



Citizenship and  
Immigration Canada

Citoyenneté et  
Immigration Canada

# **ENF 3**

## **Admissibility, Hearings and Detention Review Proceedings**

**Canada**

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## Updates to chapter

### Listing by date:

#### 2015-04-29

Substantive revisions were made to improve the flow of the manual and to reflect current legislation and procedures throughout this manual chapter, including the following:

- A new subsection 9.5 was added to clarify procedures related to persons concerned who are referred by a Port of Entry for an admissibility hearing.
- Added the numbers of the listed forms and a column titled “Purpose” to clearly define the purpose for each form. The same amendments (form titles and numbers) were applied throughout the manual.
- Section 6 was amended to clarify background information on the nature of proceedings before the Immigration Division.
- Sections 8, 9, 10 and 11 were amended to streamline the language and to clarify procedures related to Admissibility Hearings.
- Section 12 was updated to reflect 2008 changes to the *Immigration and Refugee Protection Act* regarding procedures related to applications for non-disclosure of information.
- Section 13 was updated to streamline and clarify procedures related to Detention Reviews.
- Updated section 14 to clarify instructions and procedures related to admissibility hearings and detention reviews.
- Section 15 was added to include procedures for paper based hearings for section A36(1)(a).

#### 2006-02-16

ENF 3 – Section 13.3, an explanatory paragraph was added as well as a link to IP 10, section 9.

#### 2005-11-29

ENF 3 - Minor amendments were made to reflect the split between Citizenship and Immigration Canada (CIC) and the Canada Border Services Agency (CBSA). Clarification was provided as to whom the hearings officer represents at an admissibility hearing and/or detention review before the Immigration Division of the Immigration and Refugee Board (IRB).

#### 2003-09-04

Minor changes/clarifications were made to chapter ENF 3.

## 1 What this chapter is about

This chapter provides functional direction and guidance to hearings officers when acting as counsel for the Minister of Public Safety and Emergency Preparedness (PSEP) at admissibility hearings and detention reviews before the Immigration Division (ID) of the Immigration and Refugee Board (IRB).

This chapter highlights various provisions of the *Immigration and Refugee Protection Act* (IRPA) and Regulations that may apply, to hearings officer's when preparing and presenting cases before the ID.

It also provides assistance to hearings officers by identifying procedural and evidentiary requirements.

**Note:** References to IRPA appear in the text with an "A" prefix followed by the section number. References to the *Immigration and Refugee Protection Regulations* (IRPR) appear with a "R" prefix followed by the section number.

## 2 Program objectives

The security of Canadian society and the protection of the health and safety of Canadians are two very important objectives of IRPA.

Hearings officers support the objectives of IRPA by

- promoting international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and
- ensuring that decisions taken under the IRPA are consistent with the *Canadian Charter of Rights and Freedoms* (Charter).

## 3 The Act and Regulations

The following table outlines provisions which may be useful in making determinations.

For more information about	Refer to	Notes
Foreign national	A2(1)	
Canadian citizen	R2	<i>Citizenship Act</i> , section 3(1)
Permanent resident	A2(1)	
Residency obligation	A28(1) and (2)	
Temporary resident	A22(1) and (2), A29	
Status document	A31	
Permanent resident card	R53 to R60	
Refugee protection	A95	
Security grounds	A34	
Public health and safety	A3(1)(h)	
Human or international rights violations	A35	
Serious criminality	A36(1)	
Criminality	A36(2)	
Organized criminality	A37(1)	
Health grounds	A38(1)	
Financial reasons	A39	

Misrepresentation	A40	
Non-compliance with Act	A41	
Family member	R1(3)	
Inadmissible family member	A42	
Examination	A18	
Permanent resident - Loss of status	A46	
Reasonable grounds		See ENF 2, Evaluating inadmissibility, section 3.1
Reasonable grounds to believe		See ENF 2, Evaluating inadmissibility, section 3.11
Detention and release	A54 - A60	
Place of detention		See ENF 20, Detention, section 11
Right to appeal	A63	

### 3.1 Objectives and application

For information about	Refer to this section of the Act
The objectives with respect to immigration	A3(1)
The objectives with respect to refugees	A3(2)
How the Act is to be construed and applied	A3(3)

### 3.2 Inadmissibility

Part I, Division 4 of IRPA contains the core provisions relating to inadmissibility and identifies the facts that constitute inadmissibility under the Act, making distinctions based on categories of inadmissibility as outlined in the following table:

#### Categories of inadmissibility

For information about	Refer to this section of the Act
Security grounds	A34
Human or international rights violations	A35
Serious criminality	A36
Organized criminality	A37
Health grounds	A38
Financial reasons	A39
Misrepresentation	A40
Non-compliance with Act	A41
Inadmissible family member	A42

### 3.3 Report of inadmissibility

Part I, Division 5 of IRPA refers to the report of inadmissibility under section A44(1), the making of a removal order by the Minister's delegate, or a referral to the ID for an admissibility hearing; the loss of status and the enforcement of removal orders.

For more information about	Please refer to this chapter
Inadmissibility grounds	ENF 1, Inadmissibility
How an officer decides if an applicant is inadmissible to Canada	ENF 2, Evaluating inadmissibility
Reports on inadmissibility	ENF 5, Writing Section A44(1) Reports

Minister's Delegate decisions and administrative removals	ENF 6, Review of Reports under A44(1)
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### 3.4 Referral to the Immigration Division for an admissibility hearing

A44(2) and R228 determine the cases in which, after a report under A44(1) has been written, the Minister's delegate has jurisdiction to make a removal order, and in which cases the report may be referred to the ID for an admissibility hearing.

### 3.5 Decisions by the Immigration Division

A45 identifies the various decisions that the ID may come to at the conclusion of an admissibility hearing.

R229(1) identifies the applicable removal orders made by the ID for the purposes of paragraph A45(d). Further information about detention and release is referenced in the following tables.

### 3.6 Detention and release

For more information about	Please see the Act
Legal grounds for arrest and detention of foreign nationals or permanent residents	A55
The release by an officer or by the Immigration Division	A56
The review of detention and conditions of release and the detention as a last resort of a minor child	A57-A60
For more information about	Please see chapter ENF 20, Detention
The authority to arrest and detain a person, including the various situations for detention and appropriate sections related to detention	Section 3.1
Regulatory factors and conditions	Section 3.2
CBSA policy governing the treatment of persons detained and grounds for detention	Section 5

**Note:** For more information on arrests, see chapter ENF 7, Investigations and arrests.

The factors to be taken into consideration when assessing the detention or the release of a person who is a danger to the public, whose identity has not been established, or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order, are set out in R245 to R248.

### 3.7 Removal, removal orders, stays and enforcement of removal orders

Part 1, Division 5 of IRPA refers to loss of status and removal.

Part 13 of the Regulations refers to removals.

#### Division 1- The different types of removal orders (R223 - R227)

For more information about	Please see Regulations
Departure order	R224
Exclusion order	R225



Deportation order	R226
Removal order effective against a family member	R227(2)

**Division 2 - The specified removal orders under specific circumstances (R228 - R229)**

For more information about	Please see Regulations
Removal orders to be made by the Minister's delegate	R228
For the purposes of Section A44(2) in respect of a foreign national	R228(1)
For the purposes of Section A44(2) in respect of permanent residents	R228(2)
If a claim for refugee protection is referred to the Refugee Protection Division	R228(3)
Removal orders to be made by the Immigration Division for the purposes of paragraph A45(d)	R229

**Division 3: Stays of removal orders (R230 – 233)**

For more information about	Please see Regulations
Considerations, cancellations and exceptions	R230
Judicial review	R231
Pre-removal risk assessment	R232
Humanitarian and compassionate considerations	R233

**Division 4: Enforcement of removal orders (R235 – 243)**

For more information about	Please see Regulations
Removal order—not void	R235
Providing copies of the removal order to the person concerned	R236
Modality of enforcement	R237
Voluntary compliance	R238
Removal by PSEP Minister	R239
When removal order is enforced in Canada or by an officer outside of Canada	R240
Country of removal	R241
<i>Mutual Legal Assistance in Criminal Matters Act</i>	R242
Payment of removal costs	R243

**3.8 Forms**

The forms required are shown in the following table:

Form title	Form number	Purpose
Notice of Rights Conferred by the Vienna Convention and to the Right to be Represented by Counsel at an Admissibility Hearing	IMM 0689B	To inform persons who have been arrested/detained or subject of an admissibility hearing of their rights to counsel and the right to notify their government representative.
Request for Admissibility Hearing/Detention Review Pursuant to the Immigration Division Rules	BSF 524	To request an admissibility hearing pursuant to subsection A44(2), or following an arrest under A55, or to request a detention review to be held under A57 or A57.1.
Notice of Admissibility Hearing	BSF 525	To inform persons who are subject to an admissibility hearing that a report prepared by an officer was referred to the Immigration Division for

		an Admissibility Hearing under A44(2).
Notice of Admissibility Hearing to Family Members	BSF 540	To inform family members of persons who are subject to an admissibility hearing that the report is also a report prepared against family members of the foreign national and that the family members are themselves subject to an admissibility hearing.
Generic Document	IMM 1442B (Warehouse item)	A generic form used for printing of all secure documents (e.g., work permit, study permit)
Notice to Appear for a Proceeding Under Subsection 44(2)	BSF 504	To advise persons that a proceeding under A44(2) is to be held to determine if the person shall be authorized to enter or remain in Canada, or if a removal order should be issued against them.
Referral Under Subsection 44(2) of the <i>Immigration and Refugee Protection Act</i> for an Admissibility Hearing	BSF 506	For the Minister's Delegate to refer an A44(1) report to the Immigration Division for an admissibility hearing.
Minister's Opinion Regarding the Foreign National's Identity	BSF 510	For the Minister's Delegate to advise the Immigration Division that the identity of a detained foreign national has not been, but may be established.

## 4 Instruments and delegations

Please refer to the Immigration Legislation Manual (IL 3) for specific delegations of authority. IL 3 refers to the Designation of Officers and Delegation of Authority document, which sets out the class of persons designated by the Minister to carry out any purposes of the Act and specifies the powers and duties of the officers so designated.

## 5 Departmental policy

No information available.

## 6 Immigration Division

### 6.1 General

The ID conducts admissibility hearings for individuals believed to be inadmissible to Canada pursuant to sections 33-42 of IRPA. The ID also conducts detention reviews for most persons who are detained under IRPA.

A member of the ID of the IRB presides over admissibility hearings and detention reviews. ID members are appointed under the *Public Service Employment Act*.

Members of the ID are impartial decision-makers who must consider the evidence presented at a hearing by the Minister's counsel and by the person concerned before making a decision.

### 6.2 Administrative tribunal

The ID is an administrative tribunal and hearings before the ID are quasi-judicial and adversarial. The principles of natural justice and procedural fairness apply to all proceedings before the ID.

### **6.3 Nature of the proceedings before the Immigration Division**

The courts have determined that immigration proceedings are civil, not criminal, in that the purpose of the admissibility hearing is not to determine whether the person concerned is guilty or innocent, but rather to determine the person's status in Canada.

### **6.4 Compellability of person concerned**

The testimony of the person concerned is often the principal source of evidence available to the Minister of PSEP in admissibility hearings and detention reviews. The courts have held that persons concerned are compellable witnesses because they are protected against self-incrimination by the *Canada Evidence Act* [for example, *Chana v. Canada (Minister of Manpower and Immigration)*] or, for an example of a decision in the customs context, see *Martineau v. Canada (Minister of National Revenue)*. This means that testimony given by the person concerned at a proceeding before the ID cannot be used in criminal proceedings.

Paragraph 11(c) of the Charter stipulates that individuals who are accused of an offence cannot be forced to testify at their own trial. However, paragraph 11(c) of the Charter does not apply because the person concerned is not a "person charged with an offence". [*Bowen v. Minister of Employment and Immigration; Almrei (Re)* (paragraphs 68 and 74)].

A person at an admissibility hearing who refuses to take an oath, make a solemn declaration or affirmation, or answer a question, commits an offence and may be prosecuted under A127(c).

### **6.5 Rules of evidence**

The rules governing the admissibility and presentation of evidence before the ID are less restrictive than in judicial proceedings. Unlike courts, tribunals are not bound by legal or technical rules of evidence [A173(c)], nor are they bound by the rule of best evidence. Members of the ID may, in particular, accept and consider hearsay evidence. [*Canada (Minister of Employment and Immigration) v. Dan-Ash; Canada (Minister of Citizenship and Immigration) v. Nkunzimana; Bruzzese v. Canada (Minister of Public Safety and Emergency Preparedness)*, paragraph 50].

ID members may receive and base decisions on any evidence they consider credible or trustworthy [A173(d)].

For additional information on Rules of Evidence, refer to Appendix A, Section 2.

### **6.6 Disclosure of information**

At an admissibility hearing and/or a detention review hearings officers have an obligation to present all the relevant evidence to the member of the ID, the person concerned or, if applicable, to the counsel of the person concerned. Hearings officers should be particularly vigilant when disclosing evidence in cases where the person concerned is not represented by legal counsel.

### **6.7 Public versus private hearings**

In accordance with A166(a), hearings before the ID must be held in public.

However, subject to A166(d) proceedings concerning refugee protection claimants must be held in private. This includes admissibility hearings, detention reviews, pre-hearing conferences and all other applications heard by the ID. The ID may make an exception to the rules. On request by a party to the proceeding or on its own initiative, the ID may,

- in the case of a person claiming refugee protection, order that a hearing be held in public;
- in other cases, order that a hearing be held in private or make any other order to ensure the confidentiality of the proceedings (A166) as follows:
  - When the member of the ID notes that there are observers present, the member determines if it is appropriate to allow these observers to remain or if they should be asked to leave.
  - Pursuant to A166(e) representatives or agents of the United Nations High Commissioner for Refugees (UNHCR) are entitled to observe proceedings concerning protected persons and persons who have made a claim for refugee protection.
  - Pursuant to A166(f) representatives or agents of the UNHCR may not observe proceedings that deal with information or other evidence that is protected under A86 or for which an application for non-disclosure has been made under A86 and the application was not rejected.

**“Refugee protection claimant” means**

- a refugee protection claimant whose eligibility has not yet been determined; or
- a refugee protection claimant whose claim has been determined to be eligible; or
- a refugee protection claimant whose claim has been decided by the Refugee Protection Division (RPD), but who has not exhausted all appeals of the decision;

**but does not mean**

- a refugee protection claimant whose claim has been determined to be ineligible; or
- a refugee protection claimant whose claim has been rejected by the court of last resort.

