

Federal Court



Cour fédérale

Date: 20160720

Docket: IMM-4911-15

Citation: 2016 FC 841

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

VAKUROV, SERHII

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Serhii Vakurov, seeks judicial review of an exclusion order issued by a delegate of the Minister of Citizenship and Immigration [the Delegate] dated October 2, 2015 [the Exclusion Order] under section 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] and section 228(1)(c)(iv) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (see Annex for referenced legislation).

[2] For the reasons that follow, this application is allowed.

I. Background

[3] The Applicant is a citizen of Ukraine. He entered Canada in 2011 on a student visa and remained in Canada illegally after its expiry. The Canada Border Services Agency [CBSA] became aware of the Applicant's illegal status when an Interpol warrant was issued for his arrest. A CBSA officer [the Officer] interviewed the Applicant on October 2, 2015 regarding his presence in Canada and the warrant. The Applicant told the Officer that government officials in Ukraine were falsely accusing him of fraud. He also stated that he did not want to return to Ukraine and wished to bring his son to Canada.

[4] The Applicant also alleges he told the Officer that people in a position of authority in Ukraine were persecuting him and were willing to kill him if he returned. He maintains that he asked for the Officer's help to bring his children to Canada to avoid their persecution. The Respondent disputes these allegations.

[5] Following the interview, the Officer issued a report under section 44(1) of the Act, recommending the Applicant's removal from Canada for failure to comply with section 29(2) of the Act, which required him to leave Canada at the end of the period authorized for his stay. The Applicant then sought to speak with counsel and was able to do so. The Delegate reviewed the report and conducted a further interview, during which the Applicant informed the Delegate that, on advice of counsel, he would not answer any questions. The Delegate then went over the report

with the Applicant and, after being satisfied that the Applicant understood its contents, issued the Exclusion Order.

[6] As a result of the Exclusion Order, the Applicant is precluded from making a claim for refugee protection (s 99(3) of the Act). He maintains that, under the circumstances, the Delegate had a duty to inform him of the right to make a refugee claim prior to the issuance of the Exclusion Order.

II. Standard of Review

[7] The Applicant submits that the Delegate made a reviewable error by issuing the Exclusion Order without first giving him an opportunity to be heard regarding his fear of persecution. He argues that the Delegate breached the duty of fairness owed to him, specifically that arising under his legitimate expectations under the circumstances, and that the decision is therefore reviewable on the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43).

[8] The Respondent submits that the Exclusion Order was a discretionary decision, involving the interpretation of a statute within the decision-maker's area of expertise and not of central importance to the legal system. Therefore, the standard of review is reasonableness (*Gupta v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1086) [*Gupta*].

[9] I find that the issue is one of procedural fairness reviewable on the standard of correctness (*Khosa, supra*, at para 43). The *Gupta* decision did not deal with a procedural

fairness issue, but rather with whether the delegate should have referred the matter to the Immigration Division. This involved statutory interpretation by the delegate.

[10] The issue in the present case is similar to that considered in *Canada (Minister of Citizenship and Immigration) v Don*, 2014 FCA 4 [*Don*], where the delegate issued an exclusion order to a foreign national, before he had any contact with that foreign national, therefore allowing him no opportunity to make a refugee claim. The Federal Court of Appeal found at paragraph 36 that the Federal Court judge properly identified the standard of review as correctness.

III. Issue

[11] The sole issue is whether the Delegate breached the duty of fairness.

IV. Submissions of the Parties

A. *The Applicant's Position*

[12] The Applicant recognizes that applicable jurisprudence has established that the decision of the Delegate to issue a report under section 44(1) of the Act is a purely administrative decision that attracts minimal procedural fairness. (*Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 [*Cha*] at para 45). However, his position is that, even at that low threshold, the Delegate failed to abide by the duty of fairness owed to the Applicant. In particular, he failed to act in accordance with the legitimate expectations of the Applicant that the Delegate would follow the Minister's own guidelines regarding section 44 reports. He refers to

the decision of the Supreme Court of Canada in *Baker v Canada*, [1999] 2 SCR 817 as holding that the legitimate expectations doctrine is concerned with representations and regular practices regarding the procedure to be followed in a particular circumstance.

