



Citizenship and
Immigration Canada

Citoyenneté et
Immigration Canada

PP 3

Pre-removal Risk Assessment (PRRA)

PP 3 – Pre-removal Risk Assessment (PRRA)

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Updates to chapter

Listing by date:

Date: 2009-07-24

Section 7 (Roles and Responsibilities) has been enhanced to include guidance to PRRA Coordinators and PRRA Officers, should a real, potential or apparent bias be encountered or alleged.

Date: 2008-09-05

Extensive Changes were made to PP 3 in order to reflect changes in policy resulting from jurisprudence of the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada; as well as changes in Ministerial delegations to the jurisdiction of PRRA decision-makers. Changes include:

- criteria to be applied in the assessment of PRRA applications;
- protection from refoulement of protected persons and persons found to be Convention refugees in other countries; and
- review of stays of removal afforded under Subsection 114(1) of the *Immigration and Refugee Protection Act* to persons not entitled to refugee protection.

Specific changes include references, at section 3, to regulatory provisions governing the PRRA process, and at sections 3.1 to 3.3, to forms and letters used by officers involved in the process. Section 5 is amended to provide more precise policy guidance. Sections 8 to 12 have been restructured and reorganized to provide a better flow to the process. Section 13 provides instructions on applications where the evidence raises the possibility that the applicant may be excluded from refugee protection. Section 16 expands on instructions with respect to the vacation of PRRA decisions, while section 17 outlines the process for re-visiting Ministerial stays of removal. Information on processing “H&C with risk” applications is now contained only in IP5. Section 19 contains instructions governing the assessment of exceptions to the *non refoulement* principle, where Convention refugees or protected persons are facing removal from Canada.

Date: 2005-12-14

Changes were made to PP 3 in order to reflect the policy responsibility and service delivery transition from Citizenship and Immigration Canada (CIC) to the Canada Border Services Agency (CBSA). References to CIC and CBSA officers and the Minister of C&I (Citizenship and Immigration Canada) and the Minister of PSEP (Public Service and Emergency Preparedness) were made where appropriate, and other minor changes were made.

PP 3 – Pre-removal Risk Assessment (PRRA)

1. What this chapter is about

This chapter focuses on uniform procedures to assist Pre-Removal Risk Assessment (PRRA) officers in assessing PRRA applications, as well as to assist others involved in the process. Adherence to standard procedures will assist in the delivery of timely and fair decisions.

2. Program objectives

The *Immigration and Refugee Protection Act* (IRPA) provides that, with certain exceptions, persons in Canada may, in accordance with the Regulations, apply to the Minister of Citizenship and Immigration (C&I) for protection if they are subject to a removal order that is in force.

The mechanism provided for the evaluation of such applications is the Pre-removal Risk Assessment (PRRA). For most applicants, a positive determination results in the granting of refugee protection and the opportunity to apply for permanent residence as a protected person. However, for applicants described in A112(3) [such as persons who are inadmissible on grounds of serious criminality], a positive determination simply stays the execution of the removal order. A negative determination in either case results in resumption of removal arrangements.

The policy basis for assessing risk prior to removal is found in Canada's domestic and international commitments to the principle of *non-refoulement*. This principle holds that persons should not be removed from Canada to a country where they would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment. Such commitments require that risk be reviewed prior to removal.

PRRA has the same protection objectives as the refugee determination process at the Immigration and Refugee Board of Canada (IRB). It is based on the same grounds and confers the same degree of refugee protection, except in cases described in A112(3). PRRA responds to Federal Court jurisprudence, which requires that an assessment be made for persons who allege risk upon removal. It also responds to Supreme Court jurisprudence, which suggests that everyone, including serious criminals and persons who pose a threat to national security, are entitled to a risk assessment.

3. The Act and Regulations

PRRA officers are responsible for assessing the risk an applicant might face in the country to which they are facing removal. Officers should be familiar with the legislative and regulatory authorities contained within the *Immigration and Refugee Protection Act* and the Regulations. The following authorities should assist the decision-maker and others involved in the wider process.

FOR INFORMATION ABOUT:	REFER TO:
Conferral of refugee protection Refugee protection is conferred on a person when <ul style="list-style-type: none">the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;the Board determines the person to be a Convention refugee or a person in need of protection; orexcept in the case of a person described in A112(3), the C&I Minister allows an application for protection.	A95(1) A95(1)(a) A95(1)(b) A95(1)(c)
Protected person A protected person is a person on whom refugee protection is conferred under	A95(2)

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A95(1), and whose claim or application has not subsequently been deemed to be rejected under A108(3), A109(3) or A114(4).	
<p>Convention refugee</p> <p>A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,</p> <ul style="list-style-type: none"> • is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or • not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country. 	<p>A96</p> <p>A96(a)</p> <p>A96(b)</p>
<p>Person in need of protection</p> <p>A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally</p> <ul style="list-style-type: none"> • to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the <i>Convention Against Torture</i>; or • to a risk to their life or to a risk of cruel and unusual treatment or punishment if: <ul style="list-style-type: none"> ◆ the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country, ◆ the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, ◆ the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standard, and ◆ the risk is not caused by the inability of that country to provide adequate health or medical care. 	<p>A97(1)</p> <p>A97(1)(a)</p> <p>A97(1)(b)</p> <p>A97(1)(b)(i)</p> <p>A97(1)(b)(ii)</p> <p>A97(1)(b)(iii)</p> <p>A97(1)(b)(iv)</p>
<p>Persons in need of protection</p> <p>A person in Canada who is a member of a class of persons prescribed by the Regulations as being in need of protection is also a person in need of protection.</p>	A97(2)
<p>Exclusion - Refugee Convention</p> <p>A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.</p>	A98
<p>Application for protection</p> <p>A person in Canada, other than a person referred to in A115(1), may, in accordance with the Regulations, apply to the C&I Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in A77(1).</p>	A112(1)
<p>Exception</p> <p>Despite A112(1), a person may not apply for protection if</p> <ul style="list-style-type: none"> • they are the subject of an authority to proceed issued under section 15 of the <i>Extradition Act</i>, • they have made a claim to refugee protection that has been determined under A101(1)(e) to be ineligible; • in the case of a person who has not left Canada since the application for 	<p>A112(2)</p> <p>A112(2)(a)</p> <p>A112(2)(b)</p> <p>A112(2)(c)</p>

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<p>protection was rejected, the prescribed period has not expired; or</p> <ul style="list-style-type: none"> in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected. 	A112(2)(d)
<p>Restriction</p> <p>Refugee protection may not result from an application for protection if the person</p> <ul style="list-style-type: none"> is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality; is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada 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; made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or is named in a certificate referred to in A77(1). 	<p>A112(3)</p> <p>A112(3)(a)</p> <p>A112(3)(b)</p> <p>A112(3)(c)</p> <p>A112(3)(d)</p>
<p>Consideration of application</p> <p>Consideration of an application for protection shall be as follows:</p> <ul style="list-style-type: none"> an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection; a hearing may be held if the C&I Minister, on the basis of prescribed factors, is of the opinion that a hearing is required; in the case of an applicant not described in subsection A112(3), consideration shall be on the basis of sections A96 to A98; in the case of an applicant described in subsection A112(3), consideration shall be on the basis of the factors set out in section A97 and <ul style="list-style-type: none"> in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada. 	<p>A113</p> <p>A113(a)</p> <p>A113(b)</p> <p>A113(c)</p> <p>A113(d)</p> <p>A113(d)(i)</p> <p>A113(d)(ii)</p>
<p>Effect of decision</p> <p>A decision to allow the application for protection has</p> <ul style="list-style-type: none"> in the case of an applicant not described in A112(3), the effect of conferring refugee protection; and in the case of an applicant described in A112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection. 	<p>A114(1)</p> <p>A114(1)(a)</p> <p>A114(1)(b)</p>
<p>Cancellation of stay</p> <p>If the C&I Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the C&I Minister may re-</p>	A114(2)

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examine, in accordance with A113(d) and the Regulations, the grounds on which the application was allowed and may cancel the stay.	
<p>Vacation of determination</p> <p>If the C&I Minister is of the opinion that a decision to allow an application for protection was obtained as a result of directly or indirectly misrepresenting or withholding material facts on a relevant matter, the C&I Minister may vacate the decision.</p>	A114(3)
<p>Effect of vacation</p> <p>If a decision is vacated under A114(3), it is nullified and the application for protection is deemed to have been rejected.</p>	A114(4)
<p>Protection</p> <p>A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel or unusual treatment or punishment.</p>	A115(1)
<p>Application for protection</p> <p>Subject to R160(2) and for the purposes of A112(1), a person may apply for protection after they are given notification to that effect by Citizenship and Immigration Canada (CIC).</p>	R160(1)
<p>Notification</p> <p>The notification shall be given</p> <ul style="list-style-type: none"> in the case of a person, other than a person referred to in subsections R160(2), who is subject to a removal order that is in force, before removal from Canada; and in the case of a person named in a certificate described in A77(1), on the provision of a summary under paragraph A78(h). 	R160(3) R160(3)(a) R160(3)(b)
<p>When notification is given</p> <p>Notification is given</p> <ul style="list-style-type: none"> when the person is given the application for protection form by hand; or if the application for protection form is sent by mail, seven days after the day on which it was sent to the person at the last address provided by them to CIC. 	R160(4) R160(4)(a) R160(4)(b)
<p>Stay of removal</p> <p>In order for an applicant's removal order to be stayed under R232 an application for protection must be received by CIC within 15 days after the notification is given.</p>	R162
<p>Submissions</p> <p>A person applying for protection may make written submissions in support of their application and for that purpose may be assisted, at their own expense, by a barrister or solicitor or other counsel.</p>	R161(1)
<p>New Evidence</p> <p>A person who makes written submissions must identify the evidence presented that meets the requirements of paragraph A113(a) and indicate how that evidence relates to them.</p>	R161(2)
<p>Application within 15-day period</p>	R162

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<p>An application received within 15 days after notification was given under R160 shall not be decided until at least 30 days after notification was given. The removal order is stayed under R232 until the earliest of the events referred to in paragraphs 232(c) to (f) occurs.</p>	
<p>Application after 15-day period A person who has remained in Canada since being given notification under section 160 may make an application after a period of 15 days has elapsed from notification being given under that section, but the application does not result in a stay of the removal order. Written submissions, if any, must accompany the application.</p>	R163
<p>Subsequent application A person whose application for protection was rejected and who has remained in Canada since being given notification under section 160 may make another application. Written submissions, if any, must accompany the application. For greater certainty, the application does not result in a stay of the removal order.</p>	R165
<p>Application at Port of Entry An application for protection by a foreign national against whom a removal order is made at a port of entry as a result of a determination of inadmissibility on entry into Canada must, if the order is in force, be received as soon as the removal order is made. Written submissions, if any, must accompany the application. For greater certainty, the application does not result in a stay of the removal order.</p>	R166
<p>Hearing - prescribed factors For the purposes of determining whether a hearing is required under paragraph A113(b), the factors are the following:</p> <ul style="list-style-type: none"> • whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in A96 and A97; • whether the evidence is central to the decision with respect to the application for protection; and • whether the evidence, if accepted, would justify allowing the application for protection. 	<p>R167</p> <p>R167(a)</p> <p>R167(b)</p> <p>R167(c)</p>
<p>Hearing procedure A hearing is subject to the following provisions:</p> <ul style="list-style-type: none"> • notice shall be provided to the applicant of the time and place of the hearing and the issues of fact that will be raised at the hearing; • the hearing is restricted to matters relating to the issues of fact stated in the notice, unless the officer conducting the hearing considers that other issues of fact have been raised by statements made by the applicant during the hearing; • the applicant shall respond to the questions posed by the officer and may be assisted for that purpose, at their own expense, by a barrister or solicitor or other counsel; and • any evidence of a person other than the applicant must be in writing and the officer may question the person for the purpose of verifying the evidence provided. 	<p>R168</p> <p>R168(a)</p> <p>R168(b)</p> <p>R168(c)</p> <p>R168(d)</p>
<p>Abandonment An application for protection is declared abandoned</p>	R169

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<ul style="list-style-type: none"> in the case of an applicant who fails to appear at a hearing, if the applicant has been given notice of a subsequent hearing and fails to appear at that hearing; and in the case of an applicant who voluntarily departs Canada, when the applicant's removal order is enforced under R240 or the applicant otherwise departs Canada. 	R169(a)
	R169(b)
<p>Withdrawal</p> <p>An application for protection may be withdrawn by the applicant at any time by notifying the C&I Minister in writing. The application is declared to be withdrawn on receipt of the notice.</p>	R170
<p>Effect of abandonment and withdrawal</p> <p>An application for protection is rejected when a decision is made not to allow the application or when the application is declared withdrawn or abandoned.</p>	R171
<p>Applicant described in A112(3)</p> <p>Before making a decision to allow or reject the application of an applicant described in A112(3), the C&I Minister shall consider the assessments referred to in R172(2) and any written response of the applicant to the assessments that is received within 15 days after the applicant is given the assessments.</p>	R172(1)
<p>Assessments</p> <p>The following assessments shall be given to the applicant:</p> <ul style="list-style-type: none"> a written assessment on the basis of the factors set out in A97; and a written assessment on the basis of the factors set out in A113(d)(i) or A113(d)(ii), as the case may be. 	R172(2)
	R172(2)(a)
	R172(2)(b)
<p>When assessments given</p> <p>The assessments are given to an applicant when they are given by hand to the applicant or, if sent by mail, are deemed to be given to the applicant seven days after the day on which they are sent to the last address that the applicant provided to CIC.</p>	R172(3)
<p>Applicant not described in A97</p> <p>Despite R172(1) to R172(3), if the C&I Minister decides on the basis of the factors set out in A97 that the applicant is not described in that section:</p> <ul style="list-style-type: none"> no written assessment on the basis of the factors set out in A113(d)(i) or (ii) need be made; and the application is rejected. 	R172(4)
	R172(4)(a)
	R172(4)(b)
<p>Re-examination of stay - procedure</p> <p>A person in respect of whom a stay of removal, with respect to a country or place, is being re-examined under A114(2) shall be given</p> <ul style="list-style-type: none"> a notice of re-examination; a written assessment on the basis of the factors set out in A97; and a written assessment on the basis of the factors set out in A113(d)(i) or (ii), as the case may be. 	R173(1)
	R173(1)(a)
	R173(1)(b)
	R173(1)(c)
<p>Assessments and response</p> <p>Before making a decision to cancel or maintain the stay of removal order, the C&I Minister shall consider the assessments and any written response of the applicant that is received within 15 days after the assessments are given to the applicant.</p>	R173(2)

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When assessments given The assessments are given to an applicant when they are given by hand to the applicant or, if sent by mail, are deemed to be given to the applicant seven days after the day on which they are sent to the last address that the applicant provided to CIC.	R173(3)
Reasons for decision After making a decision to allow or reject an application for protection, the C&I Minister shall, on request, give the applicant a copy of the file notes that record the justification for allowing or rejecting the application.	R174

3.1. Forms required

PRRA applications and most related documentation are issued to applicants by CBSA removals officers. As they are not available on the Internet, the following sites are not accessible to the public.

