

ENF 3 Admissibility Hearings and Detention Reviews

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Updates to chapter

Listing by date:

2022-03-03

Substantive revisions were made, taking into consideration recommendations of the [2017/2018 External Audit of the Immigration and Refugee Board on detention reviews \(where detention exceeded a minimum 100 days\)](#) and the institutional response by the CBSA. The structure of the manual is now divided into three main components:

- sections 1-9 - information applicable to both admissibility hearings and detention reviews);
- sections 10-13 - information specific to admissibility hearings and;
- section 14 - information specific to detention reviews.

The section pertaining to procedures applicable to detention reviews was also significantly expanded and updated to include, amongst other things, additional alternatives to detention.

Also, as IRCC has transitioned most ENF manuals to a PDF format, broken web links were repaired throughout the manual. A reference to the new ENF34 manual was added.

2015-04-29

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

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

2006-02-16

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

2005-11-29

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

2003-09-04

Minor changes/clarifications were made to chapter ENF 3.

1 What this chapter is about

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

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

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

Note: References to IRPA appear in the text with an "A" prefix followed by the section number. References to the IRPR appear with a "R" prefix followed by the section number.

2 Program objectives

While all the objectives of the IRPA are important to keep in mind, the key objectives that relate directly to admissibility hearings and detention reviews are:

- To protect public health and safety (the health and safety of Canadians) and to maintain the security of Canadian society (A3(1)(h) & A3(2)(g));
- To promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks (A3(1)(i)); and
- To promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals (A3(2)(h)).
- To maintain, through the establishment of fair and efficient procedures, the integrity of the Canadian immigration system; (A3(1)(f.1))

While there are other application considerations set out in the IRPA, the key considerations that relate directly to admissibility hearings and detention reviews are that the IRPA be construed and applied in a manner that:

- Furthers the domestic and international interests of Canada (A3(3)(a));
- Ensures that decisions taken under the IRPA are consistent with the [Canadian Charter of Rights and Freedoms](#)(A3(3)(d)); and
- Complies with international human rights instruments to which Canada is signatory (A3(3)(f)).

3 The Act and Regulations

3.1 IRPA objectives and application

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

3.2 Inadmissibility

Part I, Division 4 of IRPA contains the provisions that establish inadmissibility.

Categories of inadmissibility

For information about	Refer to this section of the Act
Security grounds	A34
Human or international rights violations	A35
Serious criminality	A36(1) & 36(3)
Criminality	A36(2) & 36(3)
Organized criminality	A37
Health grounds	A38
Financial reasons	A39
Misrepresentation	A40
Cessation of refugee protection	A40.1
Non-compliance with Act	A41
Inadmissible family member	A42

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

For more information about	Refer to
Foreign national	A2(1)
Permanent resident	A2(1)
Examination	A18

Temporary resident	A22(1) & (2), A29
Status document	A31
Right to appeal	A63 A64 & A65
Family member	R1(3)
Canadian citizen	R2

3.3 Report of inadmissibility and referral to the ID for an admissibility hearing

Part I, Division 5 of *IRPA* authorizes an officer to prepare an inadmissibility report [A44(1)] and, the referral of such a report by the Minister's Delegate (MD) to the ID for an admissibility hearing [44(2)].

For more information about	Please refer to chapter
Inadmissibility grounds	ENF 1 , Inadmissibility
How an officer decides if an applicant is inadmissible to Canada	ENF 2 , Evaluating inadmissibility
Reports on inadmissibility	ENF 5 , Writing Section A44(1) Reports
Minister's Delegate decisions and administrative removals	ENF 6 , Review of Reports under A44(1)
Loss of permanent resident status	ENF23 , Loss of permanent resident status

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

3.4 Detention, alternatives to detention and release

For more information about	Please see
Legal grounds for arrest and detention of foreign nationals or permanent residents	A55

The release by an officer or by the Immigration Division	A56 & A58
The review of detention, conditions of release and the detention of a minor child	A57-A60
The factors to be taken into consideration when assessing the detention or the release of a person who is a danger to the public, whose identity has not been established, or who is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order	R245-R248

For more information about

Please refer to

The authority to arrest and detain a person, including the various situations for detention and appropriate sections related to detention	ENF 20, Section 4.1
Regulatory factors and conditions	ENF 20, Section 4.2
CBSA policy governing the treatment of persons detained and grounds for detention	ENF 20, Section 6
Deposits and guarantees	ENF8
Alternatives to detention	ENF34

Note: For more information on arrests, see chapter [ENF 7](#), Investigations and arrests.

3.5 Decisions by the ID

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

R229(1) identifies the applicable removal orders made by the ID for the purposes of paragraph A45(d).

A58 identifies the various decisions that the ID may come to at the conclusion of a detention review.

For information about recourse available after the conclusion of an admissibility hearing or detention review, please refer to the references in the following table.

For more information about

Please refer to this chapter

Judicial Review	ENF9
Appeals before the Immigration Appeal Division of the IRB	ENF19

3.6 Removal, removal orders, stays and enforcement of removal orders

Part 1, Division 5 of IRPA refers to loss of status of Citizens, permanent residents and temporary residents. (A46 & A47), and removal (A48 – A52).

Part 13 of the IRPR refers to removals: enforcement of, stays, voiding, and return to Canada.” .

IRPR Part 13 Division 1 - The different types of removal orders (R223 - R227)

For more information about

Please see Regulations

Departure order	R224
Exclusion order	R225
Deportation order	R226
Removal order effective against a family member	R227(2)

IRPR Part 13 Division 2 - Specified removal orders under specific circumstances (R228 - R229)

For more information about

Please see Regulations

Removal orders to be made by the Minister's delegate	R228
For the purposes of Section A44(2) in respect of a foreign national	R228(1)
For the purposes of Section A44(2) in respect of permanent residents	R228(2)
If a claim for refugee protection is referred to the Refugee Protection Division	R228(3)

Removal orders to be made by the ID for the purposes of paragraph A45(d)	R229
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IRPR Part 13 Division 3: Stays of removal orders (R230 – 233)

For more information about

Please see Regulations

Considerations, cancellations and exceptions	R230
Judicial review	R231
Pre-removal risk assessment	R232
Humanitarian and compassionate or public policy considerations	R233

IRPR Part 13 Division 4: Enforcement of removal orders (R235 – 243)

For more information about

Please see Regulations

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

3.7 Forms

The forms required are shown in the following table:

Form title	Form number	Purpose
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Notice of Rights Conferred by the Canadian Charter of Rights and Freedoms and by the Vienna Convention Following Section 55 of the Immigration and Refugee Protection Act Arrest or Detention	BSF 776	To inform persons who have been arrested/detained of their rights to counsel and the right to notify their government representative.
Minister's Opinion Regarding the Foreign National's Identity	BSF 510	For the Minister's Delegate to advise the ID that the identity of a detained foreign national has not been, but may be established.
National Risk Assessment for Detention (NRAD)	BSF 754	To provide a transparent and objective methodology for the officer making the detention decision; includes information identifying the detainee's risk and vulnerability factors.
Detainee Medical Needs	BSF 674	To ensure the detainee medical needs are shared with detention facility staff. The form is not a medical assessment.
Referral Under Subsection 44(2) of the <i>Immigration and Refugee Protection Act</i> for an Admissibility Hearing	BSF 506	For the Minister's Delegate to refer an A44(1) report to the ID for an admissibility hearing.
Request for Admissibility Hearing/Detention Review Pursuant to the Immigration Division Rules	BSF 524	To request an admissibility hearing pursuant to A44(2), or following an arrest under A55, or to request a detention review to be held under A57 or A57.1.
Notice to Appear for a Proceeding Under Subsection 44(2)	BSF 504	To advise persons that a proceeding under A44(2) is to be held to determine if the person shall be authorized to enter or remain in Canada, or if a removal order should be issued against them.
Notice of Admissibility Hearing	BSF 525	To inform persons who are subject to an admissibility hearing that a report prepared by an officer was referred to the ID for an admissibility hearing under A44(2).
Notice of Admissibility Hearing to Family Members	BSF 540	To inform family members of persons who are subject to an admissibility hearing that the report is also a report prepared against them and that they are themselves subject to an admissibility hearing.
Information on financial information related to a deposits or guarantees assessed during the detention review process	BSF 211	To communicate to inland enforcement officers potential solvability assessment or special circumstances addressed during a detention review, where the Member ordered release upon posting of a bond.

4 Instruments and delegations

Where the Minister is identified in the IRPA or IRPR as being responsible to carry out a particular activity the Minister may delegate this authority to a certain class of persons.

Please refer to the Immigration Legislation Manual (IL 3 section 7.1) for specific delegations of authority and designation of officers by the PSEP Minister and the IRCC Minister, respectively.

5 Departmental policy

No information available.

6 Immigration Division (ID)

6.1 General

The ID conducts admissibility hearings for individuals believed to be inadmissible to Canada pursuant to sections 34-42 of IRPA.

The ID also conducts detention reviews for persons who are detained under IRPA.

A member of the ID (ID member) presides over admissibility hearings and detention reviews. Members are public servants, appointed under the *Public Service Employment Act*.

ID members are impartial decision-makers. They must consider the evidence presented at a hearing by the hearings officer and by the person concerned or their counsel before making a decision.

6.2 Administrative tribunal

The ID is an administrative tribunal and hearings before the ID are quasi-judicial and adversarial. The principles of natural justice apply to all proceedings before the ID. For further information on procedural considerations refer to [Procedural fairness \(ci.gc.ca\)](https://www.ci.gc.ca)

6.3 Nature of the proceedings before the ID

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

7 Role of the Hearings Officer

7.1 General

Hearings officers represent the position of the Minister in admissibility hearings and detention reviews before an ID member. Depending on the alleged inadmissibility, the hearings officer will represent either the PSEP Minister or the IRCC Minister. At detention reviews, the hearings officer always represents the PSEP Minister.

Representing the PSEP Minister	Representing the IRCC Minister
<ul style="list-style-type: none"> • Security (A34) • Violation of human or international rights (A35) • Organized crime (A37) • All detention reviews (A57) 	<ul style="list-style-type: none"> • Criminality (A36) • Health reasons (A38) • Financial reasons (A39) • Misrepresentation (A40) • Cessation (A40.1) • Non-compliance with the Act (A41) • Inadmissible family member (A42)

In this capacity, hearings officers:

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

Note: Hearings officers should communicate with all parties in plain language and refrain from using internal jargon or acronyms (GCMS, PRRA, H&C).

7.2 Role of the hearings advisor (HA)

Hearings advisors provide support to the hearings officers. They research and interpret legislation and jurisprudence on the grounds for the Minister's participation and conduct critical analysis of situational information and data to identify possible grounds for the Minister's participation and make appropriate recommendations.

They prepare cases by investigating and gathering information, such as court information or verification of status, through external police agencies, foreign law enforcement agencies, and other stakeholders.

Please note that the exact duties of hearings advisors may vary by office, subject to operational needs. For up-to-date information on delegated authority for hearings advisors by the PSEP Minister and/or the IRCC Minister, please refer to the Immigration Legislation Manual ([IL 3](#)).

7.3 Officer safety and security

If an officer perceives a threat to their safety **prior to a hearing**, they should immediately inform their manager and complete the form [IRB/CISR 3000](#) and submit the form to IRB security. Managers should contact the IRB and CBSA regional security to make arrangements for a risk assessment and the initiation of appropriate security measures.

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 their manager.

IRB procedures for safety and security should help prevent such situations and provide guidance for managing them if they do arise.

7.4 Incident report writing

Where an incident occurs before, or during, a hearing where an officer feels their safety has been threatened, they should complete a Security Incident Report [BSF152](#). 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.

7.5 Attending a pre-hearing conference

The ID may require the parties to participate in a pre-hearing conference to discuss issues, review disclosure of information and the procedures to be followed in the case at hand. [*Immigration Division Rules (ID Rules)*, Rule 20(1)]. The ID may require the parties to give any information or document at or before the conference [*Immigration Division Rules*, Rule 20(2)].

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

7.6 Use of a designated representative

Rule 18 of the *Immigration Division Rules* stipulates that counsel for a party has a duty to notify the ID if they believe that they should designate a representative for the person concerned. It is however the responsibility of the ID to ensure a designated representative is identified at the proceedings.

Hearings officers should ensure that the ID is notified in advance of the potential need for a designated representative by completing the appropriate section in the form BSF524 — Request for Admissibility Hearing/Detention Review Pursuant to the Immigration Division Rules. A representative must be 18 or older, understand the nature of the proceedings, be willing to act in the best interests of the permanent resident or foreign national, and not have interests that conflict with those of the permanent resident or foreign national.

The ID is obligated to appoint a designated representative for any person who is the subject of an admissibility hearing or a detention review if this person is under the age of 18 years (a "minor") or is unable to appreciate the nature of the proceedings IRPA, as directed in subsection 167(2)).

The IRB's [commentary to Rule 19](#) defines "the inability to appreciate the nature of the proceedings" as not being able to understand the reason for the hearing or why it is important or cannot give meaningful instructions to counsel about one's case.

The same IRB commentary states that an opinion regarding competency may be based on the person's own admission, the person's observable behavior at the proceeding, or on expert opinion on the person's mental health or intellectual or physical faculties.

Likewise, the commentary states that the authority to designate a representative or end a designation rests with the ID member presiding at the hearing. In the case of a minor, if the person reaches 18 years of age while the proceedings are still ongoing, the designation ends automatically, by operation of law.

7.7 Language of the proceedings

The Immigration Division Rules, Rules 3(g), 8(1)(d) and 16(1) clearly indicate that the language of the proceedings —English or French— must be chosen by the person subject to them.

At the request of the person concerned the IRB may make arrangements to provide interpretation from one official language to the other, taking into consideration third language interpretation may also be required for the case. That being said, the responsibility for the translation of documentary evidence rests with the party disclosing the information. Information provided by the Minister is governed under ID rule 3 for admissibility hearings and ID rule 8 for detention reviews The Minister is generally expected to speak and disclose documents the official language of the hearing.