According to the interpretation of the Court in *Gervasoni v. Canada (Minister of Citizenship and Immigration)* (paragraph 13), the objectives of the Act pertaining to public hearings are met “if interested members of the public are not unreasonably restricted from attending the [hearing].”

For more information on applications to hold a proceeding in private, see section 14.5 below.

Hearings before the ID may be held in person or by means of a teleconferencing or a videoconferencing device [A164].

## **6.8 Rights of the person concerned**

The principle of natural justice and procedural fairness requires that the person concerned should fully understand the nature and purpose of the proceeding. Acting as a safeguard for individuals in their interaction with the state, the principle of natural justice and procedural fairness stipulates that whenever a person’s “rights, privileges, or interests” are at stake, there is a duty to act in a fair manner.

ID members must comply with the principle of natural justice and procedural fairness, which means that persons concerned have

- the right to adequate notice of a hearing;
- the right to disclosure (to know the case that has to be met);
- the right to know the possible consequences of the hearing;
- the right to be heard (to make submissions); and
- the right to an impartial decision-maker.

IRPA and its Regulations are also bound by the Charter and are required to respect the rights afforded therein. These rights include, but are not limited to

- The right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice [section 7 of the Charter].
- The right on arrest or detention [section 10 of the Charter]:
  - to be informed promptly of the reasons for the arrest or detention;
  - to be informed without delay of the right to retain and instruct counsel; and
  - to have the validity of a detention determined and to be released from detention if the detention is not lawful.
- The right to the assistance of an interpreter: in all proceedings in which the person concerned is a party or a witness before a court or tribunal, and does not understand or speak the language in which such proceedings are being conducted or if the person concerned is deaf [section 14 of the Charter; ID Rules, Rule 17].
- The right to be represented: The person concerned has the right to obtain the services of, and to be represented by legal or other counsel for all proceedings before the ID. Although IRPA does not specifically provide for it, the right to be represented implies that the person concerned shall be informed of this right and shall be given a reasonable opportunity to obtain counsel or the services of a representative at their own expense, if so desired [A167].
- The person concerned does not have to be represented by counsel: The person may choose a friend, or a representative of an organisation or association with an interest in the welfare of the person concerned, so long as no consideration is given for representing or advising the person concerned.

**Note:** Officers should refer to A91 for guidance on who may represent or provide advice for consideration.

- The right to a hearing held in the official language of choice [Immigration Division Rules, Rules 3(g), 8(d) and 16].

## 7 Role of the Hearings Officer

Hearings officers represent the position of the Minister of PSEP in admissibility hearings and detention reviews before a member of the ID. In this capacity, hearings officers

- are firm advocates of the Minister's position at the admissibility hearing;
- should always be aware that they are speaking and acting on behalf of the Minister of PSEP, and that the positions and actions taken should reflect CBSA departmental policy;
- should always be professional and respect decorum, as well as maintain professionalism in their telephone manner, written correspondence, conduct at hearings and all interactions with the public;
- should exhibit professionalism by adequately preparing for cases; and
- should treat all parties present at hearings with dignity and respect. This includes ID members, persons of concern, counsel, witnesses, interpreters, and observers.

Claimants are more likely to be cooperative if they are not frightened and confused. Refugee hearings are usually non-adversarial. When the Minister intervenes, it changes the dynamics and the hearing becomes adversarial.

## 8 Definitions

No information available.

## 9 Procedures - The admissibility hearing

### 9.1 General

Admissibility proceedings are held pursuant to subsection A44(2) to determine the merits of allegations of inadmissibility under IRPA and to take applicable removal measures, if appropriate.

Pursuant to subsection A44(1), an officer who is of the opinion that a permanent resident or a foreign national who is seeking entry to Canada, or who is in Canada, is inadmissible may prepare a report setting out the relevant facts and transmit the report to a Minister's Delegate (MD). The report is the legal document that gives the MD the authority to issue a removal order or to refer the matter for an admissibility hearing, as prescribed by R228 and R229.

An MD who is of the opinion that the A44(1) report is well founded **may** refer the report to the ID for an admissibility hearing in the following instances:

- in the case of a foreign national who may be inadmissible to Canada on one or more grounds for which the Minister has no jurisdiction to issue a removal order (refer to R229);
- in the case of a permanent resident, **except** for a report solely based on non-compliance of permanent resident obligations under A28.

The A44(1) report **must** be referred to the ID of the IRB for an admissibility hearing in the following instances:

- in the case of a minor child who is not accompanied by a parent or adult legally responsible for the child [R228(4)(a)]; and,
- in the case of a person who is unable to appreciate the nature of the proceedings and is not accompanied by a parent or adult legally responsible for the person [R228(4)(b)].

The MD must complete and send the following forms, along with the file and supporting documentary evidence, to the Hearings and Detention Unit of the Enforcement and Intelligence Division in the respective Region:

- Referral Under Subsection 44(2) of the *Immigration and Refugee Protection Act* for an Admissibility Hearing (BSF 506);
- Request for Admissibility Hearing/Detention Review Pursuant to the Immigration Division Rules (BSF 524); and

**Note:** The Regional Hearings and Detention Section forwards copies of both forms to the ID and retains copies on file. For detention cases, the MD must send a copy of the 44(1) report, forms BSF506 and BSF 524 directly to the Immigration Division and the Regional Hearings Office without delay. The documentary evidence should also be sent to the Regional Hearings Office as soon as possible

For more information on preparing and writing A44(1) reports, refer to ENF 5, Writing 44(1) Reports.

For more information on administrative removal orders refer to ENF 6, Administrative removal orders.

For more information on inadmissibility pursuant to A35 refer to ENF 18, War Crimes and Crimes Against Humanity.

## **9.2 Port of entry referral for an admissibility hearing**

The Minister's delegate, after reviewing a report pursuant to A44(1), may determine that the report is well founded and refer it to the Immigration Division of the IRB for an admissibility hearing, which concludes the examination pursuant to R37.

However, if the person concerned was referred to an admissibility hearing and the referral is withdrawn, the examination is not concluded and the case must be returned to the POE for determination.

**Note:** Refer to ENF 4: Port of Entry Examination, section 5.6, for additional information on end of examination.

## **9.3 Burden of proof**

The burden of proof is the obligation to prove or disprove a fact. Pursuant to section A45(d) the burden of proof to establish admissibility depends on whether or not a person has lawful status in Canada.

### **9.3.1 Foreign nationals who have lawful status in Canada, including permanent residents**

For cases involving persons who have lawful status in Canada, including permanent residents, the burden of proof rests with the Minister of PSEP to establish that the person is inadmissible.

During an admissibility hearing, hearings officers must be prepared to offer evidence to support the allegation(s) of inadmissibility and rebut any statements that are made by the foreign national or the permanent resident.

### **9.3.2 Foreign nationals who do not have lawful status in Canada**

For foreign nationals who do not have lawful status in Canada, the burden of proof rests with the foreign national to prove that they are not inadmissible to Canada. This applies to the following persons:

- persons seeking to enter Canada; and
- persons who are in Canada without legal authorization.

## **9.4 Standard of proof**

Since immigration proceedings are civil in nature, the general standard of proof is the one applicable to civil matters: balance of probabilities. Consequently, the Minister of PSEP does not have to prove the existence of facts beyond a reasonable doubt (criminal standard of proof), but rather has to demonstrate that the Minister's version of the facts is more probable than the version of the person concerned. This means that the evidence presented must show that the facts as alleged are more probable than not.

Section 33 of IRPA provides that for allegations of inadmissibility listed under sections A34 to A37, evidence must be evaluated according to a lesser standard of proof, which is “reasonable grounds to believe” that the facts have occurred, are occurring or may occur. In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada upheld the ruling of the Federal Court of Appeal that the “reasonable grounds to believe” standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the “balance of probabilities” [*Sivakumar v. Canada (Minister of Employment and Immigration*, p. 445) and *Chiau v. Canada (Minister of Citizenship and Immigration)* (paragraph 60)]. The reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information [*Sabour v. Canada (Minister of Citizenship and Immigration)*].

The following table summarizes the standard of proof for sections A34 to A42:

**Standard of proof**

Reasonable grounds to believe	Balance of probabilities
<ul style="list-style-type: none"> <li>• Security (A34)</li> <li>• Violation of human or international rights (A35)</li> <li>• Criminality (A36), except for A36(1)(c) for permanent residents</li> <li>• Organized crime (A37)</li> </ul>	<ul style="list-style-type: none"> <li>• Act or omission committed outside Canada, for permanent residents [A36(1)(c)]</li> <li>• Health reasons (A38)</li> <li>• Financial reasons (A39 )</li> <li>• Misrepresentation (A40)</li> <li>• Non-compliance with the Act (A41)</li> <li>• Inadmissible family member (A42)</li> </ul>

Where the standard of proof applicable to a specific inadmissibility is reasonable grounds, the burden of proof may be established as follows:

**1. Where the burden of proof rests with the Minister of PSEP**

The Minister of PSEP must prove that there are “reasonable grounds to believe” in the existence of facts that constitute inadmissibility. If the Minister of PSEP is unable to meet this burden, the ID member shall determine that the person concerned is not inadmissible, even if the person does not produce evidence to the contrary.

On the other hand, if the Minister of PSEP meets the burden of proof, it is up to the person concerned to refute the Minister’s evidence, in other words, to prove that these facts do not exist.

The member of the ID does not have to be satisfied that the Minister’s version is more probable than the version of the person concerned, but simply that according to the evidence as a whole, there are reasonable grounds to believe in the existence of the facts that constitute the inadmissibility.

**2. Where the burden of proof rests with the person concerned**

When the burden of proof rests with the person concerned, the Minister of PSEP does not have to establish that there are reasonable grounds to believe in the existence of facts that constitute inadmissibility. Rather, it is up to the person concerned to prove that the facts constituting inadmissibility do not exist.

Since the Minister of PSEP is the party who initiates the admissibility hearing process, the Minister must nonetheless present evidence first, producing the facts that constitute the basis for inadmissibility.



## 9.5 Rules of evidence

Although members of the ID are not bound by the strict rules of evidence that apply to judicial proceedings, hearings officers should be aware of the following:

- the admissibility of evidence;
- the relevance of evidence;
- the weight of evidence; and
- the different types of evidence, including documentary evidence and testimony (includes testimony given by expert witnesses) [see *R. v. Mohan* and *R. v. Sekhon* (paragraphs 43 and 47). Expert witnesses can only give evidence with respect to the subject at issue].

For additional information about rules of evidence, refer to Appendix A.

## 9.6 Inadmissibility

### Notes:

- For guidance on obtaining evidence for all inadmissibility provisions refer to ENF 1 – Inadmissibility.
- For essential case elements for all inadmissibility provisions, refer to ENF 2 – Evaluating Inadmissibility.
- For essential case elements for inadmissibility under A35, refer to ENF 18 – War Crimes and Crimes Against Humanity.

## 9.7 Criminal equivalency between foreign and Canadian jurisdictions

The following provisions of IRPA raise the issue of equivalency with respect to serious criminality and criminality:

### 36(1)(b) - Serious criminality

Foreign conviction for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

### 36(1)(c) – Serious criminality

Committed an act outside Canada that is an offence where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.[*Edmond v. Canada (Minister of Citizenship and Immigration)*]

### 36(2)(b) - Criminality

Foreign conviction for an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament.

### 36(2)(c) – Criminality

Committed an act outside Canada that is an offence where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament.

As part of the inadmissibility determination, it is necessary to determine if a conviction or offence committed outside of Canada has an equivalent in Canadian law.

**The Federal Court provides the following guidance for equivalencing “the fundamental test of equivalence is: would the acts committed abroad and punished there have been punishable here?” [Li v. Canada (Minister of Citizenship and Immigration) (paragraph 13)].**

In *Hill v. Canada (Minister of Employment and Immigration)*, the Court described the following three ways of establishing equivalency between a foreign and a domestic offence:

- compare the elements of the Canadian and foreign statutes to determine if both have the same essential elements to substantiate the respective offences (the elements generally include mental and physical components);
- examine the evidence adduced before the member, both oral and documentary, to ascertain whether the evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings; or
- by a combination of paragraphs 1 and 2.

See also *Park v. Canada (Citizenship and Immigration)* (paragraph 14) and *Patel v. Canada (Citizenship and Immigration)* (paragraph 4).

When preparing a case that involves a conviction/offence in a foreign jurisdiction that may be equivalent to a criminal conviction/offence in Canada, hearings officers should follow these steps:

<b>Step 1</b>	Identify the foreign conviction or act.
<b>Step 2</b>	Evidence for a criminal equation must address the following three areas: <ul style="list-style-type: none"> <li>• the best proof of the conviction available;</li> <li>• the wording of the foreign statute;</li> <li>• the details of what was actually done.</li> </ul>
<b>Step 3</b>	Identify the potential Canadian equivalent.
<b>Step 4</b>	Break down each offence (Canadian and foreign) into its basic elements.
<b>Step 5</b>	Compare each foreign element to its Canadian equivalent and determine if it is equal, broader or narrower.
<b>Step 6</b>	For those foreign elements that are broader, examine the details of the offence to determine if this aspect of the actual act committed satisfies the Canadian element.
<b>Step 7</b>	Come to an overall conclusion as to whether the foreign offence is equivalent to the Canadian offence.
<b>Step 8</b>	If the two offences are equivalent, taking into account the penalty for the Canadian offence, decide which allegation under A36 is appropriate.

If the officer who issued the A44(1) report has not already done so, hearings officers must quickly determine if the text of the foreign statute is available and make a request for translation. The foreign law must be proven during the admissibility hearing by producing all the extracts relevant to the offence, which will be entered as an exhibit. The relevant extracts should, as a rule, include the sections that define the terms used in describing the offence.

In the examination of equivalence, a determination is made as to whether each of the essential elements of the foreign offence is present in the Canadian equivalent.

- If each of the elements exists in both statutes (Canadian and foreign), the offences are equivalent. It is not necessary for the wording of the two laws to be identical. For example, the term “knowingly” may be equivalent to “knowing”, and the term “whoever” may be equivalent to “any person”.
- If the foreign enactment is more restrictive than the Canadian enactment, both offences are equivalent, since the Canadian statute covers all the situations contemplated in the foreign statute.
- If the foreign enactment is broader than the Canadian statute, or if the text includes situations that do not lead to a criminal offence in Canada, there is no textual equivalence. It is then necessary to examine the circumstances of the offence to determine if there is an equivalence nonetheless. When this situation arises, evidence should be submitted regarding the facts that were proven in the criminal trial held outside Canada; or, in cases where there is no conviction, evidence may consist of police reports to show that an offence was committed. If every essential element of the Canadian offence can be established, there is an equivalence.