IMM 5503E Applying for a Pre-removal Risk Assessment: Unsuccessful Refugee Protection Claimants (Guide and form IMM 5508E)

<http://www.ci.gc.ca/cicexplore/english/form/imm5500/IMM5503E.pdf>

Purpose: Individuals who were:

- unsuccessful in a refugee claim;
- ineligible to make a refugee claim; or
- unsuccessful in a prior PRRA

and who are now facing removal, may apply for protection using this application.

IMM 5508E Application for a Pre-removal Risk Assessment

Purpose: Generic form used to gather information for making a risk assessment for individuals who are facing removal and who wish to apply for protection under PRRA.

<http://www.ci.gc.ca/cicexplore/english/form/imm5500/IMM5508E.pdf>

IMM 5523E Applying for a Pre-removal Risk Assessment: Applicants described in Section 112 (3) (Guide and form IMM 5508E)

Purpose: To give individuals who are described in Section 112 (3) of the *Immigration and Refugee Protection Act*, and who are now facing removal, the opportunity to apply for protection.

<http://www.ci.gc.ca/cicexplore/english/form/imm5500/IMM5523E.pdf>

IMM 5535E Application for a Risk Assessment further to Section 115(1) of the *Immigration and Refugee Protection Act*.

Purpose: Individuals who:

- are not entitled to apply for a Pre-Removal Risk Assessment; and
- are described in Section 115(1) of the *Immigration and Refugee Protection Act* and who are now facing removal, may apply for protection using this application

<http://www.ci.gc.ca/cicexplore/english/form/imm5500/IMM5535E.pdf>

3.2. Letters – Pre-Removal Risk Assessments (PRRA)

1. POE/Inland
2. Advance Information
3. PRRA Notification – Failed Claimants
4. PRRA Notification – Non-claimants
5. Statement of No Intention

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6. 1st Hearing
7. 2nd Hearing
8. Withdrawal
9. Abandonment – Hearing
10. Abandonment – Departed from Canada
11. Application Accepted – non-112(3)
12. Application Accepted – 112(3)
13. Application Rejected – non-112(3)
14. Application Rejected – 112(3)
15. Subsequent application
16. PDRCC
17. May not apply 112(2)
18. Opened in error

3.3. Letter – 115(1) Risk Assessment

Notification of 115(1) Risk Assessment

4. Instruments and delegations

Designations and delegations can be found in IL 3 – Designation of Officers and Delegation of Authority http://www.ci.gc.ca/Manuals/index_e.asp

Both PRRA officers and select NHQ officials are delegated to make PRRA decisions. Assessment of the factors set out in A113(d)(i) and (ii), however, is carried out only by NHQ officials of the CBSA and CIC, respectively.

5. Departmental policy

5.1. General

PRRA is found in Division 3 of Part 2 of the *Immigration and Refugee Protection Act* (IRPA), and assists in ensuring that Canada's immigration and refugee protection system meets its international obligations, as well as those under the *Canadian Charter of Rights and Freedoms*.

PRRA applications – except those of persons described in A112(3) – are considered on the same consolidated protection grounds considered by the IRB. These grounds consist of the those identified in: the *Geneva Convention relating to the Status of Refugees*; the *United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* ('*Convention against Torture*'); as well as risk to life or risk of cruel and unusual treatment or punishment, as provided in the IRPA.

Approved applications (other than 112(3) ones) result in the same refugee protection afforded persons whose refugee claims are approved by the IRB.

In the majority of cases, PRRA is carried out through a paper review process. However, in order to ensure that PRRA officers have all the tools necessary to ensure a fair and effective risk review, the IRPA also gives them the discretion to hold an oral hearing in certain exceptional cases, based on a series of criteria identified in the Regulations.

With limited exceptions outlined in A112(1) and A112(2), persons who are subject to a removal order that is in force may apply for PRRA. With the exception of Port of Entry and Subsequent

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PRRAs, persons must first be notified by the CBSA of their entitlement to apply. PRRA candidates may be divided into five overall categories:

- persons whose refugee claim has been rejected (this includes withdrawn or abandoned claims);
- persons whose refugee claim is ineligible for referral to the IRB, except those that are ineligible vis-à-vis the Safe Third Country Agreement [A101(1)(e)];
- individuals who left Canada following a rejected refugee claim or PRRA, and more than six months have passed since their departure from Canada;
- previous PRRA applicants who are still in Canada; and
- Other individuals who never previously sought refugee protection in Canada, and are now facing removal.

In cases where the applicant had a refugee hearing before the IRB, the PRRA is restricted to **new evidence** that arose after the rejection or evidence that was not reasonably available at the time of the rejection.

A PRRA application is not an appeal of a negative refugee claim decision, but rather an assessment based on new facts or evidence demonstrating that the person is now at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment.

In other cases where there has never been a previous risk determination, such as ineligible claimants, there would be no risk information on file and PRRA officers base their determination of risk on any written evidence the applicant may wish to present for consideration.

Although the A113(a) new evidence rule does not apply to repeat PRRA applications, the administrative law principle of *issue estoppel* applies to subsequent PRRA applications as a matter of binding Federal Court and Supreme Court of Canada jurisprudence. *Issue estoppel* is a form of *res judicata*—a rule by which a final judgement by a court is conclusive upon the parties in any subsequent litigation involving the same cause of action. If the same question has been decided in a previous PRRA decision that is final, the officer may limit the subsequent PRRA to a re-examination of the evidence in light of any changes that have occurred since the initial decision. However, the officer has discretion to decline to apply estoppel in appropriate, though limited, circumstances if it would be in the interests of justice to do so. For example, the officer may consider reasons why, with reasonable diligence, evidence that was available when the previous PRRA application was made could not have been presented at that time. The officer must state whether or not issue estoppel is being applied to the subsequent PRRA (or what issues are subject to the principle) and provide reasons. See *Vasquez v. MCI*, IMM-1979-97, F.C.T.D. (16 Sept 1998); *Chowdhury v. MCI*, [2003] FCJ No.1333, (9 Sept 2003); *Casseus v. MCI*, 2003 FCT 472 (23 Apr 2003).

5.2. The *Charter* and PRRA

Canada is bound by the *Canadian Charter of Rights and Freedoms* and international obligations to assess risk prior to removing an individual to a country of alleged persecution or risk of torture, to life, or of cruel or unusual treatment or punishment. PRRA stems from these obligations. While PRRA officers do not have the authority of a Court to rule on the constitutionality of legislative provisions, they are required to apply the law in a manner consistent with the *Charter*.

Some PRRA applications raise *Charter* issues. Particular examples would be the application of A97(1)(b)(iii), where the applicant would face the prospect of the death penalty, the application of A97(1)(b)(iv), where the applicant would face the prospect of imminent death because of the lack of access to critical medical treatment, or the application of A113(a), where the evidence that the applicant wishes to submit would be compelling, with respect to both the probability and the severity of the risk that the applicant would face.

When these and similar issues are raised by the evidence submitted by the applicant, the PRRA officer, through the coordinator, will seek legal advice on the *Charter* implications of the decision to be rendered, and the proper interpretation of the law in light of the *Charter*. The coordinator will

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refer the request to the departmental legal services, through Operation Management and Coordination (OMC). The PRRA officer will defer a decision on the application until legal advice is provided by OMC.

5.3. Who can apply for PRRA?

Persons in Canada, other than persons referred to in A115(1) (protected persons or persons recognized as a Convention refugee by a country to which they may return), may apply for PRRA if they are subject to a removal order that is in force or are named in a security certificate described in A77(1). It is important to note that, with the exception of Port of Entry and Subsequent PRRAs, persons may not apply before being given notification of their entitlement to do so. Exceptions to those who may apply are set out at A112(2).

For more information on who can apply for PRRA, see sections 5.5 to 5.10 below. For information on who cannot apply, see sections 5.11 to 5.15.

5.4. Regulatory stay of removal

When a person is notified (as per R160) of their entitlement to apply for PRRA, the removal order against them becomes subject to a regulatory stay of removal (R232). Notification is normally done in person, by a Canada Border Services Agency (CBSA) removals officer, who provides the candidate with a PRRA application kit. If the person applies within the 15-day application period (7 additional days are provided to those who are notified by mail), the stay is maintained until a decision on the application is made. See section 8.1 for information on calculating the application period.

5.5. Unsuccessful refugee claimants

Persons whose refugee claims are rejected by the IRB are given a CIC document titled 'Advance Information Regarding the Pre-removal Risk Assessment'. This introduces the PRRA and informs the person that they may later be found entitled to apply.

Many failed refugee claimants pursue recourses that suspend their removal. Once their removal order comes into force and no statutory or regulatory stay applies, they are in a position to be notified of their entitlement to apply for PRRA.

Once the person is removal-ready (see ENF 10, section 15.3 for information on removal readiness), CBSA issues a 'PRRA Notification,' advising them that they are entitled to apply for PRRA. The notice (see section 3.2, item 3) informs the person that they have 15 days in which to apply, plus an additional 15 days in which to provide written submissions in support of their application. The address to which everything must be sent is specified in the PRRA Notification package.

Evidence provided by previous refugee claimants is limited to that which arose after the rejection of their claim by the IRB or evidence that was not reasonably available or that the applicant could not reasonably have been expected in the circumstances to have presented to the IRB at the time of the rejection of the claim [A113(a)].

5.6. Repeat refugee claimants

A rejected refugee claimant does not have access to determination of another refugee claim. Where such a person left Canada after rejection of their claim, at least six months must have passed since their departure before they may apply for PRRA. Once a repeat claimant's removal order comes into force, they are given the PRRA Notification.

5.7. Repeat PRRA applicants

A previous PRRA applicant (including one whose application was abandoned or withdrawn) may apply for a subsequent PRRA, but this does not entail a statutory stay of removal. Repeat PRRA

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applicants have their application assessed only in terms of risk factors arising since the last PRRA assessment, in accordance with the administrative law principle of *issue estoppel*, unless the officer is satisfied that it would be in the interests of justice to revisit an issue dealt with in a previous PRRA. See section 5.1 for more information on *issue estoppel*.

A person who left Canada after rejection of their previous PRRA may not apply for another PRRA unless at least six months have passed since their departure. Someone for whom less than six months have passed since their departure will be advised in a letter titled 'Status of your Application for a Pre-removal Risk Assessment' that they are not entitled to apply. The officer making the application entitlement determination issues this letter, which is found in section 3.2 (item 17). Should the PRRA officer be the party to discover this non-entitlement to apply, the PRRA officer issues the letter.

5.8. Applicants described in A112(3)

In keeping with the principle that individuals such as serious criminals are excluded from refugee protection under the provisions of the Geneva Convention, applications submitted by persons described in A112(3) are not assessed against Convention grounds.

See section 9 for 112(3) procedures.

5.9. Persons subject to security certificates

Permanent residents or foreign nationals may be the subject of a certificate signed by the C&I Minister and the Minister of Public Safety (formerly Public Safety and Emergency Preparedness) stating that they are inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality [A77(1)].

Instructions in light of Bill C-3 are under development. Please contact Operational Management and Coordination (OMC) for guidance on security certificate cases.

5.10. Who cannot apply for PRRA?

Outlined below in sections 5.11 to 5.14 are persons who cannot apply for PRRA. The exceptions generally relate to persons who already have protection or have other means of seeking protection.

5.11. Protected persons and Convention refugees

A115(1) provides that a protected person or a person who is recognized as a Convention refugee by another country to which they may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion; or at risk of torture or cruel and unusual treatment or punishment. A115(2) provides exceptions to this protection against refoulement, for those who are inadmissible on grounds of serious criminality, of being a security risk, of violating human or international rights, or of organized criminality; and who in the opinion of the C&I Minister are also a danger to the Canadian public, a danger to the security of Canada or (by reason of the nature and severity of the acts committed) should not be allowed to remain in Canada. Pursuant to A112(1), persons described in A115 cannot apply for PRRA.

However, persons described in A115(1) may apply for an assessment of the risk they would face in the country or countries to which they can be removed. For example, applicants may assert that they are at risk in a country that has granted them Convention refugee status and to which they can be returned. The procedures with respect to such cases are found in section 19.

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5.12. Persons subject to an authority to proceed under the *Extradition Act*

The Authority to Proceed (ATP) issued under section 15 of the *Extradition Act* is issued by the Department of Justice once it has sufficient documentation from the requesting country to proceed. A confirmation of the ATP is sent to CIC's Case Management Branch and EII Lookout is placed in FOSS indicating that the ATP has been issued. A person against whom an ATP has been issued is not entitled, pursuant to A112(2)(a), to apply for PRRA. If the ATP is issued after the PRRA application has been made, the officer assigned to assess the application should consult with Operational Management and Coordination.

5.13. Claimants coming from a safe third country

A person is not entitled, pursuant to A112(2)(b), to apply for PRRA if their claim for refugee protection was determined to be ineligible because they came to Canada directly or indirectly from a safe third country; that is a country designated by the Regulations, other than the person's country of nationality or, if the person is stateless, the person's country of former habitual residence. To date, only the United States of America has been designated.

5.14. Six-month rule

A person is not entitled to apply for PRRA if they left Canada after rejection of a previous refugee claim or PRRA, and less than six months have passed since their departure [A112(2)(d)].

5.15. Duty to disclose adverse information

It is a fundamental matter of procedural fairness that the applicant knows the case to be met. If the PRRA officer possesses information that would persuade them to decide against the applicant, and the applicant is unaware of that information, they must be given an opportunity to respond. In some cases, the information may be classified, or not directly releasable. The applicant still must have an opportunity to rebut the evidence. In such situations, the PRRA officer will provide the applicant with an unclassified précis of the information. For instance, this situation will be applicable in cases where the applicant is the subject of a security certificate. The précis will have to provide sufficient information to enable the applicant to adequately prepare a rebuttal and, at the same time, protect the classified evidence. The officer will give the applicant 15 days to respond.

Courts have distinguished between extrinsic and intrinsic evidence. Extrinsic evidence is evidence that is not publicly available, and of which the applicant is unaware. If the PRRA officer intends to rely on extrinsic evidence, it must be disclosed to the applicant. Public and widely available information is not considered extrinsic evidence, and need not be disclosed to the applicant. This is information that is found in public documentation, including that accessible on the Internet, such as well known human rights reports or information found at the IRB Research Directorate. Evidence that was before the IRB at the time of the consideration of the claim and that forms part of the IRB file need not be disclosed to the applicant.

