



Immigration, Refugees  
and Citizenship Canada

Immigration, Réfugiés  
et Citoyenneté Canada

# ENF 24

## Ministerial interventions

Canada 

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## Updates to chapter

### Listing by date

2016-03-18

The following changes have been made to the chapter:

- Section 1 was changed to reflect Immigration, Refugees and Citizenship Canada (IRCC)'s Review and Interventions Pilot.
- Section 2 was changed to reflect the new triage system for refugee claims.
- Section 3.1 was amended to add the legislative changes from the *Protecting Canada's Immigration Systems Act* (PCISA) and the *Balanced Refugee Reform Act* (BRRRA).
- Section 3.2 was changed to reflect the changes to the *Refugee Protection Division Rules* (RPDR).
- Section 3.3 was amended to reflect the changes to forms used for refugee claim intake.
- Section 3.4 was added to provide definitions.
- Sections 5.1 and 5.2 have been amended to reflect the changes to the RPDR.
- Section 5.3 was changed to reflect the distribution of cases between IRCC and CBSA.
- Section 5.5 was amended to include factors for 1F(a) and 1F(b) exclusion and additional factors for 1F(b) to reflect recent case law.
- Section 5.6 was amended to reflect the recent legislative changes that affect the eligibility of claims.
- Section 5.7 was added to provide guidance on suspension procedures before and after a case has been referred to the Refugee Protection Division (RPD). Information on highest priority cases was moved to section 5.11.
- Section 5.8 was added to provide information on the resumption of eligibility processing. 1F(a) exclusion was moved to section 5.12.
- Section 5.9 has been added to include details on how extradition affects refugee protection claimants and Convention refugees. Information on 1F(b) exclusion was moved to section 5.13.
- Section 5.10 was added to include a list of factors to consider when determining whether to intervene or proceed to an admissibility hearing. Information on 1F(c) exclusion was moved to section 5.14.
- Section 5.11 was changed to reflect high priority cases (previously section 5.7) and was amended to include information on the consolidated grounds.
- Section 5.12 (previously section 5.8) provides information on 1F(a) exclusion.
- Section 5.13 (previously section 5.9) was amended to reflect jurisprudence and to further clarify Article 1F(b) exclusion concepts.
- Section 5.14 (previously section 5.10) was amended to further clarify Article 1F(c).
- Section 5.15 was amended to reflect current policy regarding means of defence applicable to Article 1F.
- Section 5.17 (previously section 5.12) was amended to include the triage process for RPD requests for Minister's intervention.
- Section 5.18 was previously 5.13
- Section 5.19 was previously 5.14

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- Section 5.23 (previously 5.18) was amended to reflect recent case law in country shopping and right of return for Article 1E cases.
- Section 5.24 (previously 5.19) was amended to include IRCC's handling of credibility cases.
- Section 5.25 (previously 5.20) was amended to include links to reference papers on credibility and nexus issues.
- Section 5.27 (previously 5.22) was changed to reflect changes to the RPDR.
- Section 5.28 was added to provide information concerning Constitutional questions (Charter challenges).
- Sections 6 to 6.13 were added and changed to provide guidance on cessation grounds (previously section 8.6).
- Sections 7 to 7.8 were changed to provide guidance on vacation applications (previously section 8.5).
- Section 8.2 (previously sections 7.1 and 7.5) was amended to reflect the elimination of the Refugee Protection Officer (RPO).
- Section 9.1 (previously sections 8.1) was amended to reflect the distribution of intervention cases between IRCC and the CBSA and to give an explanation of how the triage system works.
- Sections 9.2 to 9.7 (previously section 8.2) were added and amended to include reference to criminal and security checks, Five Country Conference (FCC) checks, Interpol checks, Front End Security Screening (FESS) and visa office requests.
- Section 9.8 was previously 8.3.
- Section 9.9 was previously 8.4.
- Section 9.10 was previously 8.7.
- Section 9.11 was added to reflect the Refugee Appeal Division.
- Section 9.12 was previously 8.8.
- Section 9.13 was previously 8.9.
- Section 9.14 was previously 8.10.
- Appendix A was amended to include hyperlinks to all conventions.
- Appendix B was amended and updated to reflect current case law on 1F exclusions.
- Appendix C was amended to reflect current case law on 1E exclusions.
- Appendix D was amended to include hyperlinks to all websites.
- Appendix E was added to reflect the National Directive to Hearings Officers.

### **2005-12-02**

Changes made to reflect transition from IRCC to the CBSA. The term "delegated officer" was replaced with "Minister's delegate" throughout the text. References to "departmental policy" were eliminated. References to IRCC and CBSA officers and the C&I Minister and the PSEP Minister were made where appropriate, and other minor changes were made.

### **2004-04-26**

Section 5.22 has been added to reflect recent jurisprudence and to clarify procedures concerning the disclosure of personal information from the refugee claim of a third party in the context of a proceeding before the Refugee Protection Division (RPD).

## 1 What this chapter is about

This chapter deals with the priorities, strategies, and procedures that surround interventions in the refugee protection determination process and cessations and vacations at the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB). Since interventions, cessations, and vacations are an important instrument for ensuring the integrity of the program, it is essential that a clear and understandable framework be established for them.

With the introduction of Immigration, Refugees and Citizenship Canada's (IRCC) Ministerial Reviews and Interventions pilot project in October 2012, senior immigration officers are delegated to effect reviews and interventions at the IRB. IRCC ministerial interventions are restricted to cases involving program integrity and credibility as well as cases where exclusion pursuant to article 1E of the United Nations Convention and Protocol Relating to the Status of Refugees (Refugee Convention) arises.

The Canada Border Services Agency (CBSA) will continue to intervene in cases involving serious criminality, security concerns, war crimes, crimes against humanity, or acts contrary to the purposes and principles of the United Nations (UN). The CBSA will be responsible for hybrid cases (i.e., where there are combined program integrity/credibility issues and criminality or security concerns). Where the case is determined to be a hybrid case and, due to various circumstances, where the Minister of Public Safety and Emergency Preparedness (PSEP) elects not to pursue the case on the grounds of criminality or security, the CBSA has made a commitment to IRCC to go forward on credibility or program integrity grounds where warranted. The CBSA also has responsibility for detention cases, all arguments under the *Charter of the United Nations* (UN Charter), and designated foreign nationals.

This chapter provides guidance for hearings officers and all officers who process refugee protection claims.

## 2 Program objectives

The Ministerial Intervention Program has the following objectives:

- ensure that individuals who are major criminals or who are compromising national security do not enjoy the benefit of Canada's protection;
- ensure that the Refugee Protection Program is fair and that protection is offered to those individuals who need it;
- help ensure the integrity of the refugee protection determination system;
- provide as much information as possible to the IRB in cases involving refugee protection claimants;
- foster the development of expertise concerning international instruments and case law pertaining to refugees; and
- develop durable partnerships with internal, external, national, and international partners who share the same objectives.

IRCC and the CBSA have in place a joint triage system to ensure that there is no duplication of work and that all claims are screened for possible intervention. Three triage centres have been set up to perform the joint triage process as follows:

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- CBSA Montréal triages all claims for the Atlantic, Quebec and Northern Ontario Regions;
- IRCC Toronto triages all claims for the Greater Toronto Area and the Southern Ontario Region; and
- CBSA Vancouver triages all claims for the Prairies and Pacific Regions.

IRCC and CBSA refugee intake officers are required to scan all intake documents, including the Basis of Claim (BOC) form, the appropriate IMM008 form, the Schedule A form, and officer notes, if applicable, and send them through the electronic sharing folder to the triage office closest to where the RPD hearing will be held. Once CBSA and IRCC officers have access to the Global Case Management System (GCMS), all these documents will be downloaded in GCMS instead of being sent through the electronic sharing folder.

Intake officers should flag cases of interest for possible intervention through the Field Operational Support System (FOSS) and GCMS. For more details on the triage process, refer to section 9.2 of this manual chapter.

**Note:** The priorities and strategies stated in section 5.4 of this manual chapter have been established by national consensus and reflect the objectives of the *Immigration and Refugee Protection Act* (IRPA), which are to promote justice and security by denying access to Canadian territory to persons, including refugee protection claimants, who are security risks or serious criminals.

With these priorities, hearings officers can clearly identify cases that require their attention, where they must take action on a priority basis. The strategies will guide hearings officers in dealing with various types of cases and will standardize interventions at the national level while preserving the integrity of the intervention program.

The procedures identified in section 9 of this manual chapter concern the internal operational perspective on case management. These procedures have the following objectives:

- reduce case preparation time;
- standardize regional practices;
- facilitate the exchange of information among the regions; and
- ensure more effective monitoring of operational case management while maintaining the highest level of quality.

## 3 The Act and Regulations

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

### 3.1 The IRPA

Section A3 specifies the objectives of the Act with respect to refugees. Some of these objectives are to

- fulfil Canada’s international legal obligations with respect to refugees;
- grant fair consideration to those who come to Canada claiming persecution;

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- protect the health and safety of Canadians;
- maintain the security of Canadian society; and
- promote international justice and security by denying access to Canadian territory to persons, including claimants, who are security risks or serious criminals.

According to section A3, the Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory. See Appendix A for a list of international instruments on human rights to which Canada is a signatory.

Table 1 below summarizes the provisions of the IRPA that are applicable to refugees and to persons in need of protection in the context of interventions led by the CBSA.

**Table 1: Legislative provisions concerning the protection of refugees**

For information on	Refer to section(s)
The right of the Minister of PSEP or IRCC to intervene at the RPD	A170
Definition of refugee protection	A95(1)
Definition of protected person	A95(2)
Definition of person in need of protection	A97
Definition of Convention Refugee	A96
Exclusion from the definition of refugee or of person in need of protection	A98
Application for refugee protection	A99
Eligibility of refugee protection claim	A100 and A102
Grounds of ineligibility	A101
Suspension of a refugee protection claim by the RPD	A103
Notice of ineligibility at the RPD	A104
Extradition procedure	A105
Undocumented claimants	A106
Determination on refugee claims by the RPD	A107(1)
No credible basis	A107(2)
Determination of manifestly unfounded refugee claims (MUC) by the RPD	A107.1
Cessation of refugee protection	A108, A40.1
Vacation of refugee protection	A109, A40(1)(c)
Designated countries of origin by Minister (DCO)	A109.1
Appeal to the Refugee Appeal Division (RAD) from the RPD	A110
Loss of permanent resident status	A46
Inadmissibility standard of proof	A33
Inadmissibility for security reasons	A34
Inadmissibility for violation of human or international rights	A35
Inadmissibility for serious criminality	A36
Inadmissibility for organized criminality	A37
Inadmissibility report	A44
Admissibility hearing by the Immigration Division	A45, A172 and A173
Pre-removal risk assessment (PRRA)	A112 to A116

The IRPA deals with the IRB in Part 4, sections A151 to A186 inclusively. Table 2 below summarizes the



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provisions applicable in relation to CBSA ministerial reviews and interventions.