The hearings officer should identify for the benefit of the ID which constituting element(s) of the Canadian offence is (are) not found in the text of the foreign offence. The hearings officer should then identify each element of the evidence (whether these elements are exhibits or part of a testimony) entered into the record to establish that the Canadian constituting elements are facts that were established at the foreign trial.

**Example:** An equivalence between the foreign offence of possession of instruments used to commit a criminal offence, and the Canadian offence of possession of break-in instruments [*Canadian Criminal Code*, Section 351(1)].

The Canadian offence is more restrictive since the instruments described under the Canadian offence have to be suitable for committing breaking and entering, while the instruments described in the foreign offence can be suitable for the purpose of committing any offence (including but not limited to breaking and entering).

If the textual equivalence is not perfect it is necessary to introduce additional evidence showing that the instruments found in possession of the person concerned when the offence was committed were, in fact, instruments that can be used for breaking and entering, for example a hammer, counterfeit keys, etc.

In this case, the evidence that the offence is equivalent to a crime committed in Canada could consist of the following:

- introduction of the relevant sections of the foreign statute; and
- testimony of the person concerned describing the instruments found in their possession ; or
- extracts of the transcript of the foreign trial showing the nature of the instruments; or
- copy of the foreign indictment which contains a description of the instruments found; or
- documentary evidence providing a description of the instruments.

In most admissibility hearings dealing with equivalence, the hearings officer will generally have to produce the following documents as exhibits, when available:

- evidence of the conviction, such as a certificate of conviction, a police report or a statutory declaration outlining a telephone conversation with a police officer, court reporter, court records clerk, or any document originating from the authorities of the country where the conviction was handed down;
- the legal description of the foreign offence; that is, the text of the statutory provision under which the person was convicted; and

- evidence (obtained from the charge or indictment or a similar document) of the particulars of the offence [*Brannson v. Canada (Minister of Employment and Immigration)* (para. 4)]. In some cases, the certificate of conviction may contain sufficient information for the certificate to be used instead of the indictment.

For additional information on documentary evidence, refer to ENF 2 Evaluating inadmissibility.

## **9.8 Criminal inadmissibility for an act or omission outside Canada that would constitute a criminal offence in Canada [A36(1)(c)]**

In the case of an act or omission, that would constitute a criminal offence in Canada, it is sufficient to prove that the act or omission was committed outside Canada, and that the act or omission would constitute an offence in Canada. It is not necessary to prove the following facts:

- that the person concerned was convicted of the offence outside Canada;
- that charges or an indictment were laid;
- that the wording of the foreign statute is equivalent to the wording of the Canadian legislation.

The IRPA does not prevent the same facts from being the subject of two different allegations in the same report [A44(1)]. If this is the case, the member presiding the admissibility hearing is responsible for determining whether the facts constitute either of the inadmissibility grounds alleged in the report.

When dealing with cases that involve equivalencing:

- the A44(1) report should refer to as many Canadian equivalents as is reasonably necessary;
- if officers have doubt as to the possible Canadian equivalent, the A44(1) report may include two allegations: one relating to an equivalence [A36(1)(b) or A36(2)(b)] and one relating to an act or omission [A36(1)(c) or A36(2)(c)].

## **9.9 Foreign pardons**

Please refer to ENF 14, Criminal Rehabilitation. The effect of a foreign pardon does not automatically render the person admissible to Canada.

The following factors must be taken into account:

- If the country's legal system is based on similar foundations and values as Canada's, the foreign legislation must be examined to determine whether the effect of the pardon is to erase a conviction or merely recognize that rehabilitation has taken place.
- In the latter case, the applicant is inadmissible and an application for rehabilitation should proceed.

## **9.10 Family inadmissibility 42(1)**

According to Section A42(1), a foreign national is inadmissible on grounds of an inadmissible family member in the following two instances:

### **1. The principal applicant is inadmissible because of the inadmissibility of a family member A42(1)(a), namely**

- a foreign national who is accompanied by a family member who is inadmissible;

**Example:** A father who is accompanied by a dependent son who is inadmissible.

**or**

- a foreign national whose non-accompanying family member is otherwise inadmissible when the conditions in R23 are met:
  1. a foreign national is a temporary resident or has made an application for temporary resident status, an application for a permanent resident visa or applied to remain in Canada as a temporary resident or permanent resident (for the concept of applying to remain in Canada as a permanent resident, see R66 and R68); **and**
  2. the non-accompanying family member is
    1. the spouse of the foreign national, except where the relationship between the spouse and foreign national has broken down in law or in fact;
    2. the common-law partner of the foreign national;
    3. a dependent child of the foreign national and either the foreign national or an accompanying family member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or written agreement or by operation of law; **or**
    4. a dependent child of a dependent child of the foreign national and the foreign national, a dependent child of the foreign national or any other accompanying family member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or written agreement or by operation of law.

**Example:** A father, who is in Canada, applies to remain in Canada as a permanent resident and his dependent son, who is abroad, is inadmissible on any of the grounds described in A34 to A41.

**Exception:** Section A42(2)(a) stipulates that a foreign national referred to in subsection (1) who is a temporary resident or who has made an application for temporary resident status or an application to remain in Canada as temporary resident, **is only inadmissible on grounds of an inadmissible family member if their accompanying or non accompanying family member is inadmissible pursuant to A34, A35 and/or A37.**

**Example:** A father, who is in Canada, applies to remain in Canada as a temporary resident and his dependent son, who is abroad, is inadmissible pursuant to A34, A35 and/or A37).

The Immigration Division (ID) cannot assume jurisdiction for an A44(1) report regarding a foreign national if the only grounds for inadmissibility are those set out in Section A42 [R228(1)(d)] including A42(2)(a)[R228(1)(e)]. In fact, R228(1)(d) and R228(1)(e) provide that the Minister's delegate not refer the A44(1) report in cases of inadmissibility on the grounds of family inadmissibility under Section A42. Under R228(1)(d) the Minister Delegate makes the same type of order against the foreign national as was made against the inadmissible family member, except if the family member is inadmissible under A34, A35 and/or A37. According to R228(1)(e), the Minister's Delegate issues a deportation order against the foreign national if the accompanying or non accompanying family member is inadmissible pursuant to A34, A35 and/or A37. This means that, even when the decision regarding the inadmissibility of a family member is within the jurisdiction of the ID, the Minister's delegate has the authority to make a removal order against the principal applicant referred to in Section A42(1)(a) or A42(2)(a). In this case however, the Minister's delegate must wait until the ID has made a removal order against the family member before making one against the foreign national.

**Example:** A father and his son apply to be admitted as temporary residents. The son is inadmissible on grounds of organized criminality and the officer prepares an A44(1) report based on an A37(1)(a) allegation. The officer prepares a separate A44(1) report regarding the father on grounds of family inadmissibility under A42(1)(a). The Minister's delegate refers the son's report for an admissibility hearing. At the end of the hearing, the ID decides that the son is inadmissible on grounds of organized criminality and makes a deportation order under R229(1)(e). Once the removal order has been made against the son, the Minister's delegate can issue the same type of deportation order against the father [R228(1)(e)]

## **2. Inadmissibility of a family member on grounds of inadmissibility of the principal applicant [A42(1)(b)], namely**

a foreign national who is a member of an inadmissible person's family and who is accompanying the inadmissible person to Canada.

**Exception:** Section A42(2)(b) stipulates that a foreign national referred to in subsection (1) who is a temporary resident or who has made an application for temporary resident status or an application to remain in Canada as temporary resident, is inadmissible only if they are an accompanying family member of a person who is inadmissible under section A34, A35, and/or A37.

**Example:** A dependent son who is accompanying his inadmissible father who made an application for a permanent resident visa. The son is inadmissible on the ground of an inadmissible family member if his father is inadmissible on any of the grounds enumerated at A34 to A41.

**Example:** A dependent son who is accompanying his inadmissible father are seeking temporary resident status. The son is only inadmissible on the grounds of an inadmissible family member if his father is inadmissible pursuant to A34, A35 and/or A37.

If the inadmissibility of the principal applicant comes under the Minister's jurisdiction, the officer must prepare two separate reports, one regarding the principal applicant's inadmissibility and the other regarding the family member for family inadmissibility under A42(1)(b). If the Minister then decides to make a removal order against the principal applicant and his son, the Minister must do so by making two separate removal orders.

If, on the other hand, the principal applicant's inadmissibility comes under the jurisdiction of the ID, the A44(1) report regarding the foreign national is sufficient and a separate report does not have to be prepared for family members. R227(1) provides that the report prepared regarding the foreign national also applies to accompanying family members.

According to R227(2) the removal order made by the ID against the principal applicant also covers family members, if the conditions in R227(2)(a) and (b) are met, namely

- an officer informed the family member(s) subject to the A44(1) report that they are the subject of an admissibility hearing, and of their right to make submissions and the right to be represented (by counsel) at the admissibility hearing at their own expense; and
- the family members are subject to a decision of the ID that they are inadmissible under section 42 of the Act on grounds of the inadmissibility of the foreign national.

At the admissibility hearing, the fact that the condition in R227(2)(a) was met will be proven by producing the "Notice of Admissibility Hearing to Family Members" form (BSF 540).

To meet the condition in R227(2)(b), it is sufficient to show that the family member meets the definition of “family member” in R1(3). If these two conditions are met, family members will automatically be covered by the removal order made against the principal applicant.

R1(3) provides that the foreign national’s “family members” are

- the spouse or common-law partner of the person;
- a dependent child of the person or of the person’s spouse or common-law partner; and
- a dependent child of a dependent child referred to in paragraph (b)

The terms “common-law partner” and “dependent child” are defined in R1(1) and R2 respectively.

**Example: A father and his dependent 18-year-old son apply for admission as permanent residents. The father is inadmissible on grounds of serious criminality under A36(1)(b).** The officer prepares a single A44(1) report regarding the father, which also serves as a report with respect to the son. The officer issues a “Notice of Admissibility Hearing to Family Members” form (BSF 540), to the son. The MD refers the report for an admissibility hearing. At the end of the hearing, the ID decides that the father is inadmissible under A36(1)(b) and makes a deportation order against the father. This deportation order will also automatically include the son if

- he was issued a BSF 540 form; and
- the son is a family member within the meaning of the Regulations.

## 10 Preparing a case: General guidelines

### 10.1 Minister’s obligation to disclose all documents and information (ID Rule 3)

When requesting an admissibility hearing, hearings officers have an obligation to provide all relevant evidence that is in their possession to the ID and to the person concerned, or counsel if applicable (for a list of documents refer to *Immigration Division Rules*, Rule 3).

Hearings officers must disclose to the person concerned or counsel if applicable and to the ID the following documents at least five (5) days before the hearing:

- “Request for Admissibility Hearing” form (BSF 524);
- “Notice of Admissibility Hearing” form (BSF 525); and
- “Notice of Rights Conferred by the Vienna Convention and to the Right to be Represented by Counsel at an Admissibility Hearing” form (IMM 0689B), **if applicable**; and
- a “Referral under subsection A44(2) of the IRPA for an admissibility hearing” form (BSF 506); and
- a copy of the A44(1) report that sets out the allegations; and
- all other documentary evidence or information that will be used to support the Minister’s position.

In the case of a forty-eight hour or a seven-day detention review and an admissibility hearing that are held at the same time, all documents must be disclosed as soon as possible. In all other cases documents must be disclosed within 5 days before the hearing. [*Immigration Division Rules*, Rule 26].

- **Note:** All documents must comply with the requirements set out in the *Immigration Division Rules* 24 and 25 with respect to language and format.
- **Note:** If the person concerned has retained counsel, the hearings officer will ensure that copies of the relevant notices and documents are sent to counsel [Rule 28(3)].

The hearings officer should also make sure that, in compliance with the requirements of R227, family members who are accompanying a foreign national, and who are the subject of a report pursuant to A44(1) have been duly informed of the hearing to be held concerning them by forwarding a completed copy of the “Notice of Admissibility Hearing to Family Members” form (BSF 540) to all parties.

The hearings officer should confirm that all information intended for the ID was sent to the registry office.

## 10.2 Additional allegations/amendments of the report

When receiving a case file for preparation, the hearings officer’s first duty is to determine if the case meets the technical, legal and factual requirements for presenting it to a member of the ID. Depending on the type of case, the hearings officer should verify the A44(1) report for correct date, authorizations and signatures, and ensure that the allegations are correctly stated.

Any errors or omissions in the report should be corrected. If it is necessary to return the file to the originating office for action, it may be necessary to make an application to the ID to request a postponement of the admissibility hearing [Immigration Division Rules, Rule 43]. This is necessary only if the error or omission in the A44(1) report or evidence cannot be rectified prior to the hearing date and would seriously impact the presentation of the case by the hearings officer.

The hearings officer must make sure that each of the essential components of the inadmissibility alleged in the report is supported by evidence, whether the evidence is documentary, or based on testimony of the person concerned, or testimony from other witnesses.

If the evidence is insufficient, the hearings officer may

- complete the file by adding additional evidence, if available;
- return the report to the MD to change the allegations of the report;
- return the report to the MD for adding additional grounds of inadmissibility; or
- withdraw the application to hold the admissibility hearing.

If time permits, the hearings officer should make sure that the person concerned and the ID have been notified of changes made to the A44(1) report prior to the hearing. If time does not permit giving advance notice of the changes made to the A44(1) report, the hearings officer must make a preliminary statement at the hearing regarding the changes. If this is the case, the member of the ID may confirm that the person concerned understands the nature of the changes. If necessary, the member may grant an adjournment, to give the person concerned time to prepare.

## 10.3 Including foreign national’s family members

When preparing a case, the hearings officer may discover that family members, who did not enter Canada at the same time as the person concerned are present in Canada and may decide that these family members should be included in the removal order. If this is the case, the hearings officer should prepare and serve a “**Notice of Admissibility Hearing to Family Members**” form (BSF 540) to all family members.

The hearings officer should assemble the required information and evidence to be introduced at the hearing to demonstrate that family members fall under the definition of “family member” pursuant to R1(3). Hearings officers should be aware that only foreign nationals who fall within the definition of R1(3) may be included in the removal order made against the principal applicant. This does not include family members who are Canadian citizens or permanent residents.