In the case of 48-hour detention reviews, official language fluency of counsel for the person may be unknown at the time that the Request for admissibility hearing/detention review pursuant to the Immigration Division Rules [BSF524] was submitted to the ID. Prior to the proceedings, the hearings officer should ensure that any official languages interpretation needs for counsel are flagged to the ID.

7.8 Interpretation

The presence of an interpreter in the hearing room may alter the way the hearings officer presents their submissions. At, or prior to, the ID member's opening statement, it must be established if the person concerned wishes to have simultaneous interpretation, or if they prefer the interpreter remain on standby and provide interpretation only at the person's request. The person's choice will be noted on the record by the member. (see ID rule 17 for requesting an interpreter).

Where simultaneous interpretation is conducted, the hearings officer must be mindful of their pace, and speak in relatively short but complete sentences.

The interpretation of strings of numbers, in particular, can slow down the proceedings; hearings officers may reconsider the relevance of quoting elements such as case numbers or phone numbers, and determine whether or not it is necessary to cite them during their submissions.

If quoting extensive volumes of text, especially legal texts with precise terminology, the interpreter should be provided a written copy to serve as a visual aid to the interpretation.

7.9 Rights of the person concerned

The principles of natural justice and [procedural fairness](#) require that the person concerned should fully understand the nature and purpose of the proceeding. Acting as a safeguard for individuals in their interaction with the state, the principles of natural justice and procedural fairness stipulate that whenever a person's "rights, privileges, or interests" are at stake, there is a duty to act in a fair manner.

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

- the right to adequate notice of a hearing;
- the right to disclosure (to know the case that has to be met);
- the right to know the possible consequences of the hearing;
- the right to be heard (to make submissions, the right to present evidence, and cross-examine witnesses."); and
- the right to a fair and impartial decision-maker.

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

- The right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice [section 7 of the *Charter*].
- The right on arrest or detention [section 10 of the *Charter*]:
 - to be informed promptly of the reasons for the arrest or detention;
 - to be informed without delay of the right to retain and instruct counsel; and

- to have the validity of a detention determined and to be released from detention if the detention is not lawful.
- The right to the assistance of an interpreter: in all proceedings in which the person concerned is a party or a witness before a court or tribunal, and does not understand or speak the language in which such proceedings are being conducted or if the person concerned is deaf [section 14 of the *Charter*; Rule 17 of the ID Rules].
- The right to be represented: The person concerned has the right to obtain the services of, and to be represented by legal or other counsel for all proceedings before the ID. Although IRPA does not specifically provide for it, the right to be represented implies that the person concerned shall be informed of this right and shall be given a reasonable opportunity to obtain and instruct counsel or the services of a representative at their own expense, if so desired [A167].

Note: Pursuant to A91 no person shall knowingly, directly or indirectly, represent or advise a person for consideration – or offer to do so – in connection with a proceeding or application under the IRPA. A person does not contravene subsection 91(1) where they are: lawyers in good standing of a law society of a province or a notary who is a member in good standing of the Chambre des notaires du Québec; any other member in good standing of a law society of a province or the Chambre des notaires du Québec, including a paralegal; or a member in good standing of a body designated by the Minister (e.g., College of Immigration and Citizenship Consultants) – refer to the Regulations Designating a Body for the Purposes of Paragraph 91(2)(c) of the IRPA SOR/2011-142 dated June 28, 2011 - <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2011-142/FullText.html>. For further information on who can represent or provide advice to a client refer to A91 of IRPA

Section 91 does not apply where a person provides representation or advice without receiving compensation, this may include a friend, or in some cases a representative of an organization or association, so long as no monetary or other enumeration is received to represent or advise the person concerned.

7.10 Compellability of person concerned

The testimony of the person concerned is often the principal source of evidence available to the Minister in admissibility hearings and detention reviews. The courts have held that persons concerned are compellable witnesses because they are protected against self-incrimination by the *Canada Evidence Act* (for example, *Suresh v Canada MPSEP 2017 FC 28 at paragraphs 70-74*) This means that testimony given by the person concerned at a proceeding before the ID cannot be used in criminal proceedings.

In the context of detention reviews, *Brown v Canada 2020 FCA 130 at paragraph 122*, the Court said that the detainee is not required to do anything, and not required to produce evidence in response. Compellability has not been definitively resolved for detention reviews.

Paragraph 11(c) of the *Charter* stipulates that individuals who are accused of an offence cannot be forced to testify at their own trial. However, paragraph 11(c) of the *Charter* does not apply

because the person concerned is not a “person charged with an offence” [*Bowen v. Minister of Employment and Immigration; Almrei (Re)* (paras 68; and 74)].

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

7.11 Disclosure of information

At an admissibility hearing and/or a detention review, hearings officers have an obligation to present all the relevant and admissible evidence to the ID member, the person concerned or, if applicable, to the counsel for the person concerned. (ID rule 3) This is achieved through the preparation of a disclosure package, which will contain the documentary evidence that will be relied on at the proceedings. Any tangible evidence including documents, photographs, audio recordings, video recordings, diagrams, and any kind of object can form part of disclosure.

The FCA in *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at para 142-143 & 145 modified the Minister’s obligation to disclose all relevant information, even information that the Minister does not rely upon, including information that can be to the sole benefit of the person concerned.

Hearings officers must be mindful that their submissions must be based on evidence that was disclosed or otherwise gathered from a witness during testimony at the hearing. Hearings officers cannot testify (i.e. generate their own evidence, whether orally or in writing) during a hearing where they act as the Minister’s representative.

7.11.1 Protecting information

As set out by Rule 3 of the *Immigration Division Rules*, for an admissibility hearing the Minister must disclose any relevant information and document that the Minister may have in its possession to the ID and the permanent resident or foreign national.

In specific circumstances there may be times when hearings officers must ensure certain information remains protected from disclosure to the person concerned or to otherwise prevent the information from becoming public. Although the Minister has an obligation to disclose all relevant information, the hearings officer must balance this obligation with a duty to protect certain information from disclosure. This includes disclosure that may damage a third party, an ongoing investigation, or national security such as: private information of a third party, information that might reveal the identity of an informant, law enforcement investigation techniques, and classified intelligence.

Hearings officers may invoke privilege over some of the information it possesses, pursuant to certain provisions of the *Canada Evidence Act*. In national security cases especially, they may [also] need to file an application to the ID for non-disclosure pursuant to A86.

The Danger Assessments Section & National Security Cases unit at Headquarters oversees the management of cases involving the use of classified information. If the hearings officer is

contemplating filing an application pursuant to A86, their manager should contact the NSCU (National_Security_Cases@cbsa-asfc.gc.ca) at the earliest opportunity. Authorisation to proceed with the application must be granted by the NSCU and NHQ Intelligence and Enforcement Branch- Hearings Unit (Hearings-Audiences-Programs@cbsa-asfc.gc.ca).

Hearings officers and advisors seeking guidance on invoking privilege under the *Canada Evidence Act* to protect some information from disclosure may reach out to the Intelligence and Enforcement Branch- Hearings Unit at Headquarters if they require guidance or information of the process (Hearings-Audiences-Programs@cbsa-asfc.gc.ca).

For additional information about applications for non-disclosure, refer to [ENF 31](#).

7.11.2 Rules of evidence

The rules governing the admissibility and presentation of evidence before the ID are less restrictive than in judicial proceedings. Unlike courts, the ID is not bound by any legal or technical rules of evidence [A173(c)] (e.g., the ID is not bound by the hearsay rule or the best evidence rule) [Refer to *Canada (Minister of Employment and Immigration) v. Dan-Ash*; [Canada \(Minister of Citizenship and Immigration\) v. Nkunzimana](#); 2005 FC 29 at para 13; [Bruzzese v. Canada \(Minister of Public Safety and Emergency Preparedness\)](#), 2106 FC 1119 at para , 50].

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

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

7.12 Witnesses

If the hearings officer decides to call witnesses (other than the person concerned) to testify on behalf of the Minister, the hearings officer must inform the person concerned or the person's counsel, if applicable, and the ID in writing. Details on the contents of this notification as the applicable deadlines are set out in [Rule 32](#) of the ID Rules.

In the case of expert testimony, a summary of the expert testimony must be included in the notification. In this regard, the admission of expert evidence depends on the following criteria: (i) relevance (ii) necessity in assisting the trier of fact (iii) the absence of any exclusionary rule, and (iv) a properly qualified expert [[R. v. Mohan](#), [R. v. Sekhon](#), [R. v. Mohan](#) at para 17; and [R. v. Sekhon](#) at para 43].

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

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

for non-disclosure. For information on an application for non-disclosure, refer to section 7.11.1 above.

7.12.1 Exclusion of witnesses

During the hearing the member will ask counsel and the hearings officer if there are any potential witnesses present in the room. If so, the member will ask the witnesses to leave the room, except for the person concerned (natural justice and procedural fairness provides that the person concerned has the right to hear the case against them and to attend the admissibility hearing that concerns them) and any expert witnesses (hearings officers may wish for expert witnesses to hear the evidence presented orally at the hearing).

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

7.12.2 Examining and cross-examining witnesses

It is recommended that hearings officers prepare a strategy on questioning witnesses prior to the admissibility hearing. The strategy should be based on the case at hand and on the facts hearings officers want to prove in order to satisfy the elements of the allegation.

Considering and anticipating potential responses beforehand will help hearings officers to maintain control of the examination and ensure that important facts are captured.

The following general guidelines may be useful in conducting a cross-examination:

- Prepare a list of general areas to cover rather than a list of questions to be followed rigidly. This will allow hearing officers to respond more effectively to witnesses' testimonies and adapt their questions to witnesses' answers.
- Questions should be geared towards satisfying the elements of the inadmissibility to provide reasonable grounds or a balance of probabilities.
- The use of open-ended questions that do not make the direction of questioning obvious to the witness is suggested in situations where hearings officers are looking to obtain as much information as possible.
- The use of leading questions – that is, questions which suggest an answer – is recommended in circumstances where the facts are not in dispute or when a witness is providing to be uncooperative.
- Hearings officers should avoid asking questions for which the answer is not known as this may have unexpected or undesired results (fishing expeditions can have unexpected results).
- Ensure that the order and type of questions are varied and well-adapted to the answer the witness is providing. Depending on the answers of the witness it may be necessary for the hearings officer to modify their plan for questioning witnesses and for introducing evidence.

- Take notes of the key aspects of the testimony given by witnesses throughout the admissibility hearing to more efficiently prepare and deliver submissions to the member of the ID.
- All parties to the proceedings may ask to see the notes that witnesses use to assist with their testimony, and may demand that these notes be introduced as an exhibit.
- If cross-examination conducted by counsel for the person concerned raises new information, it may be useful and/or necessary to ask a witness additional questions after the cross-examination has been closed.
- Objections may be raised at any time during the admissibility hearing and hearings officers may raise objections and respond to the objections raised by the other party.

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

Procedural aspects of cross-examinations:

Procedural fairness is engaged during the cross-examination process, especially when it is the intention of the hearings officer to call into questions the credibility of a witness (*Browne v. Dunn* 1893 6 R 67; *R v. Lyttle* 1 S.C.R. 193, 2004 SCC 5).

8 Applications to the board

8.1 General

At any time during an admissibility hearing or a detention review, the person concerned and/or the hearings officer may present an application in accordance with the ID Rules (e.g., application to change the date or time of a hearing (Rule 43), application to change location of the hearing (Rule 42), application for the non-disclosure of information (Rule 41), application to join or separate hearings (Rule 44), application to conduct the hearing in private (Rule 45), application to adjourn, etc.). While some of these applications are specifically provided for under the ID Rules, where the ID Rules do not provide for a specific process, hearings officers may rely on the general provisions for applications found at ID Rules 37-40.

8.2 Public versus private hearings

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

However, subject to A166(d), proceedings concerning persons who are refugee protection claimants must be held in private. This includes admissibility hearings, detention reviews, pre-hearing conferences and all other applications heard by the ID.

If, during continued detention, the person initiates a refugee claim, the hearings officer should notify the ID forthwith, as all subsequent hearings will be held in private.

However, the ID member may, on request by a party to the proceeding or on the ID member's own initiative, (IRPA 166(d)) ;

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

“Refugee protection claimant” means

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

but does not mean

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

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

8.3 Application for proceeding in-camera (in private)

If the ID member is satisfied that:

- There is a serious possibility that the life, liberty or security of the person concerned will be endangered if the proceeding is held in public;

- there is a real and substantial risk to the fairness of the proceeding such that the need to prevent disclosure outweighs the social interest that the proceeding be conducted in public; or
- there is a real and substantial risk that matters involving public security will be disclosed,

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

8.4 Application for non-disclosure of information or other evidence

Refer to section 7.11.1 above for more details on applications for non-disclosure pursuant to A86.

8.5 Application for a change of venue

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

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

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

8.6 Application for adjournment

A162(2) stipulates that the ID shall deal with all proceedings as informally and as quickly as the circumstances permit. Notwithstanding this provision, adjournments may be necessary to ensure that the principles of procedural fairness and natural justice are respected. Parties to the admissibility hearing may make an application for adjournment as outlined in rule 43 of the ID Rules.

8.6.1 Mandatory adjournments

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

To allow a minor child or a person who is unable to understand the nature of the proceedings to be appointed a designated representative. If the ID member is of the opinion that the party is not adequately represented, the member may designate a representative [A167(2); *Immigration Division Rules*, Rules 18 and 19].

Where the services of an interpreter are required to permit the presence of an interpreter at the admissibility hearing [Immigration Division Rules, Rule 17].

When the person concerned claims Canadian citizenship, and had it not been for this claim a removal order would have been issued; and

When a hearings officer requests that a dependent family member be included in the removal order issued to the person concerned, and the ID member is not convinced that the family member was notified accordingly, using the “Notice of Admissibility Hearing to Family Members” form (BSF 540).

8.6.2 Discretionary adjournments

In cases that do not involve one or more of the mandatory circumstances, ID members have discretion to grant adjournments in accordance with the principles of procedural fairness and natural justice [*Prasad v. Canada (Minister of Employment and Immigration)*], or under the general powers conferred on the member as a commissioner under Part I of the *Inquiries Act*. The principles of natural justice and procedural fairness require that the ID member consider an adjournment request by hearing submissions from both parties and by balancing their interests. Members must also take into consideration whether an adjournment will have a negative effect on the efficiency and expediency of the process.