**Table 2: Legislative provisions concerning the IRB**

For information on	Refer to section(s)
Composition of the IRB	A151 to A156
Head office and staff	A157 and A158
Chairperson of the IRB	A159 and A160
Operation of the IRB	A161
Jurisdiction of the IRB	A162
Composition of panels	A163
Presence of the parties	A164
Power of inquiry	A165
Hearings of the IRB	A166
Counsel and representation	A167
Abandonment	A168
Decisions	A169
Operation of the RPD	A170
Disciplinary actions	A176 and A177

### 3.2 Rules of the IRB concerning the RPD

The IRB is responsible for writing its own rules of procedure for its various sections. A copy of the *Refugee Protection Division Rules* (RPDR) is available at the following link: <http://lois-laws.justice.gc.ca/eng/regulations/SOR-2012-256/index.html>.

For information on	Refer to Rule(s)
Definitions	1
Conduct of a hearing	10
Applications to vacate or cease refugee protection	12, 55 and 64
Disclosure of personal information	21
Allowing a claim without a hearing	23
Exclusion, inadmissibility and ineligibility	26, 27, 28
Intervention by the Minister	29
Documents and disclosure	31 to 43
Applications	49 to 56
Decisions	67, 68

**Note:** Hearings officers must be familiar with the RPDR, reference documents, the *Chairperson's Guidelines*, and the practice notices that are available on the IRB website.

### 3.3 Forms required

Form number	Form title
IMM 5354B	Request for Consideration of Minister's Intervention
IMM 0008E	Generic Application Form for Canada

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IMM 0008E Schedule 12	Additional Information – Refugee Claimants Inside Canada
IMM 5669E	Schedule A Background / Declaration
BSF 701	Refugee Claim Triage Form
RPD.02.01	Basis of Claim Form
BSF 529	Notification of ineligible claim – Subsection A104(1)
BSF 528	Notification of suspension – Subsection A103(1)
BSF 527	Notification of redetermination of eligibility – Subsection A103(2)

### 3.4 Definitions

Evidence	The IRB has broader powers regarding the admission of evidence than regular courts, since it is not bound by any legal or technical rules of evidence. During the process, the IRB member may receive and base a decision on evidence the member considers credible or trustworthy in the circumstances, even if the strict rules of evidence have not been met.
Designated country of origin (DCO)	DCOs are countries designated under subsection A109.1(1) by the Minister that do not normally produce refugees but do respect human rights and offer state protection. The current list of DCOs can be found at Designated countries of origin
Designated foreign national (DFN)	A DFN is a person that the Minister may designate, pursuant to section A20.1 having regard to the public interest, as an irregular arrival in Canada.
Balance of probabilities	Balance of probabilities means that it is more probable than not, or more likely than not, that the alleged facts have occurred or are true.
Burden of proof	Burden of proof is the onus of establishing a fact or facts in dispute between parties.
<i>Res judicata / issue estoppel</i>	<i>Res judicata / issue estoppel</i> is a matter that is already judicially decided. If the issue actually and directly in dispute has been adjudicated on, it cannot be litigated again. However, a prior judgment between the same parties is not strictly <i>res judicata</i> because it is based on a different cause of action and operates as an <i>estoppel</i> only in regard to matters actually at issue.
Manifestly unfounded claim (MUC)	RPD decision makers have the obligation to identify in their decisions that a particular claim is manifestly unfounded if they are of the opinion that the basis of the claim was clearly fraudulent (A107.1). Individuals whose claim is identified as manifestly unfounded do not have the right to appeal to the RAD pursuant to subparagraph 110(2)(c).
Standard of proof	Standard of proof is the degree to which the decision maker must be satisfied. For example, the standard of proof for article 1F of the Refugee Convention is “serious reasons for considering,” which is lower than “the balance of probabilities.”

## 4 Instruments and delegations

### 4.1 Members of the IRB: Powers and authorities

Members of the IRB have the powers and authority of a commissioner and may do anything they consider necessary to provide a full and proper hearing [A165]. This includes the power to receive in evidence any

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relevant information, whether adverse or not, and to question the refugee protection claimant about any matter concerning their application.

### **4.2 The right of the Ministers of PSEP and IRCC to appear before the RPD**

The Ministers of PSEP and IRCC have the right to be represented in all matters before the RPD, to produce evidence, question witnesses, and make representations [A170]. The Ministers of PSEP and IRCC may exercise these rights by appearing in person at hearings or by filing evidence or written representations with the RPD if the panel authorizes filing of representations.

In representing the Minister, hearings officers must abide by the provisions of the RPDR, in particular regarding intervention notices and the time limit for disclosing evidence.

### **4.3 Authority of the hearings officer during a ministerial intervention**

Hearings officers have delegated authority to represent the Minister of PSEP or the Minister of IRCC, as the case may be, at hearings before the IRB (refer to IL3, *Designation of Officers and Delegation of Authority*).

### **4.4 Finding of ineligibility: Powers delegated to the Immigration Division or to the Minister**

The IRPA allows the Immigration Division or the Minister of PSEP, as the case may be, to make a determination of inadmissibility on grounds of security, violating human or international rights, serious criminality, or organized criminality. Such a ruling results in the refugee protection claim becoming ineligible [A101].

## **5 Departmental policy**

### **5.1 Hearings at the RPD: Regular hearing**

Section A170 stipulates that the RPD shall dispose of any matter before it by holding a hearing. Hearings before the IRB are conducted before a single member unless the Chairperson thinks it necessary to form a panel of three members [A163].

A person applying for refugee protection may be represented by counsel [A167].

A person claiming refugee protection is also entitled to an interpreter and may choose to have the hearing conducted in English or French (rules 17 and 19 of the RPDR).

The RPD must notify the Minister of PSEP or the Minister of IRCC, as the case may be, of any matter before it and must give the relevant Minister an opportunity to produce evidence, to question witnesses, and to make representations in accordance with section A170 and rule 25 of the RPDR.

## 5.2 Expedited process without a hearing

According to section A170, the RPD may allow a claim for refugee protection without holding a hearing if the Minister of PSEP or the Minister of IRCC, as the case may be, has not notified the RPD of the intention to intervene within the time limit prescribed by rule 23 of the RPDR. In such cases, a case management officer will conduct an interview with the claimant and will submit a recommendation to the member. However, given the short timeframes, it is expected to be a rare occurrence.

## 5.3 Nature of the refugee protection determination process

When a ministerial intervention takes place, the refugee determination hearing changes from non-adversarial to adversarial. The hearings officer attends and conducts a thorough examination of the refugee protection claim based on specific information contained in the CBSA's or IRCC's file in order to provide the panel with a maximum amount of information. If a rigorous examination of the claim reveals reasonable grounds for opposing a refugee protection claim, the hearings officer objects to the claim on behalf of the Minister of PSEP or the Minister of IRCC, as the case may be. If the examination does not reveal arguments giving rise to opposition on the relevant Minister's part, the hearings officer has the latitude to withdraw from the case or to make representations accordingly.

Where the case is determined to be a hybrid case and the Minister of PSEP elects not to pursue the case on grounds of criminality or security, the CBSA has made a commitment to IRCC to go forward on credibility or program integrity grounds where warranted.

In addition to hybrid cases, special cases, including those dealing with Canadian Charter of Rights and Freedoms (Charter) arguments, all cases involving detainees, irregular arrivals (DFNs), international fugitives, high-profile cases, and cases with a security/criminality nexus will be handled by the CBSA. Should disagreements arise regarding the handling of a particular case, the case will default to the CBSA until resolution can be reached.

## 5.4 CBSA priorities and strategies for hearings at the RPD

When evaluating and sorting files, officers must keep the following priorities in mind to determine and distribute their workload:

**Table 3: CBSA priorities and strategies for ministerial intervention cases**

Priority	Type of case	Strategy (type of intervention)
<p>First priority</p> <ul style="list-style-type: none"> <li>Cases involving security and criminality issues</li> <li>Cases in which a member of the RPD requests the intervention of the Minister of PSEP</li> </ul>	<p>Cases where there may be a finding of</p> <ul style="list-style-type: none"> <li>1F(a) exclusions</li> <li>1F(b) exclusions</li> <li>1F(c) exclusions</li> </ul> <p>(see sections 5.12, 5.13, 5.14 and 5.15 below)</p>	<ul style="list-style-type: none"> <li>Consider the option of obtaining an ineligibility ruling leading to inadmissibility over the intervention option</li> <li>Intervention in person</li> <li>Intervention in person or by filing documents</li> </ul>

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<p>Second priority</p> <ul style="list-style-type: none"> <li>Cases where the outcome would have a very great impact on the integrity of the program</li> </ul>	<ul style="list-style-type: none"> <li>Cases that establish a new trend in the movement of persons that affect a large population of refugee protection claimants and that involve misrepresentation or fraud</li> <li>Cases that involve a single individual with a particular profile</li> </ul>	<ul style="list-style-type: none"> <li>Intervention in person in the initial cases and intervention by filing of documents thereafter, if circumstances permit</li> <li>Intervention in person, apart from exceptional cases</li> </ul>
<p>Third priority</p> <ul style="list-style-type: none"> <li>Credibility cases that involve program integrity considerations but have less of an impact on the program as a whole</li> </ul>	<ul style="list-style-type: none"> <li>1E exclusions and other credibility cases (see section 5.18 below)</li> </ul>	<ul style="list-style-type: none"> <li>Intervention by filing of documents, apart from exceptional cases</li> </ul> <p>The following is to be considered in choosing the type of intervention:</p> <ul style="list-style-type: none"> <li>complexity and credibility of the evidence;</li> <li>need to obtain testimonies and to cross-examine; and</li> <li>impact of the decision on future cases.</li> </ul>

## 5.5 Criteria for evaluating cases

To help officers determine the relevance of an intervention, certain criteria have to be evaluated. The following tables contain indicators that help officers to evaluate cases and to make the most informed decision possible regarding the appropriateness of making an intervention, whether by filing of documents or in person.

**Table 4: Factors to consider in cases not involving exclusion grounds set out in article 1F of the Refugee Convention**

Individual factors	Factors that influence the program	Factors that influence illegal movements and smugglers' networks
The identity or nationality of the claimant is cast into doubt (e.g., seizure of documents in the mail, checking of fingerprints) or there are multiple identities.	The intervention will not unduly delay the determination process.	The application for protection has resulted from human trafficking.
There are false statements or contradictory statements regarding	The country of nationality is one of the 10 most important source	The application for protection has resulted from the use of a

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important aspects of the claim (e.g., declaration at port of entry, visa application).	countries for refugees in Canada or is increasing in importance at an accelerated rate.	dangerous or unconventional means of transportation to reach Canada.
There is a question of status in a safe third country (e.g., visitor authorization renewed for several years).	In the region, the acceptance rate is higher than the national rate, and there is an explanation (e.g., different profile of claimants in the region compared to the rest of the country).	
There is the possibility of removal.	The issues to be resolved are common to a particular group of claimants (e.g., arrival en masse of claimants all alleging the same reasons).	
There are other immigration applications in process that would allow the claimant to remain in Canada (e.g., sponsorship application).	The application for protection comes from an individual from a country that is exempt from the obligation to obtain a Canadian visitor visa.	
The claimant has a criminal record in Canada.	The CBSA has a policy on the basis for the claim.	
There are no acceptable identification documents with no reasonable justification (e.g., the person had status in a third country and had to submit identification documents to obtain status).	A question of legal interpretation is raised that might lead to an application for judicial review (e.g., interpretation of a legislative provision).	
There are sensitive, high-profile issues (e.g., child abduction case publicized in the media).	The information provided by the intervention mechanism will help provide additional details concerning the claim.	

