BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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Via Email

Canada Border Services Agency
Horizontal Policy Unit
Enforcement and Intelligence Programs, Policy Division
100 Metcalfe, 10th Floor

Ottawa, ON K1A 0L8

Dear Madam/Sir:

RE: Proposed regulations concerning Ministerial relief applications and regulatory amendments to section 37 of the *Immigration and Refugee Protection Regulations*

We write in response to your letters of notification to external stakeholders concerning:

- The development of regulations to establish a formal process for Ministerial relief (MR) applications; and
- The development of regulatory amendments to section 37 of the *Immigration and Refugee Protection Regulations* that would define the end of an examination for a refugee claimant.

The British Columbia Civil Liberties Association ("BCCLA") is one of Canada's oldest and most active civil society organizations. Our mandate is to preserve, defend, maintain and extend civil liberties and human rights in Canada. We are an independent, non-partisan organization. We speak out on the principles which protect individual rights and freedoms, including due process and fundamental justice concerns in situations where individual interests are affected or engaged by the state.

Thank you for the opportunity to comment on these proposals.

We have reviewed the comments submitted by the Canadian Association of Refugee Lawyers (CARL) and share many of their concerns about these proposed changes. Rather than repeating similar comments here, we refer you

to their submissions on the following points, with which we find substantial agreement:

- With respect to the proposed changes to section 37, we agree with CARL that the power of officials to compel information when an individual makes a refugee claim should be interpreted narrowly, and that the power to compel information must be limited to relevant information relating to their eligibility to make a refugee claim.

- With respect to the proposed regulations relating to applications for Ministerial relief under s. 34(2) of the *Immigration and Refugee Protection Act* (IRPA), we agree with CARL that Ministerial relief is "an essential part of a just administration of the IRPA", particularly given the breadth of the Act's inadmissibility provisions. Accordingly, any reform to the Ministerial relief process must include, *inter alia*, access to a timely decision-making process; full disclosure of the materials considered by the Minister when reviewing MR applications, and an opportunity to respond to it; and access to the manuals and guidelines used by the Minister and Ministerial delegates in assessing MR applications.

In addition to the concerns outlined by CARL, we wish to provide further comment on the proposed regulations concerning the format and content of applications for Ministerial relief. As described in your letter, the proposed regulations would create a standardized MR application form. As per your description:

> The form would contain mandatory fields that are required for the application to be accepted for processing, as well as questions which will assist the Minister to assess certain national security and public safety considerations related to national interest. The form would also be accompanied by guidelines indicating the type of information recommended to be included as submissions for consideration in the request for relief.

While national security and public safety considerations are two of the relevant considerations related to national interest, they are not the only factors which must be considered by the Minister in applications for Ministerial relief. Accordingly, the MR form and its accompanying guidelines must clearly reflect the legal definition of "national interest" as articulated by the Supreme Court of Canada in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36. Given that the burden is on the applicant to satisfy

the Minister that the applicant's presence in Canada would not be detrimental to the national interest, it is crucial that individuals applying for MR are aware that there are a broad range of factors relevant to the Minister's exercise of discretion.

In *Agraira*, the Supreme Court of Canada made plain that access to Ministerial relief cannot be focused solely on national security and public safety – rather, "relief would instead be premised on a broader array of domestic and international considerations constituting the 'national interest'."[1] For example, the Court explicitly cites international obligations "stemming from rules of customary and conventional international human rights law" as factors in assessing Canada's national interest.[2] The Court also found that national interest includes the preservation of the values that underlie the *Charter of Rights and Freedoms* and the democratic character of Canada, particularly the equal protection of rights before and under the law. [3]

The Minister will not have the information necessary for the proper exercise of Ministerial discretion unless the proposed form and guidelines clearly inform MR applicants that the Minister is required to consider information relating to national interests beyond national security and public safety. The proposed form and guidelines cannot be overly restrictive in its description of what information is relevant to the Minister's decision, given the Supreme Court of Canada's observation that "although the factors the Minister may validly consider are certainly not limitless, there are many of them."[4]

Finally, the form and guidelines should be clear that personal factors and characteristics which go towards mitigating security concerns are relevant to the Minister's decision for relief under s. 34(2). Sometimes these factors and characteristics will be duplicative of the type of information submitted for humanitarian and compassionate relief under s. 25 of IRPA, though the way this information is assessed will be different depending on whether it is an application under s. 25 or s. 34(2). *Agraira* recognizes that personal factors and characteristics which could impact the Minister's assessment of whether the applicant should be viewed as a security threat are relevant considerations for the purposes of s. 34(2).[5]

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[1] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 69 -70.
[2] *Id.* at para. 72
[3] *Id.* at para. 65.
[4] *Id.* at para. 87 (emphasis added).
[5] *Id.* at para. 84.

We hope the proposed regulations and regulatory amendments will reflect the concerns articulated here. Please do not hesitate to contact us should you wish to discuss any of our comments in greater detail.

Sincerely yours,

Carmen K. M. Cheung
Senior Counsel
British Columbia Civil Liberties Association