[13] He refers to document ENF 6 – Review of Reports under A44(1) [the Guidelines] (see the Annex for the relevant provisions) as providing a set of procedures that a Minister’s delegate should follow when considering section 44 reports. The Guidelines state that section 99(3) of the Act excludes persons under a removal order from making a claim for refugee protection and, therefore, a Minister’s delegate should, *inter alia*:

- A. Ask the subject how long he or or she intends to remain in Canada;
- B. If the subject indicates an intention to remain in Canada indefinitely, the delegate is to inquire about motives for leaving their country of nationality and the consequences of returning there before making a decision on issuing a removal order; and
- C. Where the responses indicate a fear of returning to the country of nationality that may relate to refugee protection, the Minister’s delegate is to inform the subject of the definition of a “Convention refugee” or “person in need of protection” under the Act and ask whether he or she wishes to make a claim.

[14] The Applicant maintains that he communicated his intention to remain in Canada indefinitely, and that the Ukrainian government was falsely accusing him of fraud. He argues that his statements should have alerted the Delegate to the fact that he held a fear related to

refugee protection and the Delegate should have provided him with an opportunity to make a refugee claim before proceeding with a removal order.

B. *The Respondent's Position*

[15] The Respondent's position is that the Delegate followed the Guidelines in the case at hand. He advised the Applicant of the content of the section 44 report and asked the Applicant if there was any aspect of this information he wished to challenge. However, the Applicant refused to speak to the Delegate on advice of counsel.

[16] By way of affidavit, the Delegate attests that at no time during their conversation did the Applicant ever tell him that he was at risk in Ukraine or feared persecution. In the Respondent's view, nothing on the facts could have alerted the Delegate to a possible refugee claim. The Respondent also notes that, while the Exclusion Order precludes the Applicant from making a refugee claim, he is entitled to pursue a Pre-Removal Risk Assessment [PRRA] application to address his alleged risk of persecution. Counsel advised the Court at the hearing of this judicial review that the Applicant has pursued a PRRA, that this was unsuccessful, and that the Applicant is separately seeking judicial review of that decision.

V. Analysis

A. *Preliminary Matter – The Officer's Affidavit*

[17] The Applicant submits that the affidavit sworn by the Officer should be disregarded as an attempt to supplement the Delegate's decision, relying on *Barboza v Canada (Minister of*

Citizenship and Immigration), 2011 FC 1420 at paragraph 26. I find nothing inappropriate about the Respondent's reliance on the Officer's affidavit. Rather, it is probative to respond to the Applicant's allegations as to what he told the Officer during the events in question. It is trite law that evidence extraneous to the record before the decision-maker can be tendered to support the consideration of issues of procedural fairness (*Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 218, para 30). The Applicant's own affidavit is of that nature, and the Respondent cannot be faulted for introducing the Officer's evidence in response.

[18] I also note that my decision to allow this application, for the reasons explained below, does not turn on these disputed statements to the Officer. The Applicant's position is that his undisputed statements, as reflected in the memorandum prepared by the Officer as a record of their interview, are sufficient to support his procedural fairness argument, and at the hearing of this application, the Applicant placed no reliance on the alleged statements about fear of being killed in Ukraine. As my decision turns on the undisputed statements, it is unnecessary for me to reach a conclusion on the conflicting evidence.

B. *Procedural Fairness Obligations Arising from the Guidelines*

[19] The Respondent correctly argues that the Guidelines do not have the force of statutes or regulations. However, this does not prevent them from giving rise to obligations of procedural fairness. The doctrine of legitimate expectations, which the Applicant argues is invoked by the Guidelines and gives rise to procedural fairness obligations in this case, is explained by the

Supreme Court of Canada in *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*] at paragraphs 94 to 95:

[94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.

[95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:

The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [Emphasis added.]

(D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710; see also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)

[20] The Federal Court of Appeal in *Cha*, at paragraphs 49 to 50, relied on what appears to be an earlier version of the Guidelines in applying the doctrine of legitimate expectations, albeit with a conclusion that the resulting procedural fairness obligations are at the lower end of the spectrum:

d) Legitimate expectations of the person challenging the decision

[49] The Department Procedures Manual has set out rules that decision-makers are expected to follow. Chapter ENF 6, at page 10 of the October 31, 2005 version, contemplates the making of notes and the completion of forms in as much detail as possible; the need to inform the persons concerned of the nature of the allegations made against them, to give them a reasonable opportunity to respond and to note and take into account any representations made; and the conduct of interviews in the presence of the persons concerned or, in certain circumstances, by telephone.