With particular reference to information obtained through Internet research:

- Copies of all documents obtained from the Internet [other than "standard documents" such as well known human rights reports and information found at the IRB Research Directorate] and used in the decision-making process will be retained on the case file [this will ensure not only that the document is available for review by the Court, but also that the "version" of the document available to the Court is the same as that consulted by the officer];
- Subject to the following paragraph, officers will retain discretion with regard to whether a document should be shared with the applicant prior to rendering a decision, if it can be demonstrated that the document is "publicly accessible" ["publicly accessible" documents should originate with reliable sources, and should be available at sites directly related to the source, rather than through cross-references from other sites, the reliability of which may not be as well established];

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- Where a document post-dates the submission of the applicant, or where the date of publication is not clearly indicated, officers will share with the applicant, prior to rendering a decision, any document that shows changes in the country conditions that could affect the decision;
- Officers may seek responses from applicants with respect to any relevant documentation that comes to light, and on which they intend to rely, but they retain the authority, pursuant to R167, to determine whether an oral hearing is required.

See *Zamora v. MCI*, 2004 FC 1414 (14 Oct 2004) for more details. See also IMM-656-03 Gnanaseharan Selliah (17 June 2004)

5.16. Decision in writing

The following principles and techniques will help in the preparation of well-written and defensible decisions.

Good organization is indispensable to effective writing. All decisions should begin with the decision to be made and the identified risk issues should be outlined to highlight the most important aspects. This does not involve repeating the whole case, but simply highlighting the most important details as a framework for the analysis and decision.

It is important to show that you have carefully analyzed the case, weighed all of the evidence, and balanced the treatment you have given to the evidence considered. The decision should be based on the evidence presented and researched, supported by the factual weight of the evidence itself. The decision should not be based on any preconceived bias or information. The research should be fresh and show that you have addressed the individual case. Each PRRA applicant is entitled to a fully independent assessment of the facts.

To a certain extent, the method of conveying the decision can be influenced by the submissions received. Whatever your personal style, thorough decisions will fully identify the issues and the relevant facts, will provide an analysis of facts and issues and will clearly and concisely rationalize the decision made. The decision should be clear, **concise**, logical and factual. The source material should be identified in the decision. Photocopies of articles cited may be kept on file for future reference especially material that is specific to the applicant, not widely available or subject to frequent updates.

The reasons for the decision should be **short and concise** and address the issues raised. It is not necessary for you to write volumes to explain your decision. Brevity is advised and will assist in focusing on case specific issues.

Decisions have to be written with a sense of the audience: principally the applicant and the applicant's authorized representative, and occasionally, a third party reader. Consequently, the rationale or reason for the determination made should be fully transparent. To the extent possible, language and tone should be impersonal, non-judgmental, respectful and impartial.

5.17. PRRA officers' notes

PRRA officers' notes—the analysis and reasons—form the rationale for a decision. They should be clear and concise, address the risk issues alleged by the applicant, and reflect the research conducted. The notes should help the reader reach the same reasoned conclusion. Notes may be written in point form but they must capture the rationale of the issues and the research.

Officers' notes will be provided to the applicant upon request. As the notes form the reasons for a decision, care should be taken to remain non-judgmental, to honestly and accurately reflect research. The notes should show that the PRRA officer made a fair and considered decision. The PRRA officer's consideration of the evidence and the weight afforded it should be apparent. In cases dealing with positive risk pursuant to A112(3), the notes are forwarded to the applicant as part of the rebuttal process.

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5.18. *Functus officio*: After the PRRA decision is made

Once a PRRA officer has reached a final decision, and that fact has been communicated to the applicant, that decision cannot be revisited. See 5.19 below, for procedures when a submission is received after a decision has been made but before that fact is communicated to the applicant. PRRA decision-makers are considered to have performed the task for which they were empowered and consequently no longer have jurisdiction to reconsider or otherwise review their decision. In A112(3) cases in which R172(2)(a) assessments are prepared, the final decision is the one rendered after the *balancing* by the Minister's delegate. The purpose is to impose finality to decision-making.

Functus officio applies in particular to the following situations:

- change of mind;
- error within jurisdiction;
- unreasonableness;
- new evidence that was available;
- change of circumstances;
- consent.

However, the doctrine *functus officio* has some exceptions which render the PRRA officer's decision void or voidable, thus providing the authority for the decision-maker to reconsider the decision. Here are some exceptions applicable in the PRRA context:

- a clerical error;
- an accidental slip or omission;
- fraud;
- the decision is not made yet;
- failure of the decision to address the issue;
- decision void because of jurisdictional error (including errors such as breach of natural justice, making a decision without evidence, etc.).

It should be noted that a change in the country conditions does not justify a review of a PRRA decision. PRRA officers should never revisit their decision without guidance from Legal Services via Operational Management and Coordination (OMC) further to a thorough review of the circumstances of the case. PRRA decisions are subject to judicial review and must comply with the general principles of fairness and administrative law.

5.19. Submissions received after a PRRA decision has been made, but not delivered

PRRA applicants will not usually know that a decision has been made on a PRRA application, until convoked by CBSA for delivery of the decision; the convocation letter states that a decision has been made, but does not indicate the nature of the decision. An applicant may wish, prior to receiving that letter, to present new information or evidence in support of a pending application; the Federal Court, in *Chudal* [2005 FC 1073], has ruled that submissions made by a PRRA applicant, up to the point where the applicant is notified that a decision has been made, must be considered by the PRRA officer. The principle of *Functus officio* does not preclude the making of submissions up to that point.

5.20. Abandonment

R169 provides the conditions under which an application will be declared abandoned. Abandonment applies in the context of lack of attendance at hearings or where the applicant voluntarily departs Canada. Those two scenarios provide an efficient means to close a file where applicants demonstrate that they do not wish to pursue the application.

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In the case of lack of attendance at a hearing, however, R169(a) dictates that the applicant should be afforded a second opportunity to attend a hearing with prior notice; should the applicant fail to appear at the subsequent hearing, the application is declared abandoned.

If an applicant voluntarily departs Canada, the application under PRRA is declared abandoned once the PRRA officer is informed of the departure.

The Regulations provide that the stay of removal, where applicable, will no longer apply once an application for protection is rejected. R171 states that an application for protection is rejected when the application is declared abandoned.

5.21. Withdrawal

R170 provides a legal basis for applicants to withdraw an application for protection. Notice of withdrawal will have been made in writing and the application is declared rejected on receipt of the notice.

5.22. Vacation

The C&I Minister has the authority to annul or set aside a decision to allow a PRRA application that was obtained as a result of directly or indirectly misrepresenting or withholding material facts on a relevant matter. The authority to vacate a decision is contained in A114(3). When a PRRA decision is vacated, the decision is nullified and the application for protection is deemed to have been rejected at the time of the decision to vacate.

5.23. Duration of regulatory and ministerial stays

R232 states that a stay is effective until the earliest of the following events occurs:

- CIC receives confirmation in writing from the person that they do not intend to apply;
- the person does not apply within the period provided under R162 (15 days after notification);
- the application is rejected;
- if a decision to allow the application for protection is made under A114(1)(a) and the person has not applied within the period provided under R175(1) to remain in Canada as a permanent resident, the expiry of that period (180 days);
- if a decision to allow the application for protection is made under A114(1)(a), the decision with respect to the person's application to remain in Canada as a permanent is made; and
- in the case of a person to whom A112(3) applies, the stay is re-examined under A114(2) and the C&I Minister cancels the stay.

Failure of the person to apply for permanent residence, or refusal of the application for permanent residence, does not affect the person's status as a protected person.

5.24. Positive PRRA decisions

A decision to allow a PRRA application normally results in the protected person being able to apply for permanent residence. The applicant is called in by a removals officer, who delivers the PRRA decision by hand. In rare cases, the decision may be mailed to the applicant.

5.25. Country of removal

The country to which the applicant will be removed is in accordance with R241 which states:

R241. (1) If a removal order is enforced under section R239, the foreign national shall be removed to

- (a) the country from which they came to Canada;
- (b) the country in which they last permanently resided before coming to Canada;

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(c) a country of which they are a national or citizen; or

(d) the country of their birth.

(2) If none of the countries referred to in subsection (1) is willing to authorize the foreign national to enter, the PS Minister shall select any country that will authorize entry within a reasonable time and shall remove the foreign national to that country.

(3) Despite section 238 and subsection (1), the PS Minister shall remove a person who is subject to a removal order on the grounds of inadmissibility referred to in paragraph 35(1)(a) of the *Act* to a country that the PS Minister determines will authorize the person to enter.

5.26. Humanitarian and compassionate considerations and risk

Applications for humanitarian and compassionate consideration where a risk of return has been raised will be referred to a PRRA decision-maker as a departmental expert in matters of risk. The steps to be considered by the H&C decision-maker are outlined in sections 13.1 to 13.6 of IP 5, *Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds*.

The authority for officers to consider humanitarian and compassionate applications is stated in A25(1):

A25. (1) The C&I Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the C&I Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the C&I Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

Kim v MCI [2005] FCJ No. 540 supports the proposition that PRRA officers are not mandated to consider humanitarian and compassionate factors in making their decisions, in the absence of an H&C application. The PRRA inquiry and decision making process does not take into account factors other than risk.

Case inventory control

Case inventory control will be the responsibility of the individual PRRA offices. The priority assigned to each case will be the responsibility of the PRRA manager or co-ordinator. Requests from removals offices or CICs to expedite processing of cases should be on a manager to manager or manager-coordinator basis. To ensure the independence of the PRRA decision-maker and avoid any apprehension of bias, there should be no direct contact between removals officers and PRRA officers.

To maintain consistency and the integrity of the PRRA, inventory cases involving families are to be entered for each family member. Although only one decision is taken, it must be entered for each family member in NCMS and FOSS.

Example: Five family members, one decision as a family unit, the decision is entered five times.

The only exception to this rule is if a spouse or older child makes an independent application and presents separate risks from that of the family.

The inventory of removal ready case files will require careful management between CIC and the CBSA

5.27. Notifications and letters

In order to maintain a consistent and uniform approach to program delivery, all offices will use the standard forms. Substantive changes to the letters provided must be made through Operational Management and Coordination (OMC).

The following two notifications are provided to the potential PRRA applicant:

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1. Advance Information - provided primarily by the IRB to failed refugee claimants, this notice introduces the PRRA and informs the recipient that they may later be found entitled to apply.
2. PRRA Notification - provides PRRA candidates with an application form and the time frames to be met.

See section 3.1 for links to these documents.

5.28. National Case Management System (NCMS)

PRRA appears on the Case Tracing tree under a tab called PRRA. There is a complete set of Business Rules created for PRRA, as well as updates to the Risk Review business rules. It is mandatory that PRRA officers complete the case tracing in NCMS to ensure an up-to-date computer reference. One of the important aspects of PRRA in NCMS is the linking of the PRRA process to other processes in the system, particularly the removals process. These important links are clearly identified in the PRRA business rules.

5.29. Field Operations Support System (FOSS)

FOSS remains operational in all offices. Until NCMS is available in all offices, officers or support staff will be required to make entries into both systems. This will enable offices without NCMS to follow the history of a PRRA application and determine the PRRA officer's decision. It is vital that these systems are updated immediately.

5.30. Quality assurance

The PRRA managers or co-ordinators, as well as NHQ staff, review a sample of the decisions of PRRA decision-makers on a regular basis. The purpose of this review is to ensure the integrity of the written decisions. The review is not meant to influence or change the decision of the PRRA officer but only to determine if the PRRA decision-maker has met the guidelines on decision writing and notes suggested in this chapter in sections 5.16 and 5.17 above. The review will confirm that:

- the applicant is eligible for PRRA;
- the time frames for applications and submissions were honoured;
- all of the risks stated by the applicant or counsel were given full consideration;
- the decision is supported by objective evidence available on the file;
- although not submitted, applicable risks were considered;
- the language of the decision is non-judgmental and respectful;
- the decision was not taken in a capricious manner;
- the decision of the PRRA decision-maker has been recorded in both FOSS and NCMS correctly and in a timely manner, and a copy remains on file;
- files are promptly forwarded to the Removals Unit;
- if an oral hearing was held, the three criteria required for an oral hearing were present.

6. Definitions

6.1. Agent of torture

An important element of the definition of torture is that the pain or suffering amounting to torture must be inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity. However, the risk of torture need not be from the State government itself, and may arise, for instance, from an errant police force, the military or

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quasi-public actors (e.g. Tribes responsible for enforcing locally accepted customs, particularly in countries where the rule of law is non-existent).

6.2. Cruel and unusual treatment or punishment

The concept of “cruel and unusual treatment or punishment” is found in section 12 of the *Canadian Charter of Rights and Freedoms*. Therefore, jurisprudence interpreting section 12 is applicable. Notions familiar to section 12 of the Charter are also present in international conventions that Canada has signed, such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, known as the Convention against Torture (CAT) and the *International Covenant on Civil and Political Rights* (ICCPR). Thus, international jurisprudence, while not binding, can provide helpful guidance.

The following propositions, taken from Charter jurisprudence, are applicable:

- the treatment or punishment is of such character or duration that it would outrage the conscience of Canadians or be degrading to human dignity to remove someone to face such treatment or punishment;
- the treatment or punishment is disproportionate to the achievement of a valid social aim, is arbitrarily imposed or is excessive as to not be compatible with human dignity.

These risks include actions that would constitute violations of fundamental human rights, such as – but not limited to – serious affronts to the physical and psychological integrity of the individual.

In *Cruz Varas and others v. Sweden* (15576/89 [1991] ECHR 26 20 March 1991), the European Court of Human Rights explained the minimum threshold of what constitutes inhuman treatment in the following words:

“It is recalled that ill-treatment must attain a minimum level of severity... The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age, and state of health of the victim.”

6.3. Inadmissibility

Applicants who are referred to in A112(3) are those determined, following the making, pursuant to A44(1), of a report with respect to a ground of inadmissibility referred to in A112(3), to be inadmissible based on grounds of security, violating human or international rights, serious criminality or organized criminality, as well as those whose claims for refugee protection were rejected by the Refugee Protection Division on the basis of Article 1F of the Refugee Convention.

6.4. Persecution

The courts have defined persecution by relying on the dictionary definitions: “To harass or afflict with repeated acts of cruelty or annoyance.” It will be necessary to determine whether or not the harassment or sanctions that the applicant fears are sufficiently serious to constitute persecution. Threats to a person’s life and freedom for one of the reasons in the definition will constitute persecution and so would be violations of other fundamental human rights. Other sanctions against the individual may or may not be persecution. In some cases, the cumulative effect of discrimination or a series of incidents constitutes persecution. The sanctions need not be against the individual, but can also encompass acts committed against the individual’s family or similarly situated persons. Minor forms of harassment, such as in employment discrimination, may not be sufficiently serious to constitute persecution. The jurisprudence illustrates situations where harassment does not amount to persecution.