**Table 5: Particular factors to consider**

Type of case	Particular factors
Cases that establish a new trend in the movement of persons that affect a large population of refugee protection claimants and that involve misrepresentation, fraud, or human trafficking	<ul style="list-style-type: none"> <li>• The number of refugee protection claims that are part of the movement</li> <li>• The documentary evidence available on the subject</li> <li>• The existence of precedents in other regions</li> </ul>
Vacation of a refugee protection claim [A109]	<ul style="list-style-type: none"> <li>• The nature and importance of the false declarations or withholding of facts, taking the circumstances of the case into account</li> <li>• Does there remain enough evidence, among the pieces of evidence considered at the time of the initial decision, to justify retaining refugee protection? [A109(2)]</li> </ul>

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Cessation of refugee protection [A108]	Whether or not there is <i>prima facie</i> evidence to support one of the circumstances for cessation under subsection A108(1)
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### 5.6 Finding of ineligibility

Before determining whether an intervention is appropriate, it is imperative to determine whether the individual is or might be the subject of a finding of ineligibility.

The IRPA allows the Immigration Division or the Minister of PSEP, as the case may be, to make a finding of inadmissibility on grounds of security, violating human or international rights, serious criminality, or organized criminality that causes the refugee protection claim to be ineligible [A101].

In the case of inadmissibility for serious criminality, the refugee claim will only be ineligible if it concerns conviction

- in Canada for an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least ten years; or
- outside of Canada for an offence that, if committed in Canada, would be an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least ten years.

Sections A33 to A37 describe in detail the reasons for inadmissibility that result in a refugee claim being ineligible on grounds of security, violating human or international rights, serious criminality, or organized criminality [A101(1)(f) and A101(2)].

Officers must keep the following factors in mind:

- the standard of proof at the Immigration Division for a finding of inadmissibility is reasonable grounds for believing that the facts in question have occurred, are occurring, or may occur [A33]

The Federal Court of Appeal has found 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. It is a *bona fide* belief in a serious possibility based on credible evidence [ *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100. par 114].

This is a lower standard than the criminal standard of reasonable doubt. It is a *bona fide* belief in a serious possibility based on credible evidence; and

- beginning with *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, the standard of proof at the RPD regarding exclusion under article 1F of the Refugee Convention is “serious reasons for considering”, which is equivalent to “reasonable grounds for believing.” The Refugee Convention can be found at the UNHCR site.

Consequently, a person does not have to have been convicted of a crime by a court for an exclusion clause to apply. The clause may also apply where a person has been found not guilty by a court due to insufficient evidence (the standard is higher in criminal cases in a number of countries) or for other reasons, if it is possible to reach the standard of “reasonable grounds for believing.”

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A refugee protection claimant who has been found inadmissible in or outside of Canada on grounds of security, violating human or international rights, serious criminality, or organized criminality [A112(3)(a) and A112(3)(b)] or a claimant who has been refused protection under article 1F of the Refugee Convention [A112(3)(c)] may not obtain refugee status at the time of the PRRA in either case but may benefit from a stay of the removal order [A114(1)(b) and A112(3)]. See *PP 3, Pre-removal risk assessment*.

Failed refugee protection claimants are subject to a one-year bar (or three-year bar if the claimant is a national from a DCO) on a PRRA following the final decision on their claim. However, vacated or excluded claims are not subject to the PRRA bar [A112(2)(b. 1)]. See *PP 3, Pre-removal risk assessment* for further information.

**Note:** If an officer thinks that a claimant may be inadmissible on security or serious criminality grounds, which would render the claim ineligible, and the officer determines it is better to pursue the admissibility hearing route (versus exclusion), the officer must follow the appropriate procedure. See *ENF 5, Writing subsection A44(1) Reports* and *ENF 6, Review of reports under A44(1)*.

## 5.7 Suspension

Pursuant to section A103, a claim is suspended when a subsection 44(1) report has been referred to an admissibility hearing on grounds of security, violating human or international rights, serious criminality, organized criminality, or outstanding, serious criminal charges in Canada (refer to form BSF 528).

### Suspension before a claim is referred to the RPD

There are two circumstances where an officer can suspend the processing of a claim and delay the eligibility decision, which is made typically within three working days.

The officer shall suspend the eligibility of the person's claim if

- a) a report has been referred for a determination, at an admissibility hearing, of whether the person is inadmissible on grounds of security, violating human or international rights, serious criminality, or organized criminality; or
- b) the officer considers it necessary to wait for a decision of a court with respect to a claimant who is charged with an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years [A100(2)].

### Suspension after a claim is referred to the RPD

Similar to suspension prior to referral to the RPD, section A103 requires the RPD to suspend proceedings when notified by an officer that the case has been referred to the Immigration Division to decide whether the claimant is inadmissible on grounds of security, violating human or international rights, serious criminality, or organized criminality.

Suspension after the claim is referred to the RPD is required if the claimant is charged with an offence punishable by a maximum term of imprisonment of at least 10 years and the officer considers it necessary to wait for the court's decision.



## **5.8 Resumption of eligibility processing**

If the Immigration Division determines that the person is inadmissible based on security, violating human or international rights, serious criminality, or organized criminality, then the claim should be determined ineligible, and the RPD should be notified accordingly [A104 and BSF 529].

However, if the Immigration Division determines that the person is not inadmissible based on security, violating human or international rights, serious criminality, or organized criminality, the Minister's delegate should make a determination of eligibility and notify the RPD accordingly [A103 and BSF 527].

If the Minister is considering filing or has already filed an appeal pursuant to subsection A63(5), the officer should notify the RPD.

In summary, if the

- application for refugee protection has been referred to the RPD [A100], and if a report pursuant to subsection A44(1) has been prepared and is referred to the Immigration Division for an admissibility hearing, a notice pursuant to section A103 will inform the RPD that the claim for refugee protection before them is suspended until a determination is made by the Immigration Division;
- Immigration Division makes a finding of inadmissibility, section A104 provides that the proceedings before the RPD are terminated; consequently, the refugee claim is not eligible, and any proceedings before the RPD are thus terminated as though they never took place; or
- Immigration Division does not make a finding of inadmissibility, the refugee protection claim is continued on notice that the claim is eligible [A103], and the normal process for dealing with the claim at the RPD continues. An officer shall reassess the case and determine whether an intervention is justified.

## **5.9 Extradition**

If an officer comes across a case that involves extradition procedures, the Case Management Branch at IRCC National Headquarters must be contacted.

### **Subsection 105(1) suspension if proceeding under Extradition Act**

The RPD and the RAD shall not commence or shall suspend consideration of any matter concerning a person against whom an authority to proceed has been issued under section 15 of the *Extradition Act* with respect to an offence that is equivalent to an offence under Canadian law that is punishable under an Act of Parliament by a maximum term of imprisonment of at least 10 years, until a final decision under the *Extradition Act* with respect to the discharge or surrender of the person has been made.

### **Subsection A105(2) continuation if discharged under Extradition Act**

If the person is finally discharged under the *Extradition Act*, the proceedings of the applicable division may be commenced or continued as though there had not been any proceedings under that Act.

### **Subsection A105(3) rejection if surrendered under Extradition Act**

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If the person is ordered surrendered by the Minister of Justice under the *Extradition Act* and the offence for which the person was committed by the judge under section 29 of that Act is punishable under an Act of Parliament by a maximum term of imprisonment of at least 10 years, the order of surrender is deemed to be a rejection of a claim for refugee protection based on article 1F(b) of the Refugee Convention.

If the person was already a Convention refugee or a protected person before extradition was requested, the Minister of Justice, in deciding whether to issue the surrender order, must consider whether the conditions which led to the conferral of refugee status still exist.

The relevant time for considering the person's ongoing entitlement to refugee protection and, therefore, protection against *refoulement* and any change of conditions in the requesting state for the purposes of paragraph 44(1)(b) of the *Extradition Act* is the time at which surrender is sought.

If a person is ordered surrendered under the *Extradition Act*, they are considered rejected based on article 1F(b) of the Refugee Convention. Refer to *Németh v. Canada* (Justice) 2010 SCC 56 [2010] 3 SCR 281 and *Gavrila v. Canada* (Justice), 2010 SCC 57, [2010] 3 SCR 342.

**Note:** Pursuant to paragraph A112(2)(a), persons under an authority to proceed issued under section 15 of the *Extradition Act* are not eligible for a PRRA.

### Subsection A105(4) final decision

The deemed rejection referred to in subsection A105(3) may not be appealed and is not subject to judicial review except to the extent that a judicial review of the order of surrender is provided for under the *Extradition Act*.

### Subsection A105(5) Limit if no previous claim

If the person has not made a claim for refugee protection before the order of surrender referred to in subsection A105(3), the person may not do so before the surrender.

## 5.10 Deciding on process – intervention or admissibility hearing

When determining whether or not to pursue an intervention at the RPD to exclude an individual from refugee protection or to have the claim suspended under subsection A103(1) and referred to the Immigration Division for an admissibility hearing, officers may consider the following factors:

	<b>Intervention at the RPD leading to exclusion pursuant to article 1F(b) of the Refugee Convention</b>	<b>Suspension of consideration of the claim and referral to the Immigration Division for an admissibility hearing</b>
Burden of proof	The burden of proof always rests with the Minister.	The burden of proof rests with the person concerned when the person has not been legally authorized to enter Canada and with the Minister when entry was authorized [A45(d)].
Elements to be proven	To establish complicity, the	To establish complicity pursuant to

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	individual must have made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime.	paragraph A35(1)(a), it must be established that the individual voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime.
Classified information	<i>Ex parte</i> hearings are not available.	<i>Ex parte</i> hearings are available in order to present classified information to the decision maker.
Serious criminality in Canada	Interventions are not available for in-Canada convictions. The offence must have taken place outside of Canada.	Pursuant to paragraph A36(1)(a), the offence must be punishable by a term of imprisonment of 10 years in order for the claim to be ineligible [A101(2)(a)].
Serious criminality outside of Canada	The crime must be described in article 1F(b) of the Refugee Convention.	Pursuant to paragraph A36(1)(a), the offence must be punishable by a term of imprisonment of 10 years in order for the claim to be ineligible [A101(2)(a)].
PRRA	The individual is ineligible to make a claim but is eligible for a full PRRA.	Restricted PRRAs are restricted to section A97 only.

**Note:** Hearings officers must keep in mind that they may intervene at the RPD and seek exclusion, even if the Immigration Division has determined that there is no basis for a finding of inadmissibility.

### 5.11 Highest priority: Cases involving security and criminality issues – Exclusions under articles 1F(a), 1F(b), and 1F(c) of the Refugee Convention

The IRPA grants protection on the following three grounds, which are known as the consolidated grounds:

- well-founded fear of persecution based on a Refugee Convention ground [A96];
- danger of torture [A97(1)(a)]; and
- risk to life or risk of cruel and unusual treatment or punishment [A97(1)(b)].

While recognizing the need to protect refugees, the Refugee Convention contains provisions under which persons who might otherwise be eligible for refugee status are excluded from the protection offered by this status. The provisions of the Refugee Convention on exclusions have been incorporated into section A98.

