

ENF 19

**Appeals before the Immigration
Appeal Division (IAD) of the
Immigration and Refugee Board (IRB)**

Canada 

Active Operational Bulletins (OBs)

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Updates to chapter

Listing by date:

Date: 2018-08-03

Changes have been made throughout this chapter. All previous versions should be discarded in favour of the current one.

Of particular importance are changes and additions as follows:

- Content from previous section 5 has been moved to section 4 and reworded
- Updates to section 7.5 application to re-open appeals
- Section 7.7 updated to reflect change in definition of serious criminality
- Section 7.7 updated to reflect SCC Tran decision, conditional sentence is not considered a term of imprisonment
- Section 7.11 DOJ has a new name and contact information for requests to assign a litigator
- Old 8.9 right of permanent residence fee refund has been deleted
- Update to section 8.8 Failure to meet financial criteria
- New 8.9 has amended old 8.10 replacing sponsorship exclusion with other sponsorship eligibility requirements
- Old 8.11 is now 8.10
- New section added 8.11 Bad faith marriage R4(1)
- New section added 8.12 New relationship R4.1
- Old 8.12 now 8.13
- Old 8.13 now 8.14
- Old 8.14 deleted,
- New section added 8.17 ARC
- Old 8.17 now 8.18
- Old 8.18 deleted
- The old section 11.6 from the 2005-12-30 version has been deleted.
- Old 11.7 (now 11.6) amended to remove distinction between criminal and entrepreneurial cases
- Old 11.8 now 11.7
- Old 11.9 deleted
- The old Appendix A Procedural fairness letter has been deleted
- New Appendix A added for the Detention, Safety and Security Annex
- The old Appendix B Letter to medical officer – new medical information has been deleted
- Old Appendix C is now Appendix B
- Old Appendix D is now Appendix C
- Old Appendix E is now Appendix D
- Old Appendix F is now Appendix E
- The old Appendix G Application to reconsider an appeal (A197, A64) has been deleted
- The old Appendix H Application to reconsider an appeal (A197, A68(4)) has been deleted

Date: 2005-12-30

Changes have been made throughout this chapter. All previous versions should be discarded in favour of the current one.

Of particular importance are changes and additions as follows:

- Dispositions with respect to guardianship have been deleted in the Regulations amending the *Immigration and Refugee Protection Regulations*, which came into force on March 22, 2005. Changes throughout this chapter have been made accordingly.
- Changes have been made to reflect sharing of policy responsibility between the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness. The latter is also responsible for the service delivery of hearings before the Immigration Appeal Division.

More comprehensive sections have been added in relation to the conditions, mandatory and discretionary, imposed by the Immigration Appeal Division when a decision to stay a removal order is taken. See new sections 11.4, 11.5, 11.6 and 11.7.

2003-10-01

Important changes have been made to ENF 19 - Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB). Among the changes to this chapter, the highlights include:

- A new Section 11.7 provides guidelines on the interpretation and the application of A197 of the transitional provisions of the IRPA (appellant who has been granted a stay of the removal order and who breaches a condition of the stay);
- Appendix F has been updated to reflect changes to the Immigration Appeal Division Rules;
- a new Appendix G provides guidance on how to prepare an application to reconsider an appeal pursuant to A197 and A64 of the IRPA and rule 26 of the IAD Rules;
- a new Appendix H provides guidance on how to prepare an application to reconsider an appeal pursuant to A197 and A68(4) of the IRPA and rule 26 of the IAD Rules;

It is recommended that any former version of this chapter be discarded in favour of the one now appearing in CIC Explore.

1. What this chapter is about

This chapter describes the role of a Canada Border Service Agency (CBSA) hearings officer while acting as counsel at appeals heard before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB) for either the Minister of Immigration, Refugee, Citizenship Canada (IRCC) or the Minister of Public Safety and Emergency Preparedness (PSEP). Procedures for the preparation of an appeal, the conduct of appeal proceedings and for post-hearing responsibilities are all covered in this chapter. In addition, this chapter will also outline the program objectives, the role and jurisdiction of the IAD, the different types of IAD hearings and the ways in which they may be resolved are discussed.

2. Program objectives

Canada's Immigration and Refugee Protection Act (IRPA) allows specific groups of people to appeal to the IAD in order to:

- ensure that prescribed groups of people ordered to be removed from Canada after an examination or admissibility hearing have had the benefit of a full hearing on the allegations against them. The Act recognizes an additional commitment to permanent residents, protected persons and foreign nationals who hold a permanent resident visa by allowing them to appeal their removal orders to the IAD, not only on the basis of legal and factual questions relating to the allegations at the admissibility hearing, but also on the basis that special considerations may be warranted;
- ensure that the reunion in Canada of Canadians and permanent residents with their close relatives from abroad is facilitated by providing a review, by way of appeal, of refusals of sponsored applications for permanent residence from members of the family class; and
- ensure that the rights of permanent residents are given due consideration by allowing an oral appeal to the IAD for loss of residency status determinations made both within and outside Canada.

Pursuant to A63(5) the Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division (ID) in an admissibility hearing.

The right of appeal to the IAD is consistent with the objectives of IRPA in that it helps to accomplish the following:

- ensure that families are reunited in Canada; and
- protect the health and safety of Canadians and maintain the security of Canadian society.

3. The Act and Regulations

The following statutory and regulatory provisions apply to appeals before the IAD.

| Provision | IRPA and its Regulations |
|--|---------------------------------|
| Definition of foreign national | A2(1) |
| Definition of permanent resident | A2(1) |
| Family reunification | A12(1) |
| Sponsorship of foreign nationals | A13(1) |
| Obligation-answer truthfully (non-compliance) | A16 |
| Residency obligation – permanent resident residency obligation For more details regarding the residency obligation, see ENF 23, Loss of Permanent Resident Status, OP 10, Permanent Residency Status Determination, and ENF 1, Inadmissibility | A28(1), A A28(2) |
| Security - inadmissibility on security grounds For more details, see ENF 1 ,ENF 2 | A34(1) |
| Human or international rights violations – inadmissibility for violating human or international rights For more details, see ENF 1, ENF 18 | A35(1) |
| Serious criminality – inadmissibility for serious criminality For more details, see ENF 1, ENF 2, Evaluating inadmissibility | A36(1) |
| Criminality – inadmissibility for criminality For more details, see ENF 1 | A36(2) |
| Organized Criminality – inadmissibility for criminality For more details, see ENF 1, ENF 2, Evaluating inadmissibility | A37(1) |
| Health grounds – inadmissibility for health grounds For more details, see ENF 1,see ENF 2, /OP 18, Evaluating Inadmissibility, section 8, https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/excessive-demand-june-2018.html | A38(1) |

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| Financial reasons – inadmissibility for financial reasons For more details, see ENF 2, /OP 18, Evaluating Inadmissibility, section 8 | A39 |
| Misrepresentation – inadmissibility for misrepresentation For more details, see ENF 1, ENF 2, Evaluating inadmissibility, section 9 | A40 |
| Inadmissibility – cessation of refugee protection | A40.1 |
| Non-compliance with the Act – inadmissibility for non-compliance with the Act For more details, see ENF 1, Inadmissibility, ENF 2, Evaluating inadmissibility | A41 |
| Non-compliance with the Act and failure to meet residency obligations | A41/A28 |
| Inadmissible family member See, ENF 2, Evaluating inadmissibility, for more details | A42 |
| Loss of status – loss of permanent resident status For more details regarding the residency obligation, see ENF 23, Loss of Permanent Resident Status, OP 10, Permanent Residency Status Determination and ENF 1, Inadmissibility, ENF 2 - Evaluating inadmissibility | A46 |
| Right to appeal - visa refusal of family class | A63(1) |
| Right to appeal – visa holder and removal order | A63(2) |
| Right to appeal - removal order | A63(3) |
| Right of appeal - residency obligation | A63(4) |
| Right of appeal - PSEP Minister | A63(5) |
| No appeal rights – inadmissibility | A64(1) |
| No appeal rights – serious criminality | A64(2) |
| No appeal rights – misrepresentation | A64(3) |
| Humanitarian and compassionate considerations | A65 |

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| Disposition of an appeal | A66 |
| Allowing an appeal | A67 |
| Effect of allowing an appeal | A67(2) |
| Staying a removal order | A68 |
| Effect of staying a removal order | A68(2) |
| Reconsideration of a stay of a removal order | A68(3) |
| Termination of a stay of a removal order | A68(4) |
| Dismissal of an appeal | A69(1) |
| Minister's appeal | A69(2) |
| Making a removal order | A69(3) |
| IAD decision binding | A70(1) |
| Examination suspended | A70(2) |
| Reopening appeal | A71 |
| Judicial review | A72 |
| Judicial consideration | A78 |
| Application for non-disclosure of information | A86 |
| Composition of the IRB | A151 |
| Sole and exclusive jurisdiction | A162(1) |
| Proceedings before all Divisions | A166 |
| Abandonment of proceeding | A168(1) |
| Abuse of process | A168(2) |
| Decisions and reasons | A169 / Rule 54(1) |
| IAD - Court of record | A174(1) |
| Powers of the IAD | A174(2) |
| IAD proceedings | A175(1) |
| Presence of a permanent resident at a hearing | A175(2) |
| Transition – Application of the Act | A190 |
| Transition – Immigration Appeal Division | A192 |
| Transition – Loss of appeal rights | A196 |
| Transition – Stays – Breach of conditions – Application of the Act | A197 |
| Definition of common-law partner | R1(1) |

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| Definition of family member | R1(3) |
| Definition of marriage | R2 |
| Definition of conjugal partner | R2 |
| Definition of dependent child | R2 |
| Definition of Hague Convention on Adoption | R2 |
| Definition of relative | R2 |
| Definition of minimum necessary income | R2 |
| Definition of social assistance | R2 |
| Family relationships – Bad faith | R4(1) |
| Adopted children | R4(2) |
| New relationship | R4.1 |
| Excluded relationships | R5 |
| Medical examination required | R30(1) |
| Danger to public health | R31 |
| Danger to public safety | R33 |
| Definition of excessive demand | R1 |
| Definition of health services | R1 |
| Definition of social services | R1 |
| Excessive demand on health services or social services | R34 |
| Definition of Canadian business (residency obligation) | R61 |
| Employment outside Canada (residency obligation) | R61(3) |
| Renounce permanent residence | R72.5 |
| Member of the family class | R117(1) |
| Adoption under 18 | R117(2) |
| Best interests of the child | R117(3) |
| Adoption over 18 | R117(4) |
| Excluded relationships | R117(9) |
| Member of the spouse or common-law partner in Canada class | R123 |

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| Sponsorship eligibility | R130 |
| Sponsorship undertaking | R131 |
| Requirements for sponsor | R133 |
| Income calculation rules | R134 |
| Rehabilitation | R18 |
| Inadmissibility on health grounds | R20 |
| Types of removal order | R223 |
| Specified removal order – Permanent resident loss of residency status | R228(2) |
| Country of removal | R241 |
| IAD – Mandatory conditions for stayed removal orders | R251 |

| Provision | IAD Rules |
|---|------------------|
| Definitions | Rule 1 |
| Appeal by sponsor – Notice of appeal | Rule 3(1) |
| Time limit | Rule 3(2) |
| Appeal record | Rule 4(1) |
| Time limit | Rule 4(4) |
| Late appeal record | Rule 4(5) |
| Removal order appeals made at an admissibility hearing | Rule 5 |
| Appeal record | Rule 6 |
| Removal order appeals made at an examination | Rule 7 |
| Appeal record | Rule 8 |
| Appeals of decisions made outside Canada on residency obligations | Rule 9 |
| Appeal record | Rule 10 |
| Appeals by the Minister | Rule 11 |
| Counsel of record | Rule 14 |
| Designated representative | Rule 19 |
| Alternative dispute resolution process | Rule 20 |

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| Subject of an appeal in custody | Rule 24 |
| Stay of removal order | Rule 26 |
| Disclosure of documents | Rule 30 |
| Witnesses | Rule 37 |
| Applications | Rule 42 |
| Return to Canada for a hearing | Rule 46 |

3.1. Forms

| Title | Number |
|--|-----------|
| Application to Sponsor and Undertaking | IMM 1344E |
| Medical Notification | IMM 5365E |

4. Instrument of delegation and designation

Except as otherwise provided in section 4 of the Immigration and Refugee Protection Act (IRPA), the Minister of IRCC is responsible for the administration of IRPA and the Minister of PSEP is responsible for the administration of IRPA as it relates to:

- a) examination at ports of entry;
- b) the enforcement of IRPA, including arrest, detention and removal;
- c) the establishment of policies respecting the enforcement of IRPA and inadmissibility on grounds of security (A34), organized criminality (A37) or violating human or international rights (A35); or
- d) declarations referred to in section 42.1 of the IRPA.

The Minister of IRCC is responsible for appeals pertaining to visa refusal of family class (sponsorship appeals) and residency obligation appeals re decisions made abroad. Consequently the CBSA hearings officers represent the Minister of IRCC for these appeals.

The Minister of PSEP is responsible for removal order appeals (including for residency obligation appeals re in-Canada decisions) and Ministerial appeals against a decision by the IRB Immigration Division in an admissibility hearing. The CBSA hearings officers represent the Minister of PSEP for these appeals.