6.5. Torture

The protection against torture is restricted in its scope. Article 1 of the *Convention Against Torture*, which has been incorporated into IRPA, defines torture as follows:

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. . . any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

According to the U.N. General Assembly's *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of December 9, 1975 at Article 1:

(2) Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

It is difficult to provide a rigorous definition of what conduct would amount to torture. Some international decisions provide examples. The European Court of Human Rights found the following treatment to constitute torture:

- "Palestinian hanging": the applicant was stripped naked and suspended by his arms that had been tied together behind his back, resulting in severe pain and in paralysis in both arms that lasted for some time. *Aksoy v. Turkey*, 18 Dec 1996.
- Rape in custody. *Aydin v. Turkey*, 25 Sept 1997.
- Beatings that kept the applicant in a constant state of physical pain and mental anguish over a three-day period while she was blindfolded. She was also paraded naked and pummelled with high-pressure water while being spun around in a tire. The Court held that the cumulative effect of this treatment amounted to torture (although not necessarily the beatings alone). *Aydin v. Turkey*, 25 Sept 1997.
- In the cases of *Ireland v. United Kingdom*, 13 Dec 1977, and *Tomasi v. France*, 27 Aug 1992, the European Human Rights Court concluded that beatings while in custody constituted inhuman or degrading treatment, but not torture. The Court revisited this issue in 1999 and noted that the European Convention is a living instrument that must be interpreted in light of current conditions. Acts that were not classified as torture in the past could be so classified in the future because of an increasingly high standard set for the protection of human rights. The Court concluded that a severe beating that inflicted a large number of blows and caused substantial pain constitutes torture. *Selmouni v. France*, 28 Jul 1999.
- The following techniques used by the Greek military junta: mock executions, death threats, electric shock, the use of insulting language, being compelled to be present at the torture or cruel, inhuman or degrading treatment of relatives or friends [*Denmark et al. v. Greece* (3321-3/67; 3344/67 Report: YB 12 bis)].
- The following techniques when used in combination by British Security Forces in Northern Ireland against detainees: being forced to stand for long periods of time, hooding, subjection to noise, deprivation of sleep, food and drink [*Ireland v. United Kingdom*].
- The infliction of mental suffering through the creation of a state of anguish and stress by means other than bodily assault (e.g., threatening to kill or hurt family members) [*Ireland v. United Kingdom, supra*].
- Beatings in police custody. The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism do not change the nature of torture [*Tomasi v. France*, judgment of 27 August 1992 (Series A, no. 241)].

There is no need to demonstrate that the applicant would face torture for one of the five enumerated grounds set forth in the refugee definition. The 1951 Refugee Convention requires that the fear of persecution be based on specified grounds (i.e., race, religion, nationality, membership of a particular social group or political opinion). Under the Convention against

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Torture, however, the sole question is whether there is a substantial risk of torture, regardless of whether it is based on any of the grounds specified in the definition of Convention refugee.

7. Roles and responsibilities

The PRRA office is structured in such a way to ensure that the independence of the PRRA decision-maker is safeguarded. For more information, see the following table.

Table: Roles and responsibilities

Role	Responsible for:
PRRA Director	<ul style="list-style-type: none">• The overall operation of the office ensuring that it is adequately resourced to maintain the timely and effective flow of applications and removal needs.• Directly or through the coordinators identifying the needs, concerns and issues of the PRRA Unit, addressing any concerns or issues involving removals with the removals manager.• Addressing, with senior regional Managers of CBSA, any concerns or issues involving expectations of CBSA with respect to removals, within the resource limitations of CIC.• Interacting with National Headquarters to resolve major issues that may affect the integrity of the PRRA program nationally. Upon resolution the changes are adopted to maintain the consistency of PRRA program.
PRRA coordinator	<ul style="list-style-type: none">• In the major centres, assisting the Director in the day to day operation of the PRRA Unit.• Being the contact for the Removals Unit supervisors. By maintaining this level of interaction the establishment of case priorities and a viable inventory flow can be attained.• The coordinator or manager will assign the cases and communicate with the removals manager or supervisor if issues arise, preserving the independence of the PRRA decision-maker.
PRRA officer	<ul style="list-style-type: none">• Speaking with the PRRA Director or coordinator, if errors are discovered in applications assigned to them.• It is inappropriate for the PRRA officer to have direct contact with a removals officer and all communication must take place through the established lines of communications.

7.1. Bias

As independent decision makers, PRRA officers have an obligation to ensure that they are not only unbiased in making their decisions, but also that they *do not appear* to be biased.

PRRA officers should inform PRRA coordinators of personal circumstances that may give rise to an apprehension of bias such as previous involvement in an applicant's case by the PRRA officer or by a family member. A family relationship between officers who work on cases involving the same client, on its own, would not necessarily require consideration of recusal, unless an allegation of bias is made.

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PRRA coordinators should be cognizant of the potential for apprehension of bias in their assignment of cases. While coordinators and officers are not required to exhaustively examine files to assure themselves that no potential for apprehension of bias exists, they will need to consider the matter when such a circumstance comes to light.

In considering whether they should recuse themselves, PRRA officers should ask themselves whether a reasonable person, apprised of all the facts, would apprehend bias if they were to decide the case. Note that the *Values and Ethics Code* instructs, "if a conflict should arise [real, potential or apparent] between the private interest and the official duties of a public servant, the conflict shall be resolved in favour of the public interest."

If a PRRA officer decides to recuse them self from a case, they should request that the PRRA coordinator re-assign the file to another officer.

If an allegation of bias is raised and the PRRA officer feels that no actual, potential or apparent bias exists, the officer must clearly outline that analysis in their assessment.

8. Applications and Eligibility

The PRRA officer must verify that the applicant is indeed entitled to apply for PRRA [see section 5.3], and that the application process is followed.

8.1. Applications made within 15-day period after PRRA notification

PRRA applications must be submitted within 15 days of receipt of the PRRA notification for the applicant to be afforded continuation of the regulatory stay of removal. If an individual does not submit their application within 15 days of notification, the regulatory stay ends. In most instances, the PRRA notification will be hand delivered to the applicant. However, if the PRRA notification is mailed, an additional seven days is provided for mailing (7+ 15 = 22 days). The deadline is calculated in calendar days, commencing with the day following the delivery of the notice, and ending at midnight on the fifteenth day. If the fifteenth day is a Saturday, Sunday or Federal statutory holiday [or day designated in lieu thereof], the deadline for submitting the application is midnight on the next day that is not a Saturday, Sunday or Federal statutory holiday.

See section 8.4 for special 'security certificate' procedures.

An application is deemed to have been submitted on the date that it is postmarked. When the application has been submitted within the 15 day time-frame, the applicant has an additional 15 days (30 days total from the date of notification) to provide written submissions. A decision cannot be rendered before this 30-day period expires. There is no specific cut-off date for additional submissions or restrictions on their number. The only requirement is that they be received before the decision is made. If no submissions are received, the PRRA officer makes a decision based on the risk identified in the application and the information on file.

If a PRRA candidate does not wish to apply, they may complete a declaration of intent attached to the PRRA Notification. Once received by the CBSA, removal arrangements proceed.

Applicants may decide to be represented by counsel, at their own expense. Counsel will help in such matters as preparing the application, collecting evidence and preparing the written submissions.

8.2. Applications made after expiration of the 15-day period

For an application made after the 15 day application period, or where an individual makes **multiple applications**, the written submissions must accompany the application. The PRRA officer does not have to wait for subsequent submissions, and may assess the application and render a decision immediately. This does not preclude the PRRA officer from receiving and considering a submission at any time up until a decision is made. The applicant does not benefit from a stay of removal when the application is not received within the 15 day deadline.

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8.3. Applications made at a port of entry (POE)

During the examination of a foreign national seeking entry to Canada, the person may state that they are seeking refugee protection. If this statement is made before any removal order has been issued, the person is considered to be making a refugee claim. However, once a removal order has been made, the person subject to that removal order may not make a refugee claim [as per A99(3)].

If a person asserts risk at a POE after having become subject to a removal order that is in force, they are entitled to apply for PRRA [unless they are described in A115 or subject to one of the exceptions at A112(2)]. They are given the PRRA application kit, and the application must be completed and submitted immediately. Written submissions, if any, must accompany the application [R166]. As a POE PRRA application does not result in a stay of removal, the person may be removed before their application is assessed.

8.4. Applications made by persons subject to security certificates

Instructions in light of Bill C-3 are under development. Please contact Operational Management and Coordination (OMC) for guidance on security certificate cases.

9. Restrictions on Access to Protection

PRRA applicants who are described in A112(3) have restricted access to protection. Applications from such persons are assessed on the basis of factors set out in A97 only. Approved applicants do not become protected persons, but benefit only from a reviewable stay of removal.

9.1. Establishing grounds of protection

PRRA officers must know whether the applicant is described in A112(3). An applicant is described in A112(3) only if they:

- have been determined to be inadmissible on grounds of security, violating human or international rights, or organized criminality;
- have been determined to be inadmissible with respect to convictions, in Canada, that resulted in a sentence of two or more years; or abroad that are punishable in Canada by imprisonment for 10 or more years;
- have had a refugee protection claim rejected on the basis of an Article 1F of the Refugee Convention; exclusion ground; or
- have been named in a certificate referred to in A77(1).

A finding that a person is described in A112(3) (a) or (b) requires a determination of inadmissibility based on grounds set out in one of those paragraphs, even where the person is already the subject of a removal order on other grounds. That a PRRA applicant is described in A112(3) is usually identified by an officer of CBSA before referral of the application to a PRRA officer. Should the PRRA officer be uncertain--*before or during an assessment*--as to whether an applicant is described in A112(3), the officer may return the file, through the coordinator or manager, to CBSA for clarification. Where, however, limited evidence is submitted in support of the asserted risk, the PRRA officer may elect not to return the file and proceed with the risk assessment, returning the file to CBSA for clarification only if it is determined that the applicant would indeed be at risk. If the clarification is that the applicant has not been determined to be inadmissible on a ground set out in A112(3) (a) or (b), or A112(3) (c) or (d) does not apply, the scope of the assessment is not restricted.

The ENF 5 Manual provides that where a CBSA enforcement officer is of the opinion that a person is inadmissible on grounds involving security, human or international rights violations, serious criminality or organized criminality, it is important to have a formal record of that alleged inadmissibility; this is initiated by preparation of an A44(1) inadmissibility report. These reports

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must be transmitted to either a Delegate of the PS Minister or the Immigration Division (depending on the type of inadmissibility), who will make a determination with respect to that alleged inadmissibility and, if warranted, issue the appropriate removal order.

9.2. Applicant is not described in A112(3)

Applicants who have not been determined to be inadmissible based on a ground referred to in A112(3)a) or (b), have not had a refugee claim rejected on the basis of Article 1F of the Refugee Convention or are not the subject of a security certificate issued pursuant to A77(1), will have the risk they expressed considered against the consolidated protection grounds. The basis to consider the consolidated grounds for eligible applicants is established in A113(c). The consolidated grounds are stated in A96 to A98 and include Convention refugee grounds, torture within the meaning of Article 1 of the Convention against Torture, and risk to life or risk of cruel and unusual treatment or punishment.

9.3. Applicant is described in A112(3)

Applicants who have been determined to be inadmissible on a ground referred to in A112(3)a) or b), or with respect to whom A112(3)c) or d) applies, will have the risk they express considered only on the basis of factors set out in A97:

- Danger of torture; and
- Risk to life or risk of cruel and unusual treatment or punishment

See section 13 for guidance on 112(3)(c) cases

9.4. Procedure: applicants described in A112(3)

Applicant not described in A97

If the PRRA officer finds no danger of torture, no risk to life and no risk of cruel and unusual treatment or punishment, the assessment terminates at this point. The officer finalizes the assessment and prepares the refusal letter, which is sent with the file to the CBSA Removals office. The removals officer calls in the applicant and delivers the decision to the applicant by hand.

Applicant described in A97

If the PRRA officer finds the applicant described in A97, the officer prepares the assessment referred to in R172(2)(a) and sends it and any supporting documentation to the CBSA removals office.

The removals officer prepares supporting documentation regarding the restrictions set out in A112(3)(a), (b), (c), or (d), and A113(d)(i) or (ii), as applicable, and sends it, as well as the PRRA assessment and supporting documents, to the Coordinator, Danger to the Public/Rehabilitation, Case Review, Case Management Branch (CMB), CIC. CMB will manage these cases, and forward the security, organized crime, and modern war crime cases to National Security Division, CBSA, for assessment.

An analyst at Danger to the Public/Rehabilitation, Case Review, or National Security Division, as applicable, prepares an assessment, in accordance with R172(2)(b), with respect to whether the applicant's presence in Canada is a danger to the public, or a danger to the country's security, or the nature or severity of the acts committed by the applicant are such that the application should be refused. The assessment referred to in R172(2)(b), including the supporting documentation, is returned to the CBSA removals office.

The removals officer delivers the assessments referred to in R172(2)(a) and (b), and the supporting documentation, to the applicant. Any new extrinsic evidence that is related and central to the assessment is disclosed.

The applicant then has 15 days to respond in writing. The applicant is instructed to send any submissions directly to the removals office. The applicant may request an extension of time to

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respond. The granting of an extension is discretionary, but a request cannot be unreasonably refused.

Upon receipt of the applicant's submissions, the removals officer returns the two assessments and the supporting documentation, as well as the applicant's submissions, to the Coordinator, Danger to the Public/Rehabilitation, Case Review, CMB. An analyst adds a covering memo to the package confirming that the applicant has seen the assessments, ensure that the applicant's submissions, if any, are included, and forwards the file to the C&I Minister's delegate.

The C&I Minister's delegate considers the assessments, the supporting documentation, and the applicant's submissions, and renders a decision on the application. The decision is then returned to the CBSA removals office; concurrently, if NSD prepared an R172(2)(b) assessment, NSD will be notified of the decision. The removals officer calls in the applicant and delivers the decision by hand.

9.5. Special rules for security certificates

Instructions in light of Bill C-3 are under development. Please contact Operational Management and Coordination (OMC) for guidance on security certificate cases.

9.6. Ministerial Stay of Removal

A Ministerial stay under A114(1)(b) results if it is determined that the need for protection for a person described in A112(3) outweighs the danger to the public in Canada, the danger to the security of Canada, or the nature or severity of the acts committed by the applicant. Such stays may be reviewed. If the circumstances surrounding a stay have changed, the grounds on which the decision was based may be re-examined. See section 17 for more information on stays under A114(1)(b).

10. Procedures and guidelines applicable to all cases

When assessing an application, all applicable protection grounds must be considered and applied. Reasons must be given in respect of all applicable grounds in coming to a determination that the application be rejected. Where the application is allowed on the basis of one of the grounds, it is not necessary to consider the application of other grounds.

