and respectful of the Chairperson and his policies, and as a result would defer to the strong mandatory language of the guideline. Further it is argued that since the vast majority of members are not lawyers, they lack the confidence to make procedural determinations and will often defer to the guideline in assessing the appropriate choice of procedure. The evidence of Professor Galloway, at paragraphs 42 and 43 of his affidavit, essentially attest to the above circumstances and supports the Intervener's argument.

[125] There is further evidence, adduced through the affidavit of Raoul Boulakia, indicating that certain Board members feel they have to follow the guideline. The presiding Board member during the hearing in the *Baskaran* case, stated in response to an objection to the standard-order questioning procedure:

> 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.… [Boulakia Affidavit, Exhibit B.]

[126] In response, the Respondent points to cases where Board members have indeed disagreed with and not applied the guideline. The Respondent argues that this supports its contention that Guideline 7 is not binding on Board members. One such case is the above-mentioned decision of

Board member Steve Ellis, which forms part of the record before this Court. The member strongly criticizes Guideline 7, particularly with respect to its fettering of Board members' discretion. Board member Ellis wrote that members are "strongly urged" to follow a decision rendered by the Board in *R.K.N. (Re)*, above, where it was decided that the guideline did not violate natural justice. The Board in this case, as noted above, cited from the Board's decision in *R.K.N.* in its reasons.

[127] The Intervener also argues that there is evidence of "top down pressure" on Board members to follow the standard-order questioning procedure and of the threat of sanctions for non compliance with Guideline 7. Specifically, the Intervener directs the Court's attention to the following evidence indicating that the IRB is monitoring compliance:

(1) the Board's "Hearing Information Sheets" on which members are requested to indicate whether they followed "reverse-order questioning" and if not, why not.

(2) a series of email correspondence which indicate that the Deputy Chair of IRB requested copies of decisions where a Board member allowed counsel to question first, and that "counsel-first" hearings were being flagged and the individual member who proceeded that way was asked to explain whether exceptional circumstances were cited, or if there were other reasons for the member not following "reverse-order questioning": Boulakia Affidavit, Exhibit A.

(3) the Board's "Performance Appraisal Forms" which indicate that one factor considered in the re-appointment process is whether the member has applied the guidelines in "appropriate circumstances".

[128] Finally, the Intervener points out that in cross-examination, Paul Aterman admitted that the Deputy Chair of the IRB requires managers to monitor individual member's compliance with Guideline 7, and that he further admitted that individuals who were not complying with Guideline 7 were called to a personal accounting for failing to do so.

[129] Professor Galloway's affidavit evidence supports the contention that the "top down pressure" from the IRB fetters Board members' discretion. At page 43 of his cross-examination he stated:

> The difficulty that I would have as a board member that I try and express is I think that following the guideline would actually interfere with my ability to do the job really well, and my concern would be that that would put me in a position where I would feel a dilemma that there is a – that there is a – a requirement that I do something, that the institution is saying this is the best practice and my personal experience is saying, no, it's not; and that confrontation with the board is something that I see as being a[n] uncomfortable and unhappy and unfortunate situation to put myself into and I would say to put other—other like-minded board members into.
>
> In that sense I think we have fettering in the – in the sense that there is pressure to – there is institutional pressure to abide by a practice that you don't actually think is the best way of making the determination.

[130] I accept the evidence adduced by the Intervener to support the following findings: (1) that the IRB engages in monitoring the implementation of its guidelines; (2) that in respect to Guideline 7, there is a clear expectation that the guideline be followed; (3) that the monitoring

exercise would in the minds of Board members serve to reinforce this expectation; (4) that compliance with the guideline is a factor considered in a member's performance appraisal. In my view, these findings combined, constitute institutional pressure on Board members to abide by the practice.

