A-38-06

FEDERAL COURT

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

DANIEL THAMOTHAREM
(a.k.a. Daniel Prashant Thamotharem)

Respondent

and

THE CANADIAN COUNCIL FOR REFUGEES

Intervener

INTERVENER'S MEMORANDUM OF FACT AND LAW

FACTS

1. Reverse order questioning ("ROQ") was implemented under Guideline 7 as part of the Chairperson's Action Plan which aimed to "reform procedural practices before the IRB."

   ***Affidavit of Paul Aterman,* Appeal Book Vol. 5, Tab 22, para 1.**

2. Prior to the introduction of Guideline 7, Board members were expressly discouraged by the Immigration and Refugee Board (the "IRB") from questioning claimants before Counsel. This is clear from the IRB's Code of Conduct, which provided, and still provides, that: "members are advised to leave their questions until the end of a witness' testimony." Paragraph 19 of Guideline 7 reversed this practice, requiring Board members as a "standard practice" to question the claimant before Counsel. Under paragraph 23 Board members may vary this standard order of questioning, but only in exceptional circumstances; for example where the claimant is *severely disturbed* or a *very young* child.

   ***Code of Conduct for Members of the Immigration and Refugee Board of Canada,* Rule 8, Commentary**

3. Despite some regional variation among the smaller offices of the IRB, prior to the introduction of Guideline 7 and in accordance with the Code of Conduct, the vast majority of refugee claims proceeded with an examination in chief. Reflecting this fact, in its written materials the IRB expressly acknowledges that Guideline 7 changed the Board's standard order of questioning.

   ***Affidavit of Paul Aterman,* Appeal Book, Vol. 5, Exhibit 1, page 5**
   ***Cross Examination of Paul Aterman,* Appeal Book, Exhibit 6, at pages 54 -58**
   Written Reasons with Respect to the Challenge made to Reverse Order Questioning, TA4-13180, 13811, 13812, Board Member Steve Ellis, June 2005

4. Radical reform of the IRB's procedural practices took place without meaningful consultation with stakeholders. Thus no attempt was made to survey refugee claimants to determine their views on the proposed changes. As well, although Canadian Council for Refugees ("CCR"), along with other NGO stakeholders repeatedly expressed its opposition to ROQ at Consultative Committee on Practices and Procedures meetings between May 2003 and June 2004, the IRB nevertheless proceeded with mandatory implementation of ROQ in June 2004. In addition, while lawyers from the refugee bar were invited to a "consultation meeting" concerning the changes, they were informed that following consultation, the right to an examination in chief *would* be introduced. Finally, although Guideline 7 was phased in over a six month period from December 2003 to June 2004, the Board expressly stated that this phasing in period was not a pilot project: as of June 2004, ROQ would become mandatory irrespective of concerns raised by stakeholders. Implementation occurred without any systematic evaluation of whether ROQ advanced the Board's objectives or had negative consequences.

***Affidavit of Raoul Boulakia,* Appeal Book, Vol. 4, Tab 17 at paras. 8-9**
***Affidavit of Paul Aterman,* Appeal Book , Vol. 5, Tab 17, Exhibits L1, pages 3 and 4; Exhibit L2, page 3.**

5. From the outset, the CCR, along with other stakeholders, expressed concerns that both because of the special vulnerability of refugee claimants and because refugee hearings are frequently adversarial in practice, application of paragraphs 19 and 23 of Guideline 7 would substantially interfere with claimants' right to be heard, and thus would violate natural justice.

***Affidavit of Nick Summers,* Appeal Book, Vol. 4, Tab 21, paras. 16-17**
***Affidavit of Raoul Boulakia,* Appeal Book, Vol 4, Tab 17, para. 16**

6. Following mandatory implementation of the Guideline in June 2004, Board members were orally instructed that they had to question first. Board members who failed to comply with this instruction were called to a personal accounting for their failure to do so. Board members who did not apply the Guideline were also required to provide reasons in writing as to why they had not applied the Guideline. Board members applying the Guideline were not required to provide written reasons for doing so.

***Affidavit of Raoul Boulakia,* Appeal Book, Vol. 4, Tab 17, para. 14, Exhibit A and B**
***Cross examination of Paul Aterman,* Vol. 6, Tab 23, page 70 at 19-25, page 71 at 1-19, pages 75-80**
***Affidavit of Paul Aterman,* Vol 5, Tab 22, Exhibit J, page 5**

7. Guideline 7 was introduced on the alleged grounds that it would result in greater efficiencies at the Board. However there is no evidence that any efficiency gains have been realized as a result of implementation of ROQ and some evidence that there has actually been a reduction in output by the Board since its introduction. Moreover, continuing dramatic declines in the number of refugee claims made in Canada further undermine the Board's efficiency rationale. Nor is there any evidence that ROQ promotes procedural clarity, a rationale later promoted by the Board. This is because the determinative issues in all claims are, in any event, set out by Board members at the outset of the hearing.