[50] A claimant has every reason to believe that these rules will be followed. These rules, however, are those found at the lower end on the continuum of procedural protection.

[21] Similarly, in *Don*, the Federal Court of Appeal considered arguments based on the Guidelines and accepted at paragraph 45 that the foreign national in that case was entitled to certain procedural protections, even though it ultimately found in favour of the Minister. That case involved issuance of a removal order to a deserter from a ship who had not yet had any contact with immigration authorities, and the Court of Appeal concluded that the Guidelines did not provide for a “clear, unambiguous and unqualified” process (as required by *Agraira*) to be followed in circumstances where a person’s contact information was lacking. Although the foreign national in *Don* was not able to rely on the Guidelines for the particular procedural protection he was advocating, I regard that case to be additional support for the conclusion that the Guidelines do give rise to some procedural fairness obligations on the part of the Delegate.

[22] Indeed, I do not understand the Respondent to be taking issue with that proposition. Rather, the Respondent's argument is that the Guidelines were followed in the present case. In considering this argument, I note first that in oral submissions the Respondent expressed concern, based on the questions put to the Delegate in cross-examination on his affidavit, that the Applicant was arguing the Delegate to be subject to an obligation ask the Applicant whether he wanted to make a refugee claim. To the extent the Applicant's position can be interpreted in that manner, I disagree that the procedural fairness obligations arising from the Guidelines give rise to an obligation in those terms. As noted in *Agraira* and *Don*, only a clear, unambiguous and unqualified process can give rise to such obligations under the doctrine of legitimate expectations. In fact, the Guidelines expressly provide that there is no requirement in the Act for the Minister's delegate to ask whether the subject of a determination wishes to make a claim for refugee protection.

[23] Rather the Guidelines require a Minister's delegate to be aware of Canada's Convention obligations and to satisfy himself or herself that removal would not be contrary to the spirit of Canada's obligations before issuing an order, even where the subject does not explicitly request access to the refugee determination process. The Guidelines prescribe a set of procedures to accomplish these objectives. I consider the portion of the Guidelines most relevant to the current case to be the following steps:

- Where the subjects of a determination for an administrative removal order have not made a claim, the Minister's delegate should ask them how long they intend to remain in Canada.
- If the persons indicate that their intention is or was to remain in Canada indefinitely, the Minister's delegate is to inquire about their motives for leaving their country of nationality and the consequences of returning there before making a decision on issuing a removal order.

- Where the responses indicate a fear of returning to the country of nationality that may relate to refugee protection, the Minister's delegate is to inform the subjects of the definition of a "Convention refugee" or "person in need of protection" as found in A96 and A97, and ask whether they wish to make a claim.

[24] I find these steps to be clear, unambiguous and unqualified, and my decision to allow this application for judicial review turns on the fact that the Delegate did not follow these steps in the present case. The material before the Delegate clearly indicated that the Applicant wished to remain in Canada and not return to his own country, i.e. to remain in Canada indefinitely. With the benefit of this information, the Guidelines provide that the Delegate should have inquired about the Applicant's motives for leaving Ukraine and the consequences of returning there.

[25] The Applicant also relies on the Delegate's statement in cross-examination that he was aware of the Applicant's claim that the government or someone in Ukraine had lied or falsified information about his history. One could debate whether this indicates a fear of returning to Ukraine that may relate to refugee protection, such that it should have prompted the Delegate to move to the step of providing the relevant definitions and asking the Applicant if he wished to make a claim. However, the process never moved to this step, as the Delegate did not perform the previous step of inquiring about the Applicant's motives for leaving Ukraine and the consequences of returning there.

C. *The Applicant's Refusal to Answer Questions*

[26] The case is complicated by the fact that the Applicant declined to answer the Delegate's questions on the advice of his legal counsel. The Respondent relies on *Don*, at paragraph 36,

where the Federal Court of Appeal held that the foreign national was not permitted to recreate, through the doctrine of legitimate expectations, a right that was available to him but which he chose not to exercise.