Section A98 reads as follows:

A person referred to in article 1E or F of the Refugee Convention is not a Convention refugee or a person in need of protection.

Article 1F of the Refugee Convention is included as a schedule to the IRPA and reads as follows:

The provisions of this Convention shall not apply to any person with respect to whom there are

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serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

### No balancing required

Once it has been determined that an exclusion clause applies, there is no need to consider if the person is a Convention refugee or a person in need of protection, and there is no requirement to balance the nature of the exclusion with the degree of persecution feared.

## 5.12 Exclusion under article 1F(a) of the Refugee Convention

**Note:** For an in-depth analysis of exclusion under article 1F(a) of the Refugee Convention, refer to ENF 18, *War Crimes and Crimes Against Humanity*.

In the matter of *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, the Supreme Court of Canada (SCC) ruled that membership in an organization with a limited, brutal purpose is no longer sufficient for an individual to be excluded from refugee protection under section 1F(a) of the Refugee Convention.

The SCC established that an individual will be excluded from refugee protection under article 1F(a) of the Refugee Convention for complicity in international crimes if there are serious reasons for considering that the individual voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime; this is also known as the contribution-based test.

The SCC indicated that other forms of liability, such as aiding and abetting and command/superior responsibility, continue to be operative, and pre-*Ezokola* jurisprudence pertaining to these concepts should continue to be used for this purpose.

The SCC also indicated that the guidance to apply the contribution-based test can be found in a number of factors, namely

- (i) the size and nature of the organization, including a limited, brutal purpose organization;
- (ii) the part of the organization with which the refugee claimant was most directly concerned;
- (iii) the refugee claimant's duties and activities within the organization;
- (iv) the refugee claimant's position or rank in the organization;
- (v) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and

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(vi) the method by which the refugee claimant was recruited and what kind of opportunity they had to leave the organization.

Most of these factors were already being applied by the IRB prior to *Ezokola*, either directly (factors i and iv–vi) or indirectly (factor ii), but factor iii is new and should be given due attention.

**Note:** The contribution-based test to establish complicity as proposed by the SCC in *Ezokola* must also be applied in the context of evaluating inadmissibility pursuant to paragraph A35(1)(a).

When presenting arguments related to exclusions pursuant to article 1F(a) of the Refugee Convention or paragraph A35(1)(a), the hearings officer must show how an individual meets the contribution-based test as established in *Ezokola v. Canada (Citizenship and Immigration)*. For case law pertaining to article 1F(a) of the Refugee Convention, refer to Appendix B of this manual chapter.

**Note:** The SCC decision on *Ezokola* does not impact evaluation of inadmissibility pursuant to subsections A34(1) and A37(1) or paragraphs A35(1)(b) and A35(1)(c). *Ezokola* has also no impact on how membership under paragraphs A34(1)(f) or A37(1)(a) is evaluated.

### 5.13 Exclusion under article 1F(b) of the Refugee Convention

The primary purpose of this provision is to protect the population of the host country from a person who has committed a serious non-political crime before being admitted to Canada. This provision relates to the IRPA's objective of protecting Canadians and denying access to Canadian territory to serious criminals.

**Note:** Exclusions under article 1F(b) of the Refugee Convention concern the commission of a crime. **It is not necessary for the claimant to have been convicted of a serious non-political crime. All that is necessary is that there be serious reasons for believing that the person has committed such a crime.**

See Appendix B for case law on exclusions under article 1F(b) of the Refugee Convention.

#### 1. Concept of serious non-political crime

In order to successfully intervene in cases of exclusion under article 1F(b) of the Refugee Convention, hearings officers must clearly articulate the definition of a serious non-political crime.

According to paragraph 155 of the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*,

“What constitutes a ‘serious’ non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term ‘crime’ has different connotations in different legal systems. In some countries, the word ‘crime’ denotes only offences of a serious character. In other countries, it may comprise anything from petty larceny to murder. In the present context, however, a ‘serious’ crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under article 1F(b) of the Refugee Convention, even if technically referred to as ‘crimes’ in the penal law of the country concerned.”

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In the context of the IRPA, the term “serious crime” is understood to mean an indictable offence under the *Criminal Code* of Canada (including mixed offences). “Serious crimes” are defined as serious by comparing the acts or omissions alleged against the claimant to Canada’s criminal law. Offences that lead to at least 10 or more years of imprisonment are considered “serious crimes,” but lesser penalties may qualify, depending on the circumstances and nature of the crime committed (see *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, which establishes that, where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious).

The presumption of the seriousness of a crime may be rebutted by the following factors:

- the elements of the crime, the mode of prosecution, the penalty prescribed, the facts, and the mitigating and aggravating circumstances underlying the conviction;
- any mitigating factors; and
- the gravity of the crime, had it been committed in Canada.

For detailed analysis on the above factors, refer to *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 F.C.R. 164.

The Federal Court of Appeal decisions in *Febles v. Canada (Citizenship and Immigration)*, 2012 FCA 324 and in *Feimi v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325 determined that rehabilitation and current danger are not relevant considerations in applying exclusions for serious criminality under article 1F(b) of the Refugee Convention. The following certified question was answered negatively by the court in *Febles*:

When applying article 1F(b) of the Refugee Convention, is it relevant for the RPD of the IRB to consider the fact that the refugee claimant has been rehabilitated since the commission of the crime at issue?

The court found the argument that a crime may be considered as less serious years after its commission because the claimant is rehabilitated and is no longer a danger is inconsistent with the court’s reasoning in *Jayasekara*. Justice Lévesque determined that, although the presumption of seriousness may be rebutted (by the factors above), there is no balancing of factors **extraneous** to the facts and circumstances underlying the conviction, such as the risk of persecution in the state of origin. In *Febles*, the Federal Court of Appeal found that rehabilitation is an extraneous factor and is not to be balanced against the presumed seriousness of the crime.

**Note:** This decision was upheld by the SCC. In *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, at paragraph 62, the SCC also commented that “while consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and while crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner”

The decision to invoke the exclusion clause or not depends on the seriousness of the offence committed. Application of the exclusion clause is warranted in the case of offences that directly or indirectly affect a person’s physical integrity and also offences such as fabrication of false passports, impersonation, and white-collar crimes. The CBSA policy is to exclude all individuals who are serious criminals in order to

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promote security and international justice. Where a hearings officer determines that sufficient evidence exists to raise the question of exclusion, and this evidence may allow the RPD to make a finding of exclusion, the hearings officer must intervene in the case.

**Note:** Officers may refer to ENF 2, *Evaluating Inadmissibility* for additional information.

### 2. Concept of political crime

For a crime to be considered political, it must have been committed during political troubles in a struggle to overthrow the government. Also, there must be a relationship between the crime committed and attainment of the desired goal. The political aspect of the offence must be more important than the non-political crime aspect. However, an exception to this interpretation is made where the nature of the crime is completely disproportionate to the goal that is sought or where the act is barbarous or atrocious.

There are offences that are clearly political in nature. These may include treason, espionage, membership in a prohibited political party, or election fraud. However, there are also common offences that have been committed with a clear political motivation. If the political character of the offence outweighs the character of a common crime, the offence should be treated as a political offence.

#### Elements of a political crime

The two parts to the test for determining whether an offence is of a political nature are the

1. political objective; and
2. nexus between the objective and the alleged crime.
  - The crime must be committed in the course of and incidental to a violent political disturbance. Therefore, a certain level of violence must exist.
  - The nature and purpose of the offence requires examination. An officer should consider if personal reasons or gain were the objective or if there were genuine political motives.
  - The political element should outweigh the common, law character of the offence.
  - An officer should consider whether the crime was aimed against a civilian, military, or government target and whether or not indiscriminate killing or injuring of the public occurred.

### 3. Concept of complicity in a non-political crime

A person may be excluded from the definition of Convention refugee if it is established that the person was complicit in a serious non-political crime.

**Note:** The SCC decision in *Ezokola* applies equally to articles 1F(a) and 1F(b) of the Refugee Convention.

For additional information on complicity in the context of exclusions, refer to ENF 18 *War Crimes and Crimes Against Humanity* and section 7.2 and Appendix B of this manual chapter.

### 4. Extradition

If a person who applies for refugee protection is the subject of an originating order made under section 15

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of the *Extradition Act* for a foreign offence punishable under an Act of Parliament by a maximum term of imprisonment of at least ten years, the RPD shall not commence or shall suspend consideration of the matter until such time as a final ruling on the extradition application is made [A105(1)].

If a person is ordered surrendered under the scheme of the *Extradition Act* for an offence contemplated in subsection A105(1), that person's refugee protection application is treated like a refusal of a refugee protection application, based on article 1F(b) of the Refugee Convention [A105(3)].

If, however, a person is discharged under the *Extradition Act*, the matter will be continued at the RPD [A105(2)].

### 5. Special case of the abduction or removal of a child from custody in contravention of a custody order

In cases where children accompanied by a single parent make a refugee protection claim—the other parent having remained in the country of nationality or being located elsewhere—it is important to establish whether the child was abducted or removed from custody in contravention of a custody order. See the provisions concerning the abduction of children in sections 280 to 286 of the *Criminal Code*.

To determine whether a child has been abducted or removed from the custody of a parent, and whether it is necessary to invoke exclusion under article 1F(b) of the Refugee Convention, officers must consider the following factors:

- the marital status of the parents;
- the age of majority in the country of nationality;
- the need to obtain the consent of both parents or of the legal guardian for the child to travel outside of the country of nationality;
- consent by the parent or guardian;
- a custody order in favour of the other parent;
- a credible defence (see section 285 of the *Criminal Code*), namely that the acts were necessary to protect the child from imminent danger or to allow the parent to flee imminent danger; and
- communication between the child and the other parent since the child's arrival in Canada.

Officers must contact and work in collaboration with provincial child protection agencies in cases of abduction or cases where the parent outside of Canada wishes to appear as a witness in the case.

For additional information on children making refugee protection claims, refer to *Processing in-Canada claims for refugee protection of minors and vulnerable persons*.

### 5.14 Exclusion under article 1F(c) of the Refugee Convention

Article 1F(c) of the Refugee Convention concerns acts that are contrary to the purposes and principles of the United Nations. Given that articles 1F(a) and 1F(b) of the Refugee Convention also apply in many cases, this provision is applied rarely.

Although debate regarding the use of article 1F(c) of the Refugee Convention persists, the following conclusions on its application can be drawn:



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### Application of article 1F(c) of the Refugee Convention

1. This exclusion ground should be interpreted restrictively.
2. The acts committed must be criminal in nature.
3. Article 1F(c) of the Refugee Convention includes acts committed in the country of refuge and the country of origin.
4. Applies to acts committed by individuals in the exercise of government functions and individuals with no connection to government.

Developments in international law and a conservative approach by the SCC have led article 1F(c) of the Refugee Convention to have a limited application. Leading cases in this area include:

- *Bazargan v. Canada (Minister of Employment and Immigration)*, (1996), 205 N.R. 282.
- *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, (1998) 1 S.C.R. 982.
- *Bitaraf v. Canada (Minister of Citizenship and Immigration)*, (2004) FC 898.
- *El Hayek v. Canada (Minister of Citizenship and Immigration)*, (2005) FC 835.
- *Islam v. Canada (Minister of Citizenship and Immigration)*, (2010) FC 71.
- *Zrig v. Canada (Minister of Citizenship and Immigration)*, (2003) FCA 178.
- *Harb v. Canada (Minister of Citizenship and Immigration)*, (2003) FCA 39.