***Affidavit of Raoul Boulakia,* Appeal Book, Vol. 4, Tab 17, para. 39**
***Affidavit of Nick Summers,* Appeal Book, Vol 4, Tab 21. para 39**
***Cross Examination of Paul Aterman,* Vol. 6, Tab 22, at pages 21-23**
***Affidavit of Paul Aterman,* Vol 5, Tab 22, at para. 13**

ISSUES

I. Are Paragraphs 19 and 23 of Guideline 7 *ultra vires* the Board's jurisdiction?
II. Do Paragraphs 19 and 23 of Guideline 7 violate natural justice?
III. What are the appropriate remedies if the answers to questions I and/or II above are in the affirmative?

SUBMISSIONS

I. Paragraphs 19 and 23 of Guideline 7 are *ultra vires* the Board's jurisdiction because:

A. The impugned paragraphs fetter Board members' discretion

B. The change to the order of questioning should have been implemented pursuant to the *Refugee Protection Division Rules* ("The *Rules*") and not pursuant to the *Chairperson's Guidelines* ("The *Guidelines*").

A. The impugned paragraphs fetter Board member's discretion

8. The Intervener submits that the decision of the Applications judge on the issue of the fettering of Board members' discretion was correct in law.

***Thamotharem v. M.C.I.*, 2006 FC 16, Appeal Book Vol. 1, Tab 5 [Thamotharem]**

9. As with the Appellant, the Intervener submits that the decision of the Ontario Court of Appeal in *Ainsley* provides a useful framework for assessing whether the Guideline has been elevated to the status of a rule, and consequently fetters the discretion of RPD Members.

***Ainsley Financial Corp. v. Ontario Securities Commission*, (1994) 21 O.R. (3d) 104**

10. It is important to note that in *Ainsley* the impugned Policy Statement, much like Guideline 7, provided a detailed regime of regulation, including exceptions to the application of the policy. The essence of the Ontario Court of Appeal's decision in *Ainsley* is that in determining whether a guideline has unlawfully been elevated to the status of law, and thus fettered discretion, the language of the guideline, in addition to other contextual factors must be considered. The Court in *Ainsley* further makes it clear that the mere presence of permissive terms such as "non-binding" and "recommended approach" are not necessarily indicative of the true nature of any guideline or policy statement. In other words, what the court in *Ainsley* makes clear is that it is important to look beyond the sanitized wording of a guideline to the actual intent that animates it. If that intent is one more properly within the domain of a Rule, the guideline is unlawful.

***Ainsley, supra*, at 105**
***Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at 596**

11. Taking guidance from the Ontario Court of Appeal in *Ainsley* and this Honourable Court in *Ha*, the Applications judge concluded that the thrust of the language of Guideline 7 is mandatory in nature. He further concluded that the language of the Guideline in combination with other factors, namely the monitoring and expectation of compliance amounted to a fettering of RPD members' discretion. On this note, the lower court preferred the evidence adduced by the Intervener to that of the Minister, a finding that was reasonably open to it.

***Thamotharem, supra* at para. 135**

***Ha v. Canada (M.C.I.),* [2004] F.C.J. No. 174 at para. 74**

12. The Intervener adduced evidence that Guideline 7 would be viewed as mandatory by the vast majority of Board members given the administrative context in which it was implemented and the strongly mandatory wording of the order of questioning paragraphs.

***Affidavit of James Donald Galloway,* Appeal Book, Vol. 4, Tab 15 at paras. 34-43**

13. While the Appellant calls into question the probative value of this evidence, it is notable that the RPD itself has retained Professor Galloway to train Board Members. Furthermore, Professor Galloway's statements that decision-makers are inclined to uncritically follow administrative guidelines is supported by commentary from other academics in the field.

***Affidavit of James Donald Galloway,* supra at para. 4**

***Demystifying the Boundaries of Public Law: Policy, Discretion, and Social Welfare* Laura Pottie & Lorne Sossin (2005) 38 U.B.C. L. Rev. 147 at para. 11**

14. To counter the prima facie evidence adduced by the Intervener that fettering is taking place, the Appellant seeks to draw to the court's attention individual examples of board member's seemingly exercising their discretion. With respect, such examples prove little, if anything, with regard to whether or not fettering actually takes place. As the Appellant notes, the Refugee Protection Division adjudicates "tens of thousands of refugee claims each year." It is highly notable that in the affidavit of Mr. Aterman, only three cases were cited in which Board members allowed counsel to question the claimant first.

***Appellant's Memorandum of Fact and Law,* para. 4**
***Affidavit of Paul Aterman,* Appeal Book, Vol. 5, Exhibits S1-S3, Tabs S1-S3 at 1394ff**

15. Moreover, the evidence shows that the Board required Members to specify on hearing sheets whether they had followed the Guideline or not. This being the case, the fact that the Appellant may point to a number of cases in which the Guideline may not have been followed is, quite simply, of little probative value. Beyond this, the negligible number of decisions referred to by the Appellant may be inferred to reveal the *lack* of discretion being exercised in the overwhelming majority of cases. To the extent that Justice Mosley in *Restrepo Benitez* relied on the evidence of an insignificant number of decisions (in that case, Justice Mosely relied on 23 selectively chosen cases, of the tens of thousands of decisions rendered by the Board) to conclude that fettering was not occurring under the Guideline, the Intervener submits that he was in error.