[131] However, I find there to be no evidence to suggest that the Chairperson of the IRB has sanctioned any Board member for non compliance with Guideline 7 or that he has or had any intention of doing so. Nor do I find there to be any merit to the allegation that the IRB threatened compliance. Moreover, I note that the Chairperson does not have the statutory authority to sanction individual members. Members are appointed, re-appointed or dismissed by the Governor in Council and not the Chairperson of the IRB: section 153(1) of the IRPA. The Chairperson can only request that the Minister of Citizenship and Immigration consider taking remedial or disciplinary measures against a member on a limited number of grounds pursuant to section 176 of the IRPA. The section provides as follows:

176.(1) The Chairperson may request the Minister to decide whether any member, except a member of the Immigration Division , should be subject to remedial or disciplinary measures for a reason set out in subsection (2)	**176. (1)** Le président peut demander au ministre de décider si des mesures correctives ou disciplinaires s'imposent à l'égard d'un commissaire non rattaché à la Section de l'immigration.
(2) The request is to be based on the reason that the member has become incapacitated from the proper execution of that office by reason of infirmity, has been guilty of misconduct, has failed in the proper execution of that office or has been placed, by conduct or otherwise, in a position that is incompatible with due execution of that office.	**(2)** La demande est fondée sur le fait que le commissaire n'est plus en état de s'acquitter efficacement de ses fonctions pour cause d'invalidité, s'est rendu coupable de manquement à l'honneur ou à la dignité, a manqué aux devoirs de sa charge ou s'est placé en situation d'incompatibilité, par sa propre faute ou pour toute autre cause.

[132] I do acknowledge that the Chairperson does have some power over individual Board members in that the Chairperson may move members between Divisions of the IRB or assign administrative functions to members or apportion work among the members. However, the Intervener does not allege that the Chairperson exercises such authority in order to sanction members for not complying with Guideline 7. Nor is there any evidence that the Chairperson has conducted himself in such a manner, which would raise concern about abuse of such authority.

[133] The evidence of Mr. Aterman indicates that the IRB has not instituted any formal or mandatory mechanisms regarding the extent to which the provisions relating to the order of questioning have been followed. He attests that the IRB did modify its Hearing Information Sheet to allow the capturing of this information but only on a voluntary basis. His evidence is that the response rate is inconsistent and low. However, as mentioned above, Mr. Aterman did testify on cross-examination that the Deputy-Chair of the Board required managers to monitor Board members' compliance with the guideline and admitted that individuals who were not complying were called upon to indicate why the guideline was not followed.

[134] There may well be good reasons for the IRB to monitor the implementation of a guideline. The Board may wish to assess the effectiveness of the change, whether there is a need to correct course or not, how it is being received, and what people's needs are in terms of training and professional development. No one would take issue with the Chairperson conducting such an exercise in respect to the Gender Guidelines. Evidence would indicate that similar monitoring was carried out at the time the Gender Guidelines were implemented. The

monitoring exercise conducted by the IRB cannot, in my view, be said to be inappropriate or, on its own, constitute a clear indicator of fettering of a Board member's discretion. It is a factor that must be considered in the circumstances of a particular case.

[135] 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. As stated earlier, the essence of discretion is that it can be exercised differently in different cases on the merits of the case. A guideline should not have 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. There is uncontroverted evidence that for at least certain Board members this is the case. Guideline 7 in my view has the effect of dictating a certain procedure and allowing few exceptions, on a procedural issue that could potentially affect the fairness of the hearing. Put another way, Guideline 7, for the most part, requires a member to exercise her or his discretion in a particular way. In the result, I find that Guideline 7 fetters the discretion of Board members.

(iii) *Does the Chairperson's standard-order of questioning procedure unlawfully distort the adjudicative role of the Board?*

[136] The Intervener asserts that the Chairperson's standard-order of questioning procedure infringes on the legislatively mandated role of Board members in refugee determination hearings. The Intervener submits that the change in the order of questioning changes the role of Board members. Coupled with the shift to one-member panels, this adds to the members' responsibilities. The Intervener argues that Courts have held that such added duty is incompatible with a decision-maker's primary responsibility. The Intervener cites *Rajaratnam v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No 1271 (QL), where the Federal Court of Appeal expressed concerns as to the propriety of a Board member intervening in the questioning of a claimant: "… 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".