For more information about family inadmissibility refer to section 9.10 above.

## 10.4 Witnesses

If the hearings officer decides to call witnesses (other than the person concerned) to testify on behalf of the Minister of PSEP, the hearings officer must inform the person concerned or the person's counsel, if applicable, and the ID in writing, as prescribed by Rule 32 of the *Immigration Division Rules*. In this regard, the admission of expert evidence depends on the following criteria: (i) relevance (ii) necessity in assisting the trier of fact (iii) the absence of any exclusionary rule, and (iv) a properly qualified expert [*R. v. Mohan*, (paragraph 17) and *R. v. Sekhon*, (paragraph 43)].

Personal information concerning witnesses and their testimony may consist of information that requires non-disclosure protection. In which case the hearings officer should make an application for non-disclosure.

For information on application for non-disclosure, refer to **section 11, below**.

If there are reasons to doubt that a witness will appear as requested, and if time permits, the hearings officer may make an application in writing to the ID to request a summons [*Immigration Division Rules*, Rule 33].

## 10.5 Questioning witnesses

It is recommended that hearings officers prepare a strategy on questioning witnesses prior to the inadmissibility hearing, based on the case at hand and on the facts hearings officers want to prove.

Hearings officers should consider a variety of potential questioning avenues. Considering and anticipating potential responses beforehand may help hearings officers to maintain control of the examination and ensure that important facts are captured.

A list of the general areas to cover may be useful and preferable to a list of questions to be followed rigidly. Hearings officers should be careful about asking questions for which the answer is not known; fishing expeditions can have unexpected results.

## 10.6 Attending a pre-hearing conference

The ID may require the parties to participate in a pre-hearing conference to discuss issues, review disclosure of information and the procedures to be followed in the case at hand. [*Immigration Division Rules*, Rule 20(1)].

Rule 20(3) of the *Immigration Division Rules* provides that the ID must state orally or make a written record of any decisions or agreements made at the conference. It is important that all decisions or agreements made at the conference are clearly outlined in the hearings officer's notes, as the parties at the hearing will be bound by them.

# 11 Presenting the case

## 11.1 Admissibility hearing opening format

Although the precise structure of admissibility hearings may vary from one member **of the ID to another**, the hearings officer **can expect that the following will** be the general format at the opening of the hearing:

- The member of the ID makes an opening statement, indicating the legal basis for the hearing, the place of the hearing, the date of the hearing and the jurisdiction. The member will then ask the parties and their counsel to identify themselves. The member of the ID will also note the presence of any observers present. The member will exclude members of the public, if the admissibility hearing concerns a refugee protection claimant or if the hearing is determined to be held “in camera.”
- Next, the member of the ID confirms that the person concerned understands and communicates in the official language in which the admissibility hearing is being held. If an interpreter is necessary, the member ensures that there is effective communication between the interpreter and the person concerned.
- If the person concerned is not represented by counsel, the member of the ID will confirm that the person concerned was made aware of his or her right to counsel.
- In the case of an admissibility hearing with respect to a foreign national, the member of the ID may ask if family members will be affected by a removal order in accordance with R227(2). If family members are affected, the hearings officer should submit the “Notice of Admissibility Hearing to Family Members” form (BSF 540) that was provided to the family members prior to the hearing.

## 11.2 Exclusion of witnesses

The member asks counsel and the hearings officer if there are any witnesses who will testify at the hearing present in the room. If so, the member will ask the witnesses to leave the room. Such a request applies to all the witnesses present in the room, except for the person concerned and the expert witnesses. The person concerned has the right to attend the admissibility hearing that concerns them. Hearings officers may wish for expert witnesses to hear all evidence presented since their testimony must be based on the evidence that has been presented during the hearing.

The member may also remind everyone that witnesses must refrain from discussing the contents of their testimony outside the hearing room [*Immigration Division Rules*, Rule 36].

## 11.3 Evidence: Reading and filing the report, or notice

The member of the ID accepts documents provided by both parties and enters them as exhibits to the hearing.

The member may ask for the originals of the A44(1) report and the “*Referral under subsection 44(2) of the IRPA for an admissibility hearing*” form (BSF 506).

The hearings officer must present documentary evidence and ask for it to be entered as an exhibit to substantiate the allegations contained in the A44(1) report. The hearings officer can examine or question the person concerned and/or witnesses on this evidence.

The evidence may cover one or more allegations. After presenting the A44(1) report, the hearings officer asks that the report be filed as an exhibit. The member of the ID will then explain the following to the person concerned:

- the reason for the admissibility hearing;
- the allegations;

- possible consequences; and
- procedures to be followed during the admissibility hearing.

If applicable, the hearings officer calls the person concerned as a witness and may call other witnesses as required to support the allegations outlined in the A44(1) report.

The person concerned (or counsel representing the person concerned) will be given the opportunity to present evidence to refute the allegations contained in the A44(1) report and to cross-examine all witnesses.

The hearings officer is given the opportunity to cross-examine on the evidence presented by the person concerned (or by counsel representing the person concerned).

If evidence that has not been previously provided to all parties arises during cross-examination, the opposing party will be given an opportunity to examine this evidence and respond accordingly.

## **11.4 Evidence on the identity, citizenship and status of the person concerned**

After the person concerned has been sworn in, the person's identity and citizenship must be clearly established. The hearings officer may develop the evidence by asking questions such as the following:

- What is your correct name in full?
- Have you ever used any other name?
- What is your date of birth?
- Where were you born?
- Of what country are you a citizen?
- Are you a Canadian citizen?
- Are you a permanent resident of Canada?
- Do you have a passport?
- Do you have other identity documents?
- What is your permanent address?

Questions should be aimed at determining whether the person concerned is

- an applicant for permanent residence with or without a valid visa;
- an individual seeking to come to Canada as a returning resident, with or without a permanent resident card or a facilitation visa;
- an applicant for a temporary resident permit (TRP) with or without a visa.

## **11.5 Evidence for inclusion of family members**

To include a family member in the removal order issued against the person concerned, hearings officers must first prove the identity, citizenship and status of the family member. A42 provides that only foreign nationals can be inadmissible on grounds of an inadmissible family member; therefore, the hearings officer must clearly establish that the family member is a foreign national.

The hearings officer must also prove that the conditions set forth in R227(2)(a) and (b) are satisfied as follows:

### **R227(2)(a)**

Hearings officers should provide proof that family members were informed that they are subject to an admissibility hearing pursuant to R227(2)(a) via a copy of the “Notice of Admissibility Hearing to Family Members” form (BSF 540) that was previously provided to family members.

### **R227(2)(b)**

Conditions set out in R227(2)(b) are satisfied if the evidence shows that

- individuals fall within the definition of “family member” pursuant to R1(3);
- the family member(s) is (are) accompanying the inadmissible foreign national.

After the hearings officer has presented the evidence, affected family members are given an opportunity to establish the reasons for why they should not be included in the removal order of the person concerned.

Family members can only avoid being included in the removal order of the person concerned if they have proof that refutes the evidence submitted by the hearings officer and demonstrate that they do not meet the definition of “family member” pursuant to R1(3).

If the ID comes to the conclusion that the foreign national is inadmissible, and that the conditions set forth in R227(2)(a) and (b) were met, then a removal order made by the ID against the person concerned will automatically be effective against family members.

See section 9.10 above, for information about family inadmissibility.

See ENF 2 for information on evidence regarding inadmissible family members.

## **11.6 Examining and cross-examining witnesses**

Examining and cross-examining witnesses can be difficult. The following general guidelines may be useful:

- Depending on the case, questioning should be subtle rather than obvious, in order to obtain as much information as possible.
- The order and type of questions should be adapted, and varied depending on the answers that the person concerned has given to preceding questions. Also, depending on the answers of the person concerned, it may be necessary to modify the plan for questioning witnesses and for introducing evidence.
- Leading questions are those which suggest an answer. They can be a useful method of cross-examination, particularly where the facts are not in dispute or when a witness is proving to be uncooperative.
- When it is the intention of the hearings officer to call into question the credibility of a witness, procedural fairness dictates that cross examination is required. (*Browne v. Dunn*; *R. v. Lyttle*).
- It is useful to take notes of the key aspects of the testimony given by witnesses throughout the admissibility hearing in order to prepare and deliver submissions to the member of the ID.
- All parties to the proceedings may ask to see the notes that witnesses use to assist with their testimony, and may demand that these notes be introduced as an exhibit.

If a cross-examination raises new information, it may be useful and/or necessary to ask a witness additional questions after the cross-examination has been closed. Throughout the admissibility hearing, the parties may raise objections and respond to the objections raised by the other party.

All testimony is given under oath (by swearing on a holy book) or by affirmation (a solemn promise to tell the truth).

The Federal Court of Canada in *Ioanmidis v. Canada (Minister of Employment and Immigration)* ruled that an adverse inference should not be drawn simply because a party/litigant does not testify, even if a reasonable explanation is not provided. However, where a witness at a hearing refuses to give evidence, the member is entitled to draw a negative inference from that refusal.

## 11.7 Submissions on the allegations

After the hearings officer and the person concerned have introduced all evidence, the member of the ID gives both parties an opportunity to make submissions on the allegations. The presentation of evidence should be clear, concise and delivered in logical order. The submission stage is not the time to introduce new facts. Hearings officers should also ensure that any statements and conclusions made in their submission are supported by evidence entered into the record.

For example, in the case of a person seeking admission to Canada, the hearings officer may indicate in his or her submissions that the person concerned

- has no right to enter Canada since the person is neither a Canadian citizen nor a permanent resident of Canada; and
- has not discharged the burden of proof and has therefore failed to establish admissibility.

In the case of a foreign national who is in Canada, the hearings officer should point out that the person concerned has no right to remain in Canada given that they are neither a Canadian citizen nor a permanent resident of Canada. The hearings officer may present a summary of the evidence that would lead a reasonable and cautious person to conclude that there is a factual basis to the allegation(s) contained in the A44(1) report.

## 11.8 The admissibility decision

Following submissions, the member of the ID renders a decision as to whether or not the person concerned is inadmissible to Canada. The decision determines if the allegations contained in the report are well founded and whether the evidence introduced into the record revealed additional grounds of inadmissibility. The member shall then render one of the decisions listed in A45 as follows:

- If the ID finds that the person concerned is in fact a Canadian citizen, a permanent resident, or a registered Indian under the *Indian Act*, the ID will recognize the person's right to enter Canada [A45(a)].
- If the ID finds that the person concerned is not inadmissible, and is satisfied that the person meets the requirements of the Act, the ID will grant the person concerned temporary or permanent resident status [A45(b)], as the case may be.
- If the ID finds that the person concerned is not inadmissible, but that the evidence does not show that the person concerned meets all of the requirements of the Act, then the ID shall authorize the person concerned to enter Canada for further examination, with or without conditions [A45(c)].
- If the ID finds that the allegation is well founded, the ID shall make the applicable removal order, which may require additional evidence [A45(d)].

The ID must give the reasons for its decision orally or in writing. The ID will provide the written reasons upon request from one of the parties, which must be received by the Division within 10 days from the notification of the decision [*Immigration Division Rules*, Rule 7(4)].

## 11.9 Submissions on a removal order

Where, at the conclusion of an admissibility hearing, the member of the ID is of the opinion that the person concerned is inadmissible on one or more grounds, the member shall make the applicable removal order [A45(d)].

- Section R229(1) lists the type of removal order to be made by the ID according to applicable inadmissibility.
- R229(2) lists grounds of inadmissibility for which the ID must make a departure order when the person concerned is a refugee protection claimant [R229(1)(f), (g), (j), (m) and (n)]. To ensure that the correct removal order is issued, the hearings officer should state whether the eligibility of the claim has been determined, and if the claim has been determined to be ineligible, produce copies of all relevant forms.
- When an application for refugee protection is presented before or during the admissibility hearing, the hearings officer must proceed as if the eligibility determination has already been made.
- R229(3) lists circumstances in which the ID **shall** make a deportation order against a person instead of the prescribed removal order pursuant to R229(1). The circumstances listed in R229(3) are the following:
  1. the person was previously subject to a removal order and the person is inadmissible on the same grounds as in that order;
  2. the person has failed to comply with any condition or obligation imposed under the Act or the *Immigration Act*, R.S.C. 1985, c. I-2, unless the failure is the basis for the removal order; or
  3. the person has been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment or of two offences under any Act of Parliament not arising out of a single occurrence, unless the conviction or convictions are the grounds for the removal order.

Hearings officers will be provided with the opportunity to make arguments on the application of 229(3) where applicable and adduce all relevant evidence to support the application of the provision. Where evidence supports the application, the hearings officer should recommend the issuance of a deportation order.

**Note:** For more information on specified removal orders, see ENF 10, Removals.

## 11.10 Cases involving refugee protection claimant

If the person concerned claims refugee protection during an admissibility hearing, the case must be referred to a Minister's delegate for determination of eligibility.

The person concerned will be issued a *Determination of Eligibility* form (IMM 1442B), which will provide reasons, if the claim is ineligible.

Where an application for refugee protection is presented before or during the proceedings, the hearings officer must proceed as if the person is eligible to make a claim for refugee protection. This means that the admissibility hearing must be held in private from the moment the application for refugee protection is presented. If it is later determined that the claim for refugee protection was not eligible, the continuation of an adjourned admissibility hearing and subsequent hearings shall be held in public.

## 11.11 Claim to Canadian citizenship

An admissibility hearing is not adjourned simply because a person concerned claims to be a Canadian citizen. To provide proof of Canadian citizenship, a genuine passport or a citizenship certificate is required. It is the responsibility of the member of the ID to determine if the evidence produced by the person concerned is sufficient to support the claim that they are Canadian citizen.

The hearings officer may challenge the claim to citizenship during the hearing, if the hearings officer is in possession of evidence to support the challenge. The hearings officer may ask the member of the ID to render a decision and continue the admissibility hearing according to established procedure. The hearings officer may request an adjournment in order to obtain the evidence required to refute the claim to Canadian citizenship, if the necessary evidence is not readily available.

If the admissibility hearing is adjourned, the person concerned must provide proof that he or she has made an application for a citizenship certificate within the specified time frame. If an application for a citizenship certificate has not been filed within the specified period, or if the hearings officer is informed by the Registrar of Canadian Citizenship (RCC) that a citizenship certificate will not be issued, the hearings officer will request the ID to resume the admissibility hearing.