***Affidavit of Raoul Boulakia,* Appeal Book, Vol 4, Tab 17**
***Thamotharem, supra,* at para. 127**

16. Regardless of the numbers, however, what is more significant is the intended effect of the Guideline, taking into account all of the factors, including its wording, sanctions for non-compliance and the context in which it was implemented. Taking these factors into consideration, it is submitted that the Guideline is *ultra vires*, that it fettered the discretion of Board members and is therefore unlawful and of no effect.

Wade, H.W.R., *Administrative Law* (4th Ed.) 1977 at page 274

17. On the issue of sanctions for non-compliance, it is acknowledged that the Applications judge concluded that he did not have any direct evidence that individual board members are being

sanctioned for refusing to follow the Guideline. However, the Applications judge *did* find that there is significant institutional pressure being applied on Board members to comply with the order of questioning set out in the Guideline. Based on the combined effect of the institutional pressure and the strongly mandatory wording of the Guideline, the Applications judge concluded that fettering was occurring. It is submitted that this decision was based on the evidence before the court and in keeping with the jurisprudence on the subject.

***Thamotharem, supra*, at para. 130, 135**

18. Importantly, in *Ainsley* as in the lower court decision, it was not the actual sanctioning of individuals that was considered important, but rather, the linkage of guideline adherence to potential institutional sanction. In other words, it is not actual, but potential or perceived sanction that is important to the analysis. In this regard it is important to note that re-appointments to the Board are made on the basis of recommendations by the IRB Chairperson.

***Ainsley, supra*.**
***Affidavit of James Donald Galloway*, supra at paras. 34-43**
***Affidavit of Raoul Boulakia*, supra, Exhibit C at page 63**

B. The change to the order of questioning should have been implemented pursuant to the *Rules* and not pursuant to the *Guidelines*

19. The CCR submits that since Guideline 7 serves as a mandatory pronouncement, it is in effect a "rule in disguise." As such, the CCR submits that the Applications judge was correct in finding that ROQ should have been promulgated pursuant to the *Rules* and not the *Guidelines*, and that by failing to do this the Chairperson had exceeded his statutory authority.

Thamotharem, supra at para. 105.

20. The CCR also submits that as a matter of statutory interpretation, the Chairperson lacked the authority to introduce fundamental procedural change by way of the *Guidelines*. Rather, reform of core procedural practices could only be promulgated under the *Rules*. The CCR submits that the Federal Court in *Restrepo Benitez, supra*, erred in finding to the contrary.

Benitez, supra at para. 184

21. That Guideline 7 sought to introduce fundamental procedural change is clear from the fact that the Guidelines not only fundamentally altered procedural norms at the Board, but also constituted an attempt to transform the Board from its established and accepted role as a quasi judicial body, as recognized by the Supreme Court of Canada, to a "Board of Inquiry."

***Singh v. Canada* (Minister), [1985] 1 S.C.R. 177**
***Affidavit of Paul Aterman*, Appeal Book, vol. 5, Tab 22, Exhibit 0, page 4,5**

22. Although the IRB has stated that it derived its mandate to transform itself from a quasi-judicial tribunal to a Board of Inquiry from certain provisions of the I*RPA*, parallel provisions also existed under the predecessor *Immigration Act* from the time of the Board's creation. While it is therefore clear that Parliament has long intended the Board to possess some of the powers enumerated in the *Inquiries Act*, it is also clear that Parliament intended the Board to be a quasi judicial body and **not** a Board of Inquiry. This must be so, for the Board was, after all created by Parliament in 1988 to respond to the Supreme Court's determination in *Singh* that refugee adjudication required a quasi judicial process. Moreover, prior to the introduction of Guideline 7, neither the Board itself, nor the

Court of Appeal, had interpreted the inquisitorial provisions in the enabling legislation as enabling Board members to adopt the role of "grand inquisitor."

Affidavit of Paul Aterman, **Appeal Book, Vol 5, Tab 22 at para 8**
Cross Examination of Paul Aterman, **Appeal Book, Vol 6, Tab 23, page 51, 72-74**
IRPA**, s. 165, s. 170, s. 162 (2)**
Immigration Act, **S.C. 1989, s. 67, s. 68, 69.1**
Singh, supra
Code of Conduct, para. 2 supra
Rajaratnam v. Canada **[1991] F.C.J. no 1271 (Fed. CA)**

The Statutory Provisions: The Rules and the Guidelines

23. The Chairpersons' power to make *Rules* is set out in section 161 of *IRPA*:

> s. 161 (1) Subject to the approval of the Governor in Council, and in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, the Chairperson may make rules respecting:
>
> > the activities, practice and procedure of each of the Divisions of the Board, including the periods for appeal, the priority to be given to proceedings, the notice that is required, and the period in which notice must be given [Emphasis added]
> > …

24. Section 161 (2) of *IRPA* further provides that following approval by the Governor in Council, rules must be tabled in both Houses of Parliament:

> Tabling in Parliament – The Minister shall cause a copy of any rule made under subsection (1) to be laid before each House of Parliament on any of the first 15 days on which the House is sitting after the approval of the rule by the Governor in Council.