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

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

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

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

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

- to allow the person concerned to retain counsel (A167);
- for either party to obtain additional evidence or to summon witnesses;
- to allow relevant documents to be introduced (e.g. evidence of a conviction outside Canada);

- to have the person concerned medically examined or to secure additional medical evidence;
- to replace an incompetent interpreter or counsel;
- to consult with the Registrar of Canadian Citizenship; and
- to allow an ID member to prepare the decision.

8.6.3 Adjournments to obtain counsel

Over the years it has often been argued before the courts that refusal to grant an adjournment for the purpose of obtaining counsel of choice was tantamount to depriving a person of the right to retain and instruct counsel. To this end, the hearings officer can argue that the right to counsel simply means that the person concerned must be given the opportunity to retain and instruct counsel of choice amongst those who are ready and available to proceed on the date fixed by the member of the ID. *Pierre v Canada (Minister of Manpower & Immigration)*, [1978] 2 F.C. 849, [1978] 2 A.C.W.S. 285 (FCCA) (concurring opinion of Kelly, DJ)

The person concerned must be given sufficient time to secure counsel. However, hearings officers should object to long adjournments when they are of the opinion that the subject of the admissibility hearing has had reasonable opportunity to obtain counsel who is willing and able to handle the case. In such cases, the hearings officer will argue that the person should take the necessary action to find other counsel. If counsel is never available or does not appear when required, the hearings officer should request that a peremptory resumption date be set.

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

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

In exceptional circumstances, the hearings officer may notify the office manager to consider whether a formal complaint to the provincial bar association or law society may be warranted. NHQ Hearings Unit of the Intelligence and Enforcement Branch (Hearings-Audiences-Programs@cbsa-asfc.gc.ca) should be informed of all such formal complaints.

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

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

8.6.4 Application for postponement by the opposing party

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

A detention review will proceed as originally scheduled notwithstanding a postponement of an admissibility hearing that was scheduled to be heard immediately before or after a detention review.

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

8.7 Post-hearing reporting and feedback

Hearings officers or delegated staff must enter all relevant information in the Global Case Management System (GCMS) and the National Case Management System (NCMS) as soon as possible to keep the case information current.

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

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

9 Definitions

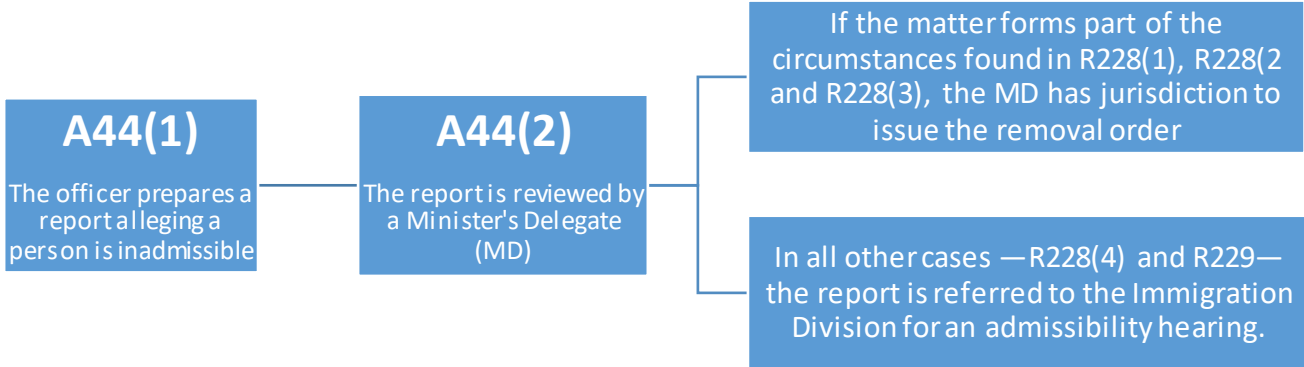
No information available.

10 Procedures - The admissibility hearing

10.1 General

Admissibility proceedings are held under the jurisdiction of the ID to determine the merits of allegations of inadmissibility under IRPA and to take applicable removal measures, if appropriate.

Pursuant to subsection A44(1), an officer who is of the opinion that a permanent resident or a foreign national who is in Canada, is inadmissible may prepare a report setting out the relevant facts and transmit the report to a Minister’s Delegate (MD).



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

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

If the MD is of the opinion that the report is well founded, they **must** also refer the A44(1) report to the ID of the Immigration and Refugee Board (IRB) for an admissibility hearing in the following situations as prescribed under r228:

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

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

- Referral Under Subsection A44(2) of the *Immigration and Refugee Protection Act* for an Admissibility Hearing ([BSF 506](#));
- Request for Admissibility Hearing/Detention Review Pursuant to the Immigration Division Rules ([BSF 524](#))

Note: The Regional Hearings and Detention Section forwards copies of both forms to the ID and retains copies on file. For detention cases, the MD must send a copy of the A44(1) report, forms BSF506 and BSF 524 directly to the ID and the Regional Hearings Office without delay. The documentary evidence should also be sent to the Regional Hearings Office as soon as possible.

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

For more information on administrative removal orders refer to [ENF 6](#), Administrative removal orders.

10.2 Port of entry (POE) referral for an admissibility hearing

If the MD, after reviewing a report made pursuant to A44(1), determines that the report is well-founded, he or she may refer it to the ID of the IRB for an admissibility hearing. Where the decision to refer to the ID is made under A44(2) and the person leaves the POE, the examination of the person has ended (R37(1)(d)).

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

Note: Refer to [ENF 4](#): Port of Entry Examinations, section 5.6, for additional information on end of examination, and ENF 6: Review of reports under subsection 44(2) Section 12 Allowing withdrawal of application to enter Canada/ Allowed to leave (Port of entry cases)

10.3 Burden of proof

The burden of proof is the obligation to prove or disprove a disputed fact. In the immigration context, it refers to who is responsible for establishing admissibility. A45(d) governs which party holds the burden of proof depending on the specific circumstances of the case.

10.3.1 Permanent residents and foreign nationals who have been authorized to enter Canada.

On a matter involving permanent residents or foreign nationals (who have been authorized to enter Canada), the burden of proof rests with the Minister to establish that the person is inadmissible.

During an admissibility hearing, hearings officers must be prepared to offer evidence to support the allegation(s) of inadmissibility and rebut any statements that are made by the foreign national or the permanent resident in order to meet the applicable standard of proof (refer to section 10.4) of the existence of facts that constitute inadmissibility. If the Minister is unable to meet this burden, the ID member shall determine that the person concerned is not inadmissible, even if the person concerned does not produce evidence to the contrary. For a list of all the ID's possible decisions following an admissibility hearing refer to A45.

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

10.3.2 Foreign nationals who have not been authorized to enter Canada

For foreign nationals who have not been authorized to enter Canada, the burden of proof rests with the foreign national to prove that they are not inadmissible to Canada. This applies to the following:

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

It is up to the person concerned to disprove the evidence presented by the Minister that constitute inadmissibility. Nonetheless, since the Minister is the party who initiates the admissibility hearing process, it is the Minister who presents evidence first, on the facts that constitute the basis for inadmissibility.

10.4 Standard of proof

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

However, A33 of IRPA provides that for allegations of inadmissibility listed under A34 to A37, evidence is to be evaluated according the standard of proof, of "reasonable grounds to believe" that the facts have occurred, are occurring or may occur. In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada upheld the ruling of the Federal Court of Appeal that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the "balance of probabilities" [*Sivakumar v. Canada (Minister of Employment and Immigration*, p. 445) and *Chiau v. Canada (Minister of Citizenship and Immigration)* (paragraph 60)]. The reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information [*Sabour v. Canada (Minister of Citizenship and Immigration)*].

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

Standard of proof

Reasonable grounds to believe	Balance of probabilities
<ul style="list-style-type: none"> • Committed/Committing an act outside Canada as described in 36(1)(c)— Note: applies only to foreign nationals] • Security (A34) • Violation of human or international rights (A35) • Serious criminality and criminality (A36), Note: except for A36(1)(c) for permanent residents • Organized crime (A37) 	<ul style="list-style-type: none"> • Committed/Committing an act outside Canada as described in 36(1)(c)— Note: applies only to permanent residents] • Health reasons (A38) • Financial reasons (A39) • Misrepresentation (A40) • Cessation of refugee protection (A40.1) • Non-compliance with the Act (A41) • Inadmissible family member (A42)

10.5 Rules of evidence

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

- the admissibility of evidence;
- the relevance of evidence;
- the weight of evidence; and
- the different types of evidence, including documentary evidence and testimony (includes testimony given by expert witnesses) Expert witnesses can only give evidence with respect to the subject at issue.

For additional information about rules of evidence, refer to [Appendix A](#).

10.6 Inadmissibility

Notes:

- For guidance on obtaining evidence for all inadmissibility provisions refer to [ENF 1](#) – Inadmissibility.
- For essential case elements for all inadmissibility provisions, refer to [ENF 2](#) – Evaluating Inadmissibility.

10.7 Criminal equivalency between foreign and Canadian jurisdictions

As part of the inadmissibility determination under A36, it is necessary to determine if an offence committed outside Canada has an equivalent offence in Canadian law. This process is referred to as equivalency.

Serious criminality inadmissibility findings apply to either a permanent resident or a foreign national under A36(1). Criminality inadmissibility findings apply to a foreign national under A36(2).

The following provisions of IRPA raise the issue of equivalency with respect to serious criminality and criminality:**36(1)(b)**

Serious criminality

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

36(1)(c) – Serious criminality Committed an act outside Canada that is an offence 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.

36(2)(b) - Criminality

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

36(2)(c) – Criminality

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

The Federal Court provides the following guidance for equivalency

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

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

- compare the elements of the Canadian and foreign statutes to determine if both have the same essential elements to substantiate the respective offences (the elements generally include mental and physical components);

- examine the evidence adduced before the ID member, both oral and documentary, to ascertain whether the evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings; or
- by a combination of paragraphs 1 and 2.

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

Offences that are no longer offences in Canada will not render a foreign national inadmissible for a crime under IRPA. IRCC’s policy position is to apply this decision to permanent residents **and** foreign nationals who are inadmissible on the ground of serious criminality for offences committed inside and outside of Canada under paragraphs A36(1)(a), (b) and (c). The policy decision does **not** apply to subsection A36(2) criminality or to cases where the maximum punishment in Canada has become more lenient.

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

Step 1	Identify the foreign offence.
Step 2	Obtain evidence on the foreign offence. You should address the following three areas: <ul style="list-style-type: none"> • the wording of the offence in the foreign statute; • the best proof of a conviction (see ENF1 Section 7 for acceptable types of evidence); • details of what was actually done (the act).
Step 3	Identify possible Canadian equivalent offence(s)
Step 4	Break down each offence (Canadian and foreign) into its basic elements (see ENF2 Section 3.7 and ENF2 Appendix A)
Step 5	Compare each foreign element to its Canadian equivalent and determine if the Canadian element is equal to, broader than or narrower than the foreign element.
Step 6	When the Canadian element is narrower than the foreign element, you will be required to examine the act (the details of the offence) to determine whether the act committed satisfies the Canadian element.
Step 7	Come to an overall conclusion as to whether the foreign offence is equivalent to the Canadian offence by finding that the foreign elements are equal to or narrower than the Canadian element and where broader than the act in question meets the Canadian element.
Step 8	If you have equivalency, take into account the penalty for the Canadian offence at the time the offence was committed to decide which allegation under A36 is appropriate.

The foreign law must be proven during the admissibility hearing by producing all the extracts relevant to the offence, which will be entered as an exhibit. The relevant extracts should, as a rule, include the sections that define the terms used in describing the offence.

As seen above, in the examination of equivalency, a determination is made as to whether each of the essential elements of the foreign offence is present in the Canadian equivalent. The following are helpful ways to remember when you have equivalency:

- If all of the elements exist in both statutes (Canadian and foreign), the offences are equivalent. It is not necessary for the wording of the two laws to be identical. For example, the term “knowingly” may be equivalent to “knowing”, and the term “whoever” may be equivalent to “any person”.
- If the foreign enactment is more restrictive than the Canadian enactment, both offences are equivalent, since the Canadian statute covers all the situations contemplated in the foreign statute.
- If the foreign enactment is broader than the Canadian statute, or if the text includes situations that do not lead to a criminal offence in Canada, there is no textual equivalency. However the analysis does not end there. It is then necessary to examine the circumstances of the offence to determine if there is equivalency nonetheless. When this situation arises, evidence should be submitted regarding the facts that were proven in the criminal trial held outside Canada or, in cases where there is no conviction, evidence such as police reports may be relied upon to show that an offence was committed. When every essential element of the Canadian offence can be established, there is equivalence.
- The hearings officer should identify for the benefit of the ID which constituting element(s) of the Canadian offence is (are) not found in the text of the foreign offence. The hearings officer should then identify the facts that establish each element in the Canadian offence by referring to exhibits or part of a testimony that prove these facts.

Example of equivalency:

General Laws of Massachusetts, Pt IV, Title I, Ch. 266, sec. 49— Burglarious instruments; making; possession; use

Whoever makes or mends, or begins to make or mend, or knowingly has in his possession, an engine, machine, tool or implement adapted and designed for cutting through, forcing or breaking open a building, room, vault, safe or other depository, in order to steal therefrom money or other property, or to commit any other crime, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ or allow the same to be used or employed for such purpose, or whoever knowingly has in his possession a master key designed to fit more than one motor vehicle, with intent to use or employ the same to steal a motor vehicle or other property therefrom [...]

Criminal Code of Canada, sec 351(1) — Possession of break-in instruments

351 (1) Every person who, without lawful excuse, has in their possession any instrument suitable for the purpose of breaking into any place, motor vehicle, vault or safe knowing that the instrument has been used or is intended to be used for that purpose,

Comparing the text of these two provisions we see that there is no textual equivalency. The Canadian offence is more restrictive since the instruments described under the Canadian offence do not address the act of making or mending the break-in instruments.