The Minister of IRCC has delegated to the CBSA hearings officers the authority to make an application for non-disclosure of information during an appeal before the IAD made under subsections 63(1) and 63(4) of the IRPA (Item 121 in the June 2017 Instrument).

The Minister of PSEP has delegated to the CBSA Manager of the Litigation Management Unit and the IRCC Director of Litigation Management the authority to appeal under 63(5).

20 January 2020

Refer to IL 3, Designation of Officers and Delegation of Authority, for IRCC and the CBSA.

5. Departmental policy

Under section 167 of the IRPA the Minister (whichever Minister that may be according to the areas of responsibility articulated in section 4 of the IRPA) may be represented by legal or other counsel. Prior to the creation of the CBSA, IRCC officers represented the Minister before the IAD. Legal assistance or personal attendance by a Government lawyer at a hearing was, when required, provided by the Department of Justice (DOJ).

With the creation of the CBSA, the responsibility to represent the Minister before the IAD was passed from IRCC officers to the CBSA hearings officers.

There will be rare circumstances where the assistance of a DOJ lawyer may be required. Such assistance will usually be in the form of consultation and advice to the hearings officer however personal attendance by the Government lawyer to present legal arguments is also possible.

5.1. Officer safety and security

If an officer perceives a threat to their safety **prior to a hearing**, they should immediately inform their manager and communicate those concerns to the IRB. The officer should communicate their safety and security concerns to the IRB by using the form entitled "Identification of Potential Security Risk in IRB Proceedings". If time does not permit, the IRB could be alerted of the security concern verbally and the form submitted as soon as possible. The IRB security unit will conduct a risk assessment to determine if additional security measures should be implemented. In certain circumstances, depending on the safety and security concerns and location of the scheduled hearing, it may be more appropriate for hearings officers to file an application to request a change of hearing location. A164 provides that whether an IAD hearing is to be conducted in the presence of the person who is subject to the proceedings or by means of live telecommunication is in the division's discretion.

Situations may arise **during a hearing** in which an officer feels their personal safety or the safety of others is being compromised. When an officer feels their safety has been threatened, such as in situations of intimidation by witnesses, the uttering of threats or other safety concerns, they should immediately bring the matter to the attention of the presiding member first and then their manager at the earliest opportunity, and take any necessary measure within reason to protect their own safety according to the IRB protocol.

IRB procedures for safety and security should help prevent such situations and provide guidance for managing them if they do arise. See Appendix A Detention Safety and Security Annex.

5.2. Incident report writing

Where an incident occurs before, or during, a hearing where an officer feels their safety has been threatened, they should complete an incident report. Reporting procedures enable the CBSA to

make important decisions regarding the safety and security of staff, ongoing training needs, and the recognition of exemplary performance in difficult situations.

6. Definitions

| The hearing process | |
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| Immigration Appeal Division (IAD) | <p>The IAD is an administrative tribunal that provides an independent review of decisions made under the immigration program where a right of appeal exists. The IAD examines cases before it for possible errors in law, in fact, and mixed law and fact, or for failure to observe a principle of natural justice. It also has the authority to reverse valid decisions on humanitarian and compassionate grounds. This Division is part of the IRB and is completely independent of the IRCC, the PSEP and their respective Ministers.</p> <p>A174 states that the IAD is a court of record. It conducts public hearings on the basis of the adversary system and established judicial principles, rules and precedents. The IAD has all the powers, rights and privileges vested in a superior court of record with respect to any matter necessary for the exercise of its jurisdiction, including the swearing and examination of witnesses, the production and inspection of documents, and the enforcement of its orders.</p> <p>The matters that may be brought before the IAD are:</p> <ul style="list-style-type: none"> • refusal to issue a visa to a member of the family class A63(1); • removal orders made against foreign nationals who hold permanent resident visas A63(2); • removal orders made against permanent residents and protected persons at an examination or admissibility hearing A63(3) ; • appeals of overseas decisions on loss of permanent resident status A63(4); and • Minister’s appeal of a decision made by a member of the Immigration Division A63(5). |
| Humanitarian and compassionate considerations | <p>The IAD has an equitable jurisdiction, which allows it to consider factors that may warrant an appeal being allowed despite the fact the decision is valid in law. IRPA sets out the test to be applied by the IAD in order to allow a case for reasons of equity. Under IRPA, the test of equity, which the IAD is to apply, has been consolidated into one test for all types of appeals to the IAD by a party other than the Minister. A67(1)(c) states that the IAD must be satisfied that, at the time the appeal is disposed of "...taking into account the best interests of a child</p> |

directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case."

The IAD will balance factors such as those set out below against the grounds for the removal order or refusal under appeal if it finds in favour of the appellant, it will set aside the decision. In the case of an appeal regarding an application based on membership in the family class, the IAD must first be satisfied that the foreign national is a member of the family class and the sponsor is a sponsor within the meaning of the Regulations before it can consider humanitarian and compassionate considerations [A65]. *Minister of Public Safety and Emergency Preparedness v. Hagos*, IMM 6378-11, April 20, 2012].

Factors to be considered by the IAD in appeals of removal orders include:

- the seriousness of the offence leading to the removal order, where applicable;
- the possibility of rehabilitation, where applicable;
- the length of time spent in Canada and the degree to which the appellant is established here;
- the family in Canada and the dislocation to the family that the deportation would cause;
- the support available to the appellant, not only within the family but also within the community;
- the degree of hardship that would be caused to the appellant by their return to their country of nationality, provided that the likely country of removal has been established by the appellant on a balance of probabilities.

These factors have been established by the Immigration Appeal Commission in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL). The Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 at paragraph 90, reaffirmed that "The factors set out in *Ribic*, [supra], remain the proper ones for the IAD to consider during an appeal..."

When considering a family class appeal, some of the factors that may be considered by the IAD include:

- whether authorizing the applicant to enter would result in the reunion in Canada of the appellant with close family;
- the strength of the relationship between the applicant and the appellant;

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| | <ul style="list-style-type: none"> • the degree to which the applicant is established abroad; • whether an applicant has demonstrated the potential to adapt to Canadian society; • whether the parties to the application have obligations to one another based on their cultural background; • whether the applicant is alone in their country; • the availability of health services to the applicant in Canada and abroad (for refusals based on medical grounds); • whether there is evidence of rehabilitation or the risk of the applicant re-offending (for refusals based on criminal grounds). |
| Hearings | <p>IAD hearings are <i>de novo</i> and therefore not limited strictly to reviewing the evidence that led up to the refusal or removal order. In <i>Kahlon v. Canada (Minister of Employment and Immigration)</i>, (1989) 7 Imm. L.R. (2d) 91; 97 N.R. 349 (F.C.A.), the Federal Court of Appeal established that the IAD must hear the whole case and consider any additional facts brought to its attention.</p> |
| Evidence | <p>The IAD has broader powers regarding the admission of evidence than regular courts since it is not bound by any legal or technical rules of evidence [A175(1)c)]. During a hearing, the IAD may receive, and base a decision, on evidence it considers credible or trustworthy in the circumstances, even if the strict rules of evidence have not been met by either party to the proceedings.</p> |
| Decisions | <p>The IAD may dispose of an appeal by allowing it or dismissing it. In the case of an appeal against a removal order, the IAD may also direct that the enforcement of the order be stayed for a set period of time, with conditions attached [A68]. Stays are sometimes granted by the IAD in cases where the residency obligation has not been complied with. These stays can be seen in files where a removal order has been issued at a port of entry but can also apply to cases against a decision made outside Canada on the residency obligation when a member authorises their return to Canada for their hearing. IRPA requires the IAD to impose mandatory conditions specified in R251 as well as any other conditions that it considers necessary. The IAD can reconsider a decision to stay a removal order at any time. A review of a stay may be initiated either by application by the appellant or the Minister’s counsel or on the IAD’s own initiative. [IAD rule 26]</p> <p>Where the Minister is successful in appealing a favourable decision made by the Immigration Division, the IAD may make or stay the removal order that the member of the Immigration Division did not make.</p> |

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| | A decision that is delivered orally at a hearing takes effect when the member states the decision. A decision made in writing takes effect when the member signs and dates the decision [IAD rule 55]. |
| Reasons | The IAD is required to provide written reasons for all decisions regarding an appeal by a sponsor and for decisions that stay a removal order. When the Minister consents to an appeal, the IAD no longer provides written reasons by invoking Rule 59. For all other decisions, the person concerned or the Minister of IRCC or Minister of PSEP may request written reasons within 10 days after the day they receive the decision [IAD rule 54(1)]. |

7. Procedure: General hearing

7.1. Calculating time limits

The Interpretation Act governs the calculation of time limits in federal statutes, regulations and rules:

Pursuant to subsection 27(2) of the *Interpretation Act*, when a statute refers to a number of days (not *clear days*) between two events, officers will exclude the day on which the first event happened and include the day on which the second event is to occur. When the time limit for the performance of a required action expires or falls on a holiday, the action may be performed on the next workday after the holiday. Pursuant to sections 26 and 35 of the Interpretation Act, Sundays are holidays, Saturdays are not.

For example, if there is a 15-day limit to appeal a decision made on June 2, the count begins on June 3 and ends on June 17. Holidays are not left out in counting up to the 15th day. June 17 would therefore be the last day to file, unless it were a Sunday, in which case, June 18 would be the last day. If June 17 is a Saturday and the office is closed, then the appeal must be filed on June 16.

7.2. Withdrawing an appeal (IAD rule 50)

An appellant may apply in writing to the IAD to withdraw their appeal. Should the IAD determine that withdrawing the appeal would have a negative effect on the integrity of the IAD appeal process, it may determine that the withdrawal is an abuse of process and refuse to allow the appellant to withdraw their appeal.

If an appeal is withdrawn before the record is prepared or distributed, it is not necessary to distribute the record.

When a decision is received from the IAD indicating that an appeal has been withdrawn, the Global Case Management System (hereinafter "GCMS") "Appeals" screen and National Case Management System (NCMS) should be updated by the hearings officer.

7.3. Reinstating an appeal after withdrawal (IAD rule 51)

An appellant may apply to the IAD to reinstate an appeal that has been withdrawn. The application must conform to the IAD Rules for applications and include the appellant's address and telephone number. The IAD may reinstate the appeal if it is satisfied that it failed to observe a principle of natural justice or that it is in the interest of justice to do so [IAD rule 51].

If an appeal is reinstated by the IAD, the decision must be entered in GCMS and NCMS by the hearings officer.

7.4. Proof of compliance (IAD rule 30(2))

A written statement stating how and when the documents were provided to the other party must accompany all applications, documents and records of appeal filed with the IAD. A sample statement of service is attached in Appendix D.

7.5. Applications to reopen an appeal

A foreign national who has not left Canada under a removal order may make an application to the IAD to reopen their appeal. The IAD may grant the application and reopen the appeal only if it is satisfied that it failed to observe a principle of natural justice [A71].

The IAD does not have jurisdiction to hear an appeal once the deportation order has been executed. [Corpuz Ledda v. Canada (Citizenship and Immigration), 2012 FC 14; Ramkissoon v Canada (MCI); [1978] 2 FC 290 (FCA); Canada (MCI) v Toledo, [2000] 3 FCR 563 (FCA). The powers conferred upon IAD under IRPA (sections 66-69, 71) with respect to removal order appeals refer to possible action before the enforcement of the deportation order. The IRPA does not confer power for the IAD to take any action in cases where the deportation order has been enforced. As such, the IAD does not have jurisdiction to re-open an appeal if the foreign national who filed an application to re-open has been removed before their application is determined by the IAD.

Hearings officers should strongly oppose any application to reopen unless they are satisfied there was a breach of natural justice that merits the appeal being reopened. Hearings officers should file a motion on the ground that the IAD has no jurisdiction against any application to reopen where the foreign national has already been removed from Canada.

Please note the following section of operation bulletin PRG-2017-67 as it pertains to attempts to re-open appeal hearings:

Attempts based on Tran (Tran v. Canada (Public Safety and Emergency Preparedness), 2017 SCC 50), 2017 SCC 50) to reopen final ID or IAD decisions where a determination of inadmissibility has been made, a removal order issued, and all avenues of appeal and/or judicial review exhausted can be opposed by the hearings officers on the basis of the doctrine of res judicata. The purpose of the Operational Bulletin (hereinafter "OB") is to direct the regions to use res judicata in the present context where the law has changed and where we do not want all

individuals who received valid removal orders at the time they were issued to re-litigate post Tran.

7.6. Applications

The IAD Rules specify that unless the IAD Rules provide otherwise, requests made to the IAD must be made in an application [IAD rule 42]. Applications may be made either orally at a proceeding or in writing. Procedures for applications made orally at an appeal will be determined by the IAD at the proceeding.

Applications made in writing must:

- state the decision that the applicant wants the IAD to make;
- give reasons why the IAD should make the decision;
- state whether the other party agrees to the application; and
- include any evidence that the applicant wants the IAD to consider when it renders its decision.

Evidence included with an application must be in the form of a statutory declaration or affidavit [IAD rule 44(2)]. This rule, however, does not apply to applications to change the location of a hearing or the date or time of a hearing or applications to reconsider the appeal, where a stay of removal has previously been granted.