25. While the *Rules* explicitly specify that procedure is within their proper purview, no such specification is supplied in the *Guidelines*. Moreover, while approval of the Governor in Council, and tabling in Parliament is mandated for the *Rules*, there are no similar consultation requirements for *Guidelines.* Rather s. 159 (1) (h) *of IRPA* provides simply that the Chairperson:

> 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.

The Guideline making authority and principles of Statutory Interpretation

26. The preferred approach to statutory interpretation is set out by E. A. Dreiger in "Construction of Statues" (2nd ed, 1983) at p. 87 as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of parliament.

Chieu, supra, **at para 27.**

The ordinary meaning of the guideline making authority

27. It is submitted that a plain reading of s. 159 (1) (h) of *IRPA* indicates that the kind of Guidelines envisioned in this provision are those which, like jurisprudential guides, facilitate a consistent, economical and sound decision making process. Examples of Guidelines facilitating a consistent, economic and sound decision making process and thus in keeping with the provision are the Board's Guidelines on gender issues and child refugee claimants. Guideline 7, however, is not about the decision making process, but is concerned with the setting of fundamental procedural norms. It is submitted that the setting of such fundamental procedural norms was neither a proper nor an anticipated use of the *Guidelines*.

28. Consistent with this plain reading of the *Guidelines*, the Federal Court has found in the past that the Board's Guideline authority reflects the IRB's "public interest mandate" and its "clear policy development role." ROQ however is not directed towards policy development but rather is directed toward sweeping procedural reform.

Sivasamboo v. Canada **[1994] FCJ No 2018 at para 20**

29. A literal approach to statutory interpretation is not however the determinative means of assessing the meaning to be given to any statutory provision. Rather, the provision in question must be read in its entire context. This inquiry involves an examination of the history of the provision at issue, Parliament's intent in enacting it, as well as an examination of the scheme and objectives of the Act in which the provision appears.

Chieu, supra at para. 34.

The history of the Chairperson's authority to make Guidelines and Parliament's intent in granting this authority

30. It is submitted that an examination of the legislative history of the *Guidelines* demonstrates that Parliament did not intend the *Guidelines* to be directed toward procedural reform.

31. The IRB was first granted authority to make Guidelines in 1992, following an amendment to the *Immigration Act*. Prior to this, the Chairperson had the authority to promulgate rules governing procedure although then, as now, this authority was subject to approval by the Governor in Council. However the Chairperson had no explicit authority to make Guidelines. The amendment provided that:

> The Chairperson may, after consulting with the Deputy Chairperson and the Assistant Deputy Chairpersons of the Refugee Division and the appeal Division and the coordinating members of the Refugee Division, issue guidelines to assist members of the Refugee Division and the Appeal Division in carrying out their duties under this Act.

S.C. 1998, c. 28, s. 65 (1)
S.C 1992, C. 49 s. 65 (3)

32. Three witnesses provided testimony before the Senate Committee concerning the purpose of this amendment. Jurisprudence establishes that such testimony may be relied upon to adduce Parliament's intent in passing legislation.

***Little Sisters Book and Art Emporium v. Canada* [2000] 2 S.C.R. at 1120**

33. Mr. Gordon Fairweather, the first Chair of the Board, provided the following testimony:

> In the Board's desire to ensure *consistency of decision making*, we welcome the legislative provision allowing for guidelines. …
>
> This provision will re-inforce my authority … to direct members towards *preferred positions* and therefore foster *consistency in decisions* (Emphasis added)

According to the Honorable Gerald S. Mathew, then Minister of Employment and Immigration, the Senate Committee relied heavily upon Mr. Fairweather's testimony.

***Immigration Act* (amdt) (Bill C86), 34th Legislature, 3rd Session, 1992, Third Reading at para. 1109**
***Immigration Act* (amdt) (Bill C86), 34th Legislature, 3rd Session, 1992, Senate Commission Debates at para. 1524**

34. Further background to the enactment was provided by Barbara Jackman who testified:

> The Board currently uses *policy guidelines*. For instance … they have a position paper, a policy paper on persecution, on statelessness …
>
> … Under these amendments they legalize or sanction this process … We have an interest in terms of *interpretation of the law* and we should be consulted on the guidelines that are going to be published (Emphasis added)

***Immigration Act (amdt)* Bill C86, 34th Legislature, 3rd Session, 1992, Senate Committee Debates at para. 1050**

35. Finally, testimony on the purpose behind the guideline making authority was provided by Professor Goodwin Gill who stated that:

> … The relevance, the timeliness, even the authority of information relating to specific countries, could it seems to me, be brought to the attention of decision makers by guidelines issued by the Chair …

***Immigration Act* (amdt), Bill C86, 34 Legislature, 3rd Session, 1992, Senate Committee Debates at 1134**

36. Nothing in this testimony indicates that the *Guidelines* were intended to be used to reform general procedural practices before the Board.