If the RCC confirms that the person concerned is indeed a Canadian citizen or issues a certificate of citizenship, the hearings officer will forward the documents to the ID and the admissibility hearing will be terminated immediately.

## 11.12 Cases involving detainees

Admissibility hearings concerning persons who are detained may coincide with the date scheduled for a detention review. Although the admissibility hearing may be adjourned, the detention review must take place within the time frames prescribed by section A57.

If the admissibility hearing takes place, the member of the ID will proceed first with the admissibility hearing. Since the admissibility hearing and the detention review are two separate proceedings, the member may ask for separate disclosure of documents.

For more information, see section 13, Detention reviews.

## 12 Application for non-disclosure of information at hearings

### 12.1 General

Section A86 provides that the Minister (hearings officer as the Minister's delegate) may, prior to or during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division (IAD), make an application for non-disclosure of information or other evidence, if the hearings officer is of the opinion that this information falls within the following definition: "security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization." (A76)

**Note:** For information on how to proceed with a non-disclosure application, hearings officers should refer to ENF 31: Applications for non-disclosure at IRB hearings.

## 12.2 Application for non-disclosure presented prior to an admissibility hearing or a detention review

If a decision is made to proceed with an application for non-disclosure of information, the hearings officer should notify counsel of record, or in the absence of counsel, the person concerned as prescribed by *ID Rules 38(5)*. A copy of the application must also be provided to the ID, including proof that the person concerned or their counsel was notified of the application.

Information provided in the application, if any, should be limited so as **not to disclose information that should be protected**. A83 and A85.1 to A85.5 govern the procedures regarding application for non-disclosure.

The ID registrar will schedule a date for an *ex parte in camera* hearing as expeditiously as possible. The member of the ID will conduct a hearing in private (*in camera*) and in the absence of the person concerned and the person's counsel to hear the application for non-disclosure of information. Subsection A83(1)(b), requires that the ID appoint a special advocate upon request of the person concerned. The role of the special advocate is to represent the interests of the person concerned at the hearing of the s. 86 application for non-disclosure.

**Note:** A list of special advocates is available on the Department of Justice website.

**Note:** All individuals participating in the non-disclosure hearing must have the required security clearance.

Once the member of the ID completes examination of the information and other evidence, the member must determine which elements of information or evidence may be considered in his or her decision as outlined in the following table.

### Information or evidence that may be considered by the ID at a non-disclosure hearing

Types of information or evidence	Applicability to decision
Relevant facts that may not be disclosed	The member takes these facts into account when making his or her decision (at the conclusion of the admissibility hearing or detention review), but does not include them in the summary that is prepared for the person concerned.
Relevant facts that may be disclosed	The member may take these facts into account when making a decision, and include them in the summary, if the hearings officer agrees that the facts may be disclosed. If the hearings officer does not agree with the contents of the summary, the hearings officer can withdraw the information under dispute, or the application altogether, and a decision on the case will be rendered without the information under dispute.
Irrelevant evidence	Such evidence is not considered in the decision.

The person concerned will be provided with a summary of information and other evidence that allows the person to be reasonably informed of the case being made by the Minister. The summary does not include information that would be injurious to national security or endanger the safety of any person if disclosed [A83(1)(e)].



## **12.3 Application for non-disclosure presented during an admissibility hearing or a detention review**

If, during the course of an admissibility hearing or a detention review it becomes apparent that evidence or other information to be presented falls under the definition of A76, the hearings officer may make an application for non-disclosure at that time. If necessary, the member of the ID may suspend the hearing to allow the hearings officer to prepare a written application.

At the time an application for non-disclosure is presented, the member of the ID must exclude the person concerned and the person's counsel from the hearing room. The ID member may adjourn the admissibility hearing or detention review at the request of the hearings officer or on the member's own initiative and schedule a date for the hearing of the Minister's application for non-disclosure.

## **12.4 Conduct of the admissibility hearing or detention review following an application for non-disclosure**

After a decision on the information in question is made, the ID will proceed with the admissibility hearing.

**Note:** Detention reviews will proceed without the information under review or without the respondent, as the case may be.

At the conclusion of the hearing into the application for disclosure of information, the member of the ID prepares a summary of the evidence including only information that, in the opinion of the member, if disclosed, would not be injurious to the national security of Canada or to the safety of any person.

The summary of the disclosure proceedings is provided to the hearings officer and the person concerned or counsel, as the case may be.

During the admissibility hearing, the hearings officers must not disclose information that is subject to the non-disclosure order. However, hearings officers may disclose facts that are part of the summary that has been provided to the person concerned.

# **13 Detention reviews**

## **13.1 General**

A detention review is a proceeding that takes place before a member of the ID during which the circumstances of detention are examined to determine

- whether the detention is lawful; and if it is
- whether detention be continued.

At these proceedings, the Minister of PSEP is represented by a hearings officer. A detention review

- is not as structured as an admissibility hearing;
- may be held on its own or in conjunction with an admissibility hearing;
- evidence may or may not be presented, usually only oral submissions are made;
- detained persons have the right to be represented by counsel.

Generally, each party (the hearings officer and the person concerned) presents facts and arguments. Parties are not required to prove the facts and arguments, unless information provided is challenged by the other party. If the information is challenged, evidence to support the facts and arguments may be introduced. Evidence may consist of documents or other material evidence, testimony of the person concerned, or affidavits. Evidence presented at detention reviews is governed by the same evidentiary rules as are admissibility hearings.

The member of the ID should be aware of the alleged reasons for detention from the information contained in the Request for Admissibility Hearing/Detention Review Pursuant to the Immigration Division Rules form (BSF 524). The ID member may require that the hearings officer present the reasons for detention and hearings officers should be prepared to do so.

Following the hearings officer's opening statement, the ID member provides an overview of the purpose of the detention review and the jurisdiction conferred upon the member by IRPA and its Regulations. The member will ask the hearings officer to submit the facts, arguments, and a recommendation regarding the continuation of the detention or the release of the person concerned, as the case may be.

### **13.2 Authority to detain a person under IRPA**

For detailed information on the authority to detain a person under IRPA, refer to ENF 20 : Detention.

### **13.3 Detention review – timeline for permanent residents and foreign nationals**

The frequency of detention reviews is prescribed in A57 as follows:

- A57(1) provides that the ID must review the reasons for continued detention **within 48 hours** after the permanent resident or foreign national was detained.
- A57(2) provides that the ID must review the reasons for continued detention at least once during the **7 days** following the initial review;
- A57(2) also provides that the ID must review the reasons for continued detention at least once during **each 30-day period** following each previous review.

The permanent resident or foreign national will be present at each detention review, either in person or by way of video or teleconference.

### **13.4 Detention review – timeline for designated foreign nationals (DFN)**

Pursuant to subsection A20.1(1), the Minister of PSEP has the authority to order the arrival in Canada of a group of persons to be designated as an "irregular arrival". A foreign national who is part of a group whose arrival in Canada is designated by the Minister as an "irregular arrival" automatically becomes a "designated foreign national" (DFN) unless he or she holds the documents required for entry, and on examination the officer is satisfied that the person is not inadmissible to Canada [A20.1(2)]. For additional information, hearings officers should refer to the Designated Irregular Arrivals Toolkit on Atlas.

DFNs are subject to mandatory arrest and detention and a revised detention review timeline. Upon designation, the CBSA must arrest and detain all DFNs who were 16 years of age or older at the time of the arrival, where the designated irregular arrival occurred **on or after June 28, 2012**.

The following modified detention timeline applies to all DFNs who are 16 years or older:

- A57.1(1) provides that the ID must review the reasons for continued detention **within 14 days** after a DFN was detained.

**Note:** Subsection A57.1(1) requires the ID to schedule the initial detention review within 14 days, meaning the ID may schedule the detention review at anytime from the day the DFN was detained to day 14 of detention.

- Pursuant to A57.1(2), subsequent detention reviews must take place **after the expiry of 6 months** following the conclusion of the previous review.

**Note:** This means that the ID may schedule the next detention review following the expiry of 6 months after the previous review, but not prior to the expiry of 6 months.

The designated foreign national will be present at each detention review, either in person or by way of video - or teleconference.

### **13.5 Mechanism of detention reviews and grounds for continued detention**

Detention reviews are a two-step process:

1. The member of the ID must release a person from detention, unless the member is satisfied that one of the reasons described in A58 exists, taking into account the prescribed factors (R244-247) as appropriate.
2. If the member determines that one or more grounds for detention exists, the member considers the factors in R248 to determine if detention should be continued.

In *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham* (paragraph 24), the Federal Court of Appeal noted that detention reviews are not technically *de novo* hearings but that the ID must come to a fresh conclusion whether detention should continue. The ID member must give clear and compelling reasons to depart from prior decisions to detain.

It is the role of hearings officers to present evidence to support one or more of the reasons for detention. In doing so, hearings officers should be guided by the factors set out in R245 to R247 depending on the reason for detention.

For additional information on reasons for detention, refer to ENF 20 Detention.

**Note:** It is not required that continued detention be sought on the same ground(s) as the original reason for arrest and detention. Hearings officers may argue for continued detention under section 58 on grounds that may or may not have existed at the time of initial arrest and detention.

In *Canada (Minister of Public Safety and Emergency Preparedness) v. Ismail*, the FC assessed the relationship between the grounds for arresting and detaining an individual under IRPA, and the grounds that permit continued detention of that individual by the Immigration Division of the IRB.

The court determined that “[T]o interpret paragraph 58(1)(c) of IRPA so as to permit the detention of an individual in order to allow the Minister to take necessary steps to inquire into a reasonable suspicion that the individual is inadmissible on grounds of security, when that suspicion only arises after the person has entered Canada, accords with the priority that the legislation ascribes to security.” The following question was certified:

“Is paragraph 58(1)(c) of the Immigration and Refugee Protection Act only available as a ground for continued detention, where it follows a detention under subsection 55(3) of the IRPA?” (paragraph 68)

It is the hearing officer’s role to make recommendations, in favour of or against continued detention to the member of the ID keeping in mind that the member will verify, consider and weigh each of the factors set out in the Regulations.

If, for example, the hearings officer seeks detention because the person concerned is alleged to be a danger to the public, the hearings officer will have to provide evidence to demonstrate that the facts of the case fall within the factors listed in R246.

The list of factors set out in each of R245, R246, and R247 is not exhaustive and other factors may be considered by the member of the ID when rendering a decision. Thus the credibility of the person concerned and statements of the person concerned that they will or will not comply with the laws governing immigration and refugee protection or any directive issued by the CBSA may be considered in the assessment of the grounds for detention.

**Note:** In the case of DFNs who were 16 years or older on the day of their arrival that is subject of the designation in question, the member of the ID must consider only the prescribed factors related to the relevant reason for detention and may not consider any other factors at the **14 day detention review [A58(1.1)]**.

### **1. Flight Risk (R245)**

For the purposes of paragraph 244(a), the factors to be considered in determining if a person is unlikely to appear for examination, an admissibility hearing, removal from Canada or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of the Act are prescribed in section R245.

In addition to the factors set out in R245, hearings officers may consider the following when preparing a submission to indicate that the person concerned is not likely to appear:

- use of pseudonym(s)/alias(es) to avoid detection or to evade compliance with IRPA and its Regulations;
- frequent changes of address in Canada;
- previously eluded examination or did not appear as requested;
- has not satisfied previous conditions attached or the conditions to a bond imposed by a criminal court, the CBSA or the IRB;
- attempted to escape or to hide; and
- a warrant was issued against the person concerned.

In cases where hearings officers perceive a risk that the person concerned will not appear unless conditions are imposed, hearings officers should consider a guarantee or a cash deposit with conditions of release [A44(3)].

**Note:** In the case of DFNs who were 16 years or older on the day of their arrival that is subject of the designation in question, at the 14 day detention review the member of the ID must consider only the prescribed factors related to R245 for detention and may not consider any other factors.

The member of the ID will consider and weigh all available evidence when deciding if continued detention is warranted.

### **2. Danger to the public (R246)**

For the purposes of paragraph 244(b), the factors to be considered in determining if a person is a danger to the public are prescribed in section R246.

Some factors may require additional arguments to demonstrate that a specific fact disclosed before the ID should be considered as a factor in favour of detention. For example, the details of a foreign conviction for a sexual offence [R246(f)(i)] should be examined carefully to determine the equivalent in Canadian law. The hearings officer should disclose all available details to satisfy the member of the ID that the offence is described in R246(f)(i).

The circumstances surrounding the commission of an offence may assist the member of the ID in determining the weight of a factor compared to another. For instance, the fact that the victim of the offence is a minor child may be considered as more serious than if the victim is an older person. An offence committed with the use of a prohibited weapon may also be considered to have more weight than an offence committed with another weapon, depending on the specific circumstances of each case.

**Note:** Each factor is in itself sufficient to find that a person is a danger to the public. [*Bruzzese v Canada (Minister of Public Safety and Emergency Preparedness)* (paragraphs 47 and 87)].

Hearings officers should submit the following documents, if applicable and available, to the ID to support an argument that an individual remains a danger to the public:

- the criminal record of the person concerned, and documents establishing a criminal conviction in or outside Canada;
- the indictment;
- evidence of the medical condition of the person concerned;
- police reports documenting association of the person concerned with known criminals or a criminal organization;
- classified reports relating to security or criminal activity of the person concerned, and a record of physical violence, if applicable; and
- correctional services report on the person's behaviour in detention.

In addition, hearings officers may consider the age of a conviction and the circumstance under which an offence was committed. The fact that the person concerned was convicted and has served the applicable sentence is not in itself an indication that the person concerned is a danger to the public. A strong indication that the person concerned is a danger to the public may consist of evidence that the offence involved violence or weapons and that the person concerned is likely to re-offend.

In some instances danger to the public may dissipate because of the length of time a person has spent in detention or because the evidence in support of a detention order is no longer valid. [*Canada (Minister of Citizenship and Immigration) v. Sittampalam* (paragraph 25)], Therefore, hearings officers must establish that the danger is current.

The member of the ID will consider and weigh all available evidence when deciding if detention should be continued.

**Note:** See ENF 28, Ministerial Opinions on Danger to the Public and to the Security of Canada, for additional information on assessing danger to the public.

**Note:** In the case of DFNs who were 16 years or older on the day of their arrival that is subject of the designation in question, at the 14 day detention review the member of the ID must consider only the prescribed factors related to R246 for detention and may not consider any other factors.