To equate with the Canadian criminal code definition of breaking in, it is necessary to introduce evidence showing that person was found in possession of the instrument that was in working order to commit the offence and was not arrested while in the process of making said break-in instrument.

In this example, the evidence that the foreign offence is equivalent to an offence committed in Canada could consist of the following:

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

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

- evidence of the conviction, such as a certificate of conviction, a police report or a statutory declaration outlining a telephone conversation with a police officer, court reporter, court records clerk, or any document originating from the authorities of the country where the conviction was handed down;
- the legal description of the foreign offence; that is, the text of the statutory provision under which the person was convicted; and
- evidence (obtained from the charge or indictment or a similar document) of the particulars of the offence [*Brannson v. Canada (Minister of Employment and Immigration)* (para. 4)]. In some cases, the certificate of conviction may contain sufficient information for the certificate to be used instead of the indictment.

After further research and investigation, the hearings officer may find that the foreign conviction would better equate to a Canadian offence other than the one initially identified by the Minister's delegate at the time of writing the report. The A44(1) report should refer to as many Canadian equivalents as is reasonably necessary. Refer to section 11.2 Additional allegations/amendments of the report for further guidance.

For additional information on documentary evidence, refer to [ENF 2](#) Evaluating inadmissibility.

Note: IRCC is the delegated department for policy oversight of A36. If required in some complex or atypical equivalency cases, hearings officers and their managers may contact the Hearings Programs unit at NHQ (Hearings-Audiences-Programs@cbsa-asfc.gc.ca) to seek guidance from IRCC).

10.8. Serious criminal inadmissibility for committing and act outside Canada that would constitute an offence in the foreign jurisdiction as well as in Canada [A36(1)(c)]

To establish inadmissibility under A36(1)(c), it is sufficient to prove that an act was committed outside Canada, that is an offence the place where it occurred and that the act, if committed in Canada would have constituted, at the time of its commission, an offence in Canada that would be punishable by a maximum term of imprisonment of at least 10 years. It is not necessary to prove the following facts:

- that the person concerned was convicted of the offence outside Canada;
- that charges or an indictment were laid;
- that the wording of the foreign statute is equivalent to the wording of the Canadian legislation;
- that the person would receive a sentence of 10 years or more if sentenced in Canada.

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

Note: A36(1)(b) and A36(1)(c) are generally mutually exclusive (officers should use one allegation or the other for the same act); nevertheless, in case where the proof of foreign conviction is unreliable or may be called in question the A44(1) report may include two allegations: one relating to an equivalence [A36(1)(b) or A36(2)(b)] and one relating to an act or omission [A36(1)(c) or A36(2)(c)].

10.8.1 Committing an offence on entry to Canada [A36(2)(d)]

For the application of A36(2)(d), the hearings officer must ensure that the act committed was contrary to an Act of Parliament that is prescribed by the IRPR. R19 lists six prescribed Acts: the Criminal Code, IRPA, Firearms Act, Customs Act, CDSA, and the Cannabis Act. Because an A36(2)(d) allegation can only be made in a ‘present tense’ scenario, all the evidence available to support it will originate from the port of entry. Hearings officers should rely on evidence such as statutory declarations from officers, copies of officer’s notebook pages, reports, photos and or video surveillance footage.

Note: Information collected in the course administering the *Customs Act* may be protected. Officers should familiarize themselves with section 107 of the *Customs Act*, which sets out the modalities and conditions for the authorized use of customs information in the enforcement of the IRPA .

For additional information on the use of A36(2)(d), refer to [ENF 2](#)

10.9 Foreign pardons

Please refer to [IRCC's Program Delivery Instructions \(PDI\) on Criminal Rehabilitation](#). The effect of a foreign pardon does not automatically render the person admissible to Canada.

The following must be taken into account:

- If the country's legal system is based on similar foundations and values as Canada's, then the foreign legislation must be examined to determine whether the effect of the pardon is to erase a conviction or merely recognize that rehabilitation has taken place. In the former case, the person would not be inadmissible. In the latter case, the applicant is inadmissible and, subject to the prescribed period in R17, an application for rehabilitation may be initiated by the person.
- In the vast majority of cases, the applicant should be able to produce a copy of the pardon.
- Canadian courts are not bound by a foreign pardon in which there is an absence of evidence as to the motivating considerations that led to the grant of a pardon by another state jurisdiction.
- Three elements must be established before a foreign discharge or pardon may be recognized:
 - 1) the foreign legal system as a whole must be similar to that of Canada;
 - 2) the aim, content and effect of the specific foreign law must be similar to Canadian law; and
 - 3) there must be no valid reason not to recognize the effect of the foreign law

10.10 Permanent Resident inadmissibility under A36(1)(a)

Cases of A44(1) reports alleging inadmissibility under A36(1)(a) for serious criminality in Canada, and referred to the ID, are usually very straightforward and therefore officers should aim to have them handled by way of written submissions instead of having the Minister's representative attend in-person. Hearings officers or hearings advisors must ensure that they are not the authors of any evidence (such as statutory declarations) that is included in the disclosure.

Hearings officers must obtain the approval from the Member to participate in writing rather than by in-person attendance. This is done by submitting a written application pursuant to ID Rule 38, seeking a release from the obligation to appear at the hearing, which is set out in ID Rule 42(3) and 43(3). Where the Member denies the application, the hearings officer is obligated to attend in person.

In some cases, where the issue is not straightforward, the hearings officer may determine that their in-person presence at the hearing is required. Before attending the hearing, the hearings officer must first obtain their manager's written approval to appear in person for A36(1)(a) cases and place a signed copy their manager's approval on file.

For the applicable templates, refer to [Appendix C and D](#).

10.11 Family inadmissibility A42(1)

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

(a) their accompanying family member, or, in prescribed circumstances, non-accompanying family member is inadmissible; or

(b) they are an accompanying family member of an inadmissible person

For the purpose of paragraph A42(1)(a), the prescribed circumstances are described in section R23. That section addresses situations where the foreign national is inadmissible on the ground of an inadmissible non-accompanying family member where the foreign national made an application for temporary residence status, or a permanent resident visa, or an application to remain in Canada as a temporary resident or a permanent resident; and where the non-accompanying family member is:

- The spouse of the foreign national, except where the relationship between them has broken down in law or in fact,
- The common-law partner of the foreign national,
- A dependent child of the foreign national and where either the foreign national or an accompanying family member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or a written agreement or by operation of law, or
- The dependent child of the dependent child of the foreign national and where the foreign national, or a dependent child of the foreign national, or any other accompanying family member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or a written agreement or by operation of law.

Subsection A42(2) provides an exception to inadmissibility that would occur pursuant to subsection A42(1). This exception applies only in the temporary resident context. The exception applies where a foreign national is a temporary resident, or where a foreign national has made an application for temporary resident status, or an application to remain in Canada as a temporary resident, and where:

- The matters referred to in paragraph A42(1)(a) constitute inadmissibility only if the family member is inadmissible under sections A34 (security concerns), A35 (human or international rights violations), or A37 (organized criminality).
- The matters referred to in paragraph A42(1)(b) constitute inadmissibility only if the foreign national is an accompanying family member of a person who is inadmissible under sections A34 (security concerns), A35 (human or international rights violations), or A37 (organized criminality).

For reference, subsections A42(1) and (2) can be summarized in the following table:

Inadmissibility of the principal applicant (PA) on the ground of inadmissible family member other than a protected person				
Inadmissibility grounds of the subject of an admissibility hearing	Foreign national is an accompanying family member (AFM) of a principal applicant who		Foreign national is a non-accompanying family member (NAFM) of a principal applicant who	
	<i>Is a temporary resident (TR) or who has made an application for TR status or an application to remain in Canada as a TR</i>	<i>Applies for a PR visa or to remain in Canada as permanent resident</i>	<i>Is a temporary resident (TR) or who has made an application for TR status or an application to remain in Canada as a TR</i>	<i>Applies for a PR visa or to remain in Canada as permanent resident</i>
	34, 35, 37	The PA is inadmissible because the AFM is inadmissible	The PA is inadmissible because the AFM is inadmissible	The PA is inadmissible because the NAFM is inadmissible
36, 38, 39, 40, 40.1, 41	The PA is not inadmissible because the AFM is inadmissible	The PA is inadmissible if the AFM is inadmissible	The PA is not inadmissible if the NAFM is inadmissible	The PA is inadmissible if the NAFM is inadmissible

Inadmissibility of the family member other than a protected person on the ground of inadmissible principal applicant (PA)				
Inadmissibility grounds of the subject of an admissibility hearing	Foreign national is an accompanying family member (AFM) of a principal applicant who		Foreign national is a non-accompanying family member (NAFM) of a principal applicant who	
	<i>Is a temporary resident (TR) or who has made an application for TR status or an application to remain in Canada as a TR</i>	<i>Applies for a PR visa or to remain in Canada as permanent resident</i>	<i>Is a temporary resident (TR) or who has made an application for TR status or an application to remain in Canada as a TR</i>	<i>Applies for a PR visa or to remain in Canada as permanent resident</i>
	34, 35, 37	The AFM is inadmissible because of the inadmissible PA	The AFM is inadmissible because of the inadmissible PA	N/A¹
36, 38, 39, 40, 40.1, 41	The AFM is not inadmissible if the PA is inadmissible	The AFM is inadmissible because of the inadmissible PA	N/A³	N/A⁴

¹ In this scenario there is no need to examine the inadmissibility of the PA vis a vis the family members because in this context the family member is non-accompanying, and is not coming to Canada.

² Same explanation as in footnote 1.

³ Same explanation as in footnote 1.

⁴ Same explanation as in footnote 1.

An allegation of inadmissibility under section 42 of the Act cannot be made against permanent residents or protected persons.

10.11.1 Including family members at an admissibility hearing

Most A42 inadmissibility cases are encountered overseas in the context of [temporary or permanent resident] visa applications and therefore never reach the ID. However, where the person and their family members are in Canada, if a person is reported for inadmissibility under A34, A35 or A37, the matter will be subject to an admissibility hearing before the ID.

An A44(1) report regarding the foreign national or permanent resident in question is sufficient and a separate report is not required for family members who are foreign nationals. **Note:** In cases where a family member was not included in the [BSF540](#), following the conclusion of the admissibility hearing for the person alleged to be inadmissible under A34, A35 or A37, the family member can be the subject of their own A44(1) report alleging inadmissibility under A42(2), whereupon a Minister's Delegate may issue them a deportation order pursuant to R228(1)(d). However, this process should only be undertaken if the officer was unable to notify the family member, or was unaware of their presence at the time of completing the BSF540. For more information on the review of A44(1) reports on family inadmissibility, refer to [ENF 6](#).

10.11.2 Evidence for inclusion of family members

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

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

R227(2)(a)

Hearings officers should provide proof that family members were informed that they are the subject of an admissibility hearing, have the right to make submissions as included in a copy of the "Notice of Admissibility Hearing to Family Members" form ([BSF 540](#)) that was previously provided to family members and have the right to be represented at their own expense at the admissibility hearing.

R227(2)(b)

To meet the condition in R227(2)(b), that the family members are subject to a decision of the Immigration Division that they are inadmissible under section 42 of the Act on grounds of the inadmissibility of the foreign national, it is sufficient to show that the family member meets the

definition of “family member” in R1(3). If 227(2)(a) and (b) are met then family members will automatically be covered by the removal order made against the principal applicant.

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

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

The term “common-law partner” is defined in R1(1).

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

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

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

See [ENF 2](#) for information on evidence regarding inadmissible family members.

11 Preparing for an admissibility hearing: General guidelines

11.1 Minister’s obligation to disclose any relevant information or document (ID Rule 3)

When requesting an admissibility hearing, hearings officers have an obligation to provide to the ID and the person concerned any relevant information or document that is in the Minister’s possession, power or control. To comply with this disclosure obligation, the hearings officer is to seek out all relevant information in the immigration enforcement file. This includes making an enquiry into any files that may hold relevant information in systems to which the hearings officer has access.

In addition to this general obligation, ID Rule 3 sets out a list of specific information that the Board requires the Minister to provide.

To meet these obligations, hearings officers should disclose the following documents:

- “Request for Admissibility Hearing” form (BSF 524); and
- “Notice of Admissibility Hearing” form (BSF 525); and
- “Referral under subsection A44(2) of the IRPA for an admissibility hearing” form (BSF 506);
- a copy of the A44(1) report that sets out the allegations;
- all documents and information the Minister intends to introduce as evidence at the hearing; and
- all other relevant document(s) or information whether or not it is being used to support the Minister’s position.

All documents must comply with the requirements set out in the *Immigration Division Rules 24* and 25 with respect to language and format.

Rule 3 of the ID Rules specifies that the hearings officer should file all relevant evidence at the time that the hearing is requested. However, if not all evidence was filed at the time the hearing was requested, ID Rule 26 requires that all documents be provided to the person concerned and the ID at least five business days before the hearing.

Note: In the case of an admissibility hearing of a detained individual, the first time the person is brought before the ID (for the 48-hour detention review) it is possible that the admissibility hearing will be postponed at the request of counsel. It is recommended that hearings officers organize the evidence into two separate disclosure packages (one for the detention review and one for the admissibility hearing), as each proceeding will follow a different schedule and may not require the same disclosure.

Note: If the person concerned has retained counsel, the hearings officer will ensure that copies of the relevant notices and documents are sent to counsel in accordance with Rule 28(3) of the ID Rules.

The hearings officer should confirm that all information intended for the ID was sent to the registry office, as indicated by a date stamp if delivered by hand. Should documents be sent by regular mail, they will be considered received seven days after the day it was mailed, refer to ID rules 27-31 for further information on how to provide a document. For the electronic transmission of documents refer to your regional IRB registry office for information on how to submit documents electronically.

11.2 Additional allegations/amendments of the report

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

Any errors or omissions in the report should be corrected. Minor errors or changes may be addressed by the hearings officer with a notification of an amendment, as long as appropriate procedural fairness is extended to the person concerned. This may include the modification of the remarks in the A44(1) report. In *Uppal v. Canada*, the Federal Court held that “an amendment to the subsection 44(1) report, for the purpose of substituting a different Canadian equivalent offence, does not require that the report be returned to the Minister for a fresh determination”. In the case of substantive errors, the report should be returned to the MD who reviewed the report. If the original officer is no longer at the office where the decision was made or no longer performs the MD function, the request should be sent to a Manager for assignment and review. It may be necessary to make an application to the ID to request a postponement of the admissibility hearing [ID Rules, Rule 43]. This is necessary only if the error or omission in the A44(1) report or evidence cannot be rectified prior to the hearing date and would seriously impact the presentation of the case by the hearings officer.