Written applications must first be provided to the other party and then filed at the IAD registry with a written statement indicating how and when the other party was provided with the application. The sample statement of service (Appendix D) may be used to meet the proof of service requirement.

Some examples of requests that must be made by way of application are:

- requests to change the location of a conference or a hearing IAD rule47;
- requests for non-disclosure of information (A86)
- requests to change the time or date of a proceeding IAD rule48;
- requests to return to Canada for a hearing IAD rule46;
- requests to change or extend time limits;
- requests to hold a hearing in private IAD rule49; and
- requests to withdraw or reinstate an appeal IAD rules 50,51.

Responses to written applications must be in writing [IAD rule 44(1)]. A written response must include the same information as noted above for the application. The response must be filed with the IAD no later than seven days after the respondent receives the application [IAD rule 44(4)]. An applicant may reply in writing to the response no later than five days after they have received the response. [IAD rule 45(4)].

When an application is received, it should be reviewed to determine whether it has merit and warrants the Minister's consent or should be opposed.

When an application is filed or received, the "Application" screen of NCMS should be completed by the hearings officer showing that an application has been initiated. All events in the application process should be entered into NCMS.

7.7. Loss of appeal rights

A64 specifies the circumstances under which a foreign national, their sponsor or a permanent resident loses their right of appeal. If a foreign national or permanent resident is determined by an officer or the Immigration Division to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, they do not have a right to appeal to the IAD.

Serious criminality—Term of imprisonment of 6 months or more for a crime that was punished in Canada or crime described in paragraph A36(1)(b) or (c) [A64(2)].

In order for the loss of appeal rights to apply on grounds of serious criminality, the person must have received a sentence of 6 months or more for a crime punished in Canada or must have been found inadmissible for a crime described in A36(1)(b) or (c). In cases where there has been time served, i.e., pre-sentence custody, the officer must verify the credit given by the criminal court sentencing judge for the pre-sentence custody by reviewing the criminal court transcript as time spent in pre-trial detention may form part of a term of imprisonment for the purpose of A64(2). *Canada (Minister of Citizenship and Immigration) v. Atwal*, 2004 FC 7. It is important that officers gather information as to the actual sentence served. When calculating the total sentence imposed, it is imperative that the sentence be calculated to the day and not rounded off to the month as the repercussion of meeting the 6 months threshold is the loss of a right of appeal. (*R. v. Wust*, [2000] 1 S.C.R. 455, 2000 SCC 18, para. 44 and 45). A sentence of 6 months is considered 183 days of imprisonment.

A64(2) is not meant to include multiple, consecutive sentences. It refers to only a single sentence. As a result of the SCC decision in *Tran*, a conditional sentence order is not considered a term of imprisonment for the purposes of A64(2) [*Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50].

Misrepresentation

If a sponsored application for permanent residence is rejected based on a finding of inadmissibility on grounds of misrepresentation, there is no right of appeal. However, this provision does not apply if the foreign national is the sponsor's spouse, common-law partner or child [A64(3)].

7.8. Non-disclosure of information: Prior to an appeal hearing

There exists some information in the possession of the Minister that should not be disclosed to the IAD or to the other party. Different sources of information may be received by the public, the applicant, the sponsor, law enforcement, or other government departments.

The methods available to the Minister to protect this information include:

- a valid privilege over the information (common law public interest privilege, informer privilege)
- an application for non-disclosure (A86)
- the security certificate regime (A77)
- redacting irrelevant portions of a document
- not relying on a document (when the Minister is not under an obligation to disclose all information)

For the purposes of the production of an appeal record, the Minister must first determine if the tip needs to be included in the record. Then, the Minister must take steps to determine if the tip needs to be redacted from the appeal record and finally, decide on which method is best suited to protect this information.

For guidelines on non-disclosure of information [A86] and protecting information, see ENF 31 and the Hearings Fundamental Course.

7.9. Non-disclosure of information: During an appeal hearing

- should the Minister's counsel present a written application for the non-disclosure of information [A86], the IAD member adjourns the hearing. The IAD member determines whether section 86 proceedings apply.

For guidelines on non-disclosure of information [A86] and protecting information, see ENF 31.

7.10. Pre-hearing conferences

When officers enter into an undertaking with counsel and the IAD at a pre-hearing conference, it *must be detailed in writing on the file*. For example, if the Minister's counsel agrees on a statement of facts, concedes on certain issues or undertake to take specific actions, it must be clearly noted on file.

Where one officer has entered into an undertaking, any officer who subsequently has responsibility for that appeal is bound by the undertaking made by the previous officer unless new information supports a change in position.

7.11. Liaison with the Department of Justice

IRCC and the CBSA's Legal Services must be the primary source of legal advice to IRCC and the CBSA respectively to ensure uniform advice and to keep IRCC and the CBSA senior officials informed of new or unexpected issues.

The office concerned should inform the Hearings Program and Case Management as early as possible of appeals involving important Charter questions or issues that could have a potentially serious impact on the immigration program and the interpretation of the legislation. IRCC or the

CBSA will consult Legal Services to decide if assigning a Department of Justice lawyer to the case is warranted.

When the hearings officer requires urgent assistance in relation to an upcoming IAD hearing, they should consult their Justice Liaison Officer (JLO) who may request the assignment of counsel by contacting the Legal Issues Coordination Group (LICG) at LICG_Litigation_Assignments@justice.gc.ca with a copy to the Hearings Program (Hearings-Audiences-Programs@cbsa-asfc.gc.ca), and the CBSA Litigation Management Unit (LMU) (SLM-GLS@CBSA-ASFC.GC.CA) for questions under the responsibility of the Minister of PSEP or the Hearings Program and the IRCC Litigation Management Division (LMD) for questions under the responsibility of the Minister of IRCC.

7.12. Applications for judicial review

Where the officer who represents the Minister before a Division of the IRB believes that there are or may be grounds to seek judicial review, the officer will immediately consult their manager or the regional CBSA Justice Liaison Officer, subject to local procedures, to discuss the possibility of seeking judicial review of the decision. If the manager agrees that judicial review should be pursued, the hearings officer must do the following:

- (a) immediately request the reasons for decision from the Board; and
- (b) within five business days of the decision, determination, order, etc., being made, send, through the regional CBSA Justice Liaison Officer, a report to the Director of Litigation Management (LMD) at IRCC or the Manager of Litigation Management (LMU) at the CBSA. The report is to be transmitted by facsimile or by electronic means.

Officers should also keep in mind the very strict time limits involved when seeking judicial review. The 15 days for serving and filing the leave application with respect to a decision of the Board is calculated from the giving of notice of the decision or from the sending of written reasons, whichever is later pursuant to A169(f).

In order for NHQ to correctly calculate the date for filing, the request for judicial review must clearly indicate the date that IRCC or the CBSA became aware of the decision and the date the decision was sent by the Board. Once IRCC or the CBSA Litigation Management agrees to seek judicial review, immediate instructions will be issued to the Department of Justice to file the appropriate documentation with the Court. Should IRCC or the CBSA Litigation Management disagree with the recommendation for judicial review, IRCC or the CBSA office will be provided with a rationale for their decision. The rationale can be provided by LMU or the JLO depending on the reasons and discussions can take place to clarify certain points.

Note: In situations where an application is required to be filed with the Court on an urgent basis in order to preserve the Minister's rights, the decision to seek judicial review may be made at the regional level. The IRCC Director of Litigation Management (LMD) or the CBSA Manager of Litigation Management (LMU) will be notified as soon as possible thereafter. Officers should refer such requests to the regional CBSA Justice Liaison Officer after they have obtained concurrence from their manager.

Note: See ENF 9, Judicial Review, for further information.

8. Procedure: Family class sponsorship appeals

IRCC has the policy responsibility for family class sponsorship and the Minister of IRCC is the respondent (as of August 3, 2018 the official name of the Ministry had not changed to IRCC and as such until it does change, the style of cause is to remain Minister of Citizenship and Immigration).

8.1. Family class sponsorship appeals

If a Canadian citizen or permanent resident files an application to sponsor a foreign national as a member of the family class, and the application for a visa is refused, the sponsor may appeal the refusal of the application to the IAD [A63(1)]. The sponsor must be informed of the reasons for the refusal and of the right of appeal to the IAD.

There is no right of appeal to the IAD if the foreign national (applicant) is inadmissible on the following grounds [A64(1), (2) and (3)]:

- security, violating human or international rights;
- serious criminality with respect to a crime that was punished in Canada by a term of imprisonment of at least 6 months or a crime that is described in paragraph 36(1)(b) or (c);
- organized crime; or
- misrepresentation [unless the foreign national in question is the sponsor's spouse, common-law partner or child A64(3)].

Details regarding loss of appeal rights and exceptions can be found in section 7.7 above.

8.2. Notice of appeal

To file an appeal to the IAD under IRPA, the sponsor must submit a notice of appeal and the officer's written reasons for refusal to the IRB registry no later than 30 days after the appellant received the reasons for the refusal of the application [IAD rule 3(2)].

The IAD will provide the notice of appeal and written reasons for refusal to the Minister of IRCC immediately upon receipt of the documents.

8.3. Designated representative

If counsel for the appellant or Minister believes the IAD should designate a representative for the subject of the appeal because they are under 18 years of age or unable to appreciate the nature of the proceedings, they must notify the IAD in writing. If counsel is aware of a person in Canada

who meets the requirements to be designated as a representative, they must provide the person's contact information in the notice of appeal [IAD rule 19(1)].

8.4. Grounds for appeal

An appeal to the IAD may be based on questions of law, fact, or mixed law and fact, or on the grounds that there are humanitarian and compassionate considerations that warrant granting special relief under its equitable jurisdiction. The definition of "humanitarian and compassionate considerations" in section 6 above elaborates on the IAD's equitable jurisdiction.

If the IAD determines that the applicant is not a member of the family class or that their sponsor is not a sponsor within the meaning of the Regulations pursuant to R130 or R117, it cannot exercise its equitable jurisdiction to consider humanitarian and compassionate (H&C) factors [A65]. In other words, the IAD cannot consider H&C factors unless it is satisfied that the applicant is a member of the family class or the sponsor meets the requirements of the regulations. If an IRCC officer refused the application without deciding if the applicant is a member of the family class, the IAD cannot consider H&C without first making a determination on whether the applicant is indeed a member of the family class. For example, in the context of a spousal application the IAD would have to be satisfied that the marriage is legally valid and the relationship is genuine (R4) [Minister of Public Safety and Emergency Preparedness v. Hagos, IMM 6378-11, April 20, 2012].

In the absence of a determination made by an IRCC officer on whether the applicant is a member of the family class, it is up to the IAD to consider the issue for the first time during the appeal, however this is not the best option. The hearing may be postponed to permit the hearings officer to reach out the visa office and request that they assess the relationship (OB 396).

8.5. Disputed appeal rights

When a refusal is based on a determination that the sponsor has not filed their application in the prescribed manner as set out in R10, then an application to dismiss the appeal should be made to the IAD. Hearings officers should argue that the IAD does not have jurisdiction to hear the appeal because the sponsor has not made an application under the Act pursuant to R10. The issue of whether or not the sponsor is entitled to appeal to the IAD will be decided by the IAD.

8.6. Preparation of the record

The IAD will notify the responsible IRRC office that an appeal has been filed and will copy the CBSA hearings office. Once the IRCC office has received the notice of an appeal, it will send the IRCC office file to the applicable CBSA hearings office within four weeks or as soon as possible.

Upon receiving the notice of appeal and the file, the hearings office should:

- ensure that the GCMS and NCMS "Appeals" screens are completed promptly;
- enter any motions or applications associated with the appeal in the GCMS and NCMS.

- prepare the record, ensuring the documentation is complete and that it is legible and suitable for presentation to the IAD. IAD rule 4(1) states that a record shall contain a table of contents and the following documents:
 - the application for a permanent resident visa that has been refused;
 - the application for sponsorship and the sponsor's undertaking;
 - any document that the Minister has that is relevant to the application, to the reasons for the refusal or to any other issue in the appeal; and
 - the written reasons for the refusal.

Note: Under IRPA, the officer is no longer required to prepare a statutory declaration. However, officers are required to record the rationale for their decision and this must be included in the record.

The CBSA hearings office must provide the appeal record to the appellant or their counsel and a copy to the IAD. The copy of the appeal record provided to the IAD must be accompanied by a written statement saying how and when the appeal record was provided to the appellant [IAD rule 4(3)].

Records must be received by the IAD no later than 120 days after the Minister receives the notice of the appeal [IAD rule 4(4)].

If the IAD has not received the record within 120 days, it may take one of the following measures:

- ask the Minister to explain orally or in writing why the appeal record has not been provided within the time limit and give reasons why the appeal record should nevertheless be accepted; or
- schedule and start the hearing without the appeal record or with only part of the appeal record.

Note: It is important that a hearings officer review the IRCC office file immediately after receipt. This review will allow officers to identify problems and opportunities to resolve the case without a hearing. Furthermore, early review of the visa file will allow the opportunity to add additional grounds of refusal if necessary.

8.7. Requirements to be eligible to sponsor

R130 to R134 provide the requirements that a person must meet to be eligible to sponsor a relative as a member of the family class. The Family Class Program Delivery Instructions (PDIs) on assessing the sponsor provide further information on the legislative requirements to be met by the sponsor.