### 3. Identity (R247)

For the purposes of paragraph 244(c), the factors to be considered in determining whether a person is a foreign national whose identity has not been established are prescribed in section R247.

In cases where the identity of the person concerned has not been established, the hearings officer must show that every effort to establish the identity of the person concerned was made.

If applicable, the hearings officer must demonstrate how the person concerned has not reasonably cooperated for the purpose of establishing his or her identity [A58(1)(d); ID Rules, Rule 247].

**Note:** In *Canada (Minister of Citizenship and Immigration) v. Bains* (paragraph 4), the Federal Court clarified that it is not up to the member of the ID to determine what is acceptable as proof of identity, but merely whether the Minister made reasonable efforts to identify the person concerned. [see also *Canada (Citizenship and Immigration) v. B046*] In the case of DFNs who were 16 years or older on the day of their arrival that is subject of the designation in question, at the 14 day detention review the member of the ID must consider only the prescribed factors related to R247 for detention and may not consider any other factors.

- The factors set out in R245, R246 and R247 are not exhaustive. Additional factors may be considered by the member of the ID when assessing the evidence.
- In *Bruzzese v. Canada (Minister of Public Safety and Emergency Preparedness)*, the FC confirmed that additional factors may be considered with respect to factors set out in R245 and R246].

The member of the ID will consider and weigh all available evidence when deciding if detention should be continued (R248).

- Hearings officers should ensure that the case file contains a signed and dated “Minister’s Opinion Regarding the Foreign National’s Identity” (BSF 510) form.

**Note:** In the case of DFNs who were 16 years or older on the day of their arrival that is subject of the designation in question, in reviewing detention on identity, the member of the ID must consider only if the Minister is of the opinion that the identity of the foreign national has not been established. The ID is not permitted to consider the foreign national’s level of cooperation or other prescribed factors [A58(e)].

## **13.6 Factors to be considered when determining if detention should be continued (R248)**

In addition to the factors referred to above, members of the ID must take into consideration the factors set out in R248, also known as the ‘Sahin factors’ when determining if detention should be continued.

In *Sahin v. Canada (Minister of Citizenship and Immigration)*, the Federal Court determined that in certain cases indefinite detention violates Section 7 of the Charter. Bektas Sahin, the person concerned had been detained for more than 14 months at the time the Federal Court rendered its decision. The Court provided a list of considerations that should be taken into account by members of the ID when making decisions on whether an individual should remain in detention. These considerations have been codified in R248.

Also refer to *Charkaoui v. Canada (Citizenship and Immigration)*, which endorsed *Sahin*.

If the hearings officer recommends continued detention, the hearings officer should submit all available evidence to the ID in support of continued detention.

**Note:** With the exception of 14 day detention reviews for DFNs, members are not limited to the considerations set out in the IRPR when deciding if continued detention of the person concerned is warranted.

**The factors set out in R248 are as follows:**

- **Reasons for detention R248(a)**

For example, there may be a stronger case for continued detention on the grounds that the person concerned is a danger to the public, if the hearings officer has actual evidence that the person concerned has committed an offence, rather than if the hearings officer presents solely hearsay evidence.

- **Length of time in detention R248(b) and length of time detention will likely continue R248(c)**

In *Sahin v. Canada (Minister of Citizenship and Immigration)*, the Federal Court determined that, in certain cases, indefinite detention violated Section 7 of the Charter.

One of the significant tests set out by the Federal Court related to the period of time that had passed before a decision was rendered as to whether the person in question was authorized to remain in Canada.

In *Canada (Minister of Citizenship and Immigration) v. Li (para. 81)*, the FCA stated that “the basis of the estimation of anticipated future length of detention should be the proceedings as they exist at the time of each monthly review and not on an anticipation of available processes but not yet underway.”

The risk a person poses to the public does not decrease or disappear with a prolonged stay in detention. Hearings officers may present evidence to show that although the person concerned has served a sentence for a violent crime they could still be considered a danger to the public.

- **Any unexplained delays or unexplained lack of diligence by the person concerned or by the CBSA R248(d)**

If the person concerned or the Minister of PSEP has caused any unexplained delays or if either of them has not been as diligent as is reasonably possible, it should weigh against the offending party.

For example, in a subsequent court decision, *Kidane v. Canada (Minister of Citizenship and Immigration)* (paragraphs 8 and 9), the Federal Court upheld the member’s decision to detain the person concerned, ruling that the member had adequately applied the four-part test set out in *Sahin*, and that prolonged detention of the person concerned did not violate his rights as he was largely himself responsible for the procedural delays that caused the continuation of his detention.

In *Canada (Minister of Citizenship and Immigration) v. Kamail* (paragraphs 34 and 37), the Federal Court applied the four-part test set out in *Sahin* and concluded that the test “clearly favours keeping the respondent in detention”. The member committed an error in law when he decided the case in the respondent’s favour on the basis that detention was indefinite when he recognized that the respondent’s lack of cooperation must count against the respondent and not the Minister.

- **The existence of alternatives to detention R248(e)**

When assessing continued detention of a person concerned, members of the ID consider the availability, effectiveness and appropriateness of alternatives to detention, including but not limited to outright release, a bond or guarantee, periodic reporting, confinement to a particular location or geographic area, the requirement to report changes to contact information or a form of detention that is less restrictive to the individual, etc.

In *Sahin v. Canada (Minister of Citizenship and Immigration)*, the Federal Court noted that the test that deserves significant weight is the length of time anticipated until a final decision, one way or the other, on whether the person concerned may remain in Canada, or must leave Canada, is rendered.

**Note:** If the hearings officer recommends continued detention, the hearings officer should submit all available evidence to the ID in support of continued detention. With the exception of 14-day detention reviews for DFNs, members are not limited to the considerations set out in the IRPR when deciding if continued detention of a person concerned is warranted.

### 13.7 Making a recommendation on continued detention

Hearings officers make recommendations for continued detention based on the facts of each particular case. If recommending to continue detention, hearings officers must be prepared to provide evidence to support the argument that the person should remain in detention.

#### Scenarios

Situation – taking into consideration the factors set out in R248 (except for detention reviews involving DFNs):	Hearings officers should consider the following:
The hearings officer is of the opinion that detention should continue.	To continue detention
The hearings officer comes to the conclusion that the person concerned should be released with a bond/guarantee and/or conditions as an alternative to detention	The hearings officer should consider if a deposit or guarantee or a combination would be appropriate in the circumstance and make the recommendation accordingly. The hearings officer should consider the financial situation of the person concerned and/or prospective guarantor(s), when setting the amount for the bond. The hearings officer may provide submissions on the nature and the size of the bond and/or conditions that should be imposed.
The hearings officer concludes that there is no need and/or justification to continue detention.	The hearings officer should indicate that the Minister has no objection to the release of the person concerned, or alternatively recommend release with a deposit/guarantee and/or conditions.

**Note:** If the hearings officer does not agree with the decision of the ID at a detention review, the hearings officer may seek advice from the Regional Justice Liaison Officer (JLO). The JLO will in turn consult with the Department of Justice and CBSA Litigation Management on whether to move forward with a stay of release and an application for leave to seek judicial review. Please refer to ENF 9 for further information on judicial review.

When recommending release with conditions, the hearings officer should be satisfied that the guarantor is in a position to exercise control over the movements of the person released, and that the person concerned will report for immigration proceedings as required.



The hearings officer should also assess the reliability of the guarantor. For example, a proposed guarantor who has defaulted on a previous bond and remains in default, is no longer eligible to be a guarantor.

**Note:** For additional information on deposits and guarantees, please refer to ENF 8, Deposits and Guarantees.

## **13.8 Detention after an admissibility hearing has been concluded**

In cases where at an admissibility hearing the member of the ID makes a removal order against a person concerned, the hearings officer should - when detention or continued detention is justified - ask the member of the ID to order the detention of the person concerned [A58].

## **14 Applications related to admissibility hearings and to detention reviews**

### **14.1 General guidelines**

At any time during an admissibility hearing or a detention review, the person concerned and/or the hearings officer may present any application (e.g., request to adjourn, application for postponement, application to change venue) All applications must be made pursuant to the format prescribed by the *ID Rules*, beginning with Rule 38.

### **14.2 Application for postponement**

If the hearings officer receives a request for postponement of an admissibility hearing from the person concerned or from counsel, the hearings officer must advise the person concerned or counsel that the request must be made to the ID [*Immigration Division Rules*, Rule 43(1)]. The Minister of PSEP does not accept applications on behalf of the ID.

### **14.3 Request for adjournment**

Parties to the admissibility hearing may make an application for adjournment as outlined in sections 38 to 43 of the ID Rules.

#### **1. Mandatory adjournments**

The member of the ID must grant a request for adjournment in the following circumstances:

- To allow a minor child or a person who is unable to understand the nature of the proceedings to be represented by a parent or a guardian. If the member of the ID is of the opinion that the person is not adequately represented, the member may designate a representative [A167(2); *Immigration Division Rules*, rules 18 and 19].
- Where the services of an interpreter are required to permit the presence of an interpreter at the admissibility hearing [*Immigration Division Rules*, rule 17].
- When the person concerned claims Canadian citizenship, and had it not been for this claim a removal order would have been issued; and
- When a hearings officer requests that a dependent family member be included in the removal order issued to the person concerned, and the member of the ID is not convinced that the family

member was notified accordingly, using the “Notice of Admissibility Hearing to Family Members” form (BSF 540).

## 2. Discretionary adjournments

In cases that do not involve one or more of the mandatory circumstances, members of the ID have discretion to grant adjournments in accordance with the principles of procedural fairness and natural justice [*Prassad v. Canada (Minister of Employment and Immigration)*], or under the general powers conferred on the member as a commissioner under Part I of the *Inquiries Act*.

The principles of natural justice and procedural fairness require that the member of the ID considers an adjournment request by hearing submissions from both parties and by balancing their interests. Members must also take into consideration if an adjournment will have a negative effect on the efficiency and expediency of the process.

Hearings officers must adequately support the recommendations against or in favour of adjourning an admissibility hearing by submitting valid reasons and by making reference to the relevant case law.

Based on the SCC decision in *Prassad v. Canada (Minister of Employment and Immigration)*, members of the ID should consider the following factors when deciding whether an adjournment should be granted (paragraphs 35 and 36):

- The number of adjournments granted previously;
- The length of time for which an adjournment is requested; and
- The timeliness of pursuing other remedies before asking for an adjournment; and
- In certain circumstances, sympathy for the concerned person’s circumstances.

When applying for an adjournment, hearings officers should address all the applicable factors [*Immigration Division Rules*, Rule 43].

Adjournments may also be granted at the discretion of the member of the ID or under the general powers conferred on the member as a commissioner under Part I of the *Inquiries Act*. Both parties may make arguments in favour of an adjournment. A member of the ID may grant an adjournment for the following reasons, among other grounds:

- to allow the person concerned to retain counsel (A167);
- for either party to obtain additional evidence or to summon witnesses;
- to allow relevant documents to be introduced (i.e. evidence of a conviction outside Canada);
- to have the person concerned medically examined or to secure additional medical evidence;
- to replace an incompetent interpreter or counsel;
- to consult with the Registrar of Canadian Citizenship; and
- to allow a member of the ID to prepare the decision.

## 3. Adjournments to obtain counsel

Over the years it has often been argued before the courts that refusal to grant an adjournment for the purpose of obtaining counsel of choice was tantamount to depriving a person of the right to retain and instruct counsel. To this end, the hearings officer can argue that the right to counsel simply means that the person concerned must be given the opportunity to retain and instruct counsel of choice amongst those who are ready and available to proceed on the date fixed by the member of the ID.

The person concerned must be given sufficient time to find counsel. However, hearings officers must object to long adjournments when they are of the opinion that the subject of the admissibility hearing has

had reasonable opportunity to obtain counsel who is willing and able to handle the case. In such cases, the hearings officer will argue that the person should take the necessary action to find other counsel. If counsel is never available or does not appear when required, the hearings officer should request that a peremptory resumption date be set.

The hearings officer should argue that the Charter does not grant an unrestricted right to counsel of choice. Clients have the right to be represented by counsel, but by counsel who is reasonably available to appear before the tribunal. Counsel is also obliged by a code of ethics not to take on cases where they are not reasonably available to appear on behalf of clients because of previous commitments.

If counsel makes continuous requests for adjournment, hearings officers may oppose these requests and provide reasons for why the request for adjournment is not justified.

In exceptional circumstances, the hearings officer may notify the office manager, to consider whether a formal complaint to the provincial bar association or law society may be warranted. The Traveller Operations Unit in the Border Operations Directorate, Operations Branch, CBSA - National Headquarters should be informed via CBSA-ASFC\_OPS\_IEO-OEI of all such formal complaints.

**Note:** Refer to **Appendix B** for additional information on adjournments and jurisprudence.

Hearings officers should base their submissions on the factors that are applicable to the particular case at hand.

Hearings officers should review the file to determine if the person concerned has in the past asked for an adjournment for similar reasons (e.g., to obtain counsel). Before arguing for or against a proposed adjournment, hearings officers should take into account the stage the admissibility hearing has reached and the anticipated length of the adjournment requested.

## 14.4 Change of venue

Requests for a change of venue must be made to the ID [*Immigration Division Rules*, Rule 42].

When deciding if the application for a change of venue should be allowed, the member of the ID must consider the following factors:

- whether a change of location would allow the hearing to be full and proper;
- whether a change of location would likely delay or slow the hearing;
- how a change of location would affect the operation of the ID;
- how a change of location would affect the parties; and
- whether a change of location would endanger public safety.

## 14.5 Application for proceeding in-camera (in private)

If the member of the ID is satisfied that

- there is a serious possibility that the life, liberty or security of the person concerned will be endangered, if the proceeding is held in public;
- there is a real and substantial risk to the fairness of the proceeding such that the need to prevent disclosure outweighs the social interest that the proceeding be conducted in public; or
- matters involving public security will be disclosed;

the member may on application on the member's own initiative, conduct a proceeding in-camera (in private) or take any other measure to ensure the confidentiality of the proceedings (A166(b)(i, ii, iii); *Immigration Division Rules*, Rule 45; *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration)*).