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

If the evidence is insufficient, the hearings officer may

- complete the file by adding additional evidence, if available; or
- withdraw the application to hold the admissibility hearing.
- refer the file back to CBSA investigations (or POE depending on the origin of the file) with a request to obtain additional evidence.

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

Note: In cases of removal orders based on an equivalency between a foreign law and Canadian law, the A44(1) report should include separate allegations for each possible Canadian equivalency that applies.

11.3 Including family members

When preparing a case, the hearings officer may discover that family members, who are foreign nationals and not protected persons in Canada, did not enter Canada at the same time as the person concerned but are nonetheless present in Canada. In such cases it may be decided that, in accordance with A42(1) and A42(2), these family members should be included in the removal order. If this is the case, an inland enforcement officer should prepare and serve a “**Notice of Admissibility Hearing to Family Members**” form ([BSF 540](#)) on the family members to which A42(1) and A42(2) apply.

This does not include family members who are permanent residents or protected persons.

For more information about family inadmissibility refer to section 10.11 above.

11.4 Attending a pre-hearing conference

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

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

11.5 Withdrawal of a request for an admissibility hearing

ID Rules, Rule 5 sets out when the Minister may withdraw a request for admissibility hearing. The timing of the withdrawal is important: if no substantive evidence has been accepted, the hearings officer need only notify the ID of the withdrawal. This can be done orally at a proceeding or in writing. If the Minister notifies in writing, the Minister must provide a copy of the notice to the other party [Rule 5(2) of the *Immigration Division Rules*]. However, once evidence has been accepted, a written application must be made to the ID. The ID will not grant the withdrawal if doing so would be an abuse of process. ID Rule 5(1) states that an abuse of process is where the withdrawal would likely have a negative effect on the integrity of the ID. Prior to initiating a withdrawal, the hearings officer should discuss the case with their manager.

If the case involves an alleged inadmissibility under A34, hearings officers should be mindful that the withdrawal of the report will automatically terminate, by operation of law, the prescribed conditions of release imposed on the person concerned as per R250.1(a)-(k).

12 Presenting the case

12.1 Admissibility hearing opening format

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

- The member of the ID makes an opening statement, indicating the legal basis for the hearing, the place of the hearing, the date of the hearing and the jurisdiction. The member will then ask the parties and their counsel to identify themselves. The member of the ID will also note the presence of any observers present. The member will exclude members of the public, if the admissibility hearing concerns a refugee protection claimant or if the hearing is determined to be held “in camera.”

- Next, the member of the ID confirms that the person concerned understands and communicates in the official language in which the admissibility hearing is being held. If an interpreter is necessary, the member ensures that there is effective communication between the interpreter and the person concerned.
- If the person concerned is not represented by counsel, the member of the ID will confirm that the person concerned was made aware of his or her right to counsel. If the PC does not have counsel, the ID may decide to adjourn and set another date to allow the PC to obtain counsel, depending on the circumstances
- In the case of an admissibility hearing with respect to a foreign national, the member of the ID may ask if family members will be affected by a removal order in accordance with R227(2). If family members are affected, the hearings officer should ensure that they were named in the BSF524 and submit the “Notice of Admissibility Hearing to Family Members” form ([BSF 540](#)) that was prepared by the IEO and provided to the family members prior to the hearing.
- The member of the ID will explain to the person concerned the reason for the hearing, the allegations, possible consequences and procedures that will be followed during the hearing.

12.2 Exclusion of witnesses

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

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

12.3 Evidence

Before the hearing, the hearings officer should ensure that the Minister’s evidence found in the Minister’s disclosure, or otherwise expected to be provided by any witnesses, will substantiate the allegations contained in the A44(1) report. The Minister must always include the A44(1) report and A44(2) referral in the Minister’s disclosure. The hearings officer should bring the original of the A44(1) report and the A44(2) referral to the hearing as the member of the ID may ask to see the originals.

At the hearing, the member of the ID accepts admissible documents provided by both parties and enters them as exhibits to the hearing. The hearings officer must ensure that all of the Minister’s disclosure is entered as an exhibit(s), however, the ID has the jurisdiction to decide whether to enter the evidence as an exhibit.

If applicable, the hearings officer calls the person concerned as a witness and may call other witnesses as required to support the allegations outlined in the A44(1) report. The hearings officer can examine or question these witnesses on the allegation and on any of the evidence found in the exhibits.

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

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

If evidence that has not been previously provided to all parties arises during cross-examination, the opposing party will be given an opportunity to examine this evidence and respond accordingly which may include calling additional witnesses to refute this new evidence. It may be appropriate to request an adjournment to review the evidence in order to provide a proper response.

12.4 Evidence on the identity, citizenship and status of the person concerned

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

- What is your correct name in full? (to establish identity)
- Have you ever used any other name? (to establish identity)
- What is your date of birth? (to establish identity)
- Where were you born? (to establish identity and possibly citizenship)
- Of what country are you a citizen? (to establish citizenship)
- Are you a Canadian citizen? (to clarify that this person is not a Canadian and therefore subject to the IRPA inadmissibility provisions)
- Are you a person registered as an Indian under the *Indian Act*? (to clarify that the person is subject to the IRPA inadmissibility provisions)
- Are you a permanent resident of Canada? (to determine burden of proof and applicability of certain provisions)
- Do you have a passport?
- Do you have other identity documents?

12.5 Submissions on the allegations

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

entered into the record. For example, in the case of a person seeking admission to Canada, the hearings officer may indicate in his/her submissions that the person concerned:

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

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

It is not sufficient to merely include the evidence in the disclosure package. It is the responsibility of the hearings officer to highlight the specific page and passage in which the evidence can be found. In *Piber v. MCI 2001 FCT 769*, the Federal Court has held that it is not incumbent on the Board to comb through a party's extensive disclosure package; the onus falls on the Minister to highlight the relevant references to show how each of the elements of the allegation is proved by the evidence.

12.6 The admissibility decision

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

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

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

12.7 Issuing the removal order

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

R229(1) lists the type of removal order to be made by the ID according to applicable inadmissibility.

R229(2) lists grounds of inadmissibility for which the ID must make a departure order when the person concerned is a claimant for refugee protection [R229(1)(f), (g), (j),(m) and (n)].

To ensure that the correct removal order is issued, the hearings officer should state whether the eligibility of the refugee claim has been determined, and if the claim has been determined to be ineligible, produce copies of all relevant forms.

When an application for refugee protection is presented before or during the admissibility hearing, the hearings officer must proceed as if the eligibility determination has already been made.

R229(3) lists circumstances in which the ID **shall** make a deportation order against a person instead of the prescribed removal order pursuant to R229(1). The circumstances listed in R229(3) are the following:

1. the person was previously subject to a removal order and the person is inadmissible on the same grounds as in that order (R229(3)(a));
2. the person has failed to comply with any condition or obligation imposed under the Act or the *Immigration Act*, R.S.C. 1985, c. I-2, unless the failure is the basis for the removal order (R229(3)(b)); or
3. the person has been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment or of two offences under any Act of Parliament not arising out of a single occurrence, unless the conviction or convictions are the grounds for the removal order (R229(3)(c)).

Hearings officers should have provided in the Minister's disclosure all relevant evidence to support the application of R229(3).

Note: For more information on specified removal orders, see [ENF 10](#), Removals.

12.8 Cases involving refugee protection claimants

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

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

Where an application for refugee protection is presented before or during the proceedings, the hearings officer must proceed as if the person is eligible to make a claim for refugee protection. This means that the admissibility hearing must be held in private from the moment the application for refugee protection is made unless the ID decides to hold the hearing in public on an exceptional basis as per A166(d). If it is later determined that the claim for refugee protection was not eligible, the continuation of an adjourned admissibility hearing and subsequent hearings shall be held in public.

12.9 Claim to Canadian citizenship

An admissibility hearing is not generally adjourned simply because the person concerned claims to be a Canadian citizen. Since Canadian citizenship is purely a creation of federal statute (refer to section 3 of the *Citizenship Act* which exhaustively defines who is a Canadian citizen and who can become one), it is the law which gives the person status and not a document. In general, there are three basic pathways to citizenship: birth in Canada (unless born to a diplomat); birth abroad in the 1st generation to a Canadian parent (gestational or biological link or legal parentage); and by grant of citizenship. While most citizens do not carry a citizenship certificate to prove they are Canadian, they will have a Canadian passport or provincial or territorial birth certificate as proof of Canadian citizenship. For other Canadians, a citizenship certificate issued by IRCC will constitute proof of status. It is the responsibility of the member of the ID to determine if the evidence produced by the person concerned is sufficient to support the claim that they are Canadian citizen.

The hearings officer may challenge the claim to citizenship during the hearing, if the hearings officer is in possession of evidence to support the challenge. The hearings officer may ask the member of the ID to render a decision and continue the admissibility hearing according to established procedure. The hearings officer may request an adjournment in order to obtain the evidence required to refute the claim to Canadian citizenship, if the necessary evidence is not readily available. In this respect, the hearings officer may wish to consult with the Registrar of Canadian Citizenship, or another citizenship official in IRCC to assist in this citizenship status determination pursuant to the information sharing arrangement between IRCC-CBSA, since this may help to refute the person's claim, or alternatively, may result in finding support for it.

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

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

12.10 Cases involving detainees

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

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

For more information, see [section 14, Detention reviews](#).

13. Carrying out a decision of the Immigration Division

Most often, member of the ID will give their decision and reasons at the conclusion of the hearing. However, in more complex cases, for instance where a substantial volume of evidence has been entered, the member may reserve their decision and provide their decision in writing. If the hearings officer proceeded by way of written submissions, the member's decision is usually made in writing, although the member could call another hearing date to render a decision orally. In all cases, the hearings officer or other staff in the hearings office must ensure that the Minister's copy of the removal order is placed on file, that the case details are updated in NCMS and GCMS and that the case file is given to the appropriate unit for action (removals unit for removal, for the storage room where the case is closed with no further enforcement actions required).

Where time permits, results of the admissibility hearing should be provided to the officers who prepared and reviewed the original report, or who arrested and detained the permanent resident or the foreign national under the provisions of IRPA. Also where time permits, for training purposes, hearings officers should provide feedback on the effectiveness of the work conducted by those involved in the specific case.

13.1 Recourse in case of 'favorable decision' by the Member (finding the person not to be inadmissible)

Person found 'not described' under section	Delegated authority to file a Minister's appeal at the IAD
A34, A35, A37	CBSA Litigation management Unit
A36, A38, A39, A40, A40.1, A41 and A42	IRCC Litigation management Division

13.1.1 Minister's appeal at the IAD

Where hearings officers are of the opinion that there are, or may be, grounds to appeal a decision by the member finding the person not described under A34, A35 or A37, they will consult with their manager, who will then contact the Litigation Management Unit (LMU) (litigation-management@cbsa-asfc.gc.ca) for guidance. The decision to appeal an ID decision to the IAD is made by persons with delegated authority from the Minister.

In the case of hearings where the Member found the person not described under A36, A38, A39, A40, A40.1, A41 or A42, the delegated authority from the Minister of Citizenship and Immigration rests with IRCC's Litigation Management Division (LMD). After concurrence from their manager, the Justice Liaison Officer (JLO) will reach out to LMD (IRCC.CMBLitigationMgmtRequest-DemandeGestLitigesDGRC.IRCC@cic.gc.ca) for guidance.

See [ENF19, sec. 13](#), for more information on the procedure for Minister's appeals

13.1.2 Application for leave for judicial review

Where hearings officers are of the opinion that there are, or may be, grounds to seek judicial review, hearings officers will consult with their manager. If the manager concurs, the hearings officer will, within five business days, send a report which summarizes the case, details the error of fact, law or mixed law and fact and the rationale for seeking judicial review to the regional JLO. If the JLO is not available, the hearings officer may send the report directly to LMU at NHQ (litigation-management@cbsa-asfc.gc.ca) or LMD (IRCC.CMBLitigationMgmtRequest-DemandeGestLitigesDGRC.IRCC@cic.gc.ca) based on which Minister is responsible as laid out in sec 13.1.1 above.

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

See [ENF 9, Judicial Review](#), for more information.

Note: Officers should keep in mind that PKI-encrypted emails should only be used to transmit information up to the 'Protected B' level. If the case contains information with a higher classification level, refer to the CBSA [Security volume](#) for guidance on alternative secure communications systems and coordinate with LMU.

13.2 Prosecutions of serious violations of IRPA

It is the CBSA's policy to refer cases involving serious violations of IRPA to the Royal Canadian Mounted Police (RCMP) or the Criminal Investigations Section of the CBSA, where appropriate, for further investigation and prosecution. The hearings manager or chief, as the case may be, decides if a case should be referred to the RCMP following a debrief from the officer on the reasons why this case should be brought to the attention of the RCMP in accordance with the guidelines set out in IRPA for the offences under A117-A119, A122, A124, A126 and A127.

14 Procedures - detention reviews

14.1 General

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

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

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

- is not as structured as an admissibility hearing;
- may be held on its own or in conjunction with an admissibility hearing (one after the other);
- evidence needs to be presented to support a position for continued detention;
- detained persons have the right to be represented by counsel.

A58(1) sets out that “the Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that [grounds for detention are present].” This means that the burden of proof rests with the Minister to establish, on a balance of probabilities that the person should remain in detention.

Generally, each party (the hearings officer and the person concerned) presents evidence and makes arguments. Evidence may consist of witness testimony, documents or other objects. Evidence presented at detention reviews is governed by the same evidentiary rules as at admissibility hearings.(see Appendix A) The member of the ID should be aware of the alleged reasons for detention from the information contained in the Request for Admissibility Hearing/Detention Review Pursuant to the Immigration Division Rules form ([BSF 524](#)). The ID member will require that the hearings officer present the reasons for initial detention.