10.1. Accepting new evidence only

A113(a) provides that persons whose claim to refugee protection has been rejected may only present **new evidence** that arose after the rejection, that was not reasonably available or that the applicant could not reasonably have been expected in the circumstances to have presented.

Where the Refugee Protection Division panel did not have or take jurisdiction with respect to the protection issue raised, and did not consider the evidence available to the applicant, the "new evidence" rule does not prevent the applicant from submitting that evidence in support of their application. Examples of this situation would include "transitional" cases where the former Convention Refugee Determination Division did not have jurisdiction with respect to assertions of torture, or of cruel or unusual treatment or punishment, or where the RPD excluded the claimant without considering whether the claimant had a well-founded fear of persecution.

When refugee protection has been vacated by the IRB, the refugee claim is deemed to have been rejected [A109(3)]. It may be inferred that the date of the vacation decision is the relevant date for purposes of A113(a). However, evidence that post-dates the original refugee claim is not admissible in vacation proceedings, as the purpose of this proceeding is to determine whether refugee protection was obtained by misrepresentation or withholding information, and if so, whether there was sufficient other evidence before the original panel by which the person could have been found to be a Convention refugee or a person in need of protection. Because the applicant could not have presented evidence at the vacation hearing that post-dates the original decision, evidence of this nature could not reasonably have been expected to have been presented at the vacation hearing, and the PRRA applicant is not precluded from presenting such evidence.

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When a PRRA is returned by the Federal Court for a re-determination by a different officer, new submissions will be solicited. If new submissions are as a result received from the applicant, the PRRA officer must consider all submissions, including those made in support of the original PRRA.

10.2. Identifying the issues

Identifying the issues is of prime importance in analysis and decision making. The research performed is centred on the issues identified in the case. PRRA decisions depend upon the research conducted if the decision is to be informed and accurate. The interdependency of the decision analysis steps becomes quite evident. Care should be taken to progress in a logical manner through these steps, affording them equal importance.

10.3. Conducting research

The PRRA officer will undertake research independent of the issues identified in the application. The research sources consulted by the PRRA officer will vary with each individual case. A number of both electronic and conventional sources of research exist and may include but **are not limited** to the following: UNHCR reports and documentation; the U.S. Department of State Country Report on Human Rights Practices; U.K. Home Office Reports; the Lawyers Committee for Human Rights Critique; Amnesty International Reports; Reporters without Borders; *L'État du monde*; Europa World; Reflex; and Human Rights Watch World Report.

When information is obtained through Internet research:

- Copies of all documents obtained from the Internet [other than those identified above as “conventional sources of research”] and used in the decision-making process will be retained on the case file [this will ensure not only that the document is available for review by the Court, but also that the “version” of the document available to the Court is the same as that consulted by the officer];
- Subject to the following paragraph, officers will retain discretion with regard to whether a document should be shared with the applicant prior to rendering a decision, if it can be demonstrated that the document is “publicly accessible” [“publicly accessible” documents should originate with reliable sources, and should be available at sites directly related to the source, rather than through cross-references from other sites, the reliability of which may not be as well established];
- Where a document post-dates the submission of the applicant, or where the date of publication is not clearly indicated, officers will share with the applicant, prior to rendering a decision, any document that shows changes in the country conditions that could affect the decision;
- Officers may seek responses from applicants with respect to any relevant documentation that comes to light, and on which they intend to rely, but they retain the authority, pursuant to R167, to determine whether an oral hearing is required.

How much research is enough? One of the implicit assumptions about PRRA is that the PRRA officer will become, over time and through experience, very knowledgeable on many countries. The knowledge accumulated should, in a straightforward case, enable officers to make judgements without the need for extensive additional research. If the officer has addressed all the issues identified or presented, the research should be complete. The gravity of the decision being made and its impact on the individual, to their life and future and that of their family, should be taken into consideration when the officer answers the question: “How much is enough?”

10.4. Weighing the evidence

Having obtained information on the facts of the case, the PRRA officer has to weigh any conflicting evidence. The decision-maker has to determine which facts have been established on a balance of probabilities and which statements are supported by the evidence. It is not a simple task to decide which fact or collection of facts is more reasonable or more likely, given the

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circumstances of the case. Furthermore, the PRRA officer then must decide whether the facts establish that the applicant would face a reasonable chance of persecution referred to in A96 or whether return would more likely than not subject the applicant to a substantial risk of treatment as defined in A97. PRRA decision-makers must be fair, sensitive and judicious in their approach to assessing the value of the evidence being considered.

For example, the fact that specific issues raised in submissions cannot be confirmed nor denied is not, in itself, grounds for a finding that a risk exists. Nor does the converse necessarily hold true. The facts related must be reasonable and logical given the existing country conditions. Although testimony and evidence filed by the applicant is presumed to be true, this presumption may be rebutted. If the weight that the officer gives to any piece of evidence is insufficient to establish the facts as alleged by the applicant, reasons must be given. Factors that can be taken into consideration include the date of the document, the reasons for which it was prepared, the relationship between the person who prepared the document and the applicant, whether the author has an interest in the outcome of the application, whether the document shows signs of bias, whether it appears to be contrived, whether its contents are consistent with other reliable evidence, the extent to which the document has been corroborated by trustworthy evidence, whether the author was a witness to the events described or whether it consists of hearsay (a legal term describing a class of evidence that is based on the reports of others rather than the personal knowledge of a witness [and that is generally not admissible as testimony]).

R168(d) provides that the officer may verify third-party evidence. It is not appropriate to judge the credibility of an applicant who does not appear before the PRRA officer except in writing, but the weight given to any set of facts can be influenced by the conclusions of the RPD and the applicant's prior history with immigration.

Where the evidence raises a serious issue of the applicant's credibility, is central to the decision with respect to the application for protection, and, if accepted, would justify allowing the application for protection, an oral hearing may be needed. The weight given any factor in the case is an objective decision of the decision-maker.

The task is to weigh the facts in a fair and impartial manner, considering both positive and negative elements judiciously. PRRA decision-makers might ask themselves which facts are more important, which evidence more persuasive, which argument more compelling or convincing, and why is this so.

It must be clearly explained in the PRRA decision why one piece of evidence was preferred over another. It is not necessary to mention each and every piece of evidence supplied by the applicant in your assessment. It is, however, advisable to mention those which are directly applicable (i.e. mention the applicant by name) or are particularly significant, so as to avoid the accusation of ignoring evidence.

10.5. Consideration of Submissions

The applicant should make it clear in submissions what risk would be faced in the country of return. The applicant is expected to explain how the alleged risk might lead to a risk to life or to a risk of cruel and unusual treatment or punishment, the danger of torture, or the reasonable possibility of persecution and which refugee Convention grounds are applicable. The submissions should address:

- what is the risk the applicant fears;
- why the applicant is unable or unwilling to avail themselves of the protection of the country of return;
- whether the risk would be faced in every part of that country and whether the risk is faced generally by other individuals in or from that country;
- whether the risk faced is inherent or incidental to lawful sanctions, and whether the sanctions are imposed in disregard of accepted international standards; and
- whether the risk is not caused by the inability of the country to provide adequate health or medical care.

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10.6. The risk must not be faced generally – Generalized oppression

All grounds for protection involve a demonstration that the risk be characterized as personal and objectively identifiable. These risks may, in fact, be shared by other persons who are similarly situated. The Act does provide for protection in cases of generalized oppression: a stay of removal to particular countries may be decided upon by the PS Minister where whole populations are at risk, according to factors set out in the Regulations. The application for protection, by contrast, is meant to deal with an allegation of personal risk. However, in some cases, a generalized risk may meet the Convention refugee definition if the applicant is personally subject to serious harm that has a nexus to at least one of the five protection grounds enumerated in the Refugee Convention. The Federal Court of Appeal has rejected the comparative approach (asking whether the applicant is more disadvantaged than others) in favour of a non-comparative approach that asks whether there is a reasonable chance of serious harm on the basis of one of the five Convention grounds. On this point, see *Salibian v. MEI*, [1990] 3 F.C. 250 (Fed. C.A.) and *Rizkalleh v. MEI* (1992), 156 N.R. 1 (Fed. C.A.).

The Federal Court of Appeal considered the question of indirect persecution in *Pour-Shariati v. MEI* (1997), 39 Imm. L.R. (2d) 103 and concluded that it does not constitute persecution within the meaning of the Refugee Convention. For example, the fact that family members face persecution does not make an applicant a Convention refugee unless he or she personally meets the definition, as may be the case if he or she were a similarly-situated person. The requirement that risk be personal is incorporated into the definition of a person in need of protection in A97.

10.7. State protection – Unable or unwilling to seek State protection

Where the applicant faces a risk, whether of persecution, of torture, to life, or of cruel and unusual treatment or punishment, the issue to be determined in every case will be whether the applicant is able to obtain the protection of the State. A person is unable to seek protection of the State in circumstances where the State cannot provide protection. This can arise either

- where the threats emanate from non-State agents [and the State is unwilling or unable to protect adequately the concerned person], or
- where the threats emanate from the State.

When a person is unwilling to avail themselves of the State's protection, the person opts, because of the risks, to not seek the protection of the State. This can arise when the State has control over its territory, or when the State has failed previously to protect the applicant from actions of third parties.

The applicant has a duty to seek State protection before soliciting international protection (see *Ward, supra*). When the State in question is a democratic State, the applicant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. The level of difficulty the applicant will face in making out his or her case is directly proportional to the level of democracy in the State in question: the more democratic the State's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her. However, the applicant is not required to seek State protection if it would be objectively unreasonable to do so in the circumstances. See *Kadenko v. Canada (Solicitor General)* (1986), 143 D.L.R. (4th) 532 (F.C.A.).

No government can guarantee the protection of all of its citizens at all times. It is not enough for the applicant to show that the state has not always been effective in protecting similarly-situated persons. Where a state has effective control of its territory, has military, police and civil authority in place and makes serious efforts to protect its citizens, the mere fact that it is not always successful will not be enough to establish that the state is unable to protect. See *Canada (MCI) v. Villafranca* (1992), 18 Imm.L.R. (2d) 130 (F.C.A.) on this point. A standard of "effective" protection should not be imposed on other states that the police forces in our own country sometimes only aspire to. See *Smirnov v. Canada (Secretary of State)*, [1995] 1 F.C. 780 (T.D.) on this point.

Local failure by the police to provide effective protection does not necessarily amount to a lack of state protection. The question of state capacity to provide protection must be assessed in light of a broader pattern of state inability or refusal to extend protection. Local refusal to provide

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protection does not constitute a state refusal in the absence of evidence of a broader state policy not to extend protection to the target group. Refusal does not necessarily have to be overt, as other factors can be cited to justify ineffective state action. See the observations of Mr Justice Pelletier on this point, in *Zhuravlyev, Anatoliy v. M.C.I.* (F.C.T.D., no. IMM-3603-99), April 14, 2000.

The question of State ability and willingness to provide protection will be determined by an objective analysis of the evidence. There is a presumption that the State is able to provide protection; therefore, there must be clear and convincing proof of the State's inability or unwillingness to provide protection.

Where the applicant has failed to demonstrate that the State is unable to provide protection, the application should be rejected.

10.8. Internal Flight Alternative (IFA)

When considering an application for protection, the decision-maker must be alert to the possibility that the applicant, although at risk in one part of the country of return, might reasonably be expected to obtain protection at some other locality within that country. In such a situation, the applicant can be denied protection because they could avail themselves of an "Internal Flight Alternative". An IFA must be a realistic and attainable option, accessible without great physical danger or undue hardship. It must offer protection from the risk that is stable, rather than transitory, and there should be an established authority to which the individual can turn for recourse.

The burden of establishing that an IFA does not exist, or that it would be unreasonable to require the individual to return to an IFA, rests with the applicant. When assessing the reasonableness of the IFA, the PRRA officer should consider the particular circumstances of the individual and of the country involved to establish whether it would be inhumane and unreasonable to require an individual to return to some part of the State. Elements such as convenience or preference of the applicant to live in a particular part of the country should not render an IFA unreasonable.

Humanitarian and compassionate considerations are not relevant when assessing the reasonableness of the IFA. For instance, hardships flowing from separation from relatives in the country of refuge are not considered relevant to the assessment of whether it would be unduly harsh to return to an IFA. These considerations are only relevant in the context of applications to the C&I Minister for humanitarian and compassionate considerations.

10.9. Factors that could lead to a rejection of the application

While all protection grounds must be considered and applied, and reasons given in respect of all grounds in coming to a determination that the application be rejected, the absence of an essential ingredient in the application of one ground will often mean that the other two grounds are also inapplicable. The factors defined above and listed below may lead to a rejection of the application, under all grounds of protection.

- harm feared is not severe;
- harm feared is generalized;
- harm feared is the law of general application, lawfully imposed, fitting international standards;
- harm feared is not objectively supported;
- there is effective State protection;
- there is an IFA or the applicant possesses multiple nationalities.

10.10. Country of reference

Country of nationality or citizenship

The definitions of "refugee" and "person in need of protection" confine the protection to persons who are outside their country of origin. The definitions include distinctions between persons who

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have a country of nationality and persons who do not; the latter may seek international protection when they are outside their country of former habitual residence. In cases where the applicant has multiple nationalities, the PRRA officer must examine the need for protection with respect to all countries of nationality if an application is to be allowed. If the application is to be rejected it need only be determined that the applicant is not at risk in one country of nationality, as defined in A96 and A97 [see *Harris, Dorca v. MCI*, IMM-1652-97, 31 Oct 1997 (F.C.T.D)]. This principle is applicable even if the applicant has never entered or lived in one of the countries of nationality.

Where citizenship in another country is available, an applicant is expected to make attempts to acquire it and will be denied refugee protection if it is shown that it is within his or her power to acquire that other citizenship. This includes the situation of a person who must renounce citizenship in one country, where persecution or a threat enumerated in A97 is asserted, in order to acquire citizenship in another; the person should be deemed to be a citizen of the country in which they have a claim to citizenship. The operative principle is whether it is within the Applicant's power to obtain citizenship as of right if established procedures are followed [see *Canada (Minister of Citizenship and Immigration) v. Manzi Williams*, 2005 FCA 125].

Country of former habitual residence

Where the applicant is stateless, the country of reference is that of former habitual residence as determined by evidence of a significant period of *de facto* residence. If there is more than one country, the applicant must be at risk as defined in A96 or A97 in *each* country of habitual residence. The applicant does not have to be able to return legally to a country of former habitual residence for it to qualify as a country of reference. In addition, the applicant must be unable or unwilling to return to any of the countries of former habitual residence. If the applicant can return to any country of former habitual residence and be safe from persecution or threat enumerated in A97, the applicant is not a Convention refugee or a person in need of protection. See the 1998 Federal Court of Appeal decision in *Thabet v. MCI*, [1998] 4 F.C. 21, 160 D.L.R. (4th) 666 (Fed. C.A.). See also *Elbarbari v. MCI* (1998), 157 F.T.R. 111 (Fed. T.D.), and *Maarouf v. MEI*, [1994] 1 F.C. 723 (Fed.T.D).