## 14.6 Application for proceeding in public

On application or on its own initiative, the ID may conduct a proceeding in public, or take any other measure that it considers necessary to ensure appropriate access to the proceeding if, after having considered all available alternate measures and the factors set out previously, the member of the ID is satisfied that it is appropriate to do so [A166(c) and (d)]. If the member of the ID is of the view that there is a serious possibility that the life, liberty or security of the person concerned would be endangered by conducting the hearing in public [*Pacific Press Ltd. v. Canada (Minister of Employment and Immigration)*], the hearing should be held in private.

## 14.7 Applications applicable only to admissibility hearings

### Withdrawing notices

After reviewing the file, the hearings officer may come to the conclusion that the A44(1) report is unfounded, or that additional facts indicate that the person concerned is admissible or the report should be otherwise withdrawn. In circumstances in which it is evident that an admissibility hearing is unwarranted, the hearings officer should discuss the matter with the Minister's delegate who signed the report. The hearings officer will make the final decision on whether or not to proceed with the admissibility hearing pursuant to Rule 5 of the *Immigration Division Rules*. The hearings officer should include a note in the file, listing the reasons that led to the final decision.

The following procedures should be followed when withdrawing a request for an admissibility hearing (*Immigration Division Rules*, Rule 5):

- where no substantive evidence has been accepted in the proceeding, the hearings officer must notify the ID orally at a proceeding, or in writing. If notifying in writing, the hearings officer must provide a copy of the notification to the person concerned or counsel if applicable;
- where evidence has been accepted in the proceedings, the hearings officer must make a written application to the ID to withdraw the request for an admissibility hearing in accordance with Rule 38 of the *Immigration Division Rules*.

Pursuant to Rule 5 of the *Immigration Division Rules*, the withdrawal of a request for an admissibility hearing may be considered an abuse of process, if it would likely have a negative effect on the integrity of the ID. There is no abuse of process if no substantive evidence has been accepted in the proceedings at the time the request for withdrawal is made [*Immigration Division Rules*, Rule 5].

## 14.8 Applications applicable only to detention reviews

### Application for an early hearing

Rule 9 of the *Immigration Division Rules* provides that the person concerned and/or the Minister of PSEP may make an application for an early detention review. This provision only applies to 7-day or 30-day detention reviews. The application for early review must be made in writing and the party initiating the application must justify the request by presenting new facts relating to the reasons for detention.

When determining if the application of the person concerned should be contested or not, the hearings officer should consider if the new facts alleged by the person concerned were available at the time of the previous detention review. If the information was available or could have been reasonably obtained at the time of the previous detention review, the hearings officer has solid grounds to contest the application.

If the facts alleged are new and may influence the decision to release the person concerned, the application may lead the ID to grant the application for early review, unless hearings officers have sufficient evidence that may convince the member of the ID that detention should be continued.

Conversely, there may be instances where hearings officers may apply for an early detention review to recommend release; if for example, the identity of the individual has been established or the person concerned received a positive PRRA decision.

### **15 A36(1)(a) – Paper-based admissibility hearings**

Unless otherwise instructed by a manager, hearings officers will participate via paper-based submissions in admissibility hearings before the ID when the admissibility hearing involves A36(1)(a) inadmissibility of Permanent Residents.

Hearings officers will continue to appear in person in the following exceptional circumstances:

- Jurisdictional arguments;
- Constitutional challenges are being argued and the issue has not previously been addressed by the higher court, which would enable the hearings officer to make written submissions; or
- The person concerned is detained in immigration hold and the ID is holding the admissibility hearing and the detention review on the same day.

**Note:** For the above-noted exceptional cases, hearings officers will require approval from a CBSA hearings manager to appear in person at admissibility hearings.

Hearings managers will complete the template for approval (Appendix C of this manual) and justify the exceptional circumstances for each case involving A36(1)(a) allegations for which the hearings officer wishes to appear in person at the hearing.

## **15.1 Application pursuant to Rule 38 of ID Rules for paper-based hearings**

Pursuant to ID Rule 38, hearings officers must make an application to the ID requesting to release the Minister of PSEP from any obligation to appear or present evidence in person.

Refer to Appendix D of this manual for a copy of the application.

## **16 Post-admissibility hearing procedures**

### **16.1 Carrying out a decision of the Immigration Division**

When the admissibility hearing is concluded, the hearings officer has three specific areas of responsibility to ensure that the member's decision is carried out:

- if the member of the ID issued a removal order against the person concerned, the hearings officer must give the case file to the removal unit for action;
- if the member of the ID ordered the detention of the person concerned, the hearings officer must take the appropriate action and annotate the file accordingly;
- if the member of the ID ordered the release of the person concerned on a performance bond, the hearings officer may have to assess the financial capacity of the person who assumes the responsibility for the bond as well as the guarantor’s ability to comply.

## 16.2 Applications for judicial review

Where hearings officers are of the opinion that there are, or may be, grounds to seek judicial review, hearings officers will consult with their manager .If the manager concurs, the hearings officer will within five business days of the decision, order, act or omission by the ID member, send a report to the Regional Justice Liaison Officer (JLO). If the JLO is not available, the hearings officer may send the report directly to CIC or CBSA litigation management at National Headquarters as follows:

CIC - Litigation Management Unit (BCL)	CBSA – Litigation Management Unit (LMU)
A36	A34
	A35
	A37

The report is to be transmitted by facsimile or by electronic means. It is imperative that a copy of the written reasons, when received, is forwarded as expeditiously as possible. This will allow sufficient time for review and the necessary consultations. This will also allow BCL or LMU to give appropriate instructions to the Department of Justice (DOJ) and to give the DOJ time to prepare applications to seek leave for judicial review.

See ENF 9, Judicial Review, for more information.

## 16.3 Prosecutions of serious violations of IRPA

It is the CBSA’s policy to refer cases involving serious violations of the Act to the Royal Canadian Mounted Police (RCMP) or the Criminal Investigations Section of the CBSA, where appropriate, for further investigation and prosecution. The hearings manager or chief, as the case may be, decides if a case should be referred to the RCMP following a debrief from the officer on the reasons why this case should be brought to the attention of the RCMP in accordance with the guidelines set out in IRPA (e.g., an offence under A118).

## 17 Reporting

Hearings officers must enter all relevant information into the Field Operations Support System (FOSS) or the Global Case Management System (GCMS) and the National Case Management System (NCMS) to keep the case information current.

## 18 Feedback

Results of admissibility hearings or detention review proceedings should be provided to the officers who prepared and reviewed the original report, or who arrested and detained the permanent resident or the foreign national under the provisions of IRPA.

## ENF 3 Admissibility, Hearings and Detention Review Proceedings

Hearings officers should provide feedback to those involved in specific cases for training purposes, and to advise officers of the effectiveness of their work.

## Appendix A List of Cases / Rules of Evidence

### References

#### Canadian courts

- Federal Court of Canada, Trial Division (FCTD)
- Federal Court of Canada, Appeal Division (Federal Court of Appeal) (FCA)
- Supreme Court of Canada (SCC)

#### List of cases cited throughout this manual chapter

- *Almrei (Re)*, 2009 FC 3.
- *Bowen v. Canada (Minister of Employment and Immigration)*, [1984] 2 F.C. 507.
- *Brannson v. Canada (Minister of Employment and Immigration)*, [1980] F.C.J. No. 247.
- *Bruzzese v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 230.
- *Browne v. Dunn*, (1893) 6 R. 67 (H.L.).
- *Canada (Citizenship and Immigration) v. B046*, 2011 FC 877
- *Canada (Minister of Employment and Immigration) v. Dan-Ash*, [1988] F.C.J. No. 571.
- *Canada (Minister of Public Safety and Emergency Preparedness) v. Ismail*, 2014 FC 390.
- *Canada (Minister of Citizenship and Immigration) v. Bains*, 1999 FCJ No. 11.
- *Canada (Minister of Citizenship and Immigration) v. Fox*, 2009 FC 987.
- *Canada (Minister of Citizenship and Immigration) v. Kamil*, 2002 FCT 381.
- *Canada (Minister of Citizenship and Immigration) v. Li*, 2009 FCA 85.
- *Canada (Minister of Citizenship and Immigration) v. Nkuzimana*, 2005 FC 29.
- *Canada (Minister of Citizenship and Immigration) v. Sittampalam*, 2004 FC 1756.
- *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4.
- *Chana v. Canada (Minister of Manpower and Immigration)*, [1977] 2 F.C. 496.
- *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9.
- *Chiau v. Canada (Minister of Citizenship & Immigration)*, [2001] 2 F.C. 297.
- *Chhokar v. Canada (Minister of Employment and Immigration)*, F.C.J. No. 173.
- *Chung v. Canada (Citizenship and Immigration)*, 2014 FC 16.
- *Edmond v. Canada (Minister of Citizenship and Immigration)*, [2012] FC 674
- *Gervasoni v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 189.
- *Green v. Canada (Minister of Employment and Immigration)*, 1983 F.C.J. No. 142.
- *Hill v. Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 47.
- *Ioannidis v. Canada (Minister of Employment and Immigration)*, [1983] 1 F. C. 369.
- *Jiminez-Perez v. Canada (Minister of Employment and Immigration)*, 1983 1 F.C. 163.
- *Kamil v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 381.
- *Kidane v. Canada (Minister of Citizenship and Immigration)*, 1997 F.C.J. No. 990.
- *Koutsouveli v. Canada (Minister of Employment and Immigration)*, 1988 F.C.J. No.133.
- *Li. v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 235.
- *Louhisdon v. Canada (Employment and Immigration Canada)*, 1978 2 FC 589.
- *Martineau v. Canada (Minister of National Revenue – M.N.R.)*, 2004 SCC 81.
- *Canada (Minister of Employment and Immigration) v. Widmont*, 1984 2 F.C. 274.
- *Mugasera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40.
- *Murray v. Canada (Minister of Employment and Immigration)*, 1979 1 F.C. 518.
- *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration)*, [1991] 2 F.C. 327.
- *Park v. Canada (Citizenship and Immigration)*, 2010 FC 782.
- *Patel v. Canada (Citizenship and Immigration)*, 2007 FC 470.
- *Poshteh v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 511.



- *Prasad v. Canada (Minister of Employment and Immigration)*, 1989 1 S.C.R. 560.
- *R. v. Mohan*, [1994] 2 S.C.R. 9.
- *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272.
- *Sabour v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1615.
- *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214.
- *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433.

## Rules of evidence

Administrative tribunals are not bound by the strict rules of evidence that are found in judicial proceedings A173(c). However, they must observe the principles of fundamental justice.

### 1. The admissibility of evidence

In judicial proceedings, strict rules govern the admissibility of evidence. The two basic rules are

- the best evidence rule, which requires that the evidence presented be the best evidence available (this means that secondary evidence should not be introduced unless primary evidence is unavailable);
- the rule against hearsay evidence. Hearsay evidence is testimony given by a witness, offered as proof of the truth of the matters contained in the testimony, which is not the personal knowledge of the witness but rather the mere repetition of what the witness heard others say. Such evidence is very weak, since the real author of the statement put in evidence is not available for cross-examination and therefore the credibility of the statement and its author cannot be tested.

At an admissibility hearing, any evidence considered by the member of the Immigration Division (ID) to be relevant, credible, and trustworthy in the circumstances of the case is admissible. In the examination of the evidence presented, the member of the ID will determine its weight or value, taking into consideration all relevant information. Hearings officers are to follow the best evidence rule. Generally, members of the ID will accept hearsay evidence, but they will attach very little significance to it if contradictory evidence is offered by the other party.

### 2. The relevance of evidence

The member of the ID will normally consider relevant any evidence that reasonably tends to prove the fact in dispute, that is:

- evidence which places a fact in a context which tends to show its relevance;
- evidence relating to credibility; and
- evidence that proves a precondition for the presentation of a fact (e.g., evidence that a statement was made freely and voluntarily).

### 3. The weight of evidence

The weight of evidence is its probative value, or importance, and the extent to which it establishes a fact before the tribunal. The stronger the inference that can be derived from the evidence, the higher the probative value. A number of pieces of evidence, each of low probative value, may be more significant when considered in the overall context of the admissibility hearing than a single piece of evidence that seemingly has very high probative value.

Admissibility of evidence and probative value are two different matters. A document of low probative value may still be admissible into evidence if it is relevant.

Secondary or hearsay evidence may not have the same weight when better evidence is available. For example, if the hearings officer uses a statutory declaration made by an officer who is reasonably available to testify, the hearings officer is depriving the other party of the opportunity to cross-examine and the hearings officer detracts from the quality of the evidence.

As a general rule, the hearings officer should attempt to secure the best evidence whenever possible. When this is not possible, would be prohibitively expensive or would cause major administrative difficulties, the hearings officer may ask the member of the ID to accept secondary evidence.

When making a decision to rely on primary or secondary evidence, the hearings officer should take into account factors such as the importance of other aspects of the case, and the need to avoid lengthy detention while waiting for stronger evidence. The hearings officer should also keep in mind that the weaker the evidence in relation to evidence presented by the opposing party, the greater the possibility that the member of the ID will admit the person concerned to Canada.

The main points to consider when assessing available evidence are as follows:

- Is this evidence relevant?
- What facts are established or can be deduced from this evidence?
- What is its weight?

## **Types of evidence**

### **1. Direct evidence**

Direct evidence is a means of proof which tends to show the existence of a fact in question without the intervention of the proof of any other fact. This includes testimony by witnesses who saw the act being done or heard the words spoken to prove a fact that is at issue.

Direct evidence may also consist of documents or objects introduced through the oral testimony of witnesses.

The hearings officer should always introduce documents or objects into evidence by first establishing a link between the document or the object and the witness, and second, by establishing the relevance of the document or object to the fact the hearings officer wishes to prove.

For example, if the hearings officer wishes to introduce a passport or other documents claimed to belong to the subject of the admissibility hearing, the hearings officer should ask the witness to identify the document(s) for the member of the ID. If the witness is unable or refuses to identify the document, the hearings officer may need to call the officer who seized the document(s) as a witness to establish the link between the document(s) and the subject of the admissibility hearing.

After establishing the link, the hearings officer may then ask questions to establish the relevance of the document in relation to the facts the hearings officer intends to prove.

### **2. Circumstantial evidence**

Circumstantial evidence is evidence not based on actual personal, direct knowledge or observation of the facts at issue. It is indirect evidence, the sum of which can lead a member of the ID to conclude that a fact which could not be established by direct evidence, has been established by inference.

For example, circumstantial evidence may consist of evidence relating to motive, opportunity, intent, character or previous activities. Such circumstances taken individually may not carry enough weight to persuade the member of the ID of an allegation; however, when argued in combination, they may be sufficient to tip the balance of probabilities.