Following the hearings officer’s opening statement, the ID member provides an overview of the purpose of the detention review and the jurisdiction conferred upon the member by IRPA and its Regulations. The member will ask the hearings officer to submit the facts as the Minister sees them based on the evidence, any legal arguments, and a recommendation regarding the continuation of the detention as to whether detention should be continued, there are any viable alternatives to detention, or if the PC should be released. If the hearings officer recommends release, the hearings officer should specify the conditions of release that the Minister would like to have imposed. Before a hearings officer presents the position of the Minister, officers should keep in mind that detention is a measure of last resort, and that the wording of A58(1) is that the ‘The Immigration Division shall order the release...’, therefore release is the default position before considerations

14.1.1 Authority to detain a person under IRPA and release them prior to the first detention review

For detailed information on the authority to detain a person (A55), as well as the authority to release prior to the first detention review before the ID (A56), refer to [ENF 20](#): Detention.

14.1.2 Detention review – timeline for permanent residents and foreign nationals

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

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

Note: A57.1 stipulates a different frequency for detention reviews to those detainees who have been designated as “designated foreign nationals (DFN). Refer to section 14.3.1 for more information on cases involving designated foreign nationals.

The detained person will be present at each detention review, either in person or by way of video or teleconference, unless they choose not to participate (something that happens very rarely).

14.1.3 Mechanism of detention reviews and grounds for continued detention

Detention reviews are a two-step process:

1. Release: The member of the ID must release a person from detention, unless the member is satisfied that one of the reasons described in A58(1) exists, taking into account the prescribed factors (R244-R247) as appropriate.
2. Detention: If the member determines that one or more grounds for detention exists, the member considers the factors in R248 to determine if detention should be continued.

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

It is the hearing officer’s role to make recommendations, in favour of or against continued detention. In doing so, hearings officers should be guided by the factors set out in R245 to R248 depending on the reason for detention. The member of the ID will verify, consider and weigh each of the factors set out in the Regulations.

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

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

It is however insufficient for the hearings officer to present evidence exclusively in support of the grounds for detention. Hearings officers should clearly articulate which alternatives to detention (ATDs) were considered for the person, but rejected or deemed unsuitable for the case at hand. They should be prepared to answer questions by the member on why the ATDs do not sufficiently mitigate the risk. For further information on ATD's refer to ENF34 Alternatives to detention

For additional information on reasons for detention, refer to [ENF 20](#) Detention.

Note: It is not required that continued detention be sought on the same ground(s) as the original reason for arrest and detention. Hearings officers may argue for continued detention under A58 on grounds that may or may not have existed at the time of initial arrest and detention.

1. Flight Risk (R245)

For the purposes of R244(a), the factors to be considered in determining if a person is unlikely to appear for examination, an admissibility hearing, removal from Canada or at a proceeding that could lead to the making of a removal order by the Minister under A44(2) of the Act are prescribed in R245.

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

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

In cases where hearings officers perceive a risk that the person concerned will not appear unless conditions are imposed, hearings officers should consider a cash deposit and/or guarantee with conditions of release [A44(3)]. For additional information on deposits and guarantees, refer to [ENF 8](#)

The member of the ID will consider and weigh all available evidence and ATDs when deciding if continued detention is warranted. It will also consider particular circumstances such as mental illness, addiction or other vulnerabilities, which may play a role in the non-compliance, and how the person is addressing those issues, such as considering any re-habilitation plans or placement in recovery rehabilitation facilities as ATD

2. Danger to the public (R246)

For the purposes of R244(b), the factors to be considered in determining if a person is a danger to the public are prescribed in R246. The ID relies on the objectives of the Act, including 3(2)(g)&(h) — “to protect public health and safety and maintain the security of Canadian society” and “to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals” — to interpret the grounds of ‘danger to the public.’

All the facts and circumstances specific to each case are relevant to support a continued detention or not. They should be considered carefully and submitted to the ID to appreciate the level of danger that the person concerned may pose.

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

The circumstances surrounding the commission of an offence may assist the member of the ID in determining the weight of a factor compared to another. For instance, the fact that the victim of the offence is a minor child may be considered as more serious than if the victim is not a minor. An offence committed with the use of a prohibited weapon may also be considered to have more weight than an offence committed with another weapon, depending on the specific circumstances of each case.

Note: In *Bruzzese v Canada (Minister of Public Safety and Emergency Preparedness)* 2014 FC 230 (paragraphs 47 and 87) the Federal Court stated that each and every one of the factors listed in R246 is a sufficient ground to find that a person is a danger to the public and that these factors may serve as a sufficient basis, in and of themselves, to find that a person is a danger to the public. Each of these, the Court held, is an indicator that a person is, at least *prima facie*, a danger to the public. Once the Minister has made out such a *prima facie* case, the burden shifts on the person detained to lead evidence as to show that he or she is not a danger to the public .

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

- the criminal record of the person concerned, and documents establishing a criminal conviction in or outside Canada;
- the indictment;

- evidence of the medical condition of the person concerned;
- police reports documenting association of the person concerned with known criminals or a criminal organization, even if that person has no criminal convictions
- classified reports relating to security or criminal activity of the person concerned, and a record of physical violence, if applicable;
- Correctional Services report on the person's behavior in detention; and
- report from the Parole Board of Canada, or from a provincial parole board.

A Minister's Opinion that the person constitutes a danger to the public under A115(2)(a) does not in itself constitute a finding that the person is a danger to the public in the context of a detention review before the ID.

In addition, hearings officers may consider the age of a conviction, the circumstance under which an offence was committed and any events which have transpired since. An assessment of danger to the public is forward-looking. Events of the past are, by necessity, all we have to make an educated guess on how an individual may behave in the future. The fact that a number of years have passed or the fact that the person has served their sentence do not on their own indicate that the person concerned is or is not a danger to the public. What is required is some evidence that the person is rehabilitated. A strong indication that the person concerned is a danger to the public may consist of evidence that the offence involved violence or weapons and that the person concerned is likely to re-offend.

The member of the ID will consider and weigh all available evidence when deciding if detention should be continued. They will also consider if the circumstances leading to a finding of danger involved a heightened level of vulnerability due to addiction or mental health issues and whether those have been mitigated.

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

3. Identity (R247)

For the purposes of R244(c), the factors to be considered in determining whether a person is a foreign national whose identity has not been established are prescribed in section R247.

In cases where the identity of the person concerned has not been established, the hearings officer must provide details of the efforts made to establish the identity of the person concerned. The officer should be ready to provide concrete plans and time estimates for these efforts. .

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

Hearings officers should ensure that the case file contains a signed and dated "Minister's Opinion Regarding the Foreign National's Identity" ([BSF 510](#)) form.

Note: In *Canada (Minister of Citizenship and Immigration) v. Bains* (paragraph 4), the Federal Court clarified that it is not up to the member of the ID to determine what is acceptable as proof of identity, but merely whether the Minister made reasonable efforts to identify the person concerned. [see also *Canada (Citizenship and Immigration) v. B046*]

The factors set out in R245, R246 and R247 are not exhaustive. Additional factors may be considered by the member of the ID when assessing the evidence.

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

14.1.4 Factors to be considered when determining if detention should be continued (R248)

In addition to the factors referred to above, members of the ID must take into consideration the factors set out in R248, also known as the ‘*Sahin* factors’ when determining if detention should be continued. Even where the Minister established a *prima facie* basis for continued detention on one of the A58(1) grounds and prescribed factors of A244-R247, the ID still must consider the factors listed in R248 before deciding whether to order detention or release.

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

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

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

The factors set out in R248 are as follows:

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

For example, there may be a stronger case for continued detention on the grounds that the person concerned is a danger to the public.

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

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

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

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

Hearings officers should be aware that, as the detention progresses and surrounding circumstances evolve, some processes such as a positive—Stage 1 application for permanent residence on humanitarian and compassionate grounds, or the implementation of a Temporary Stay of Removal (TSR) may significantly prolong the expected time of continued detention when dealing with someone who is being detained for removal. The officer should reassess in light of the evolving situation, whether continued detention is appropriate; if so, the extent to which the evidence available on file can counterbalance the Member’s weighing of R248(c), taking into account the expected duration of continued detention. In their submissions, hearings officers must establish that the person is not facing indefinite detention due to an unachievable immigration outcome with evidence.

However, in exceptional cases immigration detention could still continue where there is no foreseeable possibility of removal (positive risks) where the person is a danger to the public, in order to ensure a proper alternative to detention is secured, see *Taino 2020 FC 427*.

As noted at para 86: the Member could and should have simply ruled on whether to continue the detention or to release on the basis of the toolkit provided to her by the statute, namely section 248 of the *Regulations*, rather than predetermining it with a *Charter* analysis. Certainly, *Charter* considerations could have been used to consider aspects such as the length of time in detention but, as *Sahin* and other cases have held since, the section 248 factors comply with the demands of *section 7*.

For additional information on impediments to removal, please refer to [ENF 10, sec. 11](#).

It is important to recognize that the risk a person poses as a flight risk or danger to the public does not decrease or disappear just because the person undergoes a prolonged stay in detention. Hearings officers should be prepared to present evidence to show that although the person concerned has spent a lengthy period of time in detention, the risk they pose remains unchanged.

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

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

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

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

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

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

Even if no ATDs are proposed by either the Minister, or counsel, it is important that the hearings officer anticipate the matter of ATDs and their suitability or unsuitability (if applicable), as they will be addressed by the member. For additional information on ATD assessment at detention reviews, please refer to [ENF 34](#).

Note: Members are not limited to the considerations in the factors above when deciding if continued detention of a person concerned is warranted.

In practice, these "other factors" mean that the Immigration Division may order release even if satisfied that the Minister has established a *prima facie* basis for continued detention under s.58(1) or (2). For example, the Immigration Division may order release because detention has continued for an extremely long time with no realistic prospect of removal, or the Immigration Division may order release because the Minister is unable to explain a lack of diligence in taking steps to establish identity. Alternatively, the Immigration Division may order release because it is satisfied that alternatives to detention – such as release on conditions – would adequately address the concerns underlying the grounds for detention.

While these "other factors" are enumerated in s.248 of the Regulations, the Supreme Court of Canada held that these same factors must be examined in all cases of prolonged or lengthy

immigration detention in order to ensure the detention reviews are meaningful and consistent with Charter requirements⁵.

14.2 Preparing for a detention review: General guidelines

14.2.1 Disclosure of documents

When preparing for their disclosure, hearings officers should be cognizant of their obligations to the ID. Previously, the Minister was responsible for disclosing any information they intended to rely on during a detention review. On April 1, 2019 the ID updated its Chairperson's guidelines for detention which shifts the disclosure obligations to include all relevant information in CBSA's possession. (Rule 7.3.4 - The Minister is expected to disclose all relevant evidence, whether or not it is exculpatory or they intend to rely on it prior to the hearing.

The FCA in *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at para 142-143 & 145 re-affirms the Chairperson's guidelines in that the Minister must disclose to the detainee all information relevant to their detention review that is not subject to a valid claim of privilege. This includes information advantageous to the detainee, information regarding the grounds for the detention, information pertaining to R248 factors, the existence of immigration nexus, and the information that bears on whether continued detention is warranted and consistent with the Charter and administrative law principles. This disclosure requirement is not unlimited; it is tempered by the requirement that the information be relevant to the detention review of the particular detainee. It is recommended that documents be ordered in a logical fashion, be it chronological or thematic. See ENF 31 for more details on disclosure obligations.

The ID Rules, Rule 24 requires that each document should be numbered consecutively and where more than one document is provided, a list of documents and their corresponding page numbers is also required.

Hearings officers must disclose to the person concerned or counsel if applicable and to the ID the following documents:

- "Request for Admissibility Hearing/Detention review" form (BSF 524);
- A copy of the 44(1) report, if applicable;
- a copy of the removal order, if applicable;

all other documentary evidence or information that is relevant to the hearing. In the case of a 48-hour or a seven-day detention review, all documents must be disclosed as soon as possible. In all other cases documents must be disclosed at least five (5) business days before the hearing. [*ID Rules*, Rule 26].

⁵ *Charkaoui v. Canada (MCI)*, [2007] 1 S.C.R. 350 at paras. 107-117.

Hearings officers should be particularly mindful of this deadline for disclosure in the case of long-term detainees who are undergoing detention reviews on a 30-day cycle.

Note: Rule 50 of the ID Rules, grants the member broad discretionary powers to change the requirements of a rule and/or modify time limits. In the interests of conducting a fair and fulsome hearing, the member may choose to accept evidence provided after the deadlines, in the form of late disclosure. However, hearings officers should only consider late disclosure to provide evidence on recent and pertinent developments about the case, which occurred before the detention review but after the deadline for disclosure has passed or where the evidence was otherwise unavailable before the deadline for disclosure had passed.

Community Liaison Officers (CLOs) and Inland Enforcement Officers (IEOs) are responsible for updating the file and providing the hearings officer with additional documentary evidence, as soon as possible in advance of the deadline for disclosure.

When interviews conducted by IEOs take place, they should be documented, preferably in a Q&A format, and should include all available information including impediments to removal, steps to resolve impediments, all actions taken on the file, follow up with consulates/embassies, travel document (TD) issuance timeframe, process for obtaining a TD. Although, the evidence will most frequently take the form of written declarations, CLOs and IEOs may be summoned by the member to provide witness testimony at a detention review, should questions on the case remain, even after the evidence was disclosed and submissions were made by the hearings officer.

In the case of a detention on identity grounds, evidence disclosed should also include any documents (or copies of documents) that were found in possession of the person at the time of arrest that may speak to their identity or purpose of their presence in Canada. There could be other reasons for which the documents may be used at a hearing.

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

14.2.2 Detention under A58(1)(c)

A58(1)(c) sets out that the ID shall order the release of a foreign national or permanent resident unless it is satisfied that:

(c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality;

While hearings officers will most likely handle such cases when the person concerned was detained under A55(3), this need not be the case. Persons may have been detained under the

authority of A55(1) or A55(2) and subsequent developments might lead to a change in grounds for detention.