8.8. Failure to meet financial criteria

R134 provides procedures for calculating a sponsor's ability to meet the minimum necessary income (MNI) requirement. Financial requirements are specific to the type of family member being sponsored.

Assessment of ability to meet this requirement for the sponsorship of a family member other than a parent or grandparent is based on the last notice of assessment or equivalent document. Where the sponsor does not produce the document or their income is less than the required amount, their income will be calculated based on the income during the 12 months preceding the application. The date of the application is the date on which a complete family class application, including the processing fees, has been received at the CPC-Mississauga. Under R133(4), a sponsor is exempt from meeting MNI requirements when they are sponsoring a spouse or partner, dependent child or grandchild.

Amendments to the Immigration and Refugee Protection Regulations that came into force on January 1, 2014, made changes to the financial requirements for parents and grandparents. For the sponsorship of parents and grandparents, the sponsor must meet the minimum necessary income requirement (Low Income Cut-offs (LICOs) plus 30%) for each of the three taxation years immediately preceding the date of their application. The Minimum Necessary Income must meet or exceed the minimum necessary income requirement plus 30% on the date on which the sponsorship application is signed until the day the family members are granted status as permanent residents.

The ruling in the decision *Nematollahi v. Canada (Citizenship and Immigration)* 2017 FC 755 has led the IRCC to review its interpretation of the Regulations concerning the three consecutive taxation years immediately preceding the date the application to sponsor is received. The ruling has an impact on applications to sponsor parents and grandparents that have been received since 2014. Sponsors are encouraged to sign the statement of consent (question 8 on the Financial Evaluation for Parents and Grandparents Sponsorship) and provide their Social Insurance Number (SIN) to allow the IRCC to collect their SIN and request their income tax information quickly from Canada Revenue Agency (CRA) to determine whether they meet the minimum necessary income requirements. This may be used in cases where the sponsor has submitted their application to sponsor at the beginning of the year and may not have filed their taxes at the time of application or have still not received their Notice of Assessment for the previous taxation year. If the sponsor does not provide their consent, they must complete the applicable form Income Sources for the Sponsorship of Parents and Grandparents and submit a Notice of Assessment issued to them by the CRA for each of the three taxation years immediately preceding the date their application is received by the IRCC. If the sponsor does not have paper copies of their Notices of Assessment on file, they may view and print their tax returns as well as other personal tax information using the CRA's My Account online service.

Subsection 134(2) of IRPR provides officers with the authority to request updated evidence of income from all sponsors who submit a sponsorship application for a member of the family class in the following circumstances:

- the officer receives information indicating that the sponsor is no longer able to fulfil the obligations of the sponsorship undertaking; or
- more than 12 months have elapsed since the receipt of the sponsorship application.

Appellants may submit new evidence of income relating to the period preceding the date of filing of their sponsorship application. In such cases, officers are required to take into account the new evidence of income in determining the IRCC's position at the appeal hearing.

However, officers should argue that evidence of income relating to the period that follows the receipt of the sponsorship application is not a valid indication of a sponsor's ability to meet the requirements in R134 for authorization to sponsor. The IAD should not take such evidence into account in deciding on the basis of a question of fact or law. Where the sponsor's financial situation has improved, the option to submit a new sponsorship application is available.

The ruling in the decision of *Dokaj v. Canada* (2009, FC847) has led the IRCC to review its interpretation of the *Immigration and Refugee Protection Regulations* concerning the adding of a co-signer to an existing family class undertaking. The Federal Court found that the IRCC could not take into account the additional expenses incurred when adding a family member to the household, such as a spouse or common-law partner, without also taking into consideration the income that the individual brings to the household, if they have co-signed an undertaking. Henceforth, a co-signer can be added between the day on which the sponsorship application was filed and the day on which a decision is made with respect to the application, if required, due to a change in circumstances related to family composition. When assessing the sponsor's income against the MNI requirement, both the increase in the MNI requirements resulting from the addition of a family member, and the co-signer's income, calculated in accordance with R134(a) to (c) against the MNI in effect at the time, shall be considered. However, a co-signer may not be added to the sponsorship application if the sponsorship was already assessed and at that assessment, the sponsor failed to meet the sponsorship requirements.

8.9. Other sponsorship eligibility requirements

Sponsors are not eligible to sponsor if they are convicted of a sexual or violent offence against anyone, or for an attempt or a threat to commit such an offence, or if they are convicted of an offence causing bodily harm against certain members of their family, or for an attempt or a threat to commit such an offence [R133(1)(e)].

In addition, the sponsorship application shall only be approved if there is evidence that the sponsor is not in receipt of social assistance for a reason other than disability [R133(1)(k)].

See IP 2, Processing Applications to Sponsor Members of the Family Class, for further information concerning the processing of applications to sponsor.

8.10. Humanitarian and compassionate grounds related to sponsorship

If the IAD determines that the applicant is a member of the family class pursuant to R117 and that their sponsor is a sponsor within the meaning of the Regulations in R130, it can exercise its equitable jurisdiction to consider humanitarian and compassionate (H&C) factors [A65].

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However, when a refusal is based on the fact that the sponsor has not met the minimum necessary income requirement set out in R134 or is in default of a previous sponsorship as of the date that the undertaking was given, officers should argue that the fact that the sponsor would meet the requirements if the current situation were taken into consideration does not constitute, in itself, sufficient humanitarian and compassionate grounds.

Hearings officers should argue that, for an appeal to be allowed in equity, the decision must be based on factors other than an improvement in the sponsor's financial situation or the fact that the sponsor is no longer in default. Officers should ask the IAD to note that the sponsor had the option of taking a refund of the processing fee or proceeding with their application, knowing it would be refused because they did not meet the requirements at the time. Otherwise, allowing persons who did not meet the regulatory requirements during the specific time frame to sponsor a member of the family class negates the effect of the Regulations.

See IP 2, Processing Applications to Sponsor Members of the Family Class, for more information.

8.11. Bad faith marriage [R4(1)]

The IAD will consider a refusal by the IRCC office in order to determine whether section R4(1) is applicable, thereby excluding the applicant as a member of the family class. A "bad faith" or "non-genuine" relationship pursuant to R4(1) is present when either a relationship is not genuine, or it was entered into primarily for the purpose of acquiring any status or privilege under the Act. This creates a disjunctive relationship between the "genuineness" and the "purpose" of the bad faith assessment. This clarifies that a finding of bad faith can be made if either of these elements is present.

Therefore, the wording of subsection 4(1) of the Regulations is unambiguous; a finding of bad faith can involve either a finding that the marriage was entered into primarily for the purpose of immigration or that the marriage is not genuine. This interpretation was confirmed by Chief Justice Paul Crampton in *Gill v Canada* (Minister of Citizenship and Immigration), 2012 FC 1522.

When conducting the file review in preparation of the appeal, it is important to be cognizant of the legal framework within which sponsorship appeals are considered. In assessing whether a marriage/common law relationship/conjugal relationship was entered primarily for the purpose of acquiring status or privilege or whether the marriage was genuine, the IAD must take into consideration the totality of the evidence on the balance of probabilities standard. Since the hearing is a *de novo* hearing, the IAD's role is to evaluate all of the evidence gathered up to the hearing so as to determine whether section 4(1) of the Regulations applies.

Further instructions are available under the PDI (Program Delivery Instructions) – identifying a relationship of convenience found at the following link.

<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes/family-class-determining-spouse/assessing-relationship.html>

Other important guidance established in jurisprudence:

- The appeal to the IAD is a de novo appeal, in which the IAD must consider afresh whether the person sponsored as a spouse, common-law partner or conjugal partner is a member of the family class. *Singh Sandhar v. Canada (Citizenship and Immigration)*, 2013 FC 662;
The relevant time to assess the marriage's genuineness is the present, while the relevant time to assess the primary purpose of the marriage is in the past, i.e., at the time of the marriage. *Singh v. Canada (Citizenship and Immigration)*, 2014 FC 1077;
- The first part of the test requires an assessment of whether the marriage "was entered into primarily for the purpose of acquiring any status or privilege under the Act". In assessing whether the test is satisfied, the focus must be upon the intentions of both parties to the marriage at the time of the marriage. The Federal Court has recognized that the testimony of the couple parties regarding what they were thinking at that time typically will be the most probative evidence regarding their primary purpose for entering into the marriage. *Gill v. Canada (Citizenship and Immigration)*, 2012 FC 1522;
- A finding that a marriage is genuine weighs "significantly in favour of a marriage that was not entered into for the purpose of gaining status in Canada". However, the finding that a marriage is genuine is not determinative of the primary purpose. *Sandhu v. Canada (Citizenship and Immigration)*, 2014 FC 834;
- Evidence of commitment subsequent to the marriage can be used to prove the primary purpose of the marriage. This might include evidence of a continuing relationship or the birth of a child. However, such evidence is not necessarily determinative. *Gill v. Canada (Citizenship and Immigration)*, 2012 FC 1522; *Sandhu v. Canada (Citizenship and Immigration)*, 2014 FC 834;
- The Board, must be careful about imposing western or Canadian paradigms on non-western culture. *Nadasapillai v. Canada (Citizenship and Immigration)*, 2015 FC 72;
- The birth of a child is not determinative, however in assessing whether a marriage is genuine great weight must be afforded to the birth of a child. *Gill v. Canada (Citizenship and Immigration)*, 2010 FC 122.

8.12. New relationship [R4.1]

An applicant may be refused under Regulation 4.1 if they were previously in a prescribed relationship with their sponsor, but dissolved it primarily for immigration purposes. Section 4.1 is discussed at some length in Chapter 5 of the IRB's guideline on Sponsorship Appeals. According to this document, the intent of Section 4.1 has been stated to be "to prevent persons in a conjugal relationship from dissolving the relationship to free them to gain admission to Canada only to turn around and resume their previous relationship" (*Harripersaud, Janet Rameena v. M.C.I. (IAD TA3-11611)*, Sangmuah, 2005).

In *Wen, Chun Xiu v. M.C.I. ((IAD TA5-14563)*, MacLean, 2007), the IAD set out a list of non-exhaustive factors to consider when assessing the applicability of section 4.1 of the Regulations, including:

- When the relationship dissolved;
- The reason for the dissolution of the relationship;

- The temporal relationship between the ending of the relationship and the forming of a new relationship with the subsequent partner;
- Evidence that the former spouses or partners did not separate or end contact with each other;
- the intent of the spouses or partners upon re-establishing their relationship;
- the length of the subsequent relationship;
- the temporal connection between the dissolving of the subsequent relationship and the **re-establishment** of a new relationship with the **previous** spouse or partner, and;
- the intentions of the parties to the new relationship with respect to immigration.

It is clear from the cases of Wen and Harripersaud, as well as the IRB's guidelines that section R4.1 only applies to situations involving the reunion of two parties who previously separated primarily for immigration purposes. For greater clarity, "the dissolution of a conjugal relationship between two persons and a subsequent resumption of a conjugal relationship between these two persons to facilitate immigration constitutes an act of bad faith." Further instructions is available under the PDIs Identifying a relationship of convenience, under the section "Conjugal relationships—Dissolutions of convenience".

8.13. Sponsors residing in provinces under federal-provincial agreements [A8(1) and A9(2)]

If a sponsor resides in a province that has sole responsibility for establishing and applying financial criteria for sponsors under a federal-provincial agreement [A8(1)], the sponsor has no right of appeal to the IAD on any ground of law, fact or mixed law and fact when both of the following circumstances exist:

- the application is refused based on the rejection of the person's application for sponsorship by an official of that province on the grounds that the person failed to meet the financial criteria or to comply with any prior undertaking concerning the sponsorship of any application for permanent residence and
- the laws of that province provide the person with a right to appeal the rejection of their application for sponsorship.

Note: The sponsor can still appeal on humanitarian and compassionate grounds [A9(2)] and have a Certificat de Sélection du Québec (CSQ) issued by the Ministère de l'immigration, de la Diversité et de l'inclusion (MIDI). If the appeal is allowed, the visa office can reopen the processing of the application but the sponsor residing in Quebec would still need to meet the MIDI's financial requirements. A refusal by the MIDI can be appealed with the Tribunal administratif du Québec (TAQ) and the sponsor can provide them with the positive decision from the IAD. The visa office can also contact the MIDI directly and provide them with the IAD decision for the issuance of a CSQ.

At present, Quebec is the only province with such an agreement.

8.14. Members of the family class

The definition of member of the family class includes spouses, common-law and conjugal partners, dependent children (including adopted children), children to be adopted, parents and grandparents, some orphaned relatives under 18 and certain other relatives in specified circumstances. A12(1), R116 and R117 specify who is a member of the family class.

The age for dependent children was changed from 19 to 22 on October 24, 2017: For additional information, see the definition of a dependent child in the Glossary of the Family Class PDI.

8.15. Filing evidence

Information and documents must be submitted in a form suitable for presentation to the IAD, such as a statutory declaration or the interviewing officer's reasons or GCMS notes recording the information or identifying the documents received. Officers' declarations should contain facts, not opinions or conclusions, and should clearly indicate that the person making the declaration is an officer.

