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# New Guidelines on Discretionary Powers

On March 20, 1990 Employment and Immigration Minister Barbara McDougall brought forward new guidelines for immigration officers regarding the application of humanitarian and compassionate considerations when reviewing refugee claims. The guidelines, which we reproduce below, were announced in response to the recent Federal Court of Canada judgement rendered by Associate Chief Justice James Jerome in the case of Ken Yung Yhap. In announcing her response, the Minister rejected any suggestion of an amnesty and said that she intends to continue the refugee backlog clearance program.

## Legal authority

It is a cornerstone of the Immigration Act that persons apply for and obtain their immigrant visas from outside Canada. There may be instances, however, where the requirement to leave Canada to apply for a visa would create undue hardship for the applicant. Therefore, A114 (2) enables the Governor in Council to facilitate the admission of persons for reasons of public policy or for compassionate or humanitarian considerations. The Governor in Council may prescribe regulations to exempt persons from the requirement of A9 (1) or from any Immigration Regulation made under A114 (1).

## Exercise of discretionary powers

In its decision in the Jiménez-Pérez case, the Supreme Court confirmed that immigration officers are under a duty to consider requests for an exemption under A114 (2) of the Immigration Act from the visa requirements of A9 (1) for reasons of

public policy or on compassionate and humanitarian grounds. The Court added that immigration officers will, in the name of the Minister, deal with such requests and advise the petitioners of the result. In short, immigration officers may decide which cases warrant a *recommendation* to the Governor in Council for a exemption due to the existence of humanitarian and compassionate grounds of for reasons of public policy and also decide, on behalf of the Minister, that special relief is not warranted in other cases.

The proper exercise of discretion not only benefits our applicants, but is also consistent with the objectives of the Immigration Act in upholding Canada's humanitarian traditions. Officers are therefore encouraged to use their good judgement in applying discretion.

It is implicit in the exercise of any discretionary power, whether that of the immigration officer who makes the initial recommendation, the Minister who makes the recommendation to the Governor in Council, or the Governor in Council who, in law, makes the

decision, that decisions are made on a case by case basis. It is important therefore, that officers realize that the guidelines that follow are not intended as hard and fast rules. They will not answer all eventualities, nor can they be framed to do so. Officers are expected to consider carefully all aspects of cases, use their best judgement, and make the appropriate recommendations.

Although officers are not expected to delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated.

Discretionary authority, as it relates to humanitarian and compassionate grounds, is described in greater detail below under Definition of Humanitarian and Compassionate Grounds. Situations relating to public policy are described in the following section on Public Policy Situations. The two areas are not mutually exclusive, but as they involve different assessments, they have been grouped separately.

## Parameters for the exercise of discretion

Discretionary recommendations must be informed recommendations. Officers are encouraged to seek advice from senior officials if they have any reason to believe that they could benefit from another person's experience.

It is recognized that not all officers will react identically, every time, to any given situation. To ensure absolute consistency in recommendations, it would be necessary to provide guidelines which answer every eventuality. This is not possible, nor even desirable, as it would negate an officer's discretionary authority under A114 (2) as noted by Justice Jerome in the Yhap decision. In order to maintain an acceptable level of consistency, the following guidelines will apply.

## Definition of humanitarian and compassionate grounds

Humanitarian and compassionate grounds exist when unusual, undeserved or disproportionate hardship would be caused to a person seeking consideration. A humanitarian and compassionate review is a case by case response whereby officers are expected to consider carefully all aspects of a situation, use their best judgement and make an *informed* recommendation. For example, in dealing with requests for consideration from within Canada, officers should ask themselves: "What would a reasonable person do in such a situation?"

To assist officers in identifying situations which may warrant a humanitarian and compassionate response, the examples outlined below have been provided. They are by no means exhaustive. For example, all of the circumstances described under Public Policy situations may be considered when making a humanitarian and compassionate assessment. While a person may not meet the guidelines described under Public Policy

Situations, the officer may feel that on balance there exist humanitarian and compassionate considerations which would lead to a positive humanitarian and compassionate recommendation. Economic and establishment situations alone would not normally constitute grounds for a positive humanitarian and compassionate recommendation.

## Situations involving family

These situations refer to any family situation other than those involving spouses (which are described under Public Policy Situations), e.g. parents, children and other relatives or family members of Canadian residents. This may also apply to a person, not necessarily related by blood to the Canadian resident, but who is a de facto part of

the family. The requirement to leave Canada and to apply abroad in the normal manner could result in undue hardship because of the would be immigrant's financial or emotional dependency on family in Canada.

Officers should examine considerations such as the reason why the person did not apply abroad as required by A9 (1), the degree of independence exhibited before coming to Canada, the existence of family or other support in the home country, the physical capability to travel, etc. Issues such as the cost or inconvenience of having to return home to apply in the normal manner would not generally constitute hardship. Having weighted all these factors, officers should be able to conclude whether favourable consideration is warranted.

