



## IRB NEWS

### **Important Message regarding the *Thamotharem* Decision of the Federal Court**

On January 6, 2006, the Federal Court released its reasons for decision in the *Thamotharem* case.<sup>1</sup> In this case, the Court set aside the Refugee Protection Division decision on the grounds that portions of Guideline 7 fettered the discretion of the Board members.

#### **CERTIFIED QUESTIONS**

The Court has agreed to certify the following three questions:

1. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice by unduly interfering with claimants' right to be heard?
2. Has the implementation of Guideline 7 led to fettering of Board Members' discretion?
3. Does a finding that Guideline 7 fetters a Refugee Protection Division Member's discretion necessarily mean that the application for judicial review must be granted, without regard to whether or not the applicant was otherwise afforded procedural fairness in the particular case or whether there was an alternate basis for rejecting the claim?

#### **LEGALITY OF THE STANDARD ORDER OF QUESTIONING ESTABLISHED IN GUIDELINE 7**

In the *Thamotharem* decision, the Court upheld the legality of the order of questioning set out in Guideline 7. The Court held that the standard order of questioning established in Guideline 7 did not violate the principles of natural justice or procedural fairness, in that those principles did not demand that a hearing be conducted with counsel for the claimant questioning first, in order for claimants to have a meaningful opportunity to present their case fully and fairly. The Court also held that the procedures set out in Guideline 7 did not unlawfully distort the adjudicative role of the Refugee Protection Division.

## FETTERING OF DISCRETION

However, the Court found that Guideline 7 fettered the discretion of members because, for the most part, it required members to exercise their discretion in a particular way. This conclusion was based on the mandatory language found in Guideline 7, the “limited and narrow” description of exceptional circumstances, and “the not so subtly expressed expectation of compliance by the IRB.”

## BOARD’S RESPONSE

In the interim, and in the expectation that the case will be appealed, the Board will do the following:

1. ensure all its members receive a copy of the decision;
2. ensure that the monitoring activities mentioned in the decision concerning Guideline 7 are suspended;
3. ensure that members are informed that the Court specifically concluded that the standard order of questioning established in Guideline 7 is fair and does not breach the principles of natural justice, but found that portions of Guideline 7 fettered the discretion of members; and
4. ensure that members know that they may continue to exercise their discretion in deciding the most appropriate order of questioning in a particular hearing, having regard to all the circumstances of the case, including whether the RPO or the member should question first.

## Endnotes

<sup>1</sup> *Thamotharem, Daniel v. M.C.I.* (F.C., no. IMM-7836), Blanchard, January 6, 2006; 2006 FC 16.  
Online: <http://decisions.fct-cf.gc.ca/fct/2006/2006fc16.shtml>.