Other countries to which the applicant may be removed

IRPA does not explicitly require a risk assessment with respect to any other country to which the individual may be removed. However, both our domestic and international legal obligations require the consideration of risk in any country to which an individual is to be removed, whether it is the individual's country of citizenship or former habitual residence or not.

The assessment of risk in a country of destination, other than the individual's country of citizenship or former habitual residence, will be made on exactly the same basis as that provided for in IRPA, which grounds are set out in A96, A97, and A98. Since the issue of risk in the country of citizenship or former habitual residence is assessed in the statutory pre-removal risk assessment, the consequences of onward removal from the country of destination are not a factor in the assessment of risk in that country. An individual who is determined to be at risk in a country other than the individual's country of citizenship or former habitual residence will not be a protected person, and will not be able to apply for permanent residence pursuant to A21(2). That individual may be returned to their country of citizenship or former habitual residence, if they are determined not to be at risk there.

11. Convention refugee definition

The following applies only to applicants who are not referred to in A112(3).

11.1. Well-founded fear

At the core of the definition of "Convention refugee" is the requirement that the applicant demonstrate a well-founded fear of persecution in the country of origin. The phrase "well-founded fear" has been interpreted as having two components: a fear of persecution, felt subjectively, and the well-foundedness of the fear, tested objectively.

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Objective and subjective fear

The subjective component relates to the existence of persecution in the mind of the applicant. While this is internal to the individual, the applicant's actions should be consistent with and indicative of a subjective fear. Relevant factors with respect to the question of subjective fear include:

- delay in leaving the country of risk,
- failure to seek protection at the first reasonable opportunity,
- failure to seek protection in other countries,
- delay in making a refugee claim upon arrival in Canada,
- re-availment of State protection, and
- re-establishment in the country of risk.

Moreover, if the applicant demonstrates a lack of credibility by actions that are inconsistent with the presence of a subjective fear, then it could be held that there is no subjective basis for the application. The application could be rejected even if there is extensive evidence of human rights violations in the country of origin.

However, focus should be put on the objective basis of the fear of persecution. Once it has been established that a person has an objective basis of fear of persecution, it is conceivable that the applicant also presents a subjective fear.

Standard of proof

The objective component requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear. The nature of the test for well-founded fear of persecution is described in terms of "reasonable chance" or "serious possibility": Is there a reasonable chance, but more than a mere possibility, that persecution would take place were the applicant returned to the country of origin? An applicant need not show a probability of persecution. The officer must be satisfied on a balance of probabilities that the fear is well-founded. The test for well-foundedness is objective, based on objective evidence about conditions in the country of origin, particularly the country's human rights record.

Past and future persecution

Applicants need not show that they have been persecuted in the past in order to establish a well-founded fear of persecution. However, past events related by the applicant, together with all the other evidence, including country conditions at the time of the decision, may show that the applicant would be objectively at risk if returned. Thus, the test is forward looking, except where there are compelling reasons based on past persecution for granting protection. The *Convention Relating to the Status of Refugees* states in paragraph C (5) and (6) of Article 1:

"Provided that this paragraph shall not apply to a refugee falling under A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."

The applicant may not be in a position to present evidence of actual past persecution; in that case, evidence of persecution of persons in a similar situation to that of the applicant in the country of origin may serve to substantiate a fear of future persecution. Such persons may be family members, political associates, and members of the same social class, race, religion, or ethnic group.

11.2. Persecution

Persecution is one of the key elements of the Convention refugee definition. In order to qualify for protection as a Convention refugee, the applicant must demonstrate a fear of persecution. The term "persecution" is not defined in the Refugee Convention or in the Act; as noted in section 6.4 above, the Courts have applied the dictionary definition of persecution to the interpretation of the Convention.

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Not all harm inflicted against an individual will justify protection. In some cases, the harm might be so trivial as not to justify granting protection. In others, the harm might be a product of security measures of a non-discriminatory nature directed at the entire population. In some cases, however, a law of general application may be persecutory in nature. The Federal Court of Appeal dealt with this issue in the context of military service in *Zolfagharkhani v. MEI*, [1993] 3 F.C. 540 and in *Al-Maisri v. MEI* (1995), 183 N.R. 234, and in the context of exit laws in *Valentin v. MEI*, [1991] 3 F.C. 390

The State itself need not be the direct perpetrator, and the only issue to be determined may be whether or not the State is willing and able to provide protection.

11.3. Assessing persecution cases involving prosecution

In cases of prosecution, the particular circumstances must be assessed. The prosecution must be serious enough to qualify as persecution. If there is evidence that the prosecution is linked to the applicant's race, religion, nationality, membership in a social group or political opinion, the following considerations may be relevant:

- the nature of the law which the applicant has violated (if compliance with a law results in a violation of an international legal norm, prosecution may be persecutory);
- the nature of the law under which the individual will be prosecuted (arbitrarily punishing acceptable behaviour may be persecutory);
- whether the punishment for the offence is disproportionate to the offence itself;
- the human rights record of the prosecuting country;
- the status of the country's judicial system;
- the motivation of the government in pursuing prosecution; and
- the motivation of the applicant when the offence was committed.

11.4. Assessing the reason for persecution – Nexus

Under the Convention refugee definition, it is necessary to determine whether the harm is inflicted for one of the reasons set out in the definition: the injury feared must be linked to the applicant's race, religion, nationality, membership in a particular social group or political opinion. If there is no clear linkage, the applicant will not fit in the Convention refugee definition. In some cases involving situations of civil strife, the conclusion may be that the fear is a fear of generalized oppression and is not in some way directed against the individual or group for reasons of race, religion, nationality, membership in a particular social group or political opinion.

The Supreme Court of Canada in *Canada v. Ward (Minister of Employment & Immigration)* [1993] 2 S.C.R. 689, has noted that the meaning of "particular social group" should take into account the general underlying themes of human rights and anti-discrimination that form the basis for the international refugee protection initiative. There are three possible categories:

- groups defined by an innate or unchangeable characteristic;
- groups whose members voluntarily associate for reasons fundamental to their human dignity that they should not be forced to forsake the association;
- groups associated by a former voluntary status, unalterable due to its historical permanence.

In *Ward*, the Supreme Court explicitly held that persecution based upon a person's gender could sustain a claim to refugee status. However, the Court did not say that gender in and of itself was sufficient to define a particular social group. The Court has held that particular subcategories of women such as abused women, women subject to domestic violence constitute a particular social group. The Court has also held that women who are subject to enforced sterilization do constitute a social group. Recognition of gender as a basis for refugee protection has not been confined to claims made by women. The IRB has developed gender guidelines; PRRA officers are invited to consult them for assistance in their decision making.

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Political opinion has been defined by the Supreme Court of Canada in *Ward*, at 746-747. The Court adopted Prof. Goodwin-Gill's definition of: "any opinion on any matter in which the machinery of state, government, and policy may be engaged." The Court added two refinements: First, the political opinion need not have been expressed outright. It can be imputed to the applicant on the basis of his or her actions. Second, the political opinion ascribed to the applicant does not necessarily need to conform to his or her true beliefs. The assessment should be approached from the perspective of the agent of persecution. Although victims of crime do not generally fall within the scope of a particular social group as defined in *Ward*, there are some situations in which the definition of political opinion may apply. The Federal Court of Appeal dealt with this issue in *Klinko v. MCI*, [2000] 3 F.C. 327 (T.D.), concluding the denunciation of misconduct by public officials can qualify as political opinion, provided that the machinery of state, government and policy "may be engaged." However, risk attributable to a private vendetta or personal vengeance on the part of a government official may constitute criminal activity, but not persecution. See *Rivero v. MCI* [1996] F.C.J. No. 1517 (T.D.).

12. Risk of torture, to life, of cruel or unusual treatment or punishment

12.1. Danger of torture

The standard to be met by an applicant alleging danger of torture is defined in the legislation and is the belief, on substantial grounds, of the existence of a danger of torture. The requisite degree of danger of torture envisaged by the expression "believed on substantial grounds to exist" is that the danger of torture is more likely than not. (see *Li v. Canada (Minister of Citizenship and Immigration)* (2005 FCA 1)). The standard is not the same as for the refugee definition: a serious possibility that an individual would be in danger of torture does not satisfy the legislative threshold test. However, the risk does not have to meet the test of being highly probable (see General Comment of CAT on the implementation of article 3 of the Convention in the context of article 22 : 21/11/97). Objective factual material must show a probability of danger to the applicant if returned to the country of origin.

For more information, see definition of "torture" in section 6.5 and definition of an "agent of torture" in section 6.1 above.

12.2. Making an objective assessment of the danger of torture

The assessment of whether there are substantial grounds to believe the applicant would be personally subjected to a danger of torture is to be made on an objective basis. There is no requirement to prove a subjective fear (see *Li v. Canada (Minister of Citizenship and Immigration)*(2005 FCA 1). However, the danger must be personalized to the individual. As in the Refugee Convention, the assessment may be based on past events but is forward looking: the issue to be determined is whether events related by the applicant, together with all the other evidence, including country conditions at the time of the decision, show that the applicant would be subjected to torture, if returned. For example, the European Court of Human Rights found that Sweden had legitimately returned a claimant to Chile, even though he was suffering from post-traumatic stress disorder as a consequence of having been tortured there. Due to a change in government, there was no longer any substantial basis for the applicant's fear of torture [*Cruz Varas and Others v. Sweden*, judgment of 20 March 1991 (Series A, no. 201)].

12.3. Committee against Torture guidelines

The Committee against Torture has issued the following guidelines:

- (a) Is the country concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights?
- (b) Has the applicant been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
- (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?

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(d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?

(e) Has the applicant engaged in political or other activity within or outside the country concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the country concerned?

(f) Are there factual inconsistencies in the claim of the claimant? If so, are they relevant?

12.4. Asking key questions to determine if torture has taken place

A PRRA officer can ask the following questions to determine if torture has taken place:

1. Who is the applicant?
2. Does the applicant face severe physical or mental pain, intentionally inflicted?
3. Is the pain/suffering for a specific purpose such as to get information, to punish or to intimidate?
4. Is the pain/suffering inflicted by the State? Does the State know or ought to know about the pain/suffering but does not try to prevent it?
5. Is there an IFA?
6. Does the pain/suffering arise from, is inherent in or is incidental to lawful sanctions?

12.5. Assessing risk to life or risk of cruel and unusual treatment or punishment

The PRRA officer must assess whether there are substantial grounds to believe the applicant would be personally subjected to a risk to life or of cruel and unusual treatment or punishment. For more information, see definition of cruel and unusual treatment or punishment in section 6.2 above.

12.6. Applying the standard of proof

The standard to be met by an applicant alleging a risk to life or cruel and unusual treatment or punishment is the “balance of probabilities”, the usual standard in civil proceedings. This is also the standard applicable to s.12 of the Charter. Objective factual material must show a probability of risk to the claimant if returned to the country of origin.

12.7. Assessing protection of the State (State agent and non-State agent)

Although international jurisprudence stems generally from cases that directly involve the State as the agent of inhuman treatment, the notion of cruel and unusual treatment as defined in IRPA does not contain such a limitation. The cruel and unusual treatment or punishment does not necessitate the State as an accomplice. In all cases, the issue of protection of the State will have to be addressed.

For more information, see section 10.7 on State Protection.

12.8. Assessing the objective risk to life or of cruel and unusual treatment or punishment

The assessment of whether there are substantial grounds to believe the applicant would be personally subjected to a risk to life or of cruel and unusual treatment or punishment is evaluated on an objective basis. The risk must be personalized to the individual. The assessment may be based on past events but is forward looking: the issue to be determined is whether events related by the applicant, together with all the other evidence, including country conditions at the time of the decision, show that the applicant, if returned, would be subjected to a risk to life or of cruel and unusual treatment or punishment. Relevant considerations include the general situation in a country and, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

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12.9. Assurances in Death Penalty Cases

The Supreme Court of Canada (SCC) ruled in 2001 that obtaining diplomatic assurances is a constitutional requirement before removing someone facing capital punishment/death penalty, unless there are exceptional circumstances. Thus the removal of persons to countries where there is more than a mere possibility that they will face the death penalty should not proceed, before acceptable assurances are sought and obtained from the destination country. These assurances need to state explicitly that the death penalty will not be imposed or if imposed will not be carried out. Exceptions to this course of action will be rare.

The United Nations Human Rights Committee in the *Roger Judge vs. Canada* case ruled that Canada has an international obligation under Article 6 of the International Covenant on Civil and Political Rights not to remove a person facing the death penalty without assurances that this sentence will not be carried out.

The Supreme Court of Canada ruled, in the 2001 case of *United States v. Burns*, that extradition to face the possibility of capital punishment is unconstitutional, as it violates the *life, liberty and security of the person* provisions found in section 7 of the *Charter of Rights and Freedoms*. Consequently, the government has to consider whether assurances are required in order for removal to be lawful and Charter-compliant.

In some situations, persons who have been charged with or convicted of serious crimes face the risk of a death penalty through the judicial system in the country to which they are facing removal. While these penalties may be legally sanctioned, such cases must be examined in light of international human rights instruments to which Canada is a party, as well as Canadian jurisprudence.

Except where imposition of the death penalty is no more than a mere possibility in the domestic law of the destination country, PRRA decision-makers will usually need to have assurances from that country with respect to whether the death penalty will be sought, and/or what actions will be taken to ensure that the death penalty will not be imposed, or, if it is imposed, to ensure that it will not be implemented. The specifics of assurances, obtained through diplomatic means, may vary, depending on the particular legal regime in place in the country of destination. PRRA decision-makers will assess this evidence, along with all other relevant evidence, whether there is more than a mere possibility that the person will face the death penalty in reaching a decision on the application for protection. The threshold here is different and lower than the standard of proof for section 97, IRPA.

Initiation of a Request for Assurances

The decision whether or not to seek assurances should be made as early as possible in the enforcement process. When a CBSA removals officer¹ is aware that a person against whom a removal order is in force would face a risk of execution in the country to which she would be removed, the officer will, **before** informing the person of the opportunity to make a PRRA application, send a report electronically to the Coordinator, Danger to the Public/Rehabilitation.

Further instructions regarding the information that CBSA will relay to CMB can be found in the ENF10 manual. *Link to ENF10 - http://www.ci.gc.ca/Manuals/index_e.asp*

The Coordinator (CMB) will prepare a recommendation, which is considered by the Director General (CMB) in deciding whether to seek assurances. Resolution occurs when the decision by the Director General (CMB) is made not to seek assurances; or when assurances are sought and received from Foreign Affairs and International Trade Canada (DFAIT).