# The Backlog Clearance Program

The Backlog Clearance Program is based on the new refugee determination system; that is, those who claimed or indicated an intention to claim refugee status prior to January 1, 1989 will have the credibility of their claims assessed by an adjudicator and a member of the Immigration and Refugee Board (IRB). If either the adjudicator or the Board member finds the claim to be credible, the claimant will be able to apply for permanent residence pursuant to the Refugee Claimants Designated Class Regulations instead of going to a second hearing before the IRB for a determination of refugee status.

The Refugee Claimants Designated Class Regulations exclude persons determined under the former Act to be Convention refugees, whose applications were already refused under these regulations or the 1986 Administrative Review, who are under removal order, who have eluded inquiry, who leave Canada for more than 7 days after December 27, 1989, who are serious criminal or security risks, or who are found not to be refugees by the IRB.

The program provides for humanitarian and compassionate (H & C) reviews both before the panel hearing and, if there is no credible basis for a refugee claim, prior to removal. Persons accepted on H & C grounds may apply for permanent residence from within Canada.

All persons who are permitted to apply for permanent residence from within Canada, whether as a result of a positive H & C recommendation or from determination of credible basis, must meet all statutory requirements.

Those persons who cannot establish credible basis for their refugee claims will face removal. Claimants who voluntarily leave the country before their panel hearings will be given a letter of introduction to the visa office abroad which will assure them of an interview with a visa officer. Every consideration will be given to their Canadian experience as part of the application process.

## Severe sanctions or inhumane treatment in country of origin

Consideration should be given where there exists a special situation in the person's home country, and undue hardship would likely result from removal. Some persons might face severe government sanctions on returning home because of things they have said or done while in Canada, e.g. while in Canada, a visitor has made public condemnatory comments on the policies of his/her government or has publicly embarrassed a repressive government. Examples include members of official delegations, athletic teams or cultural groups who may have spoken out against their government or whose attempt to remain in Canada could in itself result in official sanctions upon return home.

Other may warrant consideration because of their personal circumstances in relation to current laws and practices in their country or origin. Such persons could reasonably expect unduly harsh or inhumane treatment in their country should they be removed. In these cases there should be strong reasons to believe that the person will face a life-threatening situation in his or her homeland as a direct result of the political or social situation in that country. Such situations are more likely to occur in countries with repressive governments or those experiencing civil strife or at war.

Officers will consider the facts of the case and recommend what they believe is reasonable in the particular situation. The onus is on applicants to satisfy the officer that, b) their *personal circumstances* in relation to that situation warrant positive discretion.

## Public policy situations

A114 (2) also provides for discretion for reasons of public policy. These are situations that warrant consideration from within Canada as a result of a policy direction taken by the Commission in the interests of the

Immigration Program and not necessarily because officers feel that humanitarian grounds exist. Persons dealt with under "Public Policy", would normally be expected to fall into one of the categories listed below. While a person may not warrant a positive recommendation under public policy considerations, there may exist humanitarian and compassionate grounds which warrant favourable consideration.

## Spousal policy

Requests for visa exemption made by spouses of Canadian residents will be sympathetically examined bearing in mind that separation of spouses entails hardship which warrants the exercise of special relief. In the case of a genuine marriage, that is, a marriage of substance and of likely duration that has been entered into in good faith, and not merely for immigration purposes, it is *not* necessary for the persons concerned to prove additional hardship in order for a request for relief from A9 (1) to be processed (see IS 2 "Relationships of Convenience").

## Illegal de facto residents policy

Persons who meet the definition of an illegal de facto resident may be considered from within Canada.

Illegal de facto residents are administratively defined as those persons who have *not* previously come to out attention and who, although they have no legal status in Canada, have been here so long and are so established that, in fact if not in law, they have their residence in Canada and not abroad.

These persons will have gone "underground" and will not have come previously to official immigration attention, e.g. as refugee claimants, members of the refugee claims backlog or persons previously ordered removed. Such persons would have severed their ties with their home

country and would undergo undue hardship if they were required to leave Canada in order to seek a visa to return (legally) as permanent residents.

## Long-term commitment to Canada policy

Officers may consider sympathetically the situation of long-term employment authorization holders in valid status who request processing of their application for permanent residence from within Canada.

Such cases should be examined along lines similar to the illegal de facto residents guidelines. The principal criterion will be the applicants' long-term prospects for continuation of their employment in Canada and social integration into the Canadian way of life.

Such persons will have established homes in Canada, may have raised and educated children here; their children may be Canadian citizens by birth. There would be no real residence abroad where these persons could reasonably be expected to apply for immigrant visas.

## Foreign domestics policy

The foreign domestics program is premised on a two-year assessment period which provides an opportunity for candidates to work in Canada and to upgrade their skills.

Provided the foreign domestic appears able to establish in Canada, is not inadmissible and has provided satisfactory service while in Canada, a positive recommendation should be made.

## National interest policy

There may be situations not elsewhere described, where it is in the national interest to facilitate a person's admission to Canada. These situations must have a considerable impact on the economic, cultural, social or scientific aspects of life in Canada.