[27] In my view, the present case is distinguishable from *Don*, where the foreign national failed to make contact with immigration authorities, thus preventing the delegate from affording him a right to be heard. In the case at hand, the Applicant's invocation of his right not to answer questions on the advice of counsel did not prevent the Delegate from following the procedure prescribed by the Guidelines. According to the affidavit sworn by the Delegate, his interview with the Applicant proceeded as follows:

- A. The Delegate presented himself to the Applicant, advised him that he would be acting as Minister's delegate, and asked if he understood the proceeding.
- B. The Applicant confirmed that he understood that a section 44 report had been written against him.
- C. The Delegate asked the Applicant if he had been given an opportunity to consult with counsel and was satisfied with the advice he received.
- D. The Applicant confirmed that he had consulted with counsel and that he was satisfied with the advice.
- E. The Delegate advised the Applicant of the content of the Section 44 Report and his admission that he knowingly remained in Canada without

authorization after the expiry of his visa and asked if there was any aspect of the information he wanted to challenge.

- F. The Applicant advised the Delegate that his lawyer told him not to speak with anyone at CBSA or answer questions.
- G. The Delegate advised the Applicant that, based on his statement, he wouldn't be asking any further questions, that he was satisfied that the allegation was well-founded, and that he would be issuing an exclusion order valid for one year from removal. He asked the Applicant if he understood.
- H. The Applicant responded that he didn't want to speak to anyone and was advised not to answer questions.
- I. The Delegate then issued the Exclusion Order.

[28] This sequence demonstrates that the Applicant was not entirely uncommunicative, and the Delegate was not entirely deprived of the opportunity to communicate with the Applicant after he first invoked his right not to answer questions. The Applicant responded to the Delegate's inquiries about his understanding of the proceeding, his opportunity to consult counsel, and his satisfaction with his legal advice. After the Applicant first stated that he had been advised not to answer questions, the Delegate asked him if he understood that the Delegate would be issuing an exclusion order valid for one year from removal.

[29] More significantly, the Delegate did not embark on any questioning to satisfy himself that removal would not be contrary to Canada's Convention obligations. The Delegate's questioning focused only on the basis for the Applicant's removal, notwithstanding that the Delegate had information that the Applicant wished to remain in Canada indefinitely. This should have triggered further inquiries to assess the possibility of a refugee claim. I cannot conclude that the Applicant would have declined to answer questions on the consequences of returning to Ukraine, as that line of inquiry was never commenced by the Delegate.

VI. Conclusion

[30] Assessing the applicable procedural fairness obligations on a standard of correctness, my conclusion is that they were not met in the present case and that the Exclusion Order must accordingly be set aside.

[31] I should note that I have considered the Respondent's argument that the fact the Applicant has been in Canada since 2011 without asserting a refugee claim is inconsistent with him having a subjective fear, as well as the argument that issuance of the Exclusion Order did not prevent his risk from being assessed through the PRRA process. With respect to the former point, I note that the Guidelines expressly provide that, if the inquiries prescribed thereby result in the indication of a fear of returning to the country of origin, the Delegate is to refrain from evaluating whether the fear is well-founded and from speculating on eligibility to make a refugee claim. The intent is clearly that the evaluation of the legitimacy if the claim is to be assessed by the Refugee Protection Division of the Immigration and Refugee Board, not by the Delegate. I

therefore regard arguments related to the Applicant's subjective fear to be irrelevant to the procedural fairness issue on which this decision turns.

[32] With respect to the availability of a PRRA, I agree with the Applicant's position that, while both assess risk, both the procedure and substantive considerations applicable to a PRRA determination are different from those applicable to a claim for refugee protection. Recourse to the PRRA process is not an answer to the procedural fairness concerns raised in this application.

VII. Certified Question

[33] The Applicant proposed that the Court certify, as a matter of general importance for appeal, a question to the effect whether a Minister's delegate has an obligation to inform a foreign national of the definition of a "Convention refugee" or "person in need of protection" in the Act and ask whether he or she wishes to make a claim prior to issuing an exclusion order, when there is an indication that the foreign national wants to remain in Canada indefinitely. The Respondent opposes certification of a question for appeal.

[34] As the Applicant has prevailed in this application, and as my decision is based on procedural fairness considerations as applied to the particular facts of this case and not upon an obligation as articulated by the Applicant in the proposed question, the answer to the question would not be dispositive of an appeal in this matter. I accordingly decline to certify this question.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is referred back to Citizenship and Immigration Canada to be considered by a different Minister's delegate. No question is certified for appeal.

