Federal Court  Cour fédérale

**Ottawa, September 4, 2019** – A decision was issued today by the Honourable Paul Crampton of the Federal Court in files IMM-3433-17 and IMM-3373-18:

**IN THE MATTER OF THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Summary:** In these proceedings, the Canadian Association of Refugee Lawyers (CARL) challenged the legality of decisions by the Chairperson of the Immigration and Refugee Board (the Board) to designate four Board decisions as jurisprudential guides (JG) pertaining to Nigeria, Pakistan, China, and India, respectively. The latter two JGs were revoked prior to the issuance of the Court's decision. However, some cases in which those JGs may have been applied may remain pending before the Court or the Refugee Appeal Division of the Board.

As a threshold matter, the Court found that paragraph 159(1)(h) of the *Immigration and Refugee Protection Act* authorizes the Chairperson to identify decisions as JGs not only with respect to issues of law and issues of mixed fact and law, but also in relation to issues of fact. The Chairperson is not required to engage in public consultation prior to identifying a decision as a JG.

Regarding the specific JGs, the Court determined that the Nigeria JG does not unlawfully fetter Board members' discretion or improperly encroach upon their adjudicative independence because it repeatedly refers to the need for each case to be adjudicated on the basis of its particular facts. For the same reason, it does not unfairly increase the burden faced by refugee applicants in establishing their claims. Moreover, the Court found the Nigeria JG was not improperly "pre-selected", as there was no evidence to suggest that the Chairperson made an actual or *de facto* decision to identify that decision as a JG prior to its issuance.

With respect to the other three JGs, the Court explained that the factual issues they addressed could be grouped into three categories:

(i) facts that are specific to the particular claimant(s) and that they adduced in their evidence;

(ii) facts that are characterized as having been reported in the country documentation; and

(iii) facts that appear to be presented as the Board's own findings, on issues that go beyond the evidence that was specific to the claimant(s).

While the facts in the first and second categories do not pose a potential problem, the factual findings in the third category were found to be problematic. This is because the policy notes which identified the three decisions as JGs each stated that members of the Board "are expected to apply Jurisprudential Guides in cases with similar facts or provide reasoned justifications for not doing so." The Court found that it was reasonable to apprehend that some Board members who might be unable or unwilling to provide such justifications may feel pressured to adopt the factual findings in the JGs, in cases with similar facts.

The Court emphasized that alternative language that explicitly left Board members completely free to reach their own conclusions on issues of fact would not unlawfully fetter their discretion or improperly interfere with their independence. With respect to the Pakistan JG, which remains in force, the Court observed that the obvious solution would be to remove the statement of expectation from the policy note that was issued with that JG, at least with respect to the third category of factual issues mentioned above.

By way of relief, the Court declared the statement of expectation in the policy notes that were issued with the Pakistan, India, and China JGs, respectively, to be unlawful and inoperative in respect of factual determinations falling into that third category.

A copy of the decision can be obtained via the Web site of the Federal Court: https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/421001/index.do