**Note:** The purposes and principles of the United Nations are stated in the preamble of the Refugee Convention and in articles 1 and 2 of the UN Charter.

**Article 1F(c) of the Refugee Convention applies to acts that constitute very serious and repetitive violations of human rights. Acts that may be considered to be contrary to the purposes and principles of the United Nations include international kidnapping, torture, hostage-taking, enforced disappearances, and apartheid. These crimes may be committed in Canada after the person's arrival or in another country before the person's arrival.**

In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the SCC established the following:

- drug trafficking is not included in exclusions under article 1F(c) of the Refugee Convention;
- exclusions under article 1F(c) of the Refugee Convention apply to senior government officials and to individuals who have no connection to government;
- exclusions under article 1F(c) of the Refugee Convention apply to individuals who have been convicted and to persons who have committed a crime but have not been convicted.

The SCC also established that application of article 1F(c) of the Refugee Convention in exclusions does not require a weighing of exclusion and inclusion factors (i.e., evaluating the nature of the crime against the degree of persecution to which the perpetrator might be exposed).

**Note:** The information on complicity and the means of defence referred to below in the context of exclusions under article 1F of the Refugee Convention also applies to exclusions under article 1F(c) of the Refugee Convention (see Appendix B for more information).

In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, the SCC set out two categories of acts that fall within exclusions under article 1F(c) of the Refugee Convention.

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### First category

The existence of a widely accepted international agreement or a United Nations Resolution, which declares that the commission of certain acts is contrary to the purposes and principles of the United Nations.

Similarly, other sources of international law may be relevant in a court's determination of whether an act falls within article 1F(c) of the Refugee Convention. For example, determinations by the International Court of Justice may be compelling.

### Second category

Includes acts that a court characterizes as serious, sustained, and systemic violations of fundamental human rights constituting persecution.

This second category was also described by the SCC as including any act whereby an international instrument has indicated that it is a violation of fundamental human rights.

The types of activities which are against the principles and purposes of the United Nations are outlined in international jurisprudence.

**Note: For case law** on exclusions under article 1F(c) of the Refugee Convention, see Appendix B.

Most cases involving article 1F(c) of the Refugee Convention have pertained to either terrorist activities or human rights violations. A recent case by the Supreme Court of the United Kingdom also added that attacks against peacekeeping operations mandated by the United Nations amount to acts against the purposes and principles of the United Nations in the case of *Al-Sirri and DD v. Secretary of State for the Home Department* [2012] UKSC 54.<sup>1</sup>

## 5.15 Means of defence applicable to article 1F of the Refugee Convention

The burden of proof with respect to defences lies with the person concerned, meaning the defence has to be raised and proven by that person.

Of all the possible defences in both criminal and immigration/refugee law, such as mistake of law, self defence or intoxication, superior orders and duress have been raised most often.

### a) Duress

In order for the defence of duress to be successful, the claimant must show to have been in danger of imminent harm and the harm feared must be on a balance greater than the harm inflicted. The claimant must have acted necessarily and reasonably to avoid this threat and must not be responsible for their own predicament. The remorse that the claimant now feels is not relevant.

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<sup>1</sup> [http://www.supremecourt.uk/decided-cases/docs/UKSC\\_2009\\_0036\\_Judgment.pdf](http://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0036_Judgment.pdf)

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### b) Defence of superior orders

The defence of superior orders rests on the notion that the position held required the individual to follow orders from the government or a superior officer. Although this defence may be used in a criminal prosecution to argue for a lighter sentence, it is not relevant for the purposes of the IRPA and cannot overcome inadmissibility pursuant to paragraph A35(1)(a) or article 1F(a) of the Refugee Convention, except in the narrow case of war crimes (in which case it needs to be shown by the person concerned that committing a war crime was not manifestly unlawful, which is a difficult test to meet).

### c) Prosecution versus persecution

A common defence raised in cases of exclusion under article 1F(b) of the Refugee Convention is that the claimant alleges that the criminal charges they are facing in the country of nationality are a form of persecution. That is, the claimant alleges that the charges were fabricated by the authorities in the country of alleged persecution.

When assessing persecution as a means of defence, the hearings officer should be aware of the considerations below.

1. The Federal Court of Appeal and the SCC have stated that, in the absence of evidence to the contrary, Canadian tribunals must assume that a fair and independent judicial process has taken place in the foreign country.
2. In the context of extradition matters, the SCC held that the courts may intervene if the decision to surrender a fugitive for trial in a foreign country would, in the particular circumstances, violate the principles of fundamental justice pursuant to section 7 of the Charter. An example of an exceptional circumstance would be extradition to potential death penalty. However, to surrender a person to be tried for a crime the person is alleged to have committed in the foreign country in the absence of exceptional circumstances does not violate the principles of fundamental justice. In the absence of exceptional circumstances, Canadian courts must assume that the person will be given a fair trial in the foreign country.
  - *Republic of Argentina v. Mellino*, [1987] 1 S.C.R. 536 at 558.
3. In the context of the refugee determination process and in the absence of proof by the refugee claimant, Canadian tribunals must assume a fair trial has taken place. The notion of a fair trial in a fair and independent judicial system must make allowance for the self-correcting mechanisms within the system (e.g., the trial judge's control over the excesses of the participants and the control of the appellate courts over any errors of the trial judge).

In all but the most extraordinary circumstances, the events leading up to a prosecution and trial in a free and independent foreign judicial system must be taken to be merged into the judicial process and not open to review by a Canadian tribunal. Extraordinary circumstances would be those that tend to impeach the total system of prosecution, jury selection, or judging, not indiscretions or illegalities by individual participants, which, even if proven, are subject to correction by the process itself.

The application of the principle of fundamental justice in the context of the refugee determination process was sanctioned by the SCC in *Ward*.

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- *Canada (Minister of Employment and Immigration) v. Satiacum*, [1989] F.C.J. No. 505 (F.C.A.), cited with approval in *Canada (Attorney General) v. Ward*, [1993] 2. S.C.R. 689 at page 725.

For additional details on means of defence, see section 7.4 of ENF 18, *War Crimes and Crimes Against Humanity*.

### 5.16 Intervention strategy for exclusion cases

As per subrule 29(2) of the RPDR, hearings officers have the option to intervene in writing, in person, or both.

The preferred approach is for the hearings officers to intervene in person, particularly for the more contentious cases. The concern about paper-based interventions is the quality and scope of evidence testing that may take place in the absence of a hearings officer. While RPD members can and should question the claimant about the exclusion material filed by the Minister, the member's primary role is that of an impartial decision maker.

Hearings officers are much better placed to conduct probing examinations that test all of the evidence put before the decision maker. Hearings officers appear in an adversarial role at an RPD hearing and scrutinise and challenge the evidence in a way that RPD members may be reluctant to do, given their role as independent decision makers.

Depending on circumstances, paper-based intervention by filing evidence and submissions may be appropriate. Case law is clear that the Minister does not need to participate at the hearing in order for the RPD to make an exclusion finding [*Arica v. Canada (Minister of Employment and Immigration)* (1995), 182 NR 392 (FCA)]. To this end, hearings officers must assess whether or not their presence at the hearing will be beneficial to the determination process.

If it is determined that intervention by way of filing of documents is the appropriate action, it is absolutely necessary that the hearings officer who is assigned to the case follows the decision very closely. If the outcome is not satisfactory and if it is possible to appeal the decision, a determination will have to be made as to whether it is appropriate for the Minister to file an appeal to the RAD or an application for leave and judicial review.

The hearings officer's task is to

- ensure that the RPD member, in dealing with matters that lie outside of the member's specialized purview, is informed about the terms specific to the Department (e.g., GCMS, FOSS, CAIPS, documents of the United States [U.S.] Immigration and Naturalization Service), and the contents of the documents produced by the hearings officer; and
- question the claimant about the grounds for exclusion and, where necessary, about credibility and/or program integrity.

**Note:** If the member thinks that there is sufficient evidence to support application of the exclusion clause, the member may make a determination without hearing the inclusion evidence.

## 5.17 First priority: Cases where a member of the RPD requests intervention from the Minister of PSEP

Since the RPD may or, in some cases, must inform the Minister of PSEP of matters pertaining to exclusion and certain inadmissibilities (rules 26 and 28 of the RPDR), it is important that officers take the panel's requests for intervention into account and be available to help ensure the proper conduct of the hearing in accordance with the member's instructions.

The RPD "Red letters" will be faxed to the triage centre closest to the claimant's address, and the triage centre will fax them to the appropriate hearings office, where it will be determined whether an intervention is warranted.

**Note:** The Minister has 14 days after receipt of the notice to respond to exclusion issues and 20 days after receipt to respond to a notice of possible inadmissibility or ineligibility before the RPD must fix a date for the hearing or resume a hearing that was suspended.

## 5.18 Second priority: Cases where the outcome will have a very great impact on the integrity of the program

As discussed in section 5.3 of this manual chapter, pursuant to the R&I pilot, IRCC senior immigration officers can intervene on program integrity grounds, unless the case is a hybrid case, the claimant is or was detained or is an irregular arrival (DFN), or Charter arguments are involved.

Second priority cases are cases that

- establish a new trend in the movement of persons;
- affect a large population of refugee protection claimants; and
- involve misrepresentation, fraud, or human trafficking.

Since the arrival of very large numbers of refugee protection claimants with particular ties (nationality, ethnicity, religion, etc.) may lead to the establishment of precedents at the IRB, it is important to identify clearly and to monitor these types of cases.

**Note:** Cases giving rise to monitoring in this context are cases where certain indications suggest that specific groups of persons are not genuine refugees. Refer to section 5.5, *Criteria for evaluating cases*.

Membership in a group of individuals does not in itself justify intervention. What is important is to identify groups of individuals who are using the refugee protection determination process in a fraudulent way in order to ensure that the RPD is aware of the fraud and argue that the claim should be rejected as manifestly unfounded. Individuals whose claims are rejected and determined by the RPD to have no credible basis or to be manifestly unfounded do not have access to the RAD. [A110(2)(c)]

**Note:** The individuals in question may come from the same region or have employed the same network of smugglers and allege persecution, while the CBSA or IRCC may have information suggesting that these claims are based on false declarations (i.e., they are not actually members of a political or religious group).

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The objective in monitoring these types of cases is to ensure that those who are fleeing persecution benefit from due process in a timely fashion and to offer refugee protection to those who have a well-founded fear of persecution by reason of their race, religion, nationality, membership in a particular social group, or political opinion and to those who are at risk of torture or cruel and unusual punishment.

### 5.19 Strategy to adopt in second-priority cases

Since these cases may have a major impact on the integrity of the program, it is imperative to intervene when the initial refugee protection claims are made.

In case of a mass arrival, it is important to develop expertise regarding the country concerned and the alleged events. Regions must consult the documentation centre of the IRB to obtain the available information on relevant topics, and the hearings officer must determine whether additional research is necessary to add to the evidence to support the CBSA's position.