Documents must be filed with the IAD no later than 20 days before the hearing with a written statement saying how and when the documents were provided to the other party. Medical documents related to a refusal based on inadmissibility for health grounds must be filed no later than 60 days before the hearing. The earlier filing of medical documents is intended to provide sufficient time for parties to evaluate any new medical evidence in advance of the hearing and, consequently, to help prevent adjournments.

New information may be received in the form of a report, with appropriate documentation, from an officer in Canada or abroad who has become aware of new information concerning an appellant, such as marriage, the birth of a child, hospitalization, a criminal conviction or becoming a public charge.

The IRCC office may forward information to the officer that it has used in assessing a sponsored application for permanent residence. If such evidence was obtained in confidence from the government or an institution of a foreign state, or an international organization of states and cannot be released publicly, the Minister may make an application for non-disclosure of information to the IAD. The grounds for the application will be that disclosure of such information would be injurious to national security or the safety of persons. Procedures for applications for non-disclosure of information are found in section 7.8 above.

8.16. Consenting to an appeal—Communication with the IRCC office

When a decision is made to consent to a sponsorship appeal, it is imperative that the hearings officer inform the IRCC office of the reasons in writing. A consent form must be filled out and placed on the file returning to the responsible IRCC office outlining the main reasons the appeal was conceded. In order to assist the IRCC officers in identifying ways to strengthen decisions and avoid potential trends from developing, lines of communication with the IRCC offices must be kept open.

Should the officer notice a trend forming with particular types of refusals or refusals from a particular office, copies of the refusals in question should be forwarded to Litigation Management Division, IRCC NHQ, e-mail to: IRCC.CMBLitigationMgmtRequest-DemandeGestLitigesDGRC.IRCC@ic.gc.ca with an overview of the scenario. Should a trend develop without being brought to the attention of the IRCC office and NHQ, the number of similar refusals may increase. It is imperative that hearings officers and IRCC-NHQ work in collaboration with processing offices and the processing networks (International Network, Centralized Network and Domestic Network), to ensure well-reasoned, consistent decisions that can be defended before the IAD.

8.17. Authorization to return to Canada and refusal of permanent residency application

In circumstances where a hearings officer is faced with the issue of an Authorization to Return to Canada (ARC) before the Board, Hearings Officers should argue that the IAD has no authority to issue an ARC. The issuance of an ARC in Canada is quite rare and has been delegated to the manager or director levels in the IRCC and the CBSA for inland cases. Generally, a subject who is in Canada and requires an ARC is reported for non-compliance. It is the Minister's jurisdiction to issue an ARC and should not be added as an issue before the Board.

IAD has no jurisdiction to order the issuance of an ARC, regardless of whether a decision on ARC was made by a visa officer. However, IRCC's position is that when a visa officer refuses to issue an ARC and then refuses the PR application on that basis, the IAD has H&C jurisdiction to overcome the inadmissibly underlying the ARC refusal, but it cannot order a visa officer to issue an ARC.

Recent jurisprudence has supported the position that no appeal lies to the IAD from a decision to refuse an ARC. [*MOMI v. Canada (Citizenship and Immigration)*, 2019, FCA 163]

8.18. Post-hearing procedures

When the hearings office concerned receives notice of the IAD's decision, the GCMS and NCMS "Appeals" screens are to be completed promptly.

If the IAD allows the appeal and the officer, in consultation with their supervisor, believes that an application for leave and judicial review of the decision is warranted, the IAD's decision should immediately be brought to the attention of the Manager of Litigation Management at NHQ (LMD). See ENF 9 for detailed procedures on applying for judicial review.

If the C&I Minister applies for leave to begin an application for judicial review of the IAD decision allowing a sponsorship appeal, further processing of the visa application by the officer is stayed until the leave and judicial review application are disposed of by the Federal Court and the Federal Court of Appeal. If leave is granted, further processing of the visa application is stayed until the courts have finally disposed of the matter, or until the time limits for filing the application for judicial review or appeal have elapsed.

If the IAD allows the appeal, refers the matter back for reconsideration and the Minister does not file an application for leave to apply for judicial review of the decision, the case is returned to the responsible IRCC office for reconsideration in accordance with the IAD's decision [A70(1)].

The officer should send a copy of the IAD's reasons to the responsible IRCC office, including any new evidence that was established at the hearing. If the Minister consented to the appeal, the IRCC office is given a full explanation of the reasons for the Minister's consent.

A70(1) obliges an officer to respect the decision of the IAD in re-examining an application. However, the officer must review the application to determine whether the application meets all other requirements of eligibility and admissibility. Sponsors and applicants are exempt from any requirements that the IAD has set aside in its decision. In rare cases, if there are new grounds of ineligibility or inadmissibility, or grounds that were not assessed in the first decision, the application may be refused again.

Note: To ensure that IRCC offices do not process applications where an application for judicial review has been made, hearings officers must inform IRCC office that an application for judicial review of the IAD decision is pending.

9. Procedure for appeals involving medical inadmissibility

9.1. Overview of process for medical refusal

IRCC has the policy responsibility with respect to medical inadmissibility [A38]. For further guidance on medical refusal procedures, please refer to the Program Delivery Instructions on Medical Requirements.

9.2. Grounds for appeal

The IAD will normally deal with the issue of additional medical information with the appellant at the assignment court. This includes clarifying the grounds for appeal for which the information is intended to be used and setting time frames for providing the information.

To accelerate the processing of these appeal cases, the hearings officer should try to ascertain as soon as possible the grounds for appeal to be used before the IAD, namely, whether there is a challenge in law or whether it will be argued that there are compassionate or humanitarian considerations that warrant the granting of special relief, or both.

9.3. When to consider a new medical examination during the appeal process

Where only compassionate or humanitarian considerations form the basis for the appeal, a new medical examination should not be issued during the appeal process. In these cases, the hearings officer will simply need to consider requesting sufficient time between receipt of the

medical information from the appellant and the hearing. During this time, the hearings officer will seek the advice of Operations Directorate, Migration Health Branch, IRCC, NHQ, about the medical information submitted, and to consider whether to introduce an opinion of a medical officer as rebuttal evidence.

Where newly-submitted medical information is intended to challenge the decision in law, the appellant or counsel should be advised that the examining health-care professional consulted by the applicant must refer to the medical notification of medical inadmissibility. Any health care professional's report aimed at challenging the decision in law should expressly and clearly address the issues raised in the medical notification, that is, diagnosis, prognosis and the issue of excessive demand on health and social services, and the issue of whether the health condition is likely to be a danger to public health and safety. Prior to agreeing to a postponement for obtaining this new medical information, the hearings officer will confirm that the applicant is willing to undergo further medical examinations if a medical officer so recommends.

In considering the appropriate time frame for obtaining the medical information, the hearings officer must be fair to the appellant and consider facilitating resolution without litigation, but without compromising IRCC's interest in the finality of litigation.

Generally, IRCC will not support the consideration of more than one submission of new medical information from counsel once an appeal has been filed unless there is a genuine need to clarify the evidence previously gathered by obtaining supplementary evidence.

9.4. Procedures upon receipt of new medical information during the appeal

When hearings officers receive new medical information about an applicant, they will reconfirm with the appellant or counsel the purpose for which the information is being submitted, review the new information and decide whether it should be forwarded to the Operations Directorate, Migration Health Branch, IRCC, at NHQ. Hearings officers must assess whether the information is relevant and related to the applicant's medical condition, as described in IRCC medical officer's medical assessment, namely, in terms of the diagnosis, the prognosis and the issue of excessive demand on health and social services, and the issue of whether the health condition is likely to be a danger to public health or safety. In most cases, the information will be forwarded to the Operations Directorate, Migration Health Branch, IRCC, at NHQ. However, the new information should not be forwarded to the Medical Services Branch if it clearly has no link with the reason for refusing the applicant on medical grounds or if the medical information is so vague or of such a general nature that it has little or no probative value. Instead, a date for hearing at the IAD should be requested. (Examples are provided in Appendix B.)

On receipt of the new medical information, the Migration Health Branch, NHQ will transfer a copy to the medical officer abroad and inform both the relevant visa office and the hearings officer. The hearings officer will inform the IAD and appellant or counsel in writing of the timing of this transfer. The Migration Health Branch at NHQ and the medical officer abroad will review this new medical information and jointly decide if the original medical assessment should be upheld or if a new medical examination should take place because it appears that there is a change in the person's medical status. The medical officer abroad will then forward this decision directly to the

hearings officer, with a copy to both the visa office in charge of the case and the Migration Health Branch at NHQ. The findings will read as follows:

Medical officer X has reviewed the applicant's entire medical file including the newly-submitted medical information that consists of [*list what was reviewed about the applicant*]. After completing this review, the medical officer upholds the original medical assessment. In this case, the hearings officer will proceed with the appeal before the IAD.

or

After completing this review, it is recommended that the applicant undergo a new medical examination. The hearings officer will provide any direction required as to the requested medical examination.

9.5. New medical examination

When medical officers recommend a new medical examination, the officer will contact the applicant within 30 days, request photographs within that time frame (where necessary) and issue new medical instructions.

Upon receipt of a notice that a new medical examination is required, the applicant should either undergo the medical examination within 30 days or, alternatively, provide the officer with the date of an appointment for the medical examination within 30 days.

The medical examination will be at the applicant's own risk and expense. The applicant should be advised that failure to comply within 30 days will lead IRCC to terminate the medical reassessment process. (Example letter provided in Appendix B.)

At the same time, the hearings officer will immediately inform the appellant or counsel in writing, with a copy to the IAD that the applicant will be allowed to undergo a new medical examination. The hearings officer will also advise the appellant or their counsel that it is their responsibility to ensure the applicant complies with the officer's instructions to forward passport-size photographs within 30 days and, if required, to undergo a medical examination or make an appointment for the medical examination within 30 days of receipt of the new medical instructions. The hearings officer should notify the appellant or counsel that the applicant's failure to comply within 30 days may result in IRCC terminating the medical reassessment process. (Example letter provided in Appendix C.)

It is important for IRCC office to indicate, in GCMS, the date on which the new medical instructions were sent out. If the applicant does not comply with the instructions, the officer will notify the hearings officer, who will in turn inform the IAD and ask for a hearing date to be set, with a copy of the request for a hearing date to the appellant or counsel.

Each IRCC office should appoint a coordinator to ensure the follow-up of these cases by means of a bring-forward (BF) system. The results of the new medical examination must be forwarded to the hearings office as soon as they have been received.

Hearings offices should also use a BF system to follow up on these cases with IRCC offices, at a minimum every three months, with appropriate follow-up to IRCC offices where no action seems to have been taken. GCMS could be used for follow-up by those hearings offices that have access.

IRCC's target time frame for the medical reassessment process is a maximum of nine months from the time IRCC office is informed that a new medical examination is required.

9.6. Communicating medical results

When the IRCC office receives the results of the medical officer's updated medical assessment, it shall immediately forward them to the hearings officer, with a copy to the IAD. The IRCC officer must pass on the results as soon as possible to permit the Department to meet the nine-month processing targets.

Where the re-examination reveals that the applicant is no longer medically inadmissible, there will be no need to pursue the appeal, barring other non-medical grounds for inadmissibility. The appellant or counsel should be advised in writing that processing will continue once the appeal has been formally withdrawn. Upon notification from the hearings office that the IAD has acknowledged receipt of the withdrawal of the appeal, visa officers can continue processing the application for permanent residence.

9.7. Medical officers' statutory declaration

The specialized knowledge of a medical officer is important to hearings officers in properly defending medical refusals before the IAD. Although it was the practice for medical officers to prepare statutory declarations when they were informed that a sponsor had appealed a refusal on health grounds, medical officers can no longer systematically prepare statutory declarations for all medical refusals.

Medical officers may still be called upon in some cases to provide hearings officers with statutory declarations to establish the connection between the diagnosis and the conclusion that the person's coming to Canada might cause an excessive demand on health or social services, or is likely to be a danger to public health or safety. To assist medical officers, hearings officers will have to indicate clearly those points in the medical documents that require explanation. A medical record contains technical terms and specialized vocabulary that are not always easy to understand and interpret. To help and support hearings officers in this task, the Operations Directorate, Migration Health Branch at IRCC, NHQ are available to answer questions from hearings officers and provide clarifications that could prevent additional delays.

A statutory declaration can be requested in situations where the threshold of the proof can be very demanding, for example, when a person suffering from intellectual disability is refused because their entry into Canada might cause excessive demands on social services.

In cases where the person's state of health is very serious and it is recognized by the medical community that a person suffering from this type of illness will require repeated access to health services, hospitalization or major surgery, and the medical record as well as the medical

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notification contain sufficient details, it is not necessary to request a statutory declaration. An example would be a person suffering from metastatic malignancy, renal failure or AIDS.

The IAD has upheld inadmissibility based on health reasons in cases where clear evidence was provided without a statutory declaration from a medical officer.

As of June 1, 2018, IRCC has issued a temporary public policy expanding the definition of excessive demand. Please refer to IRCC's PDIs for details on how this public policy may impact the appeal.

9.8. Effective communication

Communication is the key to ensuring that the set procedures are dealt with effectively. This means updating GCMS notes, bringing files forward on a regular basis and communicating with everyone involved in given cases, including the IRCC officers, medical services and hearings officers. If established procedures are followed, the number of requests for updates received at offices and unnecessary litigation before the IAD will be reduced. More importantly, client service in the form of more timely decisions on complex medical appeals will result.