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

The Federal Court at paragraph 65 in *Ismail* determined that “[T]o interpret paragraph 58(1)(c) of IRPA so as to permit the detention of an individual in order to allow the Minister to take necessary steps to inquire into a reasonable suspicion that the individual is inadmissible on grounds of security, when that suspicion only arises after the person has entered Canada, accords with the priority that the legislation ascribes to security.”

In all cases, if seeking continued detention under A58(1)(c), the hearings officer must satisfy the member on whether the Minister is taking necessary steps to verify a reasonable suspicion of inadmissibility. The hearings officer:

- Must describe the basis for the reasonable suspicion of inadmissibility;
- Should describe the steps the Minister has taken so far;
- Should describe the future steps the Minister intends to take.

The member is limited to examining whether the proposed steps have the potential to uncover relevant evidence bearing on the Minister’s suspicion. It is not up to the member to dictate steps to be taken in the investigation, or speculate on potential outcomes.

In *Canada (Citizenship and Immigration) v. X*, the Federal Court reaffirmed the limitations to the member’s supervisory jurisdiction during a detention review for a person detained on those grounds. “The government cannot use ss. 58(1)(c) as the basis for indefinitely detaining foreign nationals, but it is entitled to a reasonable time to complete its admissibility investigation.”

In essence, the jurisprudence limits the ability and obligation of the member to place weight on the time spent in detention, which R248 normally requires them to do. This in turn weakens the suitability of ATDs. Nevertheless, the hearings officer must continue to demonstrate that the Minister is conducting its ongoing investigation in good faith. If the investigation shows signs of faltering, it may be necessary for the officer to argue for continued detention under different grounds set out in A58(1)(a), A58(1)(b) or A58(1)(d), in which case the full range of factors R248 will need to be addressed, as they will be considered by the member.

For additional information on detention on entry of persons under A55(3)(b), refer to [ENF 20 Detention](#), Section 5.5 Suspected of security risk/human or international rights violations.

14.2.3 Alternatives to detention (ATD)

The matter of ATDs must form part of the submissions by the Minister. ATDs are evidently not suitable to all cases but, as set out in R248(e), the member is required to consider their availability, effectiveness and appropriateness in their decision.

While there is no obligation on the Minister to find an ATD, there is an ongoing obligation to consider ATD. There is a statutory duty to ensure that a person is not detained for immigration purposes unless certain criteria is met. The main principle of the IRPA detention scheme is that detention is a last resort.

Reasonable efforts throughout the detention process should be made by the Minister to participate in keeping the person out of detention unless the reasons for detention dictate otherwise (R244-247). Even if the person is a danger to the public or a flight risk, the ongoing obligation requires the Minister to consider if there would be any ATD that could mitigate that risk.

Consequently, and even if not applicable in a particular case, hearings officers should not limit their submissions on the matter to stating that there was “no suitable alternative”, but rather explain why the potential alternatives are not appropriate, or are otherwise insufficient to manage the risk in the case at hand. However, this finding is not immutable, and ATDs will be actively re-assessed by the member at every subsequent detention review. The hearings officer should keep in mind that change in a person’s circumstance may render a previously-rejected alternative into a viable option, especially in the case of long-term detentions.

The CBSA’s expanded ATD Program was implemented on June 22, 2018 and is intended to augment the existing options that were available to the CBSA and the IRB to manage individuals subject to immigration detention. The CBSA’s ATD Program provides officers with an expanded set of tools and programs that enable them to manage individuals released into the community more effectively. This included the creation of Community Liaison Officers (CLOs) who assist in examining the existence and feasibility of alternative’s to detention.

When release on conditions are deemed appropriate, the hearings officer must be ready to articulate in their submission the reasons for which those conditions should be imposed on the person concerned.

For additional information on alternatives to detention, refer to [ENF 34](#)

[Examining bondspersons proposed at a detention review](#)

The person detained or their counsel may propose a bondsperson to secure the release of a person in detention. When a potential bondsperson is proposed at the hearing, there may be insufficient time to have their ability to pay a cash deposit or post a guarantee formally assessed. Interactions with the bondsperson should be on the record; hearings officers should examine bondspersons on the record, with the bondsperson providing testimony under oath.

The hearings officer should cross-examine the proposed bondsperson at the detention review to assess their suitability and gather evidence for their submissions which may be a submission that the alternative to detention is inadequate to offset the risk. If the proposed bondsperson is not available to testify either in person or by phone, the Member may ask that they be available at the next detention review, or schedule an early detention review at which time the bondsperson may testify. In *Canada (Minister of Citizenship and Immigration) v. Ke*, the Federal court

established that a decision by the Member to release without giving the opportunity to the Minister to cross-examine the proposed bondsperson can be a breach of procedural fairness and natural justice.

The line of questioning for a proposed bondsperson should examine that proposed bondsperson's ability to ensure the person concerned's compliance with conditions of release, and not merely the dollar amount of the bond or value of the guarantee proposed.

Proposed bondspersons should be asked about:

- their immigration status and ties to the community;
- their relationship with the person concerned;
- their knowledge of the person concerned's immigration status and if applicable, criminal history;
- their own living situation;
- willingness to provide shelter to the person concerned;
- how they plan to exert influence on the person.

It is also relevant and appropriate to enquire about the potential bondsperson's income, assets, their ability to pay a cash deposit or fulfill the obligation from the guarantee. R47(3) gives an officer (as designated by the Minister of Public Safety) the authority to refuse the posting of a deposit or guarantee if they believe that it was, or will not be legally obtained. Any concerns that the proposed bondsperson will be posting a deposit or guarantee via illegally-obtained funds should be raised by the hearings officer at the detention review for the member to consider when assessing the suitability of the bondsperson.

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

A guarantor's criminal record may reflect the importance they place on law and order and social norms to respect compliance with laws and regulations. Similarly a guarantor's potential criminal associations, even in the absence of a criminal record, may speak to their character and their respect for the rule of law.

In cases of bondspersons proposed at the hearing, the officer should clearly indicate to the member of the ID, the detained person, and their counsel (if applicable), that another officer will be determining whether the bondsperson has the ability to pay the cash deposit and/or fulfil the guarantee before release (as ordered by the ID) can occur.

Note: For additional information on deposits and guarantees, please refer to [ENF 8, Deposits and Guarantees](#).

Electronic monitoring (EM)

EM is intended to be used in conjunction with community case management and supervision, a deposit or guarantee, or both for individuals who present a high risk if released into the

community but whose predicted length of detention favours release. Individuals on EM usually have restrictions on places and times that they can be in the community that eliminates or sufficiently reduces the risk that they pose to warrant release.

EM has in the past been put forward by counsel or the person concerned as an alternative to detention. However, due to the high initial and recurring costs, such proposals are rare and limited to individuals with access to significant financial resources. Should such an alternative be proposed, hearings officers should highlight the difference between self-financed EM and those conducted by CBSA. Self-financed EM is not associated with community case management and supervision, which the CBSA maintains is an essential component to mitigate risk.

For additional information on alternatives to detention and EM, refer section 4.6 of [ENF 34](#)

14.2.4 Detention and vulnerable groups

In preparing for the detention review, the hearings officer should review the Revised National Risk Assessment for Detention (NRAD) form on file to verify if the person has been identified as belonging to a vulnerable group. There is a heightened need to consider ATDs when faced with vulnerable persons as their continued detention may cause a particular hardship.

Therefore, alternatives to detention including less restrictive ATDs, should be duly considered and when hearings officers recommend continued detention for a vulnerable person, hearings officers should explain to the Member why the ATD is not suitable.

At the hearing, the member may allow certain accommodations to ensure that such vulnerable persons are not disadvantaged in presenting their cases. The member may also schedule early detention reviews to monitor the status of the vulnerable person to insist on a rapid progression on the file.

For more information on vulnerable groups at the detention stage, refer to ENF20 Detention, section 6.13 as well as [Chairperson Guideline 8: 'Procedures With Respect to Vulnerable Persons Appearing Before the IRB'](#)

Minors (under 18 years of age)

A60 explicitly establishes the detention of a minor must be a measure of last resort, taking into account other applicable grounds and criteria, [including the best interests of the child \(BIOC\)](#). Members will place a high degree of importance on the BIOC when they adjudicate the detention review.

In their submissions, depending on the evidence available to the hearings officer, the officer should address the following as much as possible hearings officers should address:

- the child's physical, emotional and psychological well-being;

- the child’s healthcare and educational needs;
- the importance of maintaining relationships and the stability of the family environment, and the possible effect on the child of disrupting those relationships or that stability;
- the care, protection and safety needs of the child; and
- the child’s views and preferences, provided the child is capable of forming their own views or expressing their preferences, taking into consideration the child’s age and maturity.

The National Directive for the Detention or Housing of Minors, sets out that:

the interests of a housed minor is a factor that can be taken into the decision to detain or maintain detention of a parent and are to be weighed along with other mandatory factors under R248

As well, the separation of the child from the parent can be a source of anxiety and may be a factor weighing in favour of the release of the parent, in the interest of the child.

If a minor is detained, or housed with their detained parent, hearings officers should provide details to the member on the ATDs which were assessed by the Minister as not being suitable. In their submissions, officers should not limit themselves to stating that there was “no suitable alternative” and describe why the detention/housing was used “as a measure of last resort.” [A60].

See [National Directive for the Detention or Housing of Minors](#), for more information.

Detainees and mental health

For information regarding detainees and mental health issues refer to ENF 7 Ch 18.6

14.3 Making a recommendation on detention

Scenarios

Situation – taking into consideration the factors set out in R248

Hearings officers should consider the following:

<p>The hearings officer defends the position that, while the grounds for detentions are still present, the person concerned should be</p>	<p>The hearings officer should consider the arresting officer’s notes in conjunction with the notes and recommendation from the Community Liaison Officer (CLO) on whether a deposit, guarantee and/or another alternative to detention would be appropriate in the</p>
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<p>released on conditions and/or an alternative to detention (ATD) and/or a bond/guarantee</p>	<p>circumstances and make the recommendation accordingly. The hearings officer should consider the financial situation of the person concerned and/or prospective guarantor(s). The hearings officer may provide submissions on the nature and the size of the bond and/or conditions that should be imposed.</p>
<p>The hearings officer defends the position that detention should continue.</p>	<p>Disclose new evidence on developments of the case at each detention review. The argument for continued detention should be consistent with the recommendations of the CLO and the Detainee Medical Needs form (if applicable). In submissions, the hearings officer should articulate why or how alternatives to detention are not suitable in this particular case.</p>
<p>The hearings officer defends the position that the standard of proof to support the grounds for detention is no longer met, or that there is no need and/or justification to continue detention.</p>	<p>The hearings officer should submit an application for an early detention review and indicate that the Minister has no objection to the release of the person concerned, thus recommending release on an ATD and/or with conditions.</p> <p>Note: this scenario is most frequently seen in persons detained on identity grounds whereby the Minister becomes reasonably satisfied of the person's identity.</p>

Whenever possible, a recommendation by the Minister for release of the detained person should be discussed with the detained person or counsel for the detained person, where represented, prior to the hearing so that agreement or potential disagreement on certain terms and conditions sought by the Minister is known ahead of time.

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

14.3.1 Detention review for designated foreign nationals

Pursuant to A20.1(1), the Minister of Public Safety has the authority to order the arrival in Canada of a group of persons to be designated as an “irregular arrival.” A foreign national who is part of a group whose arrival in Canada is designated by the Minister as an “irregular arrival” automatically becomes a “designated foreign national” (DFN) unless he or she holds the documents required for entry, and on examination the officer is satisfied that the person is not inadmissible to Canada [A20.1(2)].

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

Timeline for scheduling of detention reviews

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

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

Note: This means the ID may schedule the detention review at any time from the day the DFN was detained to day 14 of detention.

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

Note: This means that the ID must schedule the next detention review following the expiry of 6 months after the previous review, and not prior to the expiry of those 6 months.

The DFN will be present at each detention review, either in person or by way of video - or teleconference, unless they decide not to participate.

Grounds for detention of a DFN

It should also be noted that new grounds for detention apply to DFNs under A58(1)(e) and A58(1.1). As per A58(1.1), the ID shall order the continued detention of a DFN if it is satisfied that any of the grounds described in A58(1)(a), (b), (c), or (e) exist. At the initial 14 day review, the ID may not consider any other factors, including the factors in R248.

Designation while under IRPA detention

If a DFN is under immigration detention at the time of a designation decision, and has had the reasons for detention reviewed by the IRB on at least one occasion (e.g., a 48-hour review), then the individual's next review will be six months after the conclusion of the last IRB review. The previous review(s) will have fulfilled the requirement for a review within 14 days of being taken into detention.

The member of the ID may decide to restart the detention review timeline by granting the DFN a 14-day review, even in cases where a 48-hour, seven-day, and 30-day review have already been held. If the ID schedules a 14-day detention review in such a circumstance, hearings officers are advised to argue that the ID does not have jurisdiction to hold a 14-day review, while also stating that they are prepared to proceed with the detention review if the ID does not agree. In such instances, hearings officers should consult with NHQ for assistance.

If the ID releases a DFN from detention, depending on the case, it may be appropriate to seek judicial review and a stay of the release decision.

See the [Designated Irregular Arrivals Toolkit](#) in Atlas, for more information.

14.4 Outcomes of an admissibility hearing and effects on detention

14.4.1 Detained person found described at the hearing

If, at the conclusion of the admissibility hearing, the member of the ID finds the person described and issues a removal order, this will impact the case for the next detention review; the person would now be detained for removal. However, the mere fact of having been found inadmissible by the ID does not, in isolation, strengthen the case for continued detention.

Although removal is the last step in the immigration enforcement process there might be several impediments to removal which would prolong detention. Hearings officers must be prepared to speak to a timeline for the estimated time of continued detention, bearing in mind that any “estimation of anticipated future length of detention should be the proceedings as they exist at the time of each monthly review and not on an anticipation of available processes, but not yet underway” [Canada (Minister of Citizenship and Immigration) v. Li, 2009 FCA 85].

See [ENF 10, Removals](#), for more information.