**Note:** The preferred approach is intervention in person, for the initial cases at least. However, depending on circumstances, intervention by filing evidence and submissions may be appropriate in specific cases. Hearings officers must assess whether or not their attendance at the hearing will be beneficial to the determination process.

If it is determined that intervention by filing of documents is the appropriate action, it is absolutely necessary that hearings officers follow the decisions very closely. If the outcome is not satisfactory, the team leaders will have to determine whether intervention in the hearing room is required for future cases.

**Note:** If an undesirable precedent is created, it is often difficult to reverse it.

If the presence of a hearings officer at the hearing is determined to be essential, the results are satisfactory, and a trend has developed, the team lead must determine whether attendance to subsequent cases continues to be necessary to attain the desired objectives.

It is up to the regions to monitor the decisions and to inform National Headquarters and other partners of the results obtained.

### 5.20 Cases involving a single individual (and family)

Due to the particular profile of a case, there are compelling considerations in favour of intervention by the CBSA.

**Note:** In this type of case, the final outcome of a decision has a very serious impact on the entire program and may affect subsequent refugee claims.

These cases may involve interpretation of a legislative provision, case law, or doctrine. They may also be sensitive cases likely to attract special attention from the media.

### 5.21 Strategy to adopt in cases involving a single individual

Intervention in person should be the preferred strategy, apart from exceptional cases.

## 5.22 Third priority: Credibility cases whose impact on the program is minimal

Third-priority cases are credibility cases that involve program integrity considerations but have less of an impact on the program as a whole. As discussed in section 5.3 of this manual chapter, IRCC senior immigration officers intervene in RPD hearings on grounds of credibility and program integrity, unless the case is hybrid, the claimant is or was detained, the claimant is an irregular arrival, or Charter arguments are made.

For more information, see section 5.22 (exclusion cases under article 1E of the Refugee Convention) and section 5.24 below (other cases involving credibility, identity, or nexus issues).

## 5.23 Exclusion cases under article 1E of the Refugee Convention

Section A98 excludes persons referred to in article 1E of the Refugee Convention as follows:

“This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he is taking residence as having the rights and obligations which are attached to the possession of the nationality of that country.”

Since the person seeking refugee protection already enjoys the protection of another country, Canada has no responsibility to protect the person. This provision prevents people who already enjoy a permanent right of asylum from “asylum shopping” in other countries.

There is no precise definition of the rights and obligations mentioned in this section. However, it can be said that the exclusion clause will apply if the status of the person applying for refugee protection is substantially similar to that of a person having the nationality of the country in question.

In particular, the person must enjoy protection against *refoulement* or expulsion for crimes that are not serious and must have a right to return to the country of residence.

Other rights, such as the right to work, be educated, return, have access to social services, or be free to circulate within the country may also be associated with the possession of nationality.

In some countries, people who have status similar to that of a permanent resident in Canada may satisfy the criteria of article 1E of the Refugee Convention. Some countries issue temporary visas with an automatic extension option and no discretion of the government or of a public servant if an application is made for them. These applications are often for spouses of nationals, for children of nationals, or for persons who have been within the national territory for a very long time and whose status is not precarious. This type of status may also bring the exclusion clause into play, depending on circumstances.

**Note:** Students or temporary workers are not usually included in this class, unless they can establish a status that is stable or automatically renewable without any discretion of the government or of a public servant.

### Country shopping

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The Federal Court has held that article 1E of the Refugee Convention can be applied to persons who come to Canada when asylum shopping or to persons who take deliberate actions that are intended to result in not being able to return to the country where they already have refugee status. For example, not renewing a visa that could easily have been renewed [*Shahpari v. Canada (Minister of Citizenship and Immigration)*, F.C.T.D., IMM-2327-97, April 3, 1998]. For each case, the hearings officer should consider if the individual intentionally allowed their status to expire in the country in question.

### Onus and the right of return

In *Shamlou v. Canada (Minister of Citizenship and Immigration)* (1995), (F.C.T.D.) and *Shahpari v. Canada (Minister of Citizenship and Immigration)*, the court speaks to the issue of right of return. The court has gone as far as to say that there is an onus on the claimant to renew their status, if it is renewable, in the country under article 1E of the Refugee Convention. In *Shahpari*, the court held that once the Minister submits evidence to the effect that an applicant can return to a given country, the onus then shifts to the applicant to show that they cannot.

In *Canada (Minister of Citizenship and Immigration) v. Zeng*, 2010 FCA 118, Justice Layden-Stevenson concluded that it is permissible for the RPD to consider an individual's status in a third country upon arrival in Canada and thereafter, up until and including the date of the hearing before the RPD in order to determine whether the individual should be excluded under article 1E of the Refugee Convention. She also concluded that it is permissible for the RPD, in assessing whether article 1E of the Refugee Convention applies, to consider what steps the individual took or did not take to cause or fail to prevent the loss of status in a third country.

The test is to be applied in determinations under article 1E of the Refugee Convention is as follows:

- a) Considering all of the relevant factors up to the date of the hearing, does the claimant have status substantially similar to that of the nationals in a third country? If the answer is yes, the claimant is excluded.
- b) If the answer to a) is no, the next question is whether the claimant previously had such status and lost it or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded.
- c) If the answer to b) is yes, the RPD must consider and balance various factors, including but not limited to the reason for the loss of status (voluntary or involuntary), the ability of the claimant to return to the third country, the risk the claimant would face in the third country, Canada's international obligations, and all other relevant facts.

It will be for the RPD to weigh the factors and arrive at a determination as to whether the exclusion will apply, given the particular circumstances of the case at hand.

- *Shahpari v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7678 (FC).
- *Shamlou v. Canada (Minister of Citizenship and Immigration)* M.C.I. (1995), 103 F.T.R 241, 32 Imm. L.R. (2d) 135 (F.C.T.D.).
- *Canada (Minister of Citizenship and Immigration) v. Zeng*, 2010 FCA 118 (CanLII).

See Appendix C for additional case law on exclusions under article 1E of the Refugee Convention.



## 5.24 Strategy to adopt in cases under article 1E of the Refugee Convention

These cases are of lesser importance because of their limited impact on the integrity of the program. Intervention by filing of documents and submissions is the preferred method for intervening in these cases. However, in some exceptional cases, it is appropriate to intervene in person.

As discussed in section 5.3 of this manual chapter, IRCC senior immigration officers handle the majority of cases under article 1E of the Refugee Convention. A CBSA hearings officer should only intervene in cases where hybrid grounds were identified at triage, e.g., where the claimant is or was detained, or is an irregular arrival (DFN), or where Charter arguments are being made.

## 5.25 Other cases involving credibility, identity, or nexus issues

The final outcome of these cases will have only a limited impact in the sense that it will only affect the refugee claimant and the family, not the integrity of the program itself. In other words, the import of the decisions in these cases is limited.

These cases may involve some of the following situations:

- multiple or fraudulent identities;
- fraudulent declarations in the claim for refugee protection;
- a refugee protection claim for reasons that cannot be associated with the definition of a Convention refugee or of a person in need of protection;
- a prolonged stay in a country that is a signatory to the Refugee Convention without a claim being made for refugee protection;
- an application for a Canadian visa from outside of Canada for reasons that contradict the reasons contained in the form submitted to the IRB;
- previous contradictory declarations;
- rejected refugee claims of family members;
- a denunciation;
- seizure of documents in the mail.

For more information on credibility, refer to the IRB reference paper, *Assessment of Credibility in Claims for Refugee Protection*, and for nexus issues, refer to *Interpretation of the Convention Refugee Definition in the Case Law*.

## 5.26 Strategy to adopt in cases involving credibility, identity, and nexus issues

In these cases, most interventions are done by filing documents and making written submissions because these cases do not involve general program integrity issues. In some cases, an intervention in person may be appropriate.

### 5.27 Disclosure of personal information from the refugee claim of a third party

In support of an intervention in a refugee claim or an application to vacate or to cease refugee protection, the Minister of PSEP or the Minister of IRCC, as the case may be, may wish to introduce to the IRB as evidence personal information from the refugee claim of a third party.

Generally, personal information (as defined in section 3 of the *Privacy Act*) of a third party cannot be disclosed without that party's consent (section 8 of the *Privacy Act*). However, rule 21 of the RPDR gives the RPD the authority to disclose information from another claim, including personal information protected by the *Privacy Act*.

If the Minister of PSEP or the Minister of IRCC, as a party to the claim concerned (rule 1 of the RPDR), wishes information from the claim of a third party to be disclosed pursuant to rule 21 of the RPDR, they must make an application to the RPD to allow that disclosure, as per rule 49 of the RPDR and subject to rule 50 of the RPDR.

In determining whether to allow the disclosure of information from another claim, the RPD must, as per rule 21 of the RPDR, consider if, as per

1. subrule 21(1) of the RPDR, the information to be disclosed involves "similar questions of fact or if the information is otherwise relevant"; and
2. subrule 21(5) of the RPDR, whether or not a serious possibility exists that the disclosure of the information concerned would "endanger the life, liberty or security of any person or is likely to cause an injustice."

In light of these requirements, the Minister of PSEP or the Minister of IRCC, as the case may be, should consider, prior to making an application for disclosure, whether or not the conditions set out in rule 21 of the RPDR are likely to be met. If the Minister of PSEP or the Minister of IRCC believes that the information concerned does meet the relevancy criteria and that there is no serious possibility that the disclosure of said information would endanger the life, liberty or security of any person, the Minister of PSEP or the Minister of IRCC should proceed with an application to have the information disclosed.

### 5.28 Notice of Constitutional Question

Constitutional challenges are governed by rule 66 of the RPDR, which complies with the requirements of section 57 of the *Federal Courts Act*. A party wanting to challenge the constitutional validity, applicability or operability of a statutory provision must prepare a *Notice of Constitutional Question* (Notice) and then provide the original to the RPD and copies to the other party, the Attorney General of Canada and the Attorney General of every province and territory in Canada.

The Notice must be received by the recipients no later than 10 days before the date on which the constitutional question is to be argued. It must contain the information listed in subrule 66(2) of the RPDR; this information is similar to the information contained in Form 69 of the *Federal Courts Rules* (1998), entitled "Notice of Constitutional Question."

## 6 Cessation

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The Minister's participation in the refugee determination process is not limited to intervening in the hearing of a refugee claim. When information comes to the attention of the Minister that a protected person (see subsection A95(2) for precise definition) may no longer require protection for one of the grounds set out in subsection A108(1), the Minister may bring an application to the RPD for a determination that refugee protection has ceased.

Like interventions, cessation is a means for the Minister to maintain the integrity of the refugee determination process.

IRCC is responsible for the development and oversight of policies with respect to the cessation of refugee protection.

The CBSA is responsible for administering the operational delivery of cessation policies; specifically, CBSA hearings officers are responsible for filing applications for cessation and representing the Minister of IRCC before the RPD.

### 6.1 Against whom an application for cessation is made

The Minister may make an application to cease refugee protection, regardless of the process under which refugee protection was conferred [A95(2)] in the following circumstances:

- a) overseas selection process (or resettlement from overseas) [A95(1)(a)] in which officers should contact Inland Enforcement Operations if they are uncertain as to whether or not a person was conferred refugee protection overseas;
- b) determination of a refugee claim by the RPD or the RAD [A95(1)(b)]; and
- c) when the Minister allows, with the exception of persons described in subsection A112(3), an application for protection (PRRA) [A95(1)(c)].