37. Under s. 159 (1) (h) of *IRPA*, enacted in June 2002, the Chairperson was given an additional guideline making authority allowing it to "identify decisions of the Board as jurisprudential guides." It is submitted that the power to identify decisions of the Board as jurisprudential guides is self explanatory; this provision is also clearly directed towards principles of substantive law rather than to matters of procedural reform.

The scheme of the Act

38. The scheme of the Act further re-enforces the principle that the power to effect procedural change should not be read into the *Guidelines*.

39. First, as noted above, while procedure is expressly listed as being within the purview of the *Rules*, the *Guidelines* make no similar reference to procedure. It is submitted that if Parliament had intended the Chairperson to have the authority to effect profound procedural reform pursuant to the *Guidelines*, the *Guidelines* would have made specific reference to a procedural authority as do the *Rules*.

40. Second, examination of the *Rules* supports the interpretation that procedural change should be made via the *Rules* and not via the *Guidelines*. The *Rules* clearly and exhaustively set out the procedure to be followed by the IRB. While the *Rules* cover complicated procedural issues such as how claims may be allowed without a hearing (Rules 19) and how to proceed with claims involving issues of inadmissibility and exclusion (Rules 23-25) the *Rules* also spell out such minutia as the procedure for scheduling hearings (Rule 21). The specificity of the *Rules* on matters of procedure begs the question, if a procedure as relatively inconsequential as the correct paper size is regulated by statutory instrument, how could something as fundamental as the very nature of the Board's hearing processes be the proper subject of a guideline?

41. It is acknowledged that other Guidelines established by the Chairperson may touch upon procedural matters. It is submitted, however, that these guideline are fundamentally different than Guideline 7 in that they are geared towards ensuring that the needs of vulnerable claimants are accommodated in certain select and difficult circumstances. Moreover, while Guideline 7 is aimed at procedural reform, to the extent that these other Guidelines may touch upon procedural matters, they generally do so only to ensure that the Board's decisions are rendered in compliance with either the overarching legislation or the jurisprudence. Thus for example, because s. 167 (2) of the *IRPA* requires that claimants under the age of 18 have a designated representative, the Child Guidelines validly set out procedures for the designation of such a representative. Similarly, while the Gender Guidelines refer to the sensitivity with which Board members are expected to conduct hearings, they touch on procedural matters only to the extent necessary to ensure that decisions are rendered in accordance with the jurisprudence on the issues. By way of contrast, however, there is no statutory or jurisprudential requirement that hearings be conducted by way of ROQ. To the contrary, as has been mentioned, the only statutory instrument on the subject of questioning suggests that members should question *last.*

Chairperson's Guideline
Chairperson's Guideline 4 - Women Refugee Claimants Fearing Gender-Related
IRPA s. 167(2), see also the former *Immigration Act* R.S.C. 1985 (4th Supp.), c. 28, s. 18, s. 69(4)
Chairperson's Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution ("Gender Guidelines")
***R. v. Lavallee*, [1990] 1 S.C.R. 852.**
***Griffith v. MCI* (1999), 171 F.T.R. 240**
Code of Conduct, supra at Rule 8, IRPA s. 153(b)

42. Moreover it is submitted that because procedure is fundamental to justice, reform of procedural norms should not be made without consultation. Parliament recognized this fact by expressly providing, pursuant to sections 161 (1) and (2) of *IRPA*, that the Chairperson could not promulgate procedural rules without first obtaining the approval of the Governor in Council. Since similar checks and balances are not provided for in the *Guidelines*, a power to make procedural reform

should not be read into s. 159 (1) of *IRPA*. To find otherwise would, it is submitted, thwart the will of parliament.

43. It is submitted that the only plausible exception to this requirement would be, as noted above, in circumstances where the proposed procedural adjustments are aimed at ensuring compliance with the jurisprudence, the enabling statute or the needs of vulnerable claimants. Guideline 7 however is not directed towards procedural adjustment but rather towards radical reform of standard procedures. Guideline 7 has not been passed to ensure compliance with existing legislation, but rather has been imposed in contravention of the procedure in the existing statutory instrument governing the order of questioning. Guideline 7 was not implemented to meet vulnerable claimants' needs, rather it was imposed on vulnerable claimants because the Board determined that its efficiency needs dictated such procedural reform.

44. If the Board wished to reform the refugee determination process using the *Guidelines*, it should properly have raised this issue before Parliament when *IRPA* was being debated and when the *Guidelines* were amended to allow the Board to issue jurisprudential guidelines. It did not do so, and cannot now by fiat of the Chairperson impose fundamental changes upon refugee claimants using the Guidelines to do so. For all of the reasons cited above, it is submitted that the legislative scheme under the IRPA provides that structural changes are to be made via *Rules*, not *Guidelines*.