[137] The Respondent argues that the Intervener's contention that Board members will be distracted from their adjudicative role and drawn into the fray if they are required to ask

questions before counsel is based on opinion and speculation, not on evidence, and in any event, does not establish a breach of the Board's duty of fairness. The Respondent submits that the Court in *Rajaratnam* held that the Board must behave fairly and impartially – that is, judiciously; the Court did not state that Board members must behave like a judge. In my opinion, the Intervener's argument has little merit. I agree with the Respondent that the evidence is insufficient to establish a breach of natural justice or procedural fairness on the basis of the Intervener's submissions on this issue.

[138] The Board is an administrative tribunal empowered by statute with an inquisitorial mandate. It is not improper for a Board member to engage in a probing examination of a claimant in order to assess the well-foundedness of a claim. There are, however, certain parameters within which a Board member must conduct her or himself. When these are exceeded, the Court in exercising its jurisdiction on judicial review can intervene and has done so on occasion, in the appropriate circumstance. In my view, the Chairperson's standard-order of questioning procedure does not infringe on or adversely affect a Board member's role in refugee determination hearings.

9. Did the Board Err in Finding the Applicant not to be a Convention Refugee or a Person in Need of Protection?

[139] Before proceeding to consider the arguments of the parties on the merits of the case, it is necessary to consider how my above findings in respect to natural justice and procedural fairness impact on the outcome of this application for judicial review. I find that Guideline 7 did not

operate to deny the Applicant a meaningful opportunity to present his case fully and fairly. I did however find that Guideline 7 does fetter the discretion of Board members.

[140] Procedural fairness in the refugee determination process requires at a minimum the right to a fair hearing: see *Singh,* above. Fundamental to the right of a fair hearing is that a Board member exercise independent judgment in deciding a case on its merit free from undue influence. Fettering of a Board member's discretion to decide the most appropriate process in the circumstances of each case constitutes undue influence and violates the principles of procedural fairness.

[141] The Supreme Court of Canada has held that once a breach of the principles of natural justice or procedural fairness is established, the decision of an administrative agency is invalid. In *Cardinal v. Kent Institution,* [1985] 2 S.C.R. 643 at paragraph 23, Mr. Justice Le Dain wrote:

> … the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision**. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.** It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing. *(my emphasis)*

This approach was also adopted by Chief Justice Lamer in *Université du Québec à Trois-Rivières v. Laroque,* [1993] 1 S.C.R. 471. At page 493 of the Supreme Court's decision, the Chief Justice wrote:

> Secondly, and more fundamentally, the rules of natural justice have enshrined certain guarantees regarding procedure, and it is the denial of those procedural guarantees which justifies the courts in intervening. The application of these rules should thus not depend on speculation as to what the decision on the merits would have been had the rights of the parties not been denied.

[142] The Federal Court of Appeal applied the same principles in *Gale v. Canada (Treasury Board)*, 2004 FCA 13. In that decision at paragraph 13, the Court of Appeal, citing *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 228-29, acknowledged that: "… a court may exercise its discretion not to grant a remedy for a breach of procedural fairness where the result is inevitable". As was the case in *Gale,* the result is not inevitable here.

[143] In this case, since Guideline 7 fetters the discretion of the Board member, it consequently breaches the Applicant's right to procedural fairness. Following the principle of law set out by the Supreme Court of Canada in *Cardinal* and in *Université du Québec*, I therefore find the Board's decision to be unlawful. Given this determination, it is unnecessary to consider the issues raised by the Applicant in respect of the merits of the Board's decision rejecting his claim.

10. Conclusion

[144] In conclusion, for the above reasons, I will quash the Board's decision and remit the Applicant's claim back to the Board for re-determination by a differently constituted panel in accordance with these reasons.

11. Certified Question

[145] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance, if any, no later than Thursday, January 12, 2006. Each party will

have until Tuesday, January 17, 2006 to serve and file any reply to the submission of the opposite party. Following consideration of those submissions, an order will issue allowing the application for judicial review and disposing of the issue of a serious question of general importance as contemplated by paragraph 74(*d*) of the IRPA.

"Edmond P. Blanchard"
Judge

Ottawa, Ontario
January 6, 2006

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-7836-04
STYLE OF CAUSE:	Daniel Thamotharem v. MCI
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REASONS FOR ORDER AND ORDER:	Blanchard J.
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APPEARANCES:

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