When an individual has obtained Canadian citizenship, an application for cessation against them shall not be pursued so long as they maintain their Canadian citizenship.

Unless there is an exceptional circumstance (e.g., an individual is referred to the Immigration Division for one of the grounds enumerated under sections A34 to A37), when a protected person is a permanent resident an application for cessation against them should not be pursued solely under the cessation ground A108(1)(e) (as any such application would not have an appreciable effect).

When a protected person is a foreign national, an application for cessation against them may be pursued solely under the cessation ground outlined in paragraph A108(1)(e).

**Note:** When an investigation for possible cessation is ongoing, the information should be uploaded in the systems (FOSS, NCMS, GCMS) by writing the following: "Ongoing Cessation Investigation."

### 6.2 Nature of an application for cessation

Cessation proceedings are adversarial, and the burden of proof rests with the Minister to show why the person has ceased to be a protected person. The standard of proof required for the Minister to discharge their burden is a balance of probabilities.

### 6.3 Role of the hearings officer

Hearings officers are the Minister's representative in cessation proceedings. After reviewing the supporting evidence of a case, the hearings officer will assess whether *prima facie* evidence exists to support one of the grounds for cessation set out in subsection A108(1).

**Note:** The UNHCR Handbook stipulates at paragraph 116 that "cessation clauses are negative in character and are exhaustively enumerated. They should, therefore, be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status" [*Silvia Olvera Romero v. Minister of Citizenship and Immigration* 2014 FC 671, par. 39; UNHCR, *Note on the Cessation Clauses*, EC/47/SC/CRP.30, Standing Committee, 30 May 1977, para. 8].

At paragraph 106 in *Olvera Romero v. Minister (C&I)* 2014 FC 671, Justice Strickland stated that the hearings officer's discretion (whether or not to make an application to cease refugee protection) was limited to a consideration of whether the factors listed in ENF 24 (Note: this updated version of ENF 24 has removed the list of these factors) and the information gathered led to a reasonable, fact-based belief that any of the cessation criteria outlined in paragraphs A108(1)(a) to A108(1)(d) had been met. Justice Strickland held that, if this was so, the hearings officer was obliged to make the cessation application.

Justice Strickland clearly stated that the hearings officer has no discretion to consider factors beyond those related to paragraphs A108(1)(a) to A108(1)(d), including humanitarian and compassionate factors, which are specifically addressed by section A25.

Note that the facts specific to *Olvera Romero* did not include consideration of paragraph A108(1)(e), which may explain why Justice Strickland did not include that paragraph in her explanation of the scope of a hearings officer's discretion. In *Bermudez v. Minister (C&I)* 2015 FC 639, Justice Mosley certified the following question:

"Does the CBSA hearings officer, or the hearings officer as the Minister's delegate, have the discretion to consider factors other than those set out in subsection A108(1), including H&C considerations and the best interests of a child, when deciding whether to make a cessation application pursuant to subsection A108(2) in respect of a permanent resident?"

Until the Federal Court of Appeal rules on this matter, it is the Minister's position that hearings officers do not have discretion to consider factors beyond those related to grounds set out in subsection A108(1).

In certain circumstances, the hearings officer may deem it necessary to gather additional information prior to submitting an application for cessation. This may include inviting the person concerned for an interview. The additional information sought must relate to facts that are relevant to the grounds for cessation set out in subsection A108(1). Justice Strickland in *Olvera Romero* at paragraph 78 stated that it would be prudent for CBSA officers to advise individuals that the purpose of their questions is to inform a potential cessation application, which would permit the person concerned to contemporaneously provide a verbal response with any relevant information, which could, potentially, have the effect of causing the hearings officer to determine that there was no factual basis for believing that any of the subsection A108(1) criteria has been met and exercising their discretion not to proceed with the cessation application.

At paragraph 79 in *Olvera Romero*, Justice Strickland held that while a duty of fairness is owed by the

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hearings officer, the content of that duty did not require that notice and an opportunity to make submissions be given prior to the decision to make the cessation application. However, in *Bermudez v. Minister (C&I)* 2015 FC 639, at paragraph 35, Justice Mosley contradicted Justice Strickland's position by stating that, in his view, the duty of fairness required that the person concerned be given an opportunity to present full submissions as to why the application to the RPD should not be made. This conflict at the Federal Court level has not been addressed by the Federal Court of Appeal at the time of this update to ENF 24. Until this conflict is resolved by the Federal Court of Appeal, the Minister prefers the position articulated in *Olvera Romero*.

Writing in the context of paragraph A108(1)(a), Justice Heneghan, in *Balouch v. Minister (PSEP)* 2015 FC 765, at paragraph 19, held that she was not persuaded that the issue of risk is relevant in a cessation hearing. Justice Heneghan certified the following question:

"When deciding whether to allow an application by the Minister for cessation of refugee status pursuant to paragraph A108(1)(a), based on past actions, can the Board allow the Minister's application without addressing whether the person is at risk of persecution upon return to their country of nationality at the time of the cessation hearing?"

Until the Federal Court of Appeal rules on this matter, it is the Minister's position that no forward-looking risk assessment is conducted at a cessation hearing for paragraphs A108(1)(a) to A108(1)(d), nor is it a factor when a hearings officer determines whether to make an application to cease refugee protection under paragraphs A108(1)(a) to A108(1)(d). According to the Refugee Convention, the *UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR Handbook), and the IRPA, cessation does not require a forward-looking assessment of risk, since an alternative means of protection has been demonstrated by the individual's actions [A108(1)(a) to A108(1)(d)] or the reasons for which the person sought refugee protection no longer exist [A108(1)(e)].

### 6.4 Procedural Requirements: RPDR

When the evidence establishes a *prima facie* case for one of the grounds enumerated in subsection A108(1), the Minister should submit an application for cessation to the RPD in accordance with rule 64 of the RPDR. This rule sets out the content of the application, including the decision the Minister wants the RPD to make and the reasons why the RPD should make that decision.

The Minister must provide the protected person with a copy of the application and the RPD Registry with a written statement indicating how and when it was provided to the protected person (subrule 64(3) of the RPDR). If the Minister is unable to provide a copy of the application to the protected person as per rule 39 of the RPDR, the Minister can bring to the RPD an application under rule 40 of the RPDR for permission to provide the document in another way or to be excused from providing the document. The RPD must not allow the application unless the Minister has made reasonable efforts to provide the protected person with the application (subrule 40(3) of the RPDR).

### 6.5 Paragraph A108(1)(a): The person has voluntarily reavailed themselves of the protection of their country of nationality

The Federal Court has relied on the UNHCR Handbook to provide interpretive guidance as to the

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meaning of reavailment [*Li v. Minister of Citizenship and Immigration*, 2015 FC 459; *Siddiqui v. Citizenship and Immigration*, 2015 FC 329; *Canada (Public Safety and Emergency Preparedness) v. Bashir*, 2015 FC 51; *Makeen v. Citizenship and Immigration*, IMM-1862-14 (unreported); *Nsende v. Canada (Minister of Citizenship and Immigration)* 2008 FC 531; *Cabrera Cadena v. Canada (Public Safety and Emergency Preparedness)* 2012 FC 67].

**Note:** The terms “nationality” and “citizenship” are synonymous for the purposes of the cessation provisions in subsection A108(1).

Hearings officers should consider the **three requirements** below, as outlined in paragraph 119 of the UNHCR Handbook, when deciding whether to apply to cease refugee protection under paragraph A108(1)(a).

### 1. Voluntariness: The person must act voluntarily.

If the protected person does not act voluntarily, they will not cease to be a protected person. For example, if a protected person is instructed by an authority to perform against their will an act that could be interpreted as reavailment, they will not cease to be a protected person for obeying such instruction [UNHCR Handbook, paragraph 120]. Voluntariness should be measured by whether or not the protected person was compelled to act by circumstances beyond their control. Circumstances should be exceptional to compel the protected person to act without regard for their own safety and well-being and disregard for potential consequences. In the absence of exceptional circumstances beyond the protected person’s control that compel the protected person to act, the protected person’s actions should be considered voluntary.

### 2. Intention: The person must intend by their action to reavail themselves of the protection of the country of their nationality.

The intent of the protected person must be considered in order to determine whether the act was undertaken for the purpose of obtaining protection. Consideration should be given to actual reavailment of protection compared to occasional and incidental contact with national authorities. Every case must be assessed on its own merits and on the basis of the particular actions undertaken by the protected person.

Speaking in the context of reavailment outside of one’s country of nationality, the UNHCR guidelines from 1999, “The Cessation Clauses: Guidelines on their Application” (UNHCR Guidelines), state that the protection obtained is the diplomatic protection by the country of nationality of the protected person. This protection relates to the actions that a State is entitled to undertake in relation to other States in order to obtain redress for its nationals. Diplomatic protection may also include consular assistance. However “most ordinary contacts with diplomatic missions for the purpose of certification of academic documents, or for the purpose of obtaining copies of birth, marital, and other records, are not considered as acts which carry the intention of re-availment of the protection of the country of origin” (UNHCR Guidelines, paragraph 10).

Applications by refugees for the issuance or extension of national passports will normally imply an intention to entrust the protection of their interests to, or to re-establish normal relations with, their country of nationality. This implication may, however, be rebutted by the refugee. The key issue is the purpose or reason for which the passport was obtained or renewed (UNHCR Guidelines, paragraph 10). In *Canada (Public Safety and Emergency Preparedness) v. Bashir*, 2015 FC 51, the Federal Court found that the

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RPD acknowledged there was a presumption of intention to reavail (because Mr. Bashir obtained a national passport), but the explanations provided were sufficient to rebut that presumption; in *Li v. Minister of Citizenship and Immigration*, 2015 FC 459, the Federal Court upheld the RPD finding that Mr. Li had not rebutted the presumption of re-availment.

The Federal Court, in *Canada (Public Safety and Emergency Preparedness) v. Bashir*, 2015 FC 51, suggested that obtaining a national passport without actually travelling to the country of nationality is not likely sufficient to cease refugee protection, however each case must be assessed on the basis of its own circumstances as the Federal Court added that this is not to imply that a refugee who does not intend to use their passport to travel to their country of nationality could never be found to have had the intention of reavailing themselves of the protection of their country of nationality. In *Bashir*, the Federal Court held that it was open to the RPD, in light of the evidence, to conclude that, by renewing his passport with the intention to use it to travel to a third country to see his parents, the refugee did not intend to reavail himself of the protection of Pakistan and that it is difficult to see how the renewal of a national status for the purpose of submitting it to IRCC to finalize the permanent residence process can be seen as reavailing himself of the protection of Pakistan. In the Federal Court's view, the RPD has a mandate to assess the refugee's motivation in order to determine whether he intended to reavail himself of the protection of his country of nationality when he renewed his national passport for the purpose of travelling.

The Federal Court, in *Makeen v. Canada (Citizenship and Immigration)*, IMM-1862-14 (unreported), endorsed the view that it is doubtful that the renewal of a passport on its own is sufficient to establish an intention to reavail. In *Makeen*, the Federal Court upheld the RPD's decision allowing the Minister's application for cessation under paragraph A108(1)(a). The RPD concluded that by renewing his passport and returning to his country of nationality on two occasions, Mr. Makeen had voluntarily reavailed himself of the protection of Sri Lanka. The RPD found that Mr. Makeen had not provided any credible and compelling reasons for renewing his national passport and returning to Sri Lanka.