10. Alternative dispute resolution process (ADR) [IAD rule 20]

The CBSA has the responsibility for operational policies, including ADR.

The IAD may require the parties to participate in an ADR process in order to encourage the parties to resolve an appeal without having recourse to a full hearing.

10.1. Purpose of ADR

ADR aims to empower parties to an immigration appeal to participate in the resolution of their case through the use of an informal meeting. This program is premised on the notion that litigation is often not in the best interests of the parties and that some types of appeals could be prevented from proceeding to a hearing by applying ADR techniques.

The principal ADR method of attempting to resolve appeals is through a resolution process. An IAD-employed Early Resolution Officer (ERO) acts as dispute resolution officer and attempts to bring the parties to resolve the appeal. ADR cases are generally resolved by the sponsor withdrawing their appeal or by Minister's counsel consenting to it. Alternatively, in unsuccessful resolution processes, the evidence and legal issues required at the hearing are often reduced as a result of the early resolution session and a full hearing is scheduled to dispose of the appeal.

It is important to note that, as Minister's counsel, hearings officers possess the authority to make decisions on behalf of the Minister of C&I or the Minister of PSEP when appearing at ADR sessions.

10.2. Responsibilities of hearings officers for dispute resolution

| When | Responsibility |
|-----------------------------------|--|
| Before and during the ADR session | <p>The role of Minister's counsel is to represent the public interest and attempt to ensure that justice is done.</p> <p>A crucial difference between the role of Minister's counsel in the hearings process versus the ADR process is that an ADR approach requires parties to operate in a proactive manner by searching for a resolution that will avoid a hearing. This does not mean that compromise is reached for the sake of compromise. However, Minister's counsel must balance the need for program integrity with efficiency.</p> <p>This means ensuring that a resolution reached through ADR is consistent with the principles of the IRPA, and IRCC or the CBSA policy. An approach that acknowledges statutory obligations and ADR values is one in which the Minister's counsel decides to consent to an appeal because it is recognized that it is not in the public interest to litigate cases that have a poor chance of success at a hearing.</p> |
| Post-ADR | <p>In appeal cases that are resolved at ADR, an IAD-issued Summary of Agreement of the Parties form is completed by the ERO. The Minister's counsel must ensure that this form and any additional and relevant information relating to the reasons for the ADR settlement of the case are forwarded to the appropriate IRCC office. It is acceptable to do this by e-mail in addition to inserting this summary of agreement in the file that will be returned to IRCC for further processing.</p> <p>Questions regarding the outcomes of individual appeals should be directed to the hearings officer who acted as the Minister's counsel on the case. General questions regarding the use of ADR in the appeals process may be forwarded to the CBSA Director of the Inland Enforcement Branch at NHQ.</p> |

11. Procedure for removal order appeals

The CBSA has the policy responsibility with respect to the issuance of removal orders and the Minister of PSEP is the respondent in removal order appeals.

11.1. Persons who may appeal against removal orders

Pursuant to A63(2) and A63(3), permanent residents, foreign nationals who hold a permanent resident visa and protected persons, may appeal against a decision at an examination or an admissibility hearing, their removal order to the IAD . They may appeal not only on the basis of

legal and factual questions, but also on the basis that there are humanitarian and compassionate considerations that warrant granting special relief.

An appeal may be based on the grounds that the decision appealed is wrong in law, fact or mixed law and fact or that a principle of natural justice has not been observed or that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case. [A67]

A64 provides that no appeal may be made to the IAD by a foreign national, their sponsor or a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. Inadmissibility for serious criminality here refers to an offence punished in Canada by a term of imprisonment of at least six months or that is described in A36(1)(b) or A36(1)(c).

11.2. Criminality

Inadmissibility provisions have been consolidated under IRPA such that provisions apply both inland and at the port of entry. For details on inadmissibility provisions, see ENF 1, Inadmissibility, and ENF 2, Evaluating inadmissibility.

Situations may arise where the appellant had convictions as a young offender, and evidence related to those convictions is important in establishing the Minister's case. Under A36(3)(e), inadmissibility on the grounds of A36(1) or A36(2) may not be based on an offence under the *Young Offenders Act* (YOA). The YOA was replaced by the *Youth Criminal Justice Act* (YCJA) which came into effect on April 1, 2003. A conditional sentence order (CSO) is not considered a term of imprisonment for the purpose of 64(2). [Tran v. Canada (Public Safety and Emergency Preparedness), 2017 SCC 50]. The SCC in Tran decided two main issues; 1) a conditional sentence order imposed pursuant to the regime set out in ss. 742 to 742.7 of the Criminal Code of Canada (CCC) does not constitute a "term of imprisonment" under paragraph 36(1)(a) of the IRPA and ; 2) the phrase "maximum term of imprisonment" in paragraph 36(1)(a) of the IRPA refers to the maximum term of imprisonment available at the time of the commission of the offence and not the term of imprisonment available at the time of sentencing or the time when admissibility is determined.

For additional information, see ENF 14, Criminal Rehabilitation, OP 19, Criminal Rehabilitation and ENF 28, Ministerial Opinions on Danger to the Public and to the Security of Canada.

11.3. All the circumstances of the case

The definition of "humanitarian and compassionate considerations" in section 6 above provides details of the test to be applied by the IAD when exercising its equitable jurisdiction. It also sets out the general factors the IAD considers when hearing removal order appeals. Removal order appeals differ from sponsorship appeals in that the IAD's equitable jurisdiction includes the potential risk the appellant may face in their country of destination.

The Supreme Court ruled in *Chieu v. M.C.I.*, [2002] 1 S.C.R. 84 and *Al-Sagban v M.C.I.*, [2002] 1 S.C.R. 133 that “all the circumstances of the case” may include foreign hardship, including the risk that the individual may face, provided that the likely country of destination has been established. Based on the Supreme Court’s reasoning, it is highly likely that appellants will submit documentation regarding the human rights situation in the country of destination and other documentation related to risk at the appeal against their removal order. The Court has acknowledged that the Minister is entitled to have documents verified prior to the hearing or to challenge their validity.

Without a passport or travel document for a particular country, it is the CBSA’s position that there is insufficient evidence to assume which will be the likely country of destination and foreign hardship should be considered only where the likely country of destination has been established.

If such documentation is necessary to determine the likely country of destination, the circumstances in the country of destination at the time of removal cannot be certain. Where the appellant is serving a sentence or it can be established that the removal process is particularly lengthy, it will become even more difficult to anticipate country conditions at an uncertain point in the future.

Hearings officers should evaluate the circumstances of each case and, where appropriate, argue that, in the absence of sufficient evidence to establish the likely country of destination or time of removal, anticipated risk or hardship cannot be properly evaluated.

Further, appellants will have an opportunity to apply for a pre-removal risk assessment (PRRA) when they become ready for removal. Foreign hardship will be more accurately assessed at the right time through the PRRA process. Therefore, in some cases it will be appropriate for hearings officers to submit that foreign hardship should be given little weight for these reasons.

11.4. Mandatory conditions to be imposed by the IAD

A68(2)(a) states that where the IAD stays a removal order:

“it shall impose any condition that is prescribed and may impose any condition that it considers necessary.”

Mandatory conditions are found in R251 and are as follows:

251....

(a) to inform the Department and the IAD in writing in advance of any change in the person’s address;

(b) to provide a copy of their passport or travel document to the Department or, if they do not hold a passport or travel document, to complete an application for a passport or a travel document and to provide the application to the Department;

(c) to apply for an extension of the validity period of any passport or travel document before it expires, and to provide a copy of the extended passport or document to the Department;

(d) to not commit any criminal offences;

(e) if they are charged with a criminal offence, to immediately report that fact in writing to the Department; and

(f) if they are convicted of a criminal offence, to immediately report that fact in writing to the Department and the Division.

Note: Effective December 12, 2003, the portions of the Department of Citizenship and Immigration that deal with enforcement (removals, detention, investigations, hearings, appeals, interventions) and war crimes were transferred to the Canada Border Services Agency. Therefore, the words "the Agency" should be read where the words "the Department" currently appear in the above-referenced section of the Regulations (R251).

The mandatory conditions shall be imposed in all stays of removal imposed by the IAD, whether the removal order was based on criminal inadmissibility or for any other removal order appeal.

11.5. Discretionary conditions in criminal inadmissibility cases

The IAD has discretionary power to impose non-prescribed conditions when it stays a removal. Generally, these conditions are imposed in cases involving criminal inadmissibility and entrepreneur appellants.

In criminal inadmissibility appeals, conditions of a stay that are frequently imposed by the IAD include the following:

- provide all information, the notice and documents required by the conditions of the stay by hand, by regular or registered mail, by courier or priority post to the CBSA, at (address of the CBSA's office) and to the IAD (address of the IAD and fax number) It is the responsibility of the appellant to ensure that the documents are received by the Agency within any time period required by a condition of the stay.
- report to the CBSA on the dates set by the IAD, or the first of the month in a sequence chosen by the IAD. The appellant shall report in person, in writing or by telephone. The reports are to contain the following details:
 - employment or efforts to obtain employment, if unemployed;
 - current living arrangements;
 - marital status, including common-law relationships;
 - attendance at meetings of Alcoholics Anonymous, or any other drug or alcohol rehabilitation program;
 - other relevant changes of personal circumstances (ie. separation, divorce, children).
- make reasonable efforts to seek and maintain full-time employment and immediately report any change in employment to the Agency.

- not knowingly associate with individuals who have a criminal record or who are engaged in criminal activity, except contact that might result while attending meetings of Alcoholics Anonymous, or any other drug or alcohol rehabilitation program.
- not own or possess offensive weapons or imitations of offensive weapons.
- respect all parole conditions and any court orders.
- refrain from the use of alcohol.
- keep the peace and be of good behaviour.
- take immediate steps to repay any and all debts owed to creditors. Provide proof of repayment schedule and compliance at each time of reporting to the Agency.
- follow or continue to follow a psychotherapy program if the probation officer sees the need. (If appellant withdraws consent to this condition, they must forthwith make an application to the IAD to have this condition removed.)
- engage in or continue anger management counselling with (name of therapist or group).
- refrain from the illegal use or sale of drugs.
- maintain the payment schedule as foreseen in the agreement with the Municipal Court.

Discretionary conditions depend on the nature of the appellant's situation, which will have been established during the hearing before the IAD. They can be suggested by the Minister's counsel and the appellant, but the IAD decides which conditions will be imposed.

The burden rests on the appellant to demonstrate that the conditions have been met; however, the CBSA's hearings office will monitor whether the appellant complies with the mandatory and discretionary conditions imposed with the stay in order to report, when required, to the IAD. See section 11.7 below.

11.6. Monitoring compliance with the conditions of a stay of removal

Where the IAD has stayed a removal order, it may, at any time, on application or on its own initiative, reconsider the appeal [A68(3)].

The Minister or the appellant can apply to the IAD to reconsider the appeal [IAD rule 26(1)]. The applicant must follow IAD rule 43 for applications generally, but evidence is not required in an affidavit or a statutory declaration. However, a written statement of whether the subject of the appeal has complied with the conditions of the stay must be provided with the application.

When the IAD provides notice that it may reconsider an appeal in which it stayed a removal order, both parties must immediately provide the IAD with a written statement concerning compliance with the conditions of the stay of removal [IAD rule 26(3)].

The statement of the Minister's counsel must indicate the information the Minister has concerning compliance with the conditions of the stay and should indicate what decision the IAD should make when reconsidering the appeal [IAD rule 26(3)]. Where a removal order on the grounds of criminal inadmissibility has been stayed, verification of compliance with the conditions imposed by the IAD is the CBSA's responsibility. When a date is scheduled by the IAD for a review, a report indicating compliance, or default, with the conditions shall be prepared with a recommendation to the IAD. Such a recommendation may be to:

- allow the appeal, cancel the stay and quash the removal order; or
- maintain the stay for an extended period of time with additional conditions, or removal of conditions which have been met; or
- dismiss the appeal.

11.7. Cancellation of stays by operation of law

A68(4) provides that a stay is automatically cancelled by operation of law and the appeal terminated where a person who was found inadmissible on grounds of serious criminality or criminality is granted a stay of removal and is then convicted of another offence described in the serious criminality provisions of A36(1).

Where a stay is cancelled by operation of law, hearings officers must send the appellant a notice in writing regarding cancellation of their stay (see Appendix E). A copy of the notice must also be sent to the IRB with a statement of service [IAD rule 27(3)].

11.8. Permanent resident visa holders

As outlined in manual chapter ENF 4, section 12.2, border services officers may prepare a report under subsection A44(1) if they establish that a foreign national in possession of a permanent resident (PR) visa is inadmissible. The PR visa holder may later be issued a removal order as a result.

Under A63(2), a foreign national who holds a permanent resident visa may appeal to the IAD against a decision to make a removal order against them.

If the appeal on the removal order is allowed, A67(2) provides that the IAD shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration. If the foreign national arrived at the point of entry while the PR visa was valid and the examination was deferred pursuant to section A23, the foreign national can be granted PR status as per R71.1.