### **3. Presumption**

Since in many cases it is almost impossible to prove certain facts, the rules of evidence provide that certain facts may be presumed to be true. Two types of presumption may apply:

- deductions of fact that are deductions or conclusions that can be drawn from the circumstantial evidence submitted; and
- presumptions under the Act.

### **4. Judicial notice**

Judicial notice is the recognition by a judicial tribunal that a fact is true, without its having to be proven, on the basis that this fact is known to the tribunal.

Members of the ID may take judicial notice of facts generally known to everyone. For example, a member of the ID may take judicial notice of any fact relating to the member's profession, such as the duties of a member of the ID, the IRPA and its Regulations. Members of the ID may not take judicial notice of a fact known as a result of purely personal knowledge.

## **Documentary evidence and testimony**

### **1. Documentary evidence**

Hearings officers will often use documents to establish allegations. If used appropriately, presenting documents in evidence can speed up the process. Generally speaking, a member of the ID may accept documentary evidence if it is admissible (relevant, credible and trustworthy), subject to its probative value.

Official documents (e.g., passports and certified court documents) generally have more weight than unofficial documents (e.g. letters and uncertified copies of documents).

Original documents usually have more weight than copies, unless the copy is a duplicate copy (a signed copy of the original) or a certified true copy produced or issued by a competent authority. The best evidence rule dictates that the hearings officer should submit the original of a document. If this is not possible, secondary evidence becomes the best evidence. Hearings officers should verify that the documents they wish to introduce at an admissibility hearing refer to the person concerned.

### **2. Statutory declarations**

Hearings officers may introduce statutory declarations into evidence. A member of the ID must accept statutory declarations at an admissibility hearing because they are equivalent to testimony under oath [*Canada Evidence Act*, s. 14(2)]. However, a statutory declaration may be of less probative value than the oral testimony of the author because the credibility of the author of the statutory declaration cannot be tested by cross-examination.

Hearings officers may use a statutory declaration when the declarant's testimony could not likely be tested on cross-examination (for example, the declaration of a person concerning a recorded fact such as the date of admission to Canada).

### **3. Testimony**

The best form of testimony is that given by a witness relating facts of which the witness has personal knowledge. Positive evidence (e.g., facts that the witness actually observed or knows) carries more weight than negative evidence (that which was not seen or is unknown). Direct evidence is preferable to circumstantial evidence, and opinion evidence has value only if an expert gives it. Hearsay evidence, while admissible (if relevant), carries little or no weight.

## Appendix B Additional Guidance and Jurisprudence

### 1 Adjournments to seek a temporary resident permit

The person concerned or that person's counsel may request an adjournment to seek a temporary resident permit (TRP). The hearings officer should oppose such adjournment requests unless satisfied that the person concerned deserves such a permit, or the hearings officer has received notification that the Minister of Public Safety and Emergency Preparedness wishes to review the case. Thus, in assessing whether in the opinion of the hearings officer the person deserves a TRP, the case file should be reviewed carefully to see whether any previous reviews have been conducted.

In *Prasad v. Canada (Minister of Employment and Immigration)*, the Supreme Court upheld the adjudicator's (now member of the Immigration Division's) refusal to adjourn because the person concerned had from June 6, 1984 until November 21, 1984, the date when the hearing was scheduled to proceed, to make the application, but a letter was not sent to the Minister's office until November 16, 1984. The judge notes in his reasons:

"The logic of the appellant's submission would thus require that the [member of the Immigration Division] adjourn the [admissibility hearing] whenever the result of that [hearing] has the potential to inhibit the subject of that [hearing] from pursuing an alternative remedy. This would amount to reading into the legislation an automatic stay. [I]t is untenable to hinder the [Immigration Division] process under the *Immigration Act*, 1976 by laying down such an inflexible rule for the conduct of an [admissibility hearing]" (paragraph 24)

See also:

- *Canada (Minister of Employment and Immigration) v. Widmont*.
- *Louhisdon v. Canada (Minister of Employment and Immigration)*.
- *Murray v. Canada (Minister of Employment and Immigration)*.

### 2 Adjournments for humanitarian considerations

The person concerned or that person's counsel may request an adjournment to examine humanitarian considerations:

*Jiminez-Perez v. Canada (Minister of Employment and Immigration)*; *Green v. Canada (Minister of Employment and Immigration)*; *Koutsouveli v. Canada (Minister of Employment and Immigration)*; *Chhokar v. Canada (Minister of Employment and Immigration)*.

In *Green v. Canada (Minister of Employment and Immigration)*, the Federal Court of Appeal noted that the *Jiminez-Perez* case did not require that the adjudicator (now member of the Immigration Division) who receives an application pursuant to Section A115(2) (now A25(1)) during an inquiry (now admissibility hearing) adjourn immediately until the Minister or his delegate renders a decision on the application. The member of the Immigration Division is required to proceed with the hearing as expeditiously as is possible under the circumstances of each individual case. Likewise the power of the member of the Immigration Division to adjourn is restricted to adjournments "for the purpose of ensuring a full and proper admissibility hearing."

See also:

- *Chhokar v. Canada (Minister of Employment and Immigration)*,

- In *Koutsouveli v. Canada (Minister of Employment and Immigration)* (paragraph 13), the Federal Court, Trial Division, noted that an application for an exemption submitted under section A115(2) [now A25(1)] in no way permits the hearing under A27 (now A44) to be stayed.

In *Canada (Minister of Citizenship and Immigration) v. Fox*, the Federal Court noted that the Immigration Division did not have any discretion to consider humanitarian and compassionate factors at the admissibility hearing (paragraph 42). The Immigration Division's "decision to grant the adjournment was driven by its desire to allow the respondent to remain with his family and to benefit from his day parole" (paragraph 41).

In this case, the member granted the respondent a 13-month adjournment of his admissibility hearing for a section A36(1)(a) allegation of IRPA.

- [39] Once a section 44 Report is referred to the Immigration Division for an admissibility hearing, pursuant to subsection 162(2) and paragraph 173(b) of the IRPA, the admissibility hearing must be heard as quickly as the circumstances and the considerations of procedural fairness and natural justice permit and without delay. The Tribunal's function at the admissibility hearing is exclusively to find facts. If the member finds the person is a person described in paragraph 36(1)(a) of the IRPA, then pursuant to paragraph 45(d) of the IRPA and paragraph 229(1)(c) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, the Tribunal must issue a deportation order against the person.

### **3 Adjournments for additional evidence or arguments**

The hearings officer, the person concerned, or counsel may request an adjournment to obtain additional evidence or to prepare a legal or constitutional argument or submission.

Under Section 57 of the *Federal Court Act*, clients or their counsel must give the Attorney General of Canada and each of the ten provinces ten days' notice of their intention to raise a constitutional question.

### **4 Adjournments for a change of venue**

The member of the ID may grant an adjournment to allow for a change of venue, if the member decides that such a change is necessary for holding a full and proper admissibility hearing. The member of the ID will hear from both parties before making a decision. For further information see the *Immigration Division Rules*, rule 42.

### **5 Adjournments in an admissibility hearing pending a ministerial relief application**

A person concerned who is inadmissible under A34(1) A35(1) and A37(1), except a person who has committed or was complicit in human rights violations as described in A35(1), can submit a request for relief to the Minister. An applicant bears the onus of satisfying the Minister that his/her presence in Canada would not be contrary to the national interest [A42.1(1)].

In *Poshteh v. Canada (Minister of Citizenship and Immigration)* (paragraph 10), dated April 8, 2005, the Federal Court of Appeal ruled that there is no temporal aspect to A34(2), and by implication, to A35(2), to A37(2) [now A42.1(1)]. Thus, the person concerned can apply for ministerial relief, at any time, even after a finding of inadmissibility.

## ENF 3 Admissibility, Hearings and Detention Review Proceedings

Following the legislative change to consolidate ministerial relief into one section of IRPA, namely subsection 42.1(1), *Poshteh* remains relevant.

The hearings officer should oppose applications for adjournment of an admissibility hearing based on a pending ministerial relief application.

## Appendix C Manager's approval to appear

**Foss ID:**  
**ID file number:**

### MANAGER'S APPROVAL

MANAGER'S APPROVAL for Hearings Officer to appear in person at A36(1)(a) admissibility hearing due to exceptional circumstances

Requested by \_\_\_\_\_, Hearings Officer/Hearings Advisor.

Hearings Officer recommendation to Manager to appear in person in exceptional circumstances for A36(1)(a) admissibility hearing scheduled on \_\_\_\_\_ based on the following exception(s):

- Jurisdictional arguments
- Constitutional challenges are being argued and the issue has not previously been addressed by the higher court enabling the Minister to make written submissions.
- The PC is detained on immigration hold and the ID combines the admissibility hearing and the detention review on the same day.

#### Justification:

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- **Manager approves**
- **Manager does not approve**

#### Justification:

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Manager name \_\_\_\_\_ Date \_\_\_\_\_

Signature \_\_\_\_\_



## Appendix D Application Pursuant to Rule 38

Foss ID:  
ID file number:

### IMMIGRATION AND REFUGEE BOARD

#### IMMIGRATION DIVISION

**BETWEEN:**

**The Minister of Citizenship and Immigration**

**Applicant**

**and**

**Name of Person concerned**

**Respondent**

#### APPLICATION

*Pursuant to Rule 38 of IRPA Immigration Division Rules*

**In the matter of an Admissibility Hearing pursuant to s. 44(2) of the *Immigration and Refugee Protection Act* (“Act”) between *Name of Person Concerned* and the *Minister of Citizenship and Immigration*, the Minister brings an Application, pursuant to s. 38 of the Immigration Division Rules, between the Minister (“Applicant”) and *Name of Person Concerned* (“Respondent”)**

**TAKE NOTICE** that the Applicant applies for an ORDER by the Division to release the Applicant from any obligation to appear or present evidence in person including any obligation under rules 42(3), 43(3) and 48 of the Immigration Division Rules. The Applicant wishes to participate in the hearing by the following written submissions only.

**FURTHER TAKE NOTICE** that the grounds for this motion are as follows:

1. It is the Applicant’s position that the required elements for serious criminality are as follows and the inadmissibility allegation is established based solely on the evidence disclosed herein.
  - Is the person a Permanent Resident?
  - Have they acquired Canadian Citizenship?
  - Were they convicted of an offence in Canada under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or for which a term of imprisonment of more than six months has been imposed.
2. It is the Applicant’s position that the physical presence of the Minister is not required since our written submissions below will be identical to those we would make orally at the admissibility hearing.

#### OVERVIEW

3. Pursuant to s. 44(2) of the *Immigration and Refugee Protection Act* (the "Act"), the Immigration Division (ID) has jurisdiction to hear an admissibility hearing of a s.44 report referred to their division.
4. The CBSA referred a section A44(2) report to the Immigration Division on \_\_\_\_\_ (date of report) as it relates to the Respondent.
5. It is the position of the Applicant that the Respondent is inadmissible to Canada pursuant to section A36(1)(a) of the *Act*
6. Pursuant to Rule 26 of the Immigration Division Rules, attached are the Applicant's disclosure documents for the hearing, consisting of the following:
  - o [List evidence attached:]
  - o Page 1 Proof of identity
  - o Page 2 Proof person concerned is not a Canadian Citizen
  - o Page 3 Record of landing/confirmation of permanent residence
  - o Page # Certificate of conviction issued by the Provincial Court
    - Page #. Copy of relevant section of the *Criminal Code of Canada* (including cover page of CCC and publication date)

## FACTS

7. The Respondent was born on \_\_\_\_\_ (DOB) in \_\_\_\_\_ (COB). (Refer to Applicant's exhibit page)
8. On \_\_\_\_\_ (date of landing), the Respondent became a permanent resident of Canada. The Respondent is not a Canadian Citizen. (Refer to Applicant's exhibit page)
9. The **Respondent** was found/pled guilty of \_\_\_\_\_ (name offence) and was convicted on \_\_\_\_\_ (date of conviction). The Respondent received a sentence of \_\_\_\_\_ (sentence received). (Refer to Applicant's exhibit page)
10. The *Criminal Code of Canada* (CCC) is an Act of Parliament. An offence under section \_\_\_\_\_ (name section) of the CCC is punishable by a maximum term of imprisonment of at least 10 years. (**or ADD** if receive a sentence of more than six months of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed) The Applicant submits the evidence shows that the Respondent received a conviction of more than six months, namely \_\_\_\_\_ (sentence received). (Refer to Applicant's exhibit page)
11. We submit that all elements of A36(1) have been met: the Respondent is not a Canadian Citizen but is a Permanent Resident who has been convicted of an offence under an Act of Parliament, namely the CCC, punishable by a maximum term of imprisonment of at least 10 years. (**OR ADD** for which a term of imprisonment of more than six months has been imposed).

## APPROPRIATE STANDARD OF PROOF

12. Pursuant to section A33 of the Act, the Applicant submits that the appropriate standard of proof is reasonable grounds to believe.

## DECISION SOUGHT

13. The Applicant requests that the Member find the Respondent described on grounds of serious criminality pursuant to section 36(1)(a) of the Act.
14. Should the Board conclude that the Respondent is described, the Applicant requests that the Member issue a deportation order pursuant to section 229(1)(c) of the *Immigration and Refugee Protection Regulations* and provide a copy of the order to the Minister by facsimile.
15. However, if the Member determines that the report against the Respondent is not well founded, the Minister respectfully requests the decision and reasons along with a CD of the proceedings be sent to the Minister as soon as possible.

**EXCEPTIONAL CIRCUMSTANCES**

13. The Applicant respectfully requests notification of any postponement requests regarding jurisdiction or constitutional challenges. The Applicant is cognizant that there may be applications by counsel or the person concerned for postponement relating to acquiring counsel or translators etc.; the Minister would not oppose these types of postponements any longer than eight (8) weeks. The Applicant would however oppose any postponement requests outside the jurisdiction of the Immigration Division such as appeals to reduce criminal sentencing etc. [*Fox v. Canada (Citizenship and Immigration)* 2009 FCA 346]
14. The Applicant further maintains the right to appear in person or respond in writing to issues that may arise relating to the validity of the report.

All of which is respectfully submitted this \_\_\_\_\_ (day) day of \_\_\_\_\_ (month), \_\_\_\_\_ (year).

Name of Hearings Officer's address of regional office

Phone: (area code) number

FAX: (area code) number

c.c.

Person Concerned

Counsel of record if applicable