Note: If the member of the ID releases from detention a permanent resident or foreign national who is the subject of a report on inadmissibility on grounds of security (A34) which has been referred to the ID, or is the subject of a removal order for inadmissibility on grounds of security (A34), the member of the ID is required to impose prescribed conditions on the person, set out in R250.1.

14.4.2 Detained person not found described at the hearing.

If the member of the ID finds that the person is not inadmissible, this might negate the authority to detain under A55, unless the person has a pending refugee claim or is being detained on identity grounds.

In the case of a foreign national detained on entry, A45(b) grants the Member the authority to grant permanent or temporary resident status if they are satisfied that they meet the requirements of the IRPA. Should the Member avail themselves of that authority, this would conclude the examination and terminate the authority to detain under A55(3).

The Minister can also seek recourse against a member's decision by bringing the matter before the IAD or the Federal Court. See **section 13.1** for information on recourse against a positive decision at an admissibility hearing.

14.5 Post-detention review procedures

14.5.1 Carrying out a decision of the Immigration Division

When the detention review is concluded, the hearings officer has two specific areas of responsibility to ensure that the member's decision is carried out:

Reporting

- If the member of the ID ordered the continued detention of the person concerned, the hearings officer must take the appropriate action and annotate the file accordingly;
- If the member of the ID ordered the release of the person concerned, the hearings officer must give the case file to the detentions unit for action;
- That being said, it may occur, in the course of the detention review, that statements or commitments are being made by the bondsperson as the member of the ID was assessing their financial capacity and ability to comply. If the ability to pay and/or solvency is assessed during the detention review process, hearings officers will document the outcome of what was assessed and agreed to by all parties during the detention review using form BSF211. The completed form will be made available to the officer processing the bond, for their awareness on what transpired at the hearing. See [ENF 8, Deposits and Guarantees](#), for more information.

Feedback

Where time permits, the hearings office should provide the results of the detention review to the officers who arrested and detained the permanent resident or the foreign national under the provisions of the IRPA, as the case may be. The hearings officers should provide feedback to those involved in specific cases for training purposes, and to advise IEOs and CLOs of the effectiveness of their work.

14.5.2 Applications for stay of release and leave for judicial review

Where hearings officers are of the opinion that there are, or may be, grounds to seek judicial review of the member's decision, hearings officers should consult with their manager. If the manager concurs, the hearings officer should immediately contact the Regional Justice Liaison Officer (JLO) to seek an emergency stay of the ID's release order, pending an application for leave for a judicial review of the decision. If the JLO is not available, the hearings officer may send the report directly to CBSA litigation management unit (LMU) at National Headquarters :

litigation-management@cbsa-asfc.gc.ca. The hearings officer or the hearings advisor should also request an urgent copy of the transcript of the detention review with the IRB registrar.

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

Note: Officers should keep in mind that when they email information that is 'Protected B' they are only permitted to do so using PKI encryption. If the case contains information with a higher classification level, refer to the CBSA [Security volume](#) for guidance on alternative secure communications systems and coordinate with LMU.

See [ENF 9, Judicial Review](#), for more information.

Appendix A List of Cases / Rules of Evidence

References

Canadian courts

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

List of cases cited throughout this manual chapter

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- *Bowen v. Canada (Minister of Employment and Immigration)*, [1984] 2 F.C. 507.
- *Brannson v. Canada (Minister of Employment and Immigration)*, [1980] F.C.J. No. 247.
- *Brown v. Canada (Citizenship and Immigration)* 2020 FCA 130
- *Bruzzese v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 230.
- *Browne v. Dunn*, (1893) 6 R. 67 (H.L.).
- *Canada (Citizenship and Immigration) v. B046*, 2011 FC 877
- *Canada (Minister of Employment and Immigration) v. Dan-Ash*, [1988] F.C.J. No. 571.
- *Canada (Minister of Public Safety and Emergency Preparedness) v. Ismail*, 2014 FC 390.
- *Canada (Minister of Citizenship and Immigration) v. Bains*, 1999 FCJ No. 11.
- *Canada (Minister of Citizenship and Immigration) v. Fox*, 2009 FC 987.
- *Canada (Minister of Citizenship and Immigration) v. Kamil*, 2002 FCT 381.
- *Canada (Minister of Citizenship and Immigration) v. Ke*
- *Canada (Minister of Citizenship and Immigration) v. Li*, 2009 FCA 85.
- *Canada (Minister of Citizenship and Immigration) v. Nkunzimana*, 2005 FC 29.
- *Canada (Minister of Citizenship and Immigration) v. Sittampalam*, 2004 FC 1756.
- *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4.
- *Canada (Citizenship and Immigration) v. X*, 2010 FC 112
- *Chana v. Canada (Minister of Manpower and Immigration)*, [1977] 2 F.C. 496.
- *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9.
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- *Chhokar v. Canada (Minister of Employment and Immigration)*, F.C.J. No. 173.
- *Chung v. Canada (Citizenship and Immigration)*, 2014 FC 16.
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- *Gervasoni v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 189.
- *Green v. Canada (Minister of Employment and Immigration)*, 1983 F.C.J. No. 142.
- *Hill v. Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 47.
- *Ioannidis v. Canada (Minister of Employment and Immigration)*, [1983] 1 F. C. 369.
- *Jiminez-Perez v. Canada (Minister of Employment and Immigration)*, 1983 1 F.C. 163.
- *Kamil v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 381.
- *Kidane v. Canada (Minister of Citizenship and Immigration)*, 1997 F.C.J. No. 990.
- *Koutsouveli v. Canada (Minister of Employment and Immigration)*, 1988 F.C.J. No.133.

- *Li. v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 235.
- *Louhisdon v. Canada (Employment and Immigration Canada)*, 1978 2 FC 589.
- *Martineau v. Canada (Minister of National Revenue – M.N.R.)*, 2004 SCC 81.
- *Canada (Minister of Employment and Immigration) v. Widmont*, 1984 2 F.C. 274.
- *Mugasera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40.
- *Murray v. Canada (Minister of Employment and Immigration)*, 1979 1 F.C. 518.
- *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration)*, [1991] 2 F.C. 327.
- *Park v. Canada (Citizenship and Immigration)*, 2010 FC 782.
- *Patel v. Canada (Citizenship and Immigration)*, 2007 FC 470.
- *Piber v. Canada (Citizenship and Immigration)*, 2001 FCT 769
- *Poshteh v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 511.
- *Prassad v. Canada (Minister of Employment and Immigration)*, 1989 1 S.C.R. 560.
- *R. v. Mohan*, [1994] 2 S.C.R. 9.
- *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272.
- *Sabour v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1615.
- *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214.
- *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433.
- *Suresh v Canada MPSEP 2017 FC 28*
- *Uppal v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 338

Rules of evidence

A173(c) sets out that the Immigration Division is not bound by the strict rules of evidence that are found in judicial proceedings. However, it must observe the principles of procedural fairness.

1. The admissibility of evidence

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

- the best evidence rule, which requires that the evidence presented be the best evidence available (this means that secondary evidence should not be introduced unless primary evidence is unavailable); *R v Wood*, 2008 FCA 302

the rule against hearsay evidence. Hearsay evidence is testimony given by a witness, offered as proof of the truth of the matters contained in the testimony, which is not the personal knowledge of the witness but rather the mere repetition of what the witness heard others say. Such evidence is very weak, since the real author of the statement put in evidence is not available for cross-examination and therefore the credibility of the statement and its author cannot be tested; *R v O'Brien*, [1978] 1 SCR 591, 76 DLR (3d) 513.1

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At an admissibility hearing, any evidence considered by the member of the ID to be relevant, credible, and trustworthy in the circumstances of the case is admissible. In the examination of the evidence presented, the member of the ID will determine its weight or value, taking into

consideration all relevant information. Hearings officers are to follow the best evidence rule when they are able to. However, there will be occasions when a statutory declaration or a note to file from an officer will suffice as a reliable substitute for more direct evidence under the circumstances. Generally, members of the ID will accept hearsay evidence, but they will attach very little significance to it if contradictory evidence is offered by the other party.

2. The relevance of evidence

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

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

3. The weight of evidence

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

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

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

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

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

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

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

Types of evidence

1. Direct evidence

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

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

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

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

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

2. Circumstantial evidence

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

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

3. Presumption

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

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

4. Judicial notice

Judicial notice is the recognition by a judicial tribunal that a fact is true, without its having to be proven, on the basis that the fact is known to the tribunal because it is not the subject of dispute among reasonable people or because the fact can be demonstrated to be accurate through checking readily accessible sources.

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

Documentary evidence and testimony

1. Documentary evidence

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

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

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

2. Statutory declarations

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

3. Testimony

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

Appendix B Additional Guidance and Jurisprudence

1 Adjournments to seek a temporary resident permit

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

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

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

See also:

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

2 Adjournments for humanitarian considerations

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

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

In *Green v. Canada (Minister of Employment and Immigration)*, , the Federal Court of Appeal noted that the *Jiminez-Perez* case did not require that the adjudicator (now Member of the ID)

who receives an application pursuant to A115(2) (now A25(1)) during an inquiry (now admissibility hearing) adjourn immediately until the Minister or his delegate renders a decision on the application. The member of the ID is required to proceed with the hearing as expeditiously as is possible under the circumstances of each individual case. Likewise the power of the member of the Immigration Division to adjourn is restricted to adjournments "for the purpose of ensuring a full and proper admissibility hearing."

See also:

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

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

In *Fox*, the member of the ID granted the respondent a 13-month adjournment of his admissibility hearing for an A36(1)(a) allegation of IRPA. The Federal Court overturned that decision and said the following:

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

3 Adjournments for additional evidence or arguments

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

Rule 47 of the ID rules sets out the modalities of bringing forward a constitutional question, and the contents of said notice. Also, Rule 47(4) imposes that, at a minimum, a 10-day notice be provided to all parties prior to a constitutional being made.

4 Adjournments for a change of venue

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

5 Adjournments in an admissibility hearing pending a ministerial relief application

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

R24.1 (1) sets out that a person cannot apply for ministerial relief until a removal order has been issued against them or they have been refused a permanent or temporary residence visa application, on the basis of a determination of inadmissibility under section 34, paragraph 35(1)(b) or (c) or subsection 37(1) of IRPA.

Consequently, the hearings officer should oppose applications for adjournment of an admissibility hearing based on an intention to file ministerial relief application, which cannot occur until the person is found described at the conclusion of said admissibility hearing.

Appendix C Manager's approval to appear

Unique client identifier (UCI):
Immigration Division file number:

MANAGER'S APPROVAL

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

Requested by _____, hearings officer/hearings advisor.

Hearings officer recommendation to manager, to appear in person in exceptional circumstances for A36(1)(a) admissibility hearing scheduled on _____ based on the following exception(s):

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

Justification:

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

Justification:

Manager's name _____ Date _____

Signature _____

Appendix D Template for an Application to Appear for an admissibility hearing in writing only Pursuant to Rule 38

Unique client identifier (UCI):
Immigration Division file number:

IMMIGRATION AND REFUGEE BOARD
IMMIGRATION DIVISION

BETWEEN:

The Minister of Citizenship and Immigration

Applicant

and

Name of Person concerned

Respondent

APPLICATION

Pursuant to Rule 38 of IRPA Immigration Division Rules

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

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

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

1. It is the Applicant’s position that the required elements for serious criminality are as follows and the inadmissibility allegation is established based solely on the evidence disclosed herein.
 - o *Is the person a Permanent Resident?*

- *Have they acquired Canadian Citizenship?*
 - *Are they a person registered as an Indian under the Indian Act?*
 - *Were they convicted of an offence in Canada under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or for which a term of imprisonment of more than six months has been imposed.*
2. It is the Applicant's position that the physical presence of the Minister is not required since our written submissions below will be identical to those we would make orally at the admissibility hearing.

OVERVIEW

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

FACTS

7. The Respondent was born on _____ (DOB) in _____ (COB). (Refer to Applicant's exhibit page)
8. On _____ (date of landing), the Respondent became a permanent resident of Canada. The Respondent is not a Canadian Citizen. (Refer to Applicant's exhibit page)
9. The **Respondent** was found/pled guilty of _____ (name offence) and was convicted on _____ (date of conviction). The Respondent received a sentence of _____ (sentence received). (Refer to Applicant's exhibit page)
10. The _____ (e.g., *Criminal Code of Canada* (CCC)) is an Act of Parliament. An offence under section _____ (name section) of the _____ (e.g., CCC) is punishable by a maximum term of imprisonment of at least 10 years. (if you are not dealing with an offence punishable by a maximum term of imprisonment of at least 10 years but are dealing with an offence under an Act of Parliament for which the offender received a sentence of a term of imprisonment of more than six months replace the previous two sentences with the following sentence)) The

Applicant submits the evidence shows that the Respondent was sentenced to a term of imprisonment of more than six months, namely _____ (sentence received). (Refer to Applicant's exhibit page)

11. We submit that all elements of subsection 36(1)(a) have been met. The Respondent is not a Canadian Citizen but is a Permanent Resident. The Respondent has been convicted of an offence under an Act of Parliament, namely the _____ (e.g., CCC), punishable by a maximum term of imprisonment of at least 10 years. **(OR where applicable replace the last sentence with the following sentence) The Respondent has been convicted of an offence under an Act of Parliament, namely the _____ (e.g., CCC) for which a term of imprisonment of more than six months has been imposed.**

APPROPRIATE STANDARD OF PROOF

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

DECISION SOUGHT

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

EXCEPTIONAL CIRCUMSTANCES

13. The Applicant respectfully requests notification of any postponement requests regarding jurisdiction or constitutional challenges. The Applicant is cognizant that there may be applications by counsel or the person concerned for postponement relating to acquiring counsel or translators etc.; the Minister would not oppose these types of postponements any longer than eight (8) weeks. The Applicant would however oppose any postponement requests outside the jurisdiction of the Immigration Division such as appeals to reduce criminal sentencing etc. [*Fox v. Canada (Citizenship and Immigration)* 2009 FCA 346]
14. The Applicant further maintains the right to appear in person or respond in writing to issues that may arise relating to the validity of the 44(1) report or 44(2) referral.

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

Name of Hearings Officer's address of regional office

Phone: (area code) number

FAX: (area code) number

c.c.
Person Concerned
Counsel of record if applicable