“Richard F. Southcott”

Judge

ANNEX

<i>Immigration and Refugee Protection Act (SC 2001 c 27)</i>	<i>Loi sur l'immigration et la protection des réfugiés (L.C. 2001, ch. 27)</i>
Right of temporary residents	Droit du résident temporaire
Obligation — temporary resident	Obligation du résident temporaire
29 (2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.	29 (2) Le résident temporaire est assujéti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l'autorisation le prévoit.
Non-compliance with Act	Manquement à la loi
41 A person is inadmissible for failing to comply with this Act (a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and	41 S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.
Preparation of report	Rapport d'interdiction de territoire
44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant	44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié,

facts, which report shall be transmitted to the Minister.

qu'il transmet au ministre.

Referral or removal order

Suivi

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

Claim inside Canada

Demande faite au Canada

99 (3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.

99 (3) Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.

Immigration and Refugee Protection Regulations, SOR/2002-227

Règlement sur l'immigration et la protection des réfugiés (DORS/2002-227)

Specified Removal Order

Mesures de renvoi à prendre

Subsection 44(2) of the Act — foreign nationals

Application du paragraphe 44(2) de la Loi : étrangers

228 (1) For the purposes of subsection 44(2) of the Act,

228 (1) Pour l'application du paragraphe 44(2) de la Loi,

and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be

mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déferée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :

(c) if the foreign national is inadmissible under section 41 of the Act on grounds of

c) en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à :

(iv) failing to leave Canada by the end of the period authorized for their stay as required by subsection 29(2) of the Act, an exclusion order,

(iv) l'obligation prévue au paragraphe 29(2) de la Loi de quitter le Canada à la fin de la période de séjour autorisée, l'exclusion,

Canada, Citizenship and Immigration Canada, ENF-6: Review of reports under A44(1)

Canada, Citoyenneté et Immigration Canada, ENF-6: L'examen des rapports établis en vertu de la L44(1)

8 Procedure: Handling possible claims for refugee protection

8 Procédure : Traitement de demandes d'asile possibles

Although there is no requirement in IRPA for the Minister's delegate to ask whether the subject of a determination wishes to make a claim for refugee protection, he should be aware of Canada's obligation under the *United Nations Convention relating to the Status of Refugees*, and the *Convention Against Torture*

Même si rien dans la LIPR n'oblige le délégué du ministre à demander à la personne qui a fait l'objet d'une décision si elle désire déposer une demande d'asile, le délégué devrait être conscient des obligations du Canada en vertu de la *Convention des Nations Unies relative au statut des réfugiés* et de la *Convention*

and Other Cruel, Inhuman or Degrading Treatment or Punishment.

contre la torture et autres peines ou traitements cruels, inhumains ou dégradants.

A99(3) excludes persons under removal order from making a claim for refugee protection. Therefore, the Minister's delegate should satisfy himself that removal would not be contrary to the spirit of Canada's obligations before issuing an order, even when the subject does not explicitly request access to the refugee determination process.

Le L99(3) dispose que les personnes frappées d'une mesure de renvoi ne sont pas admises à déposer une demande d'asile. Par conséquent, le délégué du ministre devrait s'assurer que le renvoi ne serait pas contraire à l'esprit des obligations du Canada avant de prononcer une mesure, même lorsque l'intéressé ne demande pas explicitement à se prévaloir du processus de détermination du statut de réfugié.

It must also be recognized that some people who may have a legitimate need of Canada's protection are unaware of the provision for claiming refugee status.

Il faut également reconnaître que certaines personnes qui peuvent avoir un besoin légitime de la protection du Canada ne sont pas au courant de la disposition concernant la présentation d'une demande d'asile.

There is a set of procedures for handling a possible claim for refugee protection:

Il existe une procédure sur le traitement d'une demande d'asile possible :

- Where the subjects of a determination for an administrative removal order have not made a claim, the Minister's delegate should ask them how long they intend to remain in Canada.
- If the persons indicate that their intention is or was to remain temporarily, the
- Lorsque la personne qui fait l'objet d'une décision prévoyant la prise d'une mesure de renvoi administrative n'a pas déposé de demande d'asile, le délégué du ministre devrait lui demander combien de temps elle a l'intention de demeurer au Canada.
- Si la personne indique que son intention est ou était d'y demeurer

Minister's delegate should proceed with the removal order decision and issue the removal order, if appropriate.