The PRRA application process will not commence until a decision is made whether to seek assurances. If the decision to seek assurances is positive, the PRRA process will not commence until a response with respect to assurances has been obtained from the country of destination.

¹ This refers to the CBSA officer who convokes or will convoke the individual for the purpose of informing the individual of the opportunity to make a PRRA application prior to removal action being taken.

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A PRRA decision shall not be rendered until the issue of assurances has been resolved (either by the decision by CMB not to pursue assurances or the receipt of such assurances from DFAIT). Once assurances have been obtained, these applications will be given the highest possible priority.

Referral of Cases when the Issue of Assurances is Not Resolved

In a situation where a PRRA notification was given and the PRRA officer becomes aware that an applicant may face the death penalty and CMB has not yet been contacted, the officer shall immediately suspend processing and notify the PRRA Coordinator. The PRRA Coordinator will alert the CBSA of the need to contact the Coordinator, Danger to the Public/Rehabilitation, CMB as described above.

Decision whether to seek Assurances

An analyst at the Danger to the Public/Rehabilitation Unit, CMB, will review the report and prepare a recommendation for the Director General, CMB. If the Director General concurs with the recommendation to seek assurances, the request to obtain assurances will be made to DFAIT.

The CBSA removals officer will be informed via an e-mail by the Coordinator (CMB) that the request has been sent to DFAIT or that a decision has been made not to seek assurances.

On Receipt of Assurances

If assurances were sought and obtained before the person was informed of the opportunity to make a PRRA application, CBSA Removals officer will include the assurance in the package when they offer the person the opportunity to apply for a PRRA. The person will have the same prescribed time period for providing submissions with respect to the assurances as they do for the PRRA, which is 15 days. If assurances were sought and obtained only after the PRRA application process has commenced, the removals officer will inform the applicant that assurances have been obtained, and provide the applicant and the PRRA Coordinator with a copy of the assurances; the applicant will be given a period of 15 days in which to respond to the assurances, before the PRRA officer proceeds to consider the application further. The applicant may request an extension of time to respond. The granting of an extension is discretionary, but a request cannot be unreasonably refused.

The PRRA officer will consider the assurances in light of all of the submissions and other information before her, and in light of the Supreme Court decision in *United States v. Burns*.

Where No Assurances are Obtained

If assurances were not sought, or were sought but not obtained, the PRRA process will commence, or resume, as applicable. The removals officer will inform the applicant in writing or in person and the PRRA coordinator of the final outcome of the assurances. The PRRA officer will consider the application in light of all of the submissions before her and in light of the Supreme Court decision in *United States v. Burns*.

12.10. Assessing the inability of the country of return to provide medical care

The legislation provides that the risk to life must not be caused by the inability of the country of return to provide adequate health or medical care. A risk to life under s. 97 does not require the officer to assess whether there is appropriate health and medical care available in the country in question. [see *Covarrubias v. Canada (Minister of Citizenship and Immigration)* (2006 FCA 365), and *Singh v. Minister of Citizenship and Immigration*, 2004 FC 288 (26 Feb 2004)]. PRRA officers will use this exception with respect to PRRA applicants where it is evident that their native country

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is unable to provide adequate medical care, or chooses, in good faith, for legitimate political and financial priority reasons, not to provide such care to its nationals. It does not apply to deny protection to those applicants whose country engages in practices that are persecutory [or discriminatory to the point of persecution] with respect to the provision of access to medical treatment. (See also CAT – Mr. Suppiah Vivekanathan et al., Communication No. 49/1996).

12.11. Asking key questions

The following are sample questions the PRRA officer can ask to determine if there is risk to life or the possibility of cruel and unusual treatment or punishment:

1. Who is the applicant?
2. Where is the applicant from?
3. Does the applicant face a risk to life or a risk to treatment or punishment that is cruel and unusual?
4. Is the risk faced by the applicant personally or is it faced generally by other persons in or from that country?
5. Is there adequate State protection? Is there IFA or is risk faced in every part of the country?
6. Is there a serious possibility of risk in every part of the country or is the risk severely marginalized? If not, is that part of the country reasonably accessible?
7. Are there compelling reasons arising out of previous treatment or punishment to grant protection?
8. Is treatment or punishment inherent in or incidental to lawful sanctions?
9. Are sanctions imposed in disregard of accepted international standards?
10. Is risk caused by country's inability to provide adequate health or medical care?

12.12. No nexus

There is no need to demonstrate that the applicant would face a risk of torture or to life or of cruel and unusual treatment or punishment for one of the five enumerated grounds set forth in the refugee definition. The sole question is whether there is a substantial and objective risk of torture or to life or of cruel and unusual treatment or punishment, regardless of whether it is based on any of the grounds specified in the definition of refugee.

13. Exclusion under A98

13.1. Overview

The Exclusion clauses, contained in Schedule 1 to the Act, are an integral part of the definition of a Convention refugee set out in the 1951 Convention relating to the Status of Refugees. Section 98 extends their application to persons in need of protection as defined in subsection 97(1). Clauses D, E and F of Article 1 of the Convention provide that persons who have the characteristics of refugees are excluded from refugee status if they fall into one of three groups. Only two of these exclusions are incorporated into Canadian law. Article 1E of the Convention deals with those who are not considered to be in need of protection; Article 1F deals with those who are not considered to be deserving of protection.

13.2. Article 1E: Rights and Obligations of nationality

Paragraphs 144 to 146 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status set out explanations for the language used in Article 1E. Excluded under this Article are those who have been received into a country where they have been granted most of

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the rights of nationality, but not formal citizenship. The term "rights and obligations" is not defined, but includes full protection from deportation or expulsion. The term "taken residence" implies continued residence, and not a visit or sojourn. For more information on Article 1E, see ENF 24, section 5.18.

13.3. Article 1F(a): Crimes against peace, war crimes and crimes against humanity

Paragraph 150 of the UNHCR Handbook explains the origins and application of Article 1F(a), through its reference to "international instruments drawn up to make provision with respect to such crimes". These Conventions, dating from the end of the Second World War, contain definitions of these terms. For more information on Article 1F(a), see ENF 18.

13.4. Article 1F(b): Serious Non-Political Crimes prior to arrival in Canada

Paragraphs 151 to 161 of the Handbook provide guidance on the interpretation of of Article 1F(b) of the Convention. As well, the Act, in its distinction between serious and less serious crimes, found in section 36, provides concrete criteria for determining which criminal acts would bring an individual within the scope of this Article. For more information on Article 1F(b), see ENF 24, section 5.9.

13.5. Article 1F(c): Acts contrary to the purposes and principles of the United Nations

Paragraphs 162 and 163 of the Handbook provide guidance with respect to the application of Article 1F(c). The purposes and principles of the United Nations are, as the Handbook points out, set out in the Charter of the UN. For more information on Article 1F(c), see ENF 24, section 5.10.

13.6. Procedures

In most cases, application of the Exclusion clauses will have been dealt with by the Refugee Protection Division. Exceptions may occur where the PRRA applicant did not make a refugee protection claim, or where the relevant evidence only comes to light following a decision by the RPD. Where the RPD has not "excluded" the applicant, the PRRA officer has full authority to determine the applicability of the Exclusion Clauses.

1E Exclusion

1E Exclusion procedures are under development. In cases of possible 1E Exclusion, contact Operational Management and Coordination Branch (OMC).

1F Exclusion

The officer will conduct an assessment with respect to A97 factors, and render a decision, or prepare an assessment pursuant to R172(2)(a), as applicable.

The procedural principles, set in sections 10.1 to 10.5 above, applicable to the assessment of the "inclusion" clauses of the definitions, apply to the evaluation of the Exclusion clauses. The applicant must be afforded an opportunity to respond to any extrinsic evidence. Oral hearings may be used, provided the factors prescribed in R167 are met. The effect of a decision to allow the application is a stay of the applicant's removal order as provided in A114(1)(b), and subject to 114(2)

14. Conducting oral hearings

14.1. Reason for conducting oral hearings

The Act provides that a hearing may be held if the C&I Minister, on the basis of prescribed factors, is of the opinion that a hearing is required. A hearing will only be held in exceptional circumstances, when all factors set out in R167 are present. The officer will thoroughly examine

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the application and the submissions and evidence provided in support of it, before determining whether a hearing is necessary. The purpose of a hearing is to address the complicated issue of the credibility of the applicant, where the evidence raises a serious issue of credibility, the evidence is central to the decision to be rendered, and the evidence, if accepted, would justify allowing the application.

A hearing will normally not be held where the applicant is a previous refugee claimant for whom the IRB has made a credibility determination. The assessment of the objective well-foundedness of a fear of persecution does not require the conduct of a hearing. Similarly, the determination of whether there is objective evidence supporting a danger of torture or risk to life or of cruel and unusual treatment or punishment, does not require an oral hearing. Objective evidence with respect to the application of the Exclusion Clauses of the refugee Convention do not require an oral hearing, unless the applicant's evidence in response meets the tests set out in the Regulation.

14.2. Purpose of the oral hearing

The purpose of the hearing is to assess the credibility of the applicant. In most cases, PRRA officers will be able to determine through documentary evidence what the true facts are, and then assess the potential for an applicant to be harmed, as defined in the protection grounds. In addition, it is reasonable that, should the PRRA officer conclude, on the basis of documentary evidence, that there exists an objective well-foundedness of the alleged fear, the subjective fear is also present; a hearing will not be necessary in such a case. Moreover, the requirement for a subjective fear applies only to the persecution ground of A96. It is not the purpose of the hearing to collect information in a general way; this is done through submissions.

The officer will have to evaluate the application, assess the submissions and the evidence provided by the applicant, and conduct thorough research on country conditions before determining whether a hearing is necessary. Where the applicant appears to be credible and the grounds for protection are established, a hearing need not be held. Where the applicant has had a claim for refugee protection that was considered by the IRB and the IRB has made a determination on the credibility of the applicant, the officer will not, in normal circumstances, need to conduct a separate hearing with respect to credibility. However, a hearing may be contemplated where the IRB has either determined that the applicant was credible, or did not make any conclusion on the credibility of the applicant, but the officer is confronted with evidence that leads the officer to believe the applicant is not credible; equally, the officer may require an oral hearing if new evidence would appear to contradict the IRB's finding that the applicant was not credible.

14.3. How the oral hearing is conducted

The procedures to be followed before and during the oral hearing are set out in R168, which states:

A hearing is subject to the following provisions:

- (a) notice shall be provided to the applicant of the time and place of the hearing and the issues of fact that will be raised at the hearing;
- (b) the hearing is restricted to matters relating to the issues of fact stated in the notice, unless the PRRA officer conducting the hearing considers that other issues of fact have been raised by statements made by the applicant during the hearing;
- (c) the applicant must respond to the questions posed by the PRRA officer and may be assisted for that purpose, at their own expense, by a barrister or solicitor or other counsel; and
- (d) any evidence of a person other than the applicant must be in writing and a PRRA officer may question the person for the purpose of verifying the evidence provided.

The hearing is informal and non-adversarial in nature. It is meant to deal with the proceedings fairly and expeditiously. The PRRA officer presides over the hearing and is responsible for its fair and expedient conduct. The officer should restrict the hearing to the issues raised in the notice but may consider other issues of fact if they are raised by the applicant's statements at the hearing. It

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is not appropriate for the applicant or counsel representing the applicant to raise new issues or submit new evidence that does not relate to those issues signalled in the notice. It is also not appropriate to use the hearing to make legal representations or present arguments. It is not a forum for adjudication of the application, but rather an informal process to raise issues of facts with the applicant, affording the applicant an opportunity to answer questions raised by the PRRA officer with, if needed, the assistance of counsel. It is through written submissions that the applicant presents evidence, and makes legal representations. The applicant should not bring other witnesses to the hearing. However, officers may decide that they want to hear persons other than the applicant for the purpose of verifying the evidence provided. However, this will be done in exceptional circumstances, as evidence from persons other than the applicant should also be given in writing.

In many cases, the officer will be required to arrange for an interpreter. At the outset of the hearing the officer should verify that the interpreter and the applicant understand each other. Prior to and during the oral hearing, the interpreter is under contract to CIC.

14.4. Taking notes at the oral hearing

The PRRA officer shall take notes during the hearing. These notes form the only record of the hearing and should fairly and accurately reflect the oral evidence provided by the applicant. In large part, these notes will form the basis of the PRRA officer's decision. Caution is advised as these notes may be called into question if an appeal against the decision is launched. The notes should be limited to the facts in question with no speculation or inappropriate comments. As the notes are handwritten, legibility is a consideration.

If one of the facts addressed becomes contentious, the notes should reflect the concerns raised, including a notation that concerns of the applicant or counsel have been noted and will be considered.

PRRA officers are cautioned against indicating what their findings will be or making any decision at the oral hearing. The oral hearing is the means by which a PRRA officer tests the credibility of the evidence through the questioning of facts. Time is needed to give proper and full consideration to the evidence gathered. Further research may be required before any weight can be afforded to these clarifications.

15. Communication of PRRA decisions

15.1. Handling PRRA decisions

Upon completion of the Pre-Removal Risk Assessment, the PRRA officer returns the file to the CBSA removals office. Except when the applicant is described in A112(3) and has been found to be at risk by the PRRA officer (see 15.2), the removals officer calls in the applicant and delivers the decision by hand.

Timely decision delivery ensures that the decision communicated to the individual is based on relatively current information, but delays may be needed to finalize removal arrangements in some cases. The Federal Court, in *Chudal* [2005 FC 1073], has ruled, however, that submissions made by a PRRA applicant, up to the point where the applicant is notified that a decision has been made, must be considered by the PRRA officer. The stay of removal under R232(c) continues until the client is notified that a decision has been made. Any submissions made after the applicant has been notified that a decision has been made must be considered as a subsequent application R165, for which there is no stay of removal.

If requested, the removals officer will provide the applicant with a copy of the decision and the officer's notes, which contain the reasons for the decision. If the decision is that the applicant is not at risk, the removals officer will advise the applicant of the opportunity for judicial review of the decision and proceed with removal arrangements.

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15.2. Handling A112(3) cases

See section 9.4.

16. Vacation of PRRA decisions

A114(3) permits the C&I Minister to vacate a PRRA decision that allowed an application for protection where the decision was obtained, directly or indirectly through misrepresentation or withholding of material facts. The Regulations do not specify the procedure for vacation of PRRA decisions. The following procedures for vacation will ensure that vacation decisions are made in an efficient manner, while respecting the procedural rights of the individual concerned.