45. In the alternative, if there is any ambiguity as to whether procedural changes can be made via the *Guidelines*, Supreme Court jurisprudence provides authority for the proposition that such ambiguity should be resolved in a manner which affords litigants greater rather than lesser procedural protections. Since the effect of Guideline 7 is to substantially reduce procedural protections available to refugee claimants, Guideline 7 should therefore be found to be *ultra vires* the Chairperson's authority.

***Chieu* supra at para. 71**

II. Guideline 7 violates Natural Justice

46. The CCR submits that the use of reverse order questioning as a standard practice significantly interferes with claimants rights' to be heard having regard to the special vulnerability of refugee claimants, the differing role of Board members and RPO's as questioners as contrasted with the role of Counsel for the claimant, and the often adversarial nature of refugee proceedings. The CCR therefore submits that the Applications judge erred in finding that Guideline 7 does not violate natural justice.

A traumatized client base

47. Significant numbers of refugee claimants have suffered persecution culminating in torture. Common to many refugees, and particularly those who have experienced torture, is an often immobilizing distrust of individuals in general and a fear of state agents in particular, manifesting in distrust of both the RPO and Board members. This is a fact which the Board itself acknowledges in its training materials:

> Victims of torture may be reluctant to testify because they mistrust or are afraid of the Member and the RPO, who they perceive as persons in position of power and authority. Distrust is a common experience of the torture experience.

***Affidavit of Paul Aterman,* Appeal Book, Vol. 5, Tab 22, Exhibit Q 1 at 5, 22**
***Affidavit of Dr. Payne,* Appeal Book, Vol 4, Tab 19 at para 27**

48. Compounding these difficulties is the fact that those who have been persecuted typically suffer from a range of psychological disorders including repression, anxiety, panic attacks and depression, commonly clustered under a diagnosis of post traumatic stress disorder ("PTSD"). These psychological disorders interfere with refugee claimants' ability to testify. Gentle and supportive questioning, familiarity with and control over the proceedings, and a rapport with the examiner, are critical in ensuring that claimants suffering from PTSD and its associated symptoms are able to testify to their best advantage.

Affidavit of Dr. Payne, **Appeal Book, Vol. 4, Tab 19**

49. The CCR submits that Counsel is in the best position to fulfill these requirements given that 1) Claimants are aware that Counsel's role is to assist claimants in presenting their claim; 2) Claimants have an opportunity to build a relationship of trust with Counsel before the hearing takes place; 3) Claimants know that Counsel is not a state agent; 4) Claimants are familiar with Counsel's style of questioning. Familiarity and control are therefore present to the greatest degrees possible when Counsel questions first. The CCR further submits that given these facts, an examination-in-chief is critical to fairness for traumatized claimants.

Affidavit of Dr. Payne, **Appeal Book, Vol. 4, Tab 19**

50. Nor are claimants suffering from PTSD the only claimants whose special vulnerability re-enforces the need for an examination-in-chief. Other claimants falling into this category, irrespective of whether they have been diagnosed with PTSD, include children, victims of gender related violence, and those basing their cases on sexual orientation.

Affidavit of Paul Aterman, **Appeal Book, Vol. 5, Exhibit P1. P2**
Guideline 3 – Child Refugee Claimants: Procedural and Evidentiary issues

51. The Applications Judge acknowledged that the vulnerability of refugee claimants militates in favor of an increased requirement for procedural protection. However, the Applications judge found that vulnerable claimants are protected by the exceptional circumstances provisions of Guideline 7. Relying on evidence by Dr. Payne that claimants' fear of government agents could theoretically be overcome by gentle and supportive questioning by the Board, and noting that the Board receives specialized training and guidance on the questioning of vulnerable claimants, the Applications judge further concluded that the sensitivity required for the questioning of vulnerable claimants could be supplied by the Board. It is submitted that Applications judge ignored relevant evidence in arriving at these conclusions.

Thamotharem**, supra at paras. 89 and 90**

<u>The exceptional circumstances clause does not protect vulnerable claimants</u>

52. The uncontroverted evidence in this claim demonstrates that "significant number of claimants appearing before the Board have been tortured" and that "virtually all of these will have difficulty in testifying" Or phrased in the language of one Board member: "virtually all refugee claimants allege incidents of serious harm, which may render them psychologically vulnerable and make it difficult for them to testify." In addition, as noted above, children, victims of gender related violence, and claimants basing their cases on sexual orientation also possess psychological vulnerabilities which may make testifying difficult.

Affidavit of Paul Aterman, **Appeal Book, Vol. 5, Tab 1 at para. 10**

Affidavit of Donald Galloway, **Appeal Book, Vol. 4, Tab 15 at para 44**
Affidavit of Dr. Payne, **Appeal Book, Vol. 4, Tab 19, generally**
Affidavit of Paul Aterman, **Appeal Book, Vol 4, Exhibit Q pages 5 and 20 and Exhibit R1 at 10**

53. The prevalence of special vulnerability among refugee claimants means that is the average, and not the exceptional refugee, who requires the protection of an examination in chief. If paragraph 19 was used to protect all vulnerable claimants the use of the exception would defeat the Guideline's purpose of making ROQ a standard practice. Reflecting this reality the evidence demonstrates that the Guideline was neither intended to be, nor is, used to this effect.