- If the persons indicate that their intention is or was to remain in Canada indefinitely, the Minister's delegate is to inquire about their motives for leaving their country of nationality and the consequences of returning there before making a decision on issuing a removal order.
 - Where the responses indicate a fear of returning to the country of nationality that may relate to refugee protection, the Minister's delegate is to inform the subjects of the definition of a "Convention refugee" or "person in need of protection" as found in A96 and A97, and ask whether they wish to make a claim.
 - Where the subjects indicate an intention not to make a claim, the Minister's delegate should proceed with the decision and issue a removal order, if appropriate.
 - Where the subjects are uncertain, the Minister's delegate informs them that they will not be able to make a claim for refugee protection after a removal
- temporairement, le délégué du ministre devrait donner suite à la décision et délivrer la mesure de renvoi, le cas échéant.
 - Si la personne indique que son intention est ou était de demeurer indéfiniment au Canada, le délégué du ministre doit lui demander les raisons pour lesquelles elle a quitté son pays de nationalité et les conséquences pour elle si elle devait y retourner, avant de prendre une décision sur le prononcé d'une mesure de renvoi.
 - Lorsque les réponses indiquent une crainte de retourner dans le pays de nationalité, qui peut avoir un lien avec la protection des réfugiés, le délégué du ministre doit informer la personne de la définition de « réfugié » ou de « personne à protéger » aux termes du L96 et du L97, et lui demander si elle désire déposer une demande d'asile.
 - Lorsque la personne indique qu'elle n'a pas l'intention de déposer une demande d'asile, le délégué du ministre doit donner suite à la décision et délivrer la mesure de renvoi, le cas échéant.
 - Lorsque la personne n'est pas certaine, le délégué du ministre doit l'informer qu'elle ne pourra pas faire une demande d'asile après la prise d'une mesure de

order has been issued [A99(3)], and provide them with an opportunity to make the claim before proceeding with a removal order decision.

- If the persons do not express an intent to make a claim, despite the explanation that this is their last opportunity, the Minister's delegate should proceed with the decision and issue the removal order, if appropriate.
- Whenever the persons indicate a fear of returning to their country of nationality, the Minister's delegate is to refrain from evaluating whether the fear is well-founded. As well, the Minister's delegate must not speculate on their eligibility before they have made a refugee claim, nor speculate on the processing time or eventual outcome of a claim.

These procedures do not preclude any subject from making a claim to Convention refugee status at any time before a removal order is issued, regardless of the responses provided to the officer.

In order to address concerns that may arise subsequent to the issuing of a removal order, it is important that the notes accurately reflect—in detail—the questions asked and the information provided by the

renvoi [L99(3)] et il doit lui donner l'occasion de faire la demande avant de prendre la décision de la frapper d'une telle mesure.

- Si la personne n'exprime pas l'intention de déposer une demande d'asile, même si on lui a expliqué qu'il s'agit là de sa dernière occasion, le délégué du ministre devrait donner suite à la décision et délivrer la mesure de renvoi, le cas échéant.
- Chaque fois que la personne indique qu'elle craint de retourner dans son pays de nationalité, le délégué du ministre doit éviter d'évaluer si la crainte est fondée. En outre, il ne doit pas conjecturer sur l'admissibilité de la personne avant que celle-ci ne dépose une demande d'asile, ni conjecturer sur le temps de traitement ou l'issue éventuelle d'une demande

Cette procédure n'empêche pas une personne de faire une demande d'asile à n'importe quel moment avant la délivrance d'une mesure de renvoi, peu importe les réponses données à l'agent.

Pour pouvoir répondre aux préoccupations qui pourraient surgir à la suite du prononcé d'une mesure de renvoi, il est important que les notes reflètent fidèlement – en détail – les questions posées et

subject during an exchange
such as the aforementioned.

l'information donnée par la
personne pendant un échange
comme celui qui est mentionné
ci-dessus.

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Adolfo Morais

FOR THE APPLICANT

Max Binnie

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Adolfo Morais
Workable Immigration Solutions
Ottawa, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of
Canada
Ottawa, Ontario

FOR THE RESPONDENT