16.1. When vacation is initiated

Vacation is permitted only where the grant of protection resulted from misrepresentation or withholding of relevant information; it is not applicable where circumstances in the country of origin have changed, such that the individual would no longer be in need of protection. While PRRA officers may, through their own research, obtain evidence or facts leading to the opinion that the decision to allow the application may have been obtained as a result of direct or indirect misrepresentation or withholding of facts on a relevant matter, it is more likely that the information will come to light through other means, most probably as a result of inquiries or investigations that have been conducted with respect to the individual, either by CBSA or by other officers of CIC. Communication by PRRA officers with CBSA, or with other components of CIC, with respect to suspected cases of misrepresentation or withholding of facts should take place through the PRRA coordinator. When formal vacation proceedings are commenced, the case should not be assigned to the PRRA officer who made the original decision, nor to any PRRA officer who was previously involved in the inquiries that gave rise to the opinion that the decision to allow the application may have been obtained as a result of direct or indirect misrepresentation or withholding of relevant facts. If legal advice is required, it should be obtained through Operational Management and Coordination.

16.2. Adverse information should be disclosed

Where a PRRA officer is assigned a case where facts and evidence may lead to the conclusion that there has been misrepresentation or withholding of facts on a relevant matter, the officer shall send the person concerned a notice detailing the evidence, with copies of any unclassified evidence that is extrinsic, and provide the person with 15 days for the purpose of making submissions and presenting evidence in response. See 5.15 for definition of 'extrinsic'.

16.3. Decision

Once the PRRA officer is in receipt of the submissions made and evidence presented, the officer shall:

- carefully review the submissions and evidence;
- determine whether or not the previous decision was obtained as a result of misrepresentation or withholding of relevant facts;
- determine whether there was other sufficient evidence considered at the time of the first determination to justify refugee protection.

If the decision is to vacate the previous determination, the earlier determination is nullified and the individual is no longer a protected person.

It is not open to the person concerned to bring forth new evidence on risk in the context of this decision-making process. If the decision is to vacate the previous determination, the person is not precluded from applying again for protection and submitting any new evidence.

16.4. Vacation pending application for PR or where person is a permanent resident

A21 provides that protected persons, other than those referred to in A112(3), may apply for permanent residence. When, as a result of a decision to vacate, the person is no longer a

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protected person, any pending application to become a permanent resident is a nullity. The decision to vacate may also be rendered after the person has become a permanent resident. Should this be the case, A46 provides for the loss of the permanent residence.

17. Review of Ministerial stay of removal

When the application for protection made by an applicant who is referred to in A112(3), including an applicant who is named in a certificate described under A77(1), is allowed, the decision has the effect of staying the removal order concerning a country or place in respect of which the person is in need of protection. The stay is applicable for an indefinite duration, but must be reviewed periodically to assess change of circumstances and whether the person remains in need of protection.

The C&I Minister may, pursuant to A114(2), re-examine the circumstances surrounding a ministerial stay of the enforcement of a removal order at their discretion. The re-examination procedures contained in R173(1)(a), (b) and (c) require that the person with respect to whom the stay is being re-examined is to be given the following documents:

- a notice of re-examination;
- a written assessment on the basis of the factors set out in A97; and
- a written assessment on the basis of the factors set out in A113(d)(i) or (ii) as the case may be.

17.1. When to review: change of circumstances

An assessment of risk of torture, of risk to life or of risk of cruel and unusual treatment or punishment will be made when there is information or evidence that there has been a change of circumstances, including changes with respect to the country conditions or with respect to the individual. Concurrently, an updated assessment under A113(d) will be conducted.

17.2. Process for review of stay of removal

The CBSA removals office monitors regularly the A112(3) list of those who have received a stay of removal. When the office is of the view that country conditions have changed and a review is warranted, a notice of re-examination will be sent to the individual. The individual will be given 15 days to make submissions with respect to risk in the country of origin.

The individual's submission regarding risk will be assessed by a PRRA officer. The officer assesses the application against the factors in A97. If the assessment is that the individual is not at risk, that assessment is the decision of the Minister with respect to risk and the stay is cancelled.

If the PRRA officer finds that the individual is at risk as described in A97, that assessment will be the assessment referred to in R172(2)(a) and the PRRA officer will send the assessment to the CBSA removals office. The assessment under R172(2)(b) is prepared, in the same manner as set out in section 9.4, and described below..

The removals officer will prepare supporting documentation regarding the restrictions set out in A112(3)(a), (b), (c), or (d), and A113(d)(i) or (ii), as applicable, and send the supporting documentation regarding these restrictions, as well as the PRRA assessment and supporting documents, to the Coordinator, Danger to the Public/Rehabilitation, Case Review, Case Management Branch (CMB), CIC. CMB will manage these cases, and forward the security, organized crime, and modern war crime cases to National Security Division, CBSA for assessment.

An analyst at CMB or the National Security Division, as applicable, will prepare an assessment, in accordance with R172(2)(b), with respect to whether the individual's presence in Canada is a danger to the public, or a danger to the country's security, or the nature or severity of the acts committed by the individual are such that the individual should be removed from Canada. The assessments referred to in R172(2)(a) and (b), including the supporting documentation, are returned to the CBSA removals office.

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The removals officer delivers the assessments referred to in R172(2)(a) and (b), and the supporting documentation, to the individual. Any new extrinsic evidence that is related and central to the assessment is disclosed.

These assessments are usually given to the individual by hand or, if sent by mail, are deemed received seven days after the day they are mailed to the last address provided by the individual. The individual will have 15 days to make further submissions. The individual is instructed to send any submissions directly to the removals office. The individual may request an extension of time to respond. The granting of an extension is discretionary, but a request cannot be unreasonably refused.

Once in receipt of the submissions of the individual, the CBSA removals officer will forward the submissions to the Coordinator, Danger to the Public/Rehabilitation, CMB, for consideration by the C&I Minister's delegate, who make a decision to cancel or maintain the stay based on a balancing of the factors in A97(1) and A113(d)(i) or (ii), as applicable. The stay will be maintained if the C&I Minister's delegate is of the opinion, after balancing the risks to the individual against the risk to society, that the individual, because of the risk that would be faced upon removal, should be allowed to remain in Canada. However, should the C&I Minister's delegate decide that the risk to the individual no longer exists, or that the risk that the individual poses to Canada or Canadians outweighs the risk to the individual, the stay will be cancelled. CMB will communicate the decision to the CBSA removal officer, and the individual will be informed. If the decision is to cancel the stay, the removal process resumes.

18. Procedure: Assessing humanitarian and compassionate factors - risk

18.1. Role of PRRA officer in assessing humanitarian and compassionate factors - risk

The PRRA officer is the departmental expert in matters of risk. Upon receiving, from the PRRA coordinator, an H&C application with elements of risk, in accordance with section 13.5 of chapter IP5 of the Immigration Manual, the PRRA officer considers the application in accordance with section 13.6 of that chapter.

Note: If the H&C decision is positive and there are no A21(2) barriers, the applicant will be landed as a permanent resident.

19. 115(1) cases - Non-refoulement Assessment

If a person who is a protected person in Canada, or a Convention refugee elsewhere, claims to be at risk in the country to which they are facing removal (this typically being the country of origin or country in which the person was found to be a Convention refugee), the person can only be removed if not at risk in the country of destination.

The removals officer notifies the person that they have 30 days to make submissions in support of any contention of risk in the country that recognized the person as a Convention refugee; see section 3.3, above. Served in person or by mail, this letter indicates that the CBSA will proceed with removal if no submissions are received. The person is also given a submissions form (IMM 5535) to complete.

If no submissions are received after 30 days, and the removals officer has no reason to believe that the person would be at risk in the country of destination, removal arrangements continue.

If submissions are received, the file is referred to a PRRA Unit for risk assessment. The PRRA officer carries out a risk assessment based on the protection grounds as enumerated in A115(1).

The PRRA officer returns the file and assessment to the CBSA removals office. The removals officer decides, on the basis of the assessment, whether there is reason to believe that the person would be at risk in the country of destination. If no risk exists, the removals officer proceeds with removal arrangements.

If the removals officer determines, on the basis of the assessment, that the person would be at risk, that finding has the effect of preventing removal to that country. The removals officer informs

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the person of the decision that removal to that country will not take place. The removals officer informs the person that the suspension of removal is temporary and may be subject to review in the event of a change in circumstances.

A115(1) does not apply to persons who cannot be returned to the country in which they were recognized as Convention refugees. Such persons would not be considered described in A115(1) and would normally be entitled to apply for a PRRA.

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Appendix A – Application for Permanent Residence

The following applies to non-112(3) cases where the PRRA officer allows the application for protection. Having been found to be a protected person the PRRA applicant may apply for permanent residence. The permanent residence provisions for PRRA are stated in A21(2):

21. (2) Except in the case of a person described in subsection A112(3) or a person who is a member of a prescribed class of persons, a person whose application for protection has been finally determined by the Board to be a Convention refugee or to be a person in need of protection, or a person whose application for protection has been allowed by the C & I Minister, becomes, subject to any federal-provincial agreement referred to in subsection A9(1), a permanent resident if the officer is satisfied that they have made their application in accordance with the regulations and that they are not inadmissible on any ground referred to in section A34 or A35, subsection A36(1) or section A37 or A38.

Other permanent residence provisions are found at R175, R176, R177 and R178:

Application period

175. (1) For the purposes of subsection A21(2) of the Act, an application to remain in Canada as a permanent resident must be received by CIC within 180 days after the determination of the Board, or the decision of the C & I Minister, referred to in that subsection.

Judicial review

(2) A PRRA officer shall not be satisfied that an applicant meets the conditions of subsection 21(2) of the Act if the determination or decision is subject to judicial review or if the time limit for commencing judicial review has not elapsed.

Quebec

(3) For the purposes of subsection 21(2) of the Act, an applicant who makes an application to remain in Canada as a permanent resident - and the family members included in the application - who intend to reside in the Province of Quebec as permanent residents and who are not persons whom the Board has determined to be Convention refugees, may become permanent residents only if it is established that the competent authority of that Province is of the opinion that they meet the selection criteria of the Province.

Family members

176. (1) An applicant may include in their application to remain in Canada as a permanent resident any of their family members.

One-year time limit (concerning family members outside Canada)

(2) A family member who is included in an application to remain in Canada as a permanent resident and who is outside Canada at the time the application is made shall be issued a permanent resident visa if

- (a) the family member makes an application outside Canada to an officer within one year after the day on which the applicant becomes a permanent resident; and
- (b) the family member is not inadmissible under the grounds referred to in subsection (3).

Inadmissibility

(3) A family member who is inadmissible on any of the grounds referred to in subsection 21(2) of the Act shall not be issued a permanent resident visa and shall not become a permanent resident.

Prescribed classes

177. For the purposes of subsection 21(2) of the Act, the following are prescribed as classes

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of persons who cannot become permanent residents:

- (a) the class of persons who have been the subject of a decision under section 108 or 109 or subsection 114(3) of the Act resulting in the loss of refugee protection or nullification of the determination that led to conferral of refugee protection;
- (b) the class of persons who are permanent residents at the time of their application to remain in Canada as a permanent resident;
- (c) the class of persons who have been recognized by any country, other than Canada, as a Convention refugees and who, if removed from Canada, would be allowed to return to that country;
- (d) the class of nationals or citizens of a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution; and
- (e) the class of persons who have permanently resided in a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution, and who, if removed from Canada, would be allowed to return to that country.

Identity documents

178. (1) An applicant who does not hold a document described in any of paragraphs 50(1)(a) to (h) may submit with their application

- (a) any identity document issued outside Canada before the person's entry into Canada;
- (b) if there is a reasonable and objectively verifiable explanation related to circumstances in the applicant's country of nationality or former habitual residence for the applicant's inability to obtain any identity documents, a statutory declaration made by the applicant attesting to their identity, accompanied by
 - (i) a statutory declaration attesting to the applicant's identity made by a person who knew the applicant, a family member of the applicant, or the applicant's father, mother, brother, sister, grandfather or grandmother prior to the applicant's entry into Canada, or
 - (ii) the statutory declaration of an official of an organization representing nationals of the applicant's country of nationality or former habitual residence attesting to the applicant's identity.

Alternative documents

(2) A document submitted under subsection (1) shall be accepted in lieu of a document described in any of paragraphs R50(1)(a) to (h) if

- (a) in the case of an identity document, the identity document
 - (i) is genuine,
 - (ii) identifies the applicant, and
 - (iii) constitutes credible evidence of the applicant's identity; and
- (b) in the case of a statutory declaration, the declaration
 - (i) is consistent with information previously provided by the applicant to CIC and the Board, and
 - (ii) constitutes credible evidence of the applicant's identity.

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Appendix B Transitional provisions

The transitional provisions establish the framework for the transition from processes under the *Immigration Act* (former Act) to corresponding process under *Immigration and Refugee Protection Act* (IRPA).

Part 5 of IRPA includes a series of provisions with respect to the transition from the former Convention refugee determination process to the refugee protection process established by the (IRPA).

Old to new Act

Section A190 of the *Immigration and Refugee Protection Act* (IRPA) provides that every application, proceeding or matter under the former Act that was pending or in progress immediately before the coming into force of the IRPA shall be governed by the provisions of the new Act. Section A201 of the IRPA authorizes the making of regulations that provide for measures regarding the transition between the former Act and the new Act.

Redetermination

A199 provides that sections A112 to A114 apply to the redetermination of a decision set aside by the Federal Court with respect to an application for landing as a member of the Post-determination Refugee Claimants in Canada Class within the meaning of the *Immigration Regulations, 1978*.

Transitional Regulations – Post-determination Refugee Claimants in Canada Class

Regulations are required in order to provide clarification for matters outstanding from the former Act. The transitional regulations that apply to the Post- Determination Refugee Claimants in Canada Class are provided for in R346(1), (2), (3), (4), R347(1) and R347(3):

Post-determination refugee claimants in Canada class

346.(1) An application for landing as a member of the post-determination refugee claimants in Canada class in respect of which no determination of whether the applicant is a member of that class was made before the coming into force of this section is an application for protection under sections 112 to 114 of the *Immigration and Refugee Protection Act* and those sections apply to the application.

Notification re additional submissions

(2) Before a decision is made on the application, the applicant shall be notified that they may make additional submissions in support of their application.

Decision

(3) A decision on the application shall not be made until 30 days after notification is given to the applicant.

Giving notification

(4) Notification is given

- (a) when it is given by hand to the applicant; or
- (b) if it is sent by mail, seven days after the day on which it was sent to the applicant at the last address provided by them to CIC.

Application for landing: Convention refugees

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347. (1) If landing was not granted before the coming into force of this section, an application for landing submitted under section 46.04 of the former Act is an application to remain in Canada as a permanent resident under subsection 21(2) of the *Immigration and Refugee Protection Act*.

Application for landing: post-determination refugee claimants in Canada class

347.(3) If landing was not granted before the coming into force of this section, an application for landing submitted by a person pursuant to a determination that the person is a member of the post-determination refugee claimants in Canada class is an application to remain in Canada as a permanent resident under subsection 21(2) of the *Immigration and Refugee Protection Act*.