

CIAJ Seminar
Judging Administrative Legislation: a Primer

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Hudson Janisch

“Soft law:” Structuring the Exercise of Discretion through
Guidelines, Policy Statements and the Like

1. Discretion: lifeblood of the administrative process
2. Standardless discretion and the rule of law
3. Earlier rejection of discretion—Hayek, A.V. Dicey, et al.
4. K.C. Davis, *Discretionary Justice, a Preliminary Inquiry*, (1969)
5. “Choice of Decisionmaking Method: Adjudication, Policies and Rulemaking” (1992)
6. Individualization v. consistency and predictability
7. Statutorily authorized confining of discretion by rules (regulations)
8. Structuring discretion by guidelines and policy statements
9. “Eminently proper:” The SCC approves of structuring discretion in *Capital Cities* (1978)
10. But so far, there has been little judicial inclination to require structuring
11. To avoid being branded as fettering, structuring requires a reserve clause willing to recognize exceptions
12. Crossing the Rubicon between non-mandatory guidelines and mandatory pronouncements: the OSC, Policy Statement 1-10 and the penny stock dealers, *Ainsley Financial Corporation* (Ont CA, 1995)
13. Guideline 7 and the chairman’s standard order of questioning at the IRB, *Thamotharem* (FC, 2006)

14. Federal Court held that “reverse order questioning” did not constitute a breach of natural justice, but the guideline was characterized as mandatory and thus invalid.
15. Should non-statutory policies (*Ainsley*) be equated with statutorily authorized guidelines (*Thamotharem*)?
16. Should common law principles of fairness trump statutorily authorized procedural guidelines?
17. Is fettering fully applicable where guidelines are statutorily authorized?
18. Does a statutorily authorized guideline constitute confining or structuring? Does there have to be a significant willingness to recognize the exceptional?
19. If reverse order questioning does not constitute a breach of natural justice, why should it not be included in a guideline?
20. Isn't reverse order questioning consistent with the inquisitorial process mandated by Parliament?
21. If reverse order questioning disadvantages refugee claimants to a lesser degree than a breach of natural justice, why does it have to be contained in a rule subject to cabinet approval and not in a guideline?
22. If the guideline had been the product of a full notice and comment procedure, would this have made any difference?
23. To what extent should a reviewing judge evaluate the hierarchical nature of the IRB and place himself in the position of a board member in order to determine whether a guideline is mandatory?
24. To what extent should a reviewing judge take into account that reverse order questioning was designed to help reduce a massive backlog of cases and introduce greater consistency?
25. Should a reviewing court defer to the precise choice of procedures adopted by an administrative tribunal seeking to discharge its responsibilities provided, of course, that it gives applicants adequate opportunities to present their cases fully and fairly?
26. Overall, in judging administrative legislation in individual cases, the broader systemic dangers of standardless discretion need to be kept in mind.

Thamotharem Statutory and Guideline Provisions

Act

ss. 159(1)(h) The Chairperson ... may issue guidelines in writing to members of the Board ... to assist members in carrying out their duties.

s. 161 Provides for specific rules to be made by the Governor in Council concerning the refugee determination process and procedures

Guideline 7

Introduction The guidelines apply to most cases However, in compelling or exceptional circumstances, members will use their discretion not to apply some guidelines or to apply them less strictly.

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s. 19 In a claim for refugee protection, the standard practice will be for the Refugee Protection Officer (RPO) to start questioning the claimant. If there is no RPO participating in the hearing the member will begin, followed by counsel for the claimant. Beginning the hearing this way allows the claimant to quickly understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.

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s. 23 The member may vary the order of questioning in exceptional circumstances. For example, a severely disturbed claimant or a very young child might feel too intimidated to understand and properly answer questions. In such circumstances, the member could decide that it would be better for counsel for the claimant to start the questioning.