As the permanent resident visa holder will likely be in Canada following the IAD decision, the hearings officer must return the case to the closest local IRCC office in Canada, and not return the file to a migration office overseas.

Pursuant to A70(1), the responsible IRCC office is bound by the IAD's decision. Officers should read the IAD's decision and reasons in order to determine next steps in processing. These cases should be processed on a priority basis as the PR visa holder may have been without status for some time. The IRCC office must follow the following procedures depending on the IAD's decision:

- **If the IAD sets aside the original decision and refers the matter to a decision-maker for reconsideration**, the responsible IRCC office must re-open the application,

update background verifications and ensure the foreign national is not inadmissible to Canada before granting permanent residence.

- **If the IAD's decision is to allow the individual to remain in Canada,** the permanent resident application should only be re-opened to grant permanent resident status. The individual may be granted permanent resident status even if the permanent resident visa expired, provided they initially appeared for examination and presented their permanent resident visa within its period of validity. Given the passage of time, the responsible IRCC office may update background verification of the applicant if there are concerns there may be new grounds that could make the applicant inadmissible to Canada.
- In both cases, family members that were not previously examined and were added to the application following the IAD's decision must provide any required forms and documents, and complete a medical examination to allow the IRCC officer to assess their eligibility and admissibility.

12. Procedure: Loss of residency status appeals

IRCC has the policy responsibility with respect to loss of residency status and the Minister of IRCC is the respondent in these appeals (as of August 3, 2018, the official name of the Ministry has not changed to IRCC and as such until it does change, the style of cause is to remain Minister of Citizenship and Immigration).

12.1. In Canada

Permanent residents who are determined by the Minister's delegate to have lost their permanent resident status have the right to appeal their removal order against the Minister of IRCC pursuant to A63(3). Persons in this category are subject to the same appeal provisions as permanent residents who are ordered removed on other grounds of inadmissibility.

For more information, see section 11.

12.2. Outside Canada

Pursuant to A63(4), permanent residents may appeal to the IAD, against the Minister of IRCC, with respect to a decision made outside Canada on the residency obligation under A28. IAD rule 9 requires that:

- the notice of appeal be filed with the IAD of the region in Canada where the appellant last resided;
- the written reasons for the loss of status decision be filed with the notice of appeal;
- if the appellant wants to return to Canada for the hearing of the appeal, they must indicate it on the notice of appeal; and
- after they receive the written reasons for the decision, appellants have 60 days to file with the IAD a notice of appeal and the written reasons for the decision.

When the notice of appeal is received, the hearings office should:

- ensure that the GCMS and NCMS “Appeals” screens are completed promptly; and
- enter any motions or applications associated with the appeal in the GCMS appeals screen.

12.3. Record of refusal (outside Canada)

IAD rule 10(1) requires that the Minister prepare an appeal record that includes a table of contents and the following documents:

- any documents the Minister of IRCC has in their possession relevant to the decision on the residency obligation and the issues raised in the appeal; and
- the officer’s written decision and written reasons.

All parties must receive the appeal record and proof of compliance no later than 120 days after the Minister has received the notice of appeal.

12.4. Requests to return to Canada for the hearing (Outside of Canada)

A31(3)(c) provides that a permanent resident shall be issued a travel document if:

- they were physically present in Canada at least once in the last 365 days; and
- they have made an appeal under A63(4); or
- the period for making an appeal has not expired.

The situation will arise where permanent residents who do not meet the residency requirement request a travel document during the 60-day appeal period although they have not filed an appeal. Persons in this situation would be allowed to enter Canada during the 60-day appeal period even if they have not yet filed an appeal. In cases such as this, the port of entry will notify the hearings office. Hearings offices should monitor the file to determine if an appeal is filed. When an appeal is not filed within the 60-day period, the file should be referred to the CBSA for investigation.

When an appellant is not eligible for a travel document under A31(3)(c), they must make an application to the IAD requesting to return to Canada for their hearing [IAD rule 46(1)].

Applications must be filed with the IAD and the Minister no later than 60 days after the notice of appeal is filed. If the IAD is satisfied the presence of the permanent resident at the hearing is necessary, it will order that the permanent resident physically appear at the hearing. Where the IAD has ordered that the appellant be physically present, an officer shall issue a travel document for that purpose [A175(2)].

12.5. Dismissed appeals—Type of removal order

A69(3) requires that where the IAD dismisses an appeal under A63(4) and the permanent resident is in Canada, it shall make the removal order. Neither the Act nor the Regulations
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specify what type of removal order should be issued by the IAD. To ensure consistency with procedures in cases involving the in-Canada determination of residency obligation, hearings officers should request that the IAD issue a departure order for failure to comply with the residency obligation [R228(2)].

12.6. Failure to appear at an appeal

If an appellant fails to appear for their appeal, hearings officers should ask the IAD to declare the appeal abandoned pursuant to A168(1). If the person concerned is subject to a removal order, this order will then come into force and they will be removable from Canada. Where an appellant was determined to have lost their residency status outside Canada, and the person concerned has returned to Canada for their appeal, officers should ask that the IAD issue the appropriate removal order *in absentia*.

13. Procedure: The Minister's appeal rights

If a member of the Immigration Division decides at an admissibility hearing that the person concerned is not a person against whom a removal order should be made or, that the person may be granted authorization to enter Canada, the Minister of PSEP may appeal that decision to the IAD on questions of law or fact, mixed law and fact, or on question of a breach of a principle of natural justice. [A63(5) and A67(1)].

The decision to appeal an Immigration Division decision to the IAD is made at Litigation Management (LMD), NHQ, or CBSA Litigation Management (LMU), by persons with delegated authority from the Minister. When the Minister decides to appeal, Litigation Management will:

- serve a notice of appeal on the respondent and the IAD within 30 days of the Immigration Division's decision [IAD rule 11];
- send a copy of the material to the appropriate hearings office and advise the hearings officer supervisor where the decision was made; and
- provide a copy of the notice of appeal to the Director, Inland Enforcement, CBSA, NHQ, or the Director, Legislative and Regulatory Policy, Admissibility Branch, IRCC, NHQ.

The Immigration Division must provide the Minister of PSEP and the IAD with a certified true copy of the record no later than 45 days after the IAD receives the notice of appeal [IAD rule 12(3)].

When the Minister of PSEP begins an appeal, Litigation Management (LMD) NHQ or CBSA Litigation Management (LMU), will complete the GCMS appeals screen. If the Minister or the respondent begins a motion or application, hearings officers are responsible for completing the "Motions" screen.

A69(2) – In the case of an appeal by the Minister respecting a permanent resident or a protected person, other than a person referred to in subsection 64(1), if the Immigration Appeal Division is satisfied that, taking into account the best interests of a child directly affected by the decision,

sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case, it may make and may stay the applicable removal order, or dismiss the appeal, despite being satisfied of a matter set out in paragraph 67(1)(a) or (b).

After the IAD renders its decision, the hearings office promptly updates the GCMS "Appeals" or "Motions" screens and the NCMS screens, as the case may be. This is particularly important when the IAD issues a removal order. In those cases, the officer completes the appropriate removal order by hand and forwards the CBSA's copy of the order to the appropriate office.

If the IAD dismisses the Minister's appeal and the officer, in consultation with their supervisor, believes that an application for judicial review of the decision is warranted, the officer should immediately bring the decision to the attention of Litigation Management(LMD) NHQ or CBSA Litigation Management (LMU). The documents may be e-mailed to: IRCC.CMBLitigationMgmtRequest-DemandeGesLitigesDGRC.IRCC@cic.gc.ca (See ENF 9, Judicial Review).

In addition, in dismissed appeals, the officer should make a written request for the written reasons.

14. Procedure: Roles and responsibilities

| Role | Responsibilities |
|---------------------------------------|--|
| IRCC and CBSA's Litigation Management | <p>The Litigation Management Division (LMD), situated in the Case Management Branch, NHQ, and the CBSA Litigation Management Unit (LMU), Operations Branch, NHQ share responsibility for the management of all the IRCC and the CBSA cases involving litigation in the Federal Courts and for ministerial appeals before the Immigration Appeal Division pursuant to A63(5). Litigation Management (LMD) will determine who should manage the case and they will refer certain cases to CBSA Litigation Management (LMU) that fit within the LMU mandate.</p> <p>See ENF 9, Judicial Review, for more information.</p> |
| Hearings officer | <p>Hearings officers present cases in accordance with policies and functional direction from either the IRCC Admissibility Branch, or the CBSA Inland Enforcement Program Management Division at NHQ.</p> <p>The role of a hearings officer as the Minister's counsel is to ensure that the integrity of the system is upheld and that justice is served. In most circumstances, this requires the hearings officer to defend the decision of an officer not to issue a visa, or the decision of a</p> |

| | |
|---|---|
| | <p>Minister's delegate or the Immigration Division to issue a removal order.</p> <p>Exceptions may arise where the original decision is not defensible due to an error in law or fact or due to a breach of natural justice. Officers should consent to an appeal being allowed only when the circumstances of the case merit the original decision being overturned. Due to the <i>de novo</i> nature of IAD hearings, hearings officers will often have different evidence to consider and present to the IAD than that considered by the original decision-maker. New evidence is often introduced through documentation at the hearing.</p> <p>It is essential that hearings officers be familiar with the IAD Rules as they govern procedures such as disclosure, preparation of the record and procedures at IAD hearings.</p> <p>Hearings officers represent the Minister of IRCC or the Minister of PSEP in proceedings before all Divisions of the IRB. Hearings officers have direct contact with counsel and clients. They should always be professional in both decorum and appearance. Hearings officers should maintain their professionalism in their telephone manner, written correspondence, conduct at hearings and all other interactions with the public. Professionalism should be exhibited by properly preparing for cases and treating all participants at a hearing with dignity and respect. The participants include members, counsel, witnesses, interpreters and observers, if any.</p> |
| <p>Legislative and Regulatory Policy Division, Admissibility Branch, IRCC, NHQ.</p> | <p>The IRCC Director of the Legislative and Regulatory Policy Division at NHQ is responsible for all admissibility policies except security, war crimes and organized crime. The Director is also responsible for policies related to appeal rights and grounds for appeals.</p> |
| <p>Inland Enforcement, CBSA, NHQ.</p> | <p>The CBSA Director of Inland Enforcement Program Management Division, Intelligence and Enforcement Branch at NHQ is responsible for detention reviews, admissibility hearings as well as appeals of a removal order by a permanent resident, a protected person or a holder of a permanent resident visa.</p> <p>The Hearings Unit at NHQ can provide guidance and assistance to hearings officers on all hearings-related matters and can be reached at: Hearings-Audiences-Programs@cbsa-asfc.gc.ca</p> |

Appendix A – Detention, Safety & Security Annex

NOTE: The Department of Citizenship and Immigration Canada (CIC) is currently (August 3, 2018) being referred to as the Ministry of Immigration, Refugees and Citizenship Canada (IRCC) but the name has not officially been changed from CIC.

Detention, Safety and Security Annex

BETWEEN

THE DEPARTMENT OF CITIZENSHIP AND IMMIGRATION (CIC)

AND

THE CANADA BORDER SERVICES AGENCY (CBSA)

AND

THE IMMIGRATION AND REFUGEE BOARD OF CANADA (IRB)

Collectively referred to as the “Parties”

20 January 2020

Introduction

WHEREAS the Parties concluded and signed a Memorandum of Understanding in February 2016, hereinafter referred to as the "MOU", specifying that the Parties agree to negotiate Annexes under the MOU. This Annex will be interpreted in accordance with the principles contained in the MOU;

WHEREAS the Parties recognize that their roles are interdependent and as such, need to work together regarding the safety and security of proceedings before the IRB;

WHEREAS the Parties agree on the importance of establishing and maintaining efficient processes in relation to detention, safety and security that are open and transparent for the purposes of achieving their respective mandates;

WHEREAS the Parties recognize that the *Canada Labour Code Part II* sets out the responsibilities and obligations of both employers and employees with respect to the health and safety of workplaces; and

WHEREAS this Annex does not supersede provisions of the *Immigration and Refugee Protection Act (IRPA)*, *Immigration and Refugee Protection Regulations*, Rules of any of the Divisions of the IRB or any other applicable legislation.

Therefore the Parties agree as follows:

1. Purpose and Objective

- 1.1 The purpose of this Annex is to outline the responsibilities of the Parties as they relate to the safety and security of all proceedings before the IRB, including proceedings involving persons in detention.
- 1.2 The objectives of this Annex are:
 - to assist the Parties in providing a safe and secure environment for all persons present at proceedings before the IRB; and
 - to assist the Parties in fulfilling their roles and obligations with respect to persons in detention, including maintaining their well-being.

2. Commitment

- 2.1 The Parties commit to take reasonable steps to provide a safe and secure environment for all proceedings before the IRB by implementing the provisions set out in section 6 of this Annex.

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- 2.2 The Parties commit to maintaining, and upon request, sharing information on their own security practices and standards with the other Parties as set out in their respective policies and guidelines relating to Occupational Health and Safety (OHS) required by the *Canada Labour Code Part II*. Information shared under this provision will only be disclosed in accordance with the *Privacy Act* as outlined in the provisions of the Information Sharing Annex.
- 2.3 The Parties commit to bearing all costs associated with carrying out their respective responsibilities and commitments under this Annex.