54. With regard to intention, the CCR notes that under paragraph 23 of Guideline 7 the only examples given of those to whom the protection of the exceptional circumstances clause should be offered are "*severely* disturbed claimants" or "*very young*" children. Moreover, Paul Aterman, one of the architects of Guideline 7, acknowledged on cross examination that the exceptional circumstances clause should not be applied to all claimants suffering from psychological vulnerability, or to all victims of torture. Reflecting this understanding, the evidence demonstrates that Board members are increasingly finding that a diagnosis of PTSD does *not* warrant the application of the exceptional circumstances provision.

Affidavit of Raoul Boulakia, **Appeal Book, Vol 4, Tab 17, at para. 12**
Cross Examination of Paul Aterman, **Appeal Book, Vol. 23 at page 35, 121 -122**

55. Nor do the two cherry picked cases or the fourteen cherry picked cases presented by the Minister in *Thamotharem* and *Restrepo Benitez* respectively, in which Board members applied the exceptional circumstances clause to psychologically vulnerable claimants, demonstrate that the exceptional circumstances clause adequately protects vulnerable claimants. In 2004 alone more than 25,000 cases were referred to the IRB; the sample size presented by the Minister in both cases is simply too minute to provide any reliable information to displace the inevitable conclusion that the exceptional circumstances clause cannot sufficiently protect vulnerable claimants.

Cross examination of Paul Aterman, **Appeal Book, Vol. 6 at para. 23**

<u>Training on questioning techniques underscores the need for an examination-in-chief.</u>

56. The Applications Judge's finding that the Board's specialized training ensures that vulnerable claimants are protected fails to take into consideration the differing institutional role of the Board as examiners on the one hand, and the Claimant's counsel as questioners on the other.

57. Board members are trained that as examiners they play a critical role in distinguishing the "truth from the untruth." Consequently, members and RPO's are trained that they will frequently need to explore areas that are 'detrimental to the claim" and they are instructed to hone their examining skills with a view to "uncovering false allegations of torture and malingered manifestations of PTSD."

Affidavit of Paul Aterman, **Appeal Book, Vol. 5, Exhibit 0, page 4-6, and Exhibit Q1 at 3 and 45**
Cross examination of Paul Aterman, **Appeal Book, Vol. 6 at pages 82-88**

58. In contrast putting such difficult questions to the claimant is not part of Counsel's role. Counsel's role is to support the claim, not to act as prosecutor seeking to uncover truths. In Mr. Aterman's words:

> It is certainly not the duty of counsel for the claimant. They have a duty to their client. I am not going to expect them to be the ones who ask the difficult questions. If difficult questions need to be asked, it is normal to expect them to be done by the Board member or the RPO…
>
> We are not in a situation where you are sitting there and you have an adversary who is opposing the claimant's claim and who is exposing those inconsistencies in an adversarial manner. *The Board has to take on that role.* [Emphasis added]

***Cross examination of Paul Aterman,* Appeal Book, Vol. 6 at page143**

59. The Board's adversarial role is reflected in the reality that the Board is often aggressive and confrontational in its manner of questioning, and frequently makes accusations of falsehood, dissimulation and evasiveness. The effect of ROQ is thus to turn claimants into defendants rather than proponents of their case, with potentially devastating consequences. This is because an inquisitorial style operates to confuse, confound and unbalance claimants, typically rendering them tongue tired and inarticulate as a result. As Professor Galloway further explains:

> This loss of balance has profound consequence for the just determination of a claim. This is because the person who stumbles in response to an official's aggressions exhibits signs similar to those of a person fabricating a story. This in turn leads to adverse credibility determinations and frequently to an unjust and undeserved refusal of the claim for refugee protection.

***Affidavit of Donald Galloway,* Appeal Book, Vol. 6 Tab 19 paras. 13-15, 18, 19**
Written Reasons with respect to the Challenge made to ROQ, TA4-13180, 13811, 13812, Board Member Steven Ellis.

60. Nor are these problems mitigated by allowing the Counsel's claimant to question the claimant after questioning has been completed by the Board. As Professor Galloway notes, by this time the claimant may be tired, confused, angry and unresponsive, so that the conditions which enable the claimant to demonstrate that her claim is authentic may no longer exist.

***Affidavit of Donald Galloway,* Appeal Book, Vol. 6, Tab 19, para. 20**

61. While inappropriate in all circumstances, an inquisitorial style of questioning is particularly damaging to vulnerable claimants who require gentle supportive questioning in order to testify adequately.