3. Roles and Responsibilities of the IRB

- 3.1 The IRB is an independent quasi-judicial tribunal comprising the Immigration Division (ID), the Immigration Appeal Division (IAD), the Refugee Protection Division (RPD), and the Refugee Appeal Division (RAD).
- 3.2 The IRB is responsible for all decisions relating to the conduct of its proceedings and ensuring that principles of fairness and natural justice are respected in these proceedings.
- 3.3 The ID has the sole jurisdiction to review the reasons for detention and render decisions regarding continued detention or release of foreign nationals (FN) or permanent residents (PR) detained for immigration reasons under the specific timelines as set out under the IRPA.
- 3.4 The IRB is responsible for the security of IRB controlled premises used to conduct proceedings before the IRB including providing instructions during an emergency situation.
- 3.5 The IRB does not have jurisdiction over security in non-IRB controlled premises such as provincial and federal correctional institutions or premises under the control of other government departments or agencies or other institutions where proceedings could be held.
- 3.6 When security risks are identified to the IRB in advance of a proceeding, the IRB is responsible for communicating those security risks and recommended mitigation strategies to the provincial or federal correctional institutions, or other institutions where the proceeding is scheduled to take place.
- 3.7 The IRB has the authority to schedule cases before any Division of the IRB and will do so in a manner that respects the rights and ensures the safety and security of all persons that attend IRB proceedings and takes into account the well-being of persons in detention.
- 3.8 The IRB will consult CIC or the CBSA on availability of space and resources when scheduling proceedings at premises controlled by that Party.

4. Roles and Responsibilities of the CBSA

- 4.1 The CBSA represents the Minister of Public Safety and Emergency Preparedness (PSEP) and the Minister of CIC in proceedings before the IRB.

- 4.2 The CBSA is responsible for ensuring the security, safety and well-being of all persons under arrest, or detained under the IRPA and has the authority to apply restraints to persons who are lawfully arrested and detained, including during proceedings before the IRB.
- 4.3 The CBSA strives to avoid all unnecessary transportation of persons in detention under the IRPA where alternative measures are available and can be implemented;
- 4.4 The CBSA is responsible for the security of CBSA controlled premises used to conduct proceedings before the IRB including providing instructions during an emergency situation.
- 4.5 When a security risk arises during an IRB proceeding at a provincial or federal correctional institution or other institution, the CBSA is responsible for communicating security risks and requesting additional security measures where appropriate from the institution and informing the presiding member at the earliest opportunity.

5. Roles and Responsibilities of CIC

- 5.1 CIC represents the Minister of CIC in proceedings before the IRB.
- 5.2 CIC is responsible for the security of CIC controlled premises used to conduct proceedings before the IRB including providing instruction during an emergency situation.

6. Security

- 6.1 Security of Proceedings before the IRB
 - 6.1.1 The IRB has security screening measures on IRB controlled premises to ensure the safety and security of all persons on these premises.
 - 6.1.2 The Parties will share information about identified security-related risks associated with a proceeding before the IRB without delay to those Parties impacted by the security-related risk, and in writing whenever possible, where required and permitted by law.
 - 6.1.3 A Departmental Security Officer (DSO) and Deputy Departmental Security Officer (DDSO) or other delegate from each Party, if they are involved in the proceeding, will assess and may consult or share information related to identified security risks where required and permitted by law.
 - 6.1.4 Where a proceeding before the IRB is scheduled to take place on premises controlled by one of the Parties, that Party will be responsible for taking reasonable efforts to address the identified security risks associated with the proceeding by implementing the appropriate risk mitigation strategies, e.g. the presence of security personnel or the use of telecommunication in place of in-person proceedings.
 - 6.1.5 Where the IRB schedules a proceeding on premises which are not under the control of one of the Parties, the IRB will address any security risks associated with the proceeding with the proprietor by requesting appropriate risk mitigation strategies be implemented. Where another Party has a contractual relationship with the proprietor, the IRB will inform that Party of the request.

6.1.6 Where security risks associated with a proceeding have been identified, the IRB will take reasonable efforts to schedule the proceeding at a location where both the fairness and security of the proceeding will not be compromised; this could include scheduling at another location if possible, or using telecommunications in place of in-person proceedings.

6.2 Threat and Risk Assessment (TRA) of the premises where IRB proceedings take place.

6.2.1 The Parties conduct TRAs of their controlled premises.

6.2.2 The IRB does not have authority to conduct a TRA at any provincial or federal correctional institution or premises or other institutions where proceedings could be held.

6.2.3 The IRB commits to working with other institutions to conduct a security assessment when security risks are identified.

6.2.4 The Parties DSOs/DDSOs or other delegates commit to:

- sharing existing TRAs or portions of TRAs with the DSO or the DDSO or other delegate of the requesting Party where required and permitted by law;
- conducting joint TRAs or portions of TRAs at IRB itinerant locations and co-locations;
- conducting joint TRAs or portions of TRAs, as appropriate, where proceedings occur at CBSA, CIC or IRB facilities; and
- obtaining authorization from the originating Party prior to further sharing TRAs or portions of TRAs.

6.2.5 Where a joint TRA or portions of the TRA are undertaken by one or more of the Parties, the Party on whose premises the proceeding before the IRB is held commits to implementing the appropriate risk mitigation strategies.

6.3 Emergency Response

6.3.1 The Party on whose premise the proceeding takes place commits to providing emergency response instructions when an emergency situation arises.

6.3.2 Each Party in control of premises where a proceeding before the IRB is scheduled will post an evacuation plan or appropriate signage for all persons present at the proceeding, including members of the public, to inform them of basic emergency plans and exit routes.

7. Co-Location

7.1 The Parties agree to cooperate in examining and considering opportunities for co-location where appropriate.

8. Transportation of Persons in Detention

8.1 While the IRB has the authority to require the presence of the subject of the proceeding to appear before any division, it recognizes that the CBSA has the sole responsibility for

the care and control of persons in detention under the IRPA and the identification and management of risks associated with the transportation of persons in detention.

- 8.2 The IRB will consider the use of alternatives to transportation of persons in detention including the use of telecommunication in place of in-person proceedings, when an application is made under the appropriate Division's Rules or the IRB decides risk mitigation strategies are required to conduct the proceeding.
- 8.3 The IRB agrees to prioritize the scheduling of proceedings involving persons in detention where possible.

9. Monitoring and Evaluation

- 9.1 The Parties will share details of security incidents where required and to the extent permitted by law.
- 9.2 The Parties DSOs /DDSOs or other delegates agree to review safety and security incidents as soon as possible after their occurrence and to commit to meeting quarterly to discuss and implement preventative safety and security measures as appropriate.

10. Dispute Resolution

- 10.1 Any disagreement arising with respect to the terms of this Annex is to be resolved pursuant to sections 21 and 22 of the MOU.

11. Administration

- 11.1 This Annex will come into effect on the date it is signed by the last of the Parties.
- 11.2 This Annex will remain in effect until it is suspended or terminated as set out under the Termination section of the MOU.
- 11.3 This Annex may be amended pursuant to sections 28 and 29 of the MOU.

12. Definitions

- 12.1 Terms used in this Annex are defined in Schedule 1.

13. Counterpart signature

- 13.1 This Annex may be signed in counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

IN WITNESS THEREOF, this Annex, in both official languages, was signed in triplicate, each copy being equally authentic.

20 January 2020

Signed on March 29, 2016 in Ottawa, Canada.

Sarita Bhatla

Director General,

Refugee Affairs Branch, CIC

Michael MacDonald

Director General,

**Operational Management and
Coordination, CIC**

Leslie Soper

A/Director General,

**Enforcement and Intelligence Programs
Operations**

CBSA

Andrew Le Frank

Director General,

Enforcement and Intelligence

CBSA

Greg Kipling

Director General,

Policy, Planning and Research Branch,

IRB

Rebecca McTaggart

Director General,

Registry and Regional Support

Services Branch, IRB

20 January 2020

Schedule 1

Definitions

“Threat and Risk Assessment (TRA)”

“Threat and Risk Assessment” means an evaluation of the potential for losses (in term of disruption, modification, destruction) through any act or condition exploiting vulnerability to cause those losses. The threat and risk assessment consist of this examination in terms of a threat’s ability to exploit a vulnerability in order to cause injury to an asset, thereby resulting in the losses in terms of disruption of operations, injury to persons, or injury (in terms of destruction, modification, loss) of assets nature, likelihood and consequences of acts and events that could place employees and information, assets and systems at risk.

“Other institution”

“Other institution” could include public or private institutions such as hotels, conference centres, hospitals, universities or colleges or under federal, provincial, municipal or territorial control, whose primary ownership is defined as a legal entity outside of the government community.

“Itinerant locations”

“Itinerant locations” refers to locations where IRB proceedings are held other than in the cities where IRB regional offices are located.

“Co-location”

“Co-location” refers to the sharing of facilities between the Parties.

Appendix B – Examples of cases that do not need to be forwarded to Operations Directorate, Migration Health Branch, NHQ, by the officer

The officer should not forward the new medical information about the applicant to Operations Directorate, Migration Health Branch at NHQ when it either has no link with the applicant's reason for refusal on medical grounds or the medical information is so vague or of such a general nature that it has little or no probative value. Instead, the officer should request that a date be set for a hearing at the IAD. The following are examples of cases where the officer should not forward the new medical information to the Migration Health Branch at NHQ:

1. when the person concerned was initially found inadmissible because they were diagnosed with emphysema, and the new medical information received about the applicant states that they are being treated for an unrelated condition (e.g., a broken leg);
2. when the applicant was initially found inadmissible because of hypertension and the new medical information received deals with the applicant's prognosis with diabetes; or
3. the applicant was found inadmissible because of cancer, and the new medical information submitted states that the applicant's hypertension is being treated and there is a good prognosis.

Note: If the officer is uncertain whether the submitted information refers to the reason for medical inadmissibility, they should request clarification from their regional medical officer.

Appendix C – Sample letter from hearings officer to appellant or counsel for the appellant - New medical examinations

Appellant/counsel's address

Subject: New medical examination required for *(insert name of applicant)*

Dear Sir/Madam:

Further to the new medical information submitted by *(insert name of applicant)* on *(insert date)*, with respect to *(describe in detail the newly submitted medical information)*, please be advised that a new medical examination will be required in order for us to make a determination about the applicant's case.

Please note that it is your responsibility to ensure that the applicant complies with the officer's instructions to:

- forward passport-size photographs within 30 days (if required by the officer); and the applicant may either:
- undergo the new medical examination within 30 days of receipt of this notification letter *(medical submitted to applicant by office)*; or alternatively,
- provide the officer, within 30 days of receipt of this notification letter, with a date for the medical examination.

We wish to advise you that should the applicant fail to comply with the above-mentioned 30-day time frame, we will have no other choice but to discontinue the medical reassessment process concerning the applicant's file.

Signed at _____, on _____

Hearings officer

c.c.: IAD Registry

Appendix D – Statement of Service

The Registrar

Immigration and Refugee Board

Division

Address

Re: *(Insert name of person concerned)*

FOSS ID:

Address

IRB File:

TAKE NOTICE that the attached documents were provided to *(insert name of person concerned)* at the above-noted address on *(insert date)*. The documents were provided to the person concerned by the method of service noted below:

- by hand;
- regular mail;
- registered mail;
- certified mail;
- courier;
- priority post;
- facsimile; or
- other.

Name and position

Hearings Office

Address

Appendix E – Notice of cancellation, by operation of law, of a stay of removal order granted by the IAD [A68(4)]

Date

Name of appellant

Client UCI/IRB file

Address

Re: Notice of cancellation, by operation of law, of a stay of removal order granted by the IAD

Dear Mr./Ms. (name of appellant):

As provided for in subsection 68(4) of the *Immigration and Refugee Protection Act* (hereinafter “the Act”), you are hereby notified, in accordance with Immigration Appeal Division rule 27, that the stay of the removal order that was granted to you on *(insert date)* by the Immigration Appeal Division is cancelled by operation of law because of your conviction for *(enter nature of conviction)*, contrary to *(insert relevant provision of an Act of Parliament)* on *(insert date)* at *(insert place)*, this being a conviction for which you have been sentenced to a term of imprisonment of *(insert prison sentence imposed)*. The maximum term of imprisonment for such an offence is *(insert maximum term of imprisonment)*. The relevant provisions of the Act stipulate that:

68.(4) If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.

36.(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

- (a)** having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
- (b)** having been convicted of an offence outside Canada 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; or
- (c)** committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

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As a result of this conviction, the stay of the removal order that you enjoy is cancelled by operation of law, and your appeal is now terminated. The removal order that was issued against you on (*insert date*) is now enforceable.

Sincerely,

Name of officer

Hearings Officer

TAKE NOTICE that, pursuant to subsection 72(1) of the Act you may file an application seeking leave from the Federal Court to commence an application for judicial review of any matter—a decision, determination or order made, a measure taken or a question raised—under the Act. Pursuant to paragraph 72(2)(b) of the Act, notice of such an application must be served on the other party and filed in the Registry of the Federal Court within 15 days.

c.c.: Registry of the IAD

Counsel for the appellant

Encl. Certificate of conviction

Declaration of service

20 January 2020