***Affidavit of Donald Payne,* Appeal Book, Vol 4, Tab 19, generally**

62. Nor is it any answer, as the Department of Justice alleges, to say the remedy for these problems lies in judicial review. First, this is a perversion of the ruling in *Singh* that refugee claimants should have full access to natural justice in the initial refugee determination process. Second, such a prescription ignores the obvious psychological distress resulting from an initial denial of a refugee claim; it is thus violates claimants' rights to security of the person as protected under s. 7 of the *Charter*. Third, while in the past the Federal Court has controlled aggressive cross-examination that amounts to harassment, there is no effective institutional control over questioning that may fall short of harassment, but is nevertheless entirely inappropriate. Fourth, if the manner of questioning has led to credibility concerns, the chances of a successful judicial review application are slim, as deference accorded by the Court to credibility determinations made by the Board means that credibility determinations, once made, usually stand.

***Affidavit of Donald Galloway*, Appeal Book, Vol. 6, Tab 15, paras. 17, 19**

63. In conclusion it is submitted that to apply ROQ as a standard practice is to invite miscarriages of justice in the refugee determination process. Since these miscarriages of justice may not be corrected on judicial review, applying ROQ as a standard practice is in effect tantamount to playing Russian roulette with refugees' lives. As such it is submitted that Guideline 7 violates natural justice and should not be sanctioned by the Court.

III. Remedies

64. The Intervener has argued that Guideline 7 is *ultra vires* of the *Guidelines* and represents a violation of natural justice. The Intervener further submits that on either of the above grounds, the only appropriate remedy is to declare the Board's use of the Guideline to be unlawful and remit the matter to the Board for reconsideration.

65. The Appellant argues that the Applications judge only found there to be a contingent possibility of unfairness associated with ROQ, and that as such, remedies for any individual allegations of unfairness should be considered on a case by case basis. This is not, however, what the Applications judge concluded. Rather, he found that the Guideline (through both its plain language and the way in which it was implemented) fettered Board member's discretion and that such fettering on an issue as fundamental as the hearing process constituted undue influence and violated the principles of procedural fairness.

***Thamotharem*, supra at para. 142**

A Natural Justice Remedies

66. Where a breach of the principles of natural justice has been found to have occurred, the normal remedy is to render the underlying decision invalid.

***Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at para. 23**

67. The Applications judge rightly noted that the only exception to the principles elaborated in *Cardinal v. Kent Institution* arises where the result is positively inevitable. Furthermore, because the unfairness associated with the order of questioning goes to the core of the claimant's ability to establish credibility, it is submitted that it would be a rare case that the courts will be able to conclude that the decision of the Board was otherwise inevitable. Thus, on the facts before him, the Applications judge was correct in refusing to conclude that the result of the Respondent's refugee hearing would have been inevitable regardless of the violation of natural justice.

***Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petrol* [1994] 1 S.C.R. 202**
***Thamotharem*, supra at para. 142**

68. The Supreme Court in *Mobil* took pains to emphasize the exceptional nature of the case before it. Notwithstanding this fact, the Appellant appears to recommend an expanded reading of *Mobil Oil* far beyond what was actually contemplated in that decision, the result of which would be to deny remedies in a wide range of circumstances in which violations of natural justice have occurred. The fact of the matter is that credibility assessments in the refugee context are often sufficiently intertwined with the objective aspect of the claim, that a violation of natural justice going to credibility should generally also vitiate the board's objective findings.

***Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petrol*, supra at para. 52**

***Bokhari v. MCI* 2005 FC 574**
***Abasalizadeh v. MCI* [2004] F.C.J. No. 1714 at para. 24**
***Fani v. MCI* [2002] F.C.J. No. 1030**
***Myrto v. MCI* 2006 FC 337 at para. 9**

B. *Ultra Vires* Remedies

69. Beyond this fact, the Intervener has further argued that the Board exceeded its jurisdiction by fettering the discretion of Board members, by passing a Guideline that has taken on the guise of a mandatory rule, and by promulgating profound procedural changes by way of a Guideline. As Mullan notes, in the discourse of judicial review, errors in regard to discretion are usually described as producing an *ultra vires* decision. To the extent that a decision is *ultra vires* it is void and a nullity.

Wade, H.W.R., *supra* at p. 274
Mullan, D., *Administrative Law* (Markham: LexisNexis Butterworths, 2001), ch. 6
***Swan v. Canada (T.D.)* [1990] 2 F.C. 409 at para. 35**
***Aucoin v. Canada (M.F.O.),* [2001] F.C.J. No. 1157 at para. 50**

70. Furthermore, it is abundantly clear that in considering remedies, the courts are to grant no deference to administrative tribunals on issues going to jurisdiction and the principles of fairness.

***Pushpanathan v. MCI* [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193 at para. 28**

71. That *ultra vires* decisions, (i.e. decisions made without what has been termed "initial jurisdiction", rather than other subsequent jurisdictional errors) are a legal nullity has been found repeatedly by the courts. It is submitted that the unlawful promulgation of ROQ by way of guideline does amount to an error of initial jurisdiction and as such that the decision is void, rather than voidable.

***Danyluk v. Ainsworth Technologies* (2001), 201 D.L.R. (4th) 193**
***Immeubles Port Louis Ltée v. Lafontaine (Village)* [1991] S.C.J. No. 14**
***Abel Skiver Farm Corp v. Ste Foy (Town)* [1983] S.C.J. No. 32**

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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