In *Siddiqui v. Citizenship and Immigration*, 2015 FC 329, when considering whether the applicant had the intention to reavail himself of the protection of his country of nationality, the Federal Court stated that the applicant's first trip back to Afghanistan to visit his sick father cannot be sufficient alone to justify reavailment. However, the Federal Court confirmed the RPD decision to cease his refugee protection, as the applicant had subsequently travelled back to Afghanistan for business reasons.

Refugee protection for minor children can be ceased along with their parents', but intention must still be assessed. The parents' intention to reavail will form the requisite intent for a minor child to reavail, as a minor child cannot form an intention that is different from their parents'. There must be further analysis undertaken to determine whether an older child is capable of forming an intention that is different from their parents' [*Cabrera Cadena v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 67, paragraph 31]. Such analysis can occur in interviews or by examination in the hearing room.

### 3. Reavailment: The person must actually obtain such protection.

According to the UNHCR Handbook, a protected person who has requested protection from their country of nationality has only "reavailed" when protection has been granted. The most frequent case of "reavailment of protection" will be where the refugee wishes to return to their country of nationality. They will not cease to be a refugee merely by applying for repatriation. On the other hand, obtaining an entry permit or a national passport for the purposes of returning is, in the absence of proof to the contrary,

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considered terminating refugee status [UNHCR Handbook, paragraph 122]. The presumption applies to a refugee who is still outside of their country [*Cabrera Cadena v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 67, para.24].

**Note:** In general, obtaining a national passport on its own is insufficient for the hearings officer to file an application for cessation under paragraph A108(1)(a). The actions undertaken by the protected person, including the reasons for obtaining the passport, should be examined closely to determine if other circumstances or facts exist to support an application under paragraph A108(1)(a).

*El Kaissi v. Canada (MCI)* 2011 FC 1234; *Shanmugarajah v. Canada (MEI)*, [1992] F.C.J. No 583; and *Ribeiro v. Canada (MCI)* 2005 FC 1363 are decisions related to reavilment in the event of pressing need, such as taking care of a parent.

### **6.6 Paragraph A108(1)(b): The person has voluntarily re-acquired their nationality.**

Paragraph 126 of the UNHCR Handbook instructs that this provision applies in situations where a protected person, having lost the nationality of the country in respect of which a well-founded fear was recognized, voluntarily reacquires that nationality.

Officers should consider the following, as outlined in paragraph 128 of the UNHCR Handbook, when deciding whether to apply to cease refugee protection under paragraph 108(1)(b):

- reacquisition of nationality must be voluntary; and
- there is an act of reacquisition of citizenship that is truly indicative of a normalization of relations between the refugee and the state of origin; the refugee must have the desire to establish normal relations with their country of nationality or to benefit from the advantages of the nationality of their country.

The reacquisition of nationality must be voluntary. The granting of nationality by operation of law or by decree does not imply voluntary reacquisition, unless the nationality has been expressly or impliedly accepted. The “mere possibility of reacquiring the lost nationality by exercising a right of option [is not] sufficient to put an end to refugee status, unless this option has actually been exercised. However, where the laws give an option to reject the attribution of nationality and the refugee, with full knowledge of the option, does not exercise it, then the refugee could be deemed to have voluntarily reacquired the former nationality” [UNHCR Guidelines, paragraph 14], unless they are able to invoke special reasons showing that it was not in fact their intention to reacquire their former nationality [UNHCR Handbook, paragraph 128].

### **6.7 Paragraph A108(1)(c): The person has acquired a new nationality and enjoys the protection of the country of that new nationality.**

This requirement, as outlined in paragraph 130 of the UNHCR Handbook, extends from the phrase “and enjoys the protection of the country of that new nationality.” Nationality is restricted to citizenship and does not include permanent resident status.

Two conditions must be met when considering this ground:



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- The person has acquired a new nationality, usually after being found to be a refugee in Canada against another country. For example, a citizen of country A is found to be a refugee in Canada and subsequently obtains citizenship from country B.
- The person enjoys the protection of the country of that new nationality. For example, the person enjoys, in practice, fundamental rights that result from holding that nationality, including the right of non-refoulement.

The possession of a passport of another country is insufficient evidence if the bearer is not considered a national of that country. In assessing whether a protected person is a national of another country, the applicable law and actual administrative practice of that country must be taken into consideration.

### **6.8 Paragraph A108(1)(d): The person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada.**

A protected person must voluntarily return to become re-established in their country of origin or former habitual residence. A protected person voluntarily re-establishes themselves in the country of origin or former habitual residence when the intent of the return is to permanently reside there (UNHCR Handbook, paragraph 134).

Temporary returns may, however, constitute re-establishment under paragraph 108(1)(d) if such visits are prolonged and frequent with evidence of attachment. It can be argued that a regular presence in the state of origin for a significant part of the year is *prima facie*-inconsistent with a continued need for protection.

There are no defined criteria as to when a person could be considered re-established. The length of stay is only one possible factor in determining re-establishment. The protected person's sense of commitment in regard to the stay in the country of origin or former habitual residence should be considered. If the protected person remained and held a normal livelihood and performed obligations of a normal citizen, then cessation may be warranted, regardless of the duration of the stay, given that this is indicative of a normalization of relations with the country.

Re-establishment was addressed in the following decisions: X (Re), 2011 CanLII 100748 (CA IRB) and X (Re), 2011 CanLII 100780 (CA IRB).

A cessation application should be considered *in absentia* when the protected person has returned to their country of origin or former habitual residence and evidence indicates the person left Canada to become re-established in their country of origin or former habitual residence. However, this does not remove the obligation to serve the application to cease refugee protection in accordance with subrule 64(3) of the RPDR.

### **6.9 Paragraph A108(1)(e): The reasons for which the person sought refugee protection have ceased to exist.**

This provision is based on consideration that protection is no longer justified because the reasons for a person becoming a protected person have ceased to exist. Often, this will be the case due to changes in country conditions where persecution was feared.

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In *Winifred v. Canada (MCI)*, 2011 FC 827, the Federal Court outlined the following conditions that must be met before invoking paragraph A108(1)(e) on the ground that changes in country condition occurred:

- the change must be of substantial political significance;
- there must be reason to believe that the substantial political change is truly effective; and
- the change of circumstances must be shown to be durable.

Factors which assist in determining whether there has been a significant, effective, and durable political or social change include democratic elections, significant reforms to the legal and social structures of the state, amnesties, repealing of repressive laws, dismantling of repressive security forces, and an overall general respect for human rights. Additional examples include

- genocide in a country after which the international community has intervened;
- prolonged war that has come to an end; and
- persecution of a particular group ends due to a change in regime.

In *Youssef v. Canada (Minister of Citizenship and Immigration)* (1999), the Federal Court provides some guidance as to how the above-mentioned conditions may not always be applicable in the paragraph A108(1)(e) context.

Ms. Youssef was granted refugee status on the grounds that she feared her violent and abusive husband. Ms. Youssef subsequently tried to include her husband in her application for permanent residence. She told both IRCC and the RPD at her cessation hearing that her husband had changed, her children needed him, and he had acknowledged that he was wrong.

The Minister of IRCC filed a cessation application on the grounds that the reasons for which the RPD granted refugee status to Ms. Youssef, namely her fear of her husband, had ceased to exist. The RPD agreed and allowed the application.

In *Youssef*, the Federal Court concluded that a change of circumstance is a question of fact and that there is no separate, legal test by which any alleged change in circumstances must be measured. The use of words such as “meaningful,” “effective,” or “durable” is only helpful, Justice Teitelbaum says, if one keeps clearly in mind that the only question, and therefore the only test, is one derived from the definition of Convention Refugee in section A2: does the claimant now have a well-founded fear of persecution? At paragraph 21, Justice Teitelbaum concluded the following: “Whether the situation is a political change of circumstances in one’s country of origin or simply a change in the personal circumstances of an individual for which that individual claimed refugee status, as it is a question of fact, the Board could conclude, on the evidence before it, that the ‘original’ fear the applicant had no longer exists.”

At paragraph 22, Justice Teitelbaum stated the following: “When an application is made... for a determination of cessation of refugee status, the burden to show that there is a cessation of refugee status rests on the Minister. That is, the evidence that must be brought before the Board, by the Minister, in a [cessation] application, to ‘satisfy its burden of proof’ is not always the same. It depends on the particular circumstances.”

In circumstances such as in *Youssef*, when dealing with a change in personal circumstances of an individual’s previously abusive husband, the burden to show that the husband has changed and that the change is a durable change does not rest with the Minister. Justice Teitelbaum stated at paragraph 31 that it is impossible for the IRB to determine how “durable” the “change of circumstances” is in a case

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such as *Youssef*, and that it is sufficient that the IRB be satisfied that the “change of circumstances” is significant and effective.

### 6.10 Subsection A108(4): Exception to paragraph A108(1)(e)

Article 1C(5) of the Refugee Convention provides for an exception to the ground expressed under paragraph A108(1)(e), when a protected person is “able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.” Paragraph 136 of the UNHCR Handbook states that the exception reflects a general humanitarian principle that those who have “suffered under atrocious forms of persecution should not be expected to repatriate.” For example, the RPD may grant a person who has been tortured by the authorities of their country of nationality the exception of having compelling reasons for not wanting to return to their country. This concept is incorporated in Canada’s domestic legislation at subsection A108(4). The Federal Court of Appeal noted the exceptional circumstances envisaged by subsection 2(3) of the *Immigration Act*, now subsection A108(4), would apply to only a minority [*M.E.I. v. Obstoj*, [1992] 2 F.C. 739 (C.A.)]. The principles developed in the case law relating to subsection 2(3) of the former *Immigration Act* are applicable to subsection A108(4).

The decision in *Canada (Minister of Citizenship and Immigration) v. Belouadah* (2013-05-10 IMM-10536-12) outlines the procedure RPD members must follow when determining whether to use the exception of compelling reasons under subsection A108(4) in the context of a refugee hearing. Members must

- acknowledge that the person was at some point in time a Convention refugee [A96] or a person in need of protection [A97];
- come to the conclusion that paragraph A108(1)(e) applies since there is a change in country conditions; and
- determine, once the two steps above have been completed, if compelling reasons exist to warrant the retention of protected person status pursuant to subsection A108(4).

### 6.11 Multiple cessation grounds including paragraph A108(1)(e): The temporal aspect

Once an officer is satisfied that there is a *prima facie* case for one of the cessation grounds set out in subsection A108(1), the officer is not required to, but may, conduct a further investigation or assessment as to whether a *prima facie* case exists for any of the other grounds set out in subsection A108(1).

When there are multiple cessation clauses, and one of those clauses is paragraph A108(1)(e) and the other(s) is/are one or more of paragraphs A108(1)(a), A108(1)(b), or A108(1)(d), then a temporal aspect comes into play (Note: paragraph 108(1)(c) has been intentionally excluded from consideration). The application of the temporal aspect is as follows:

1. When a *prima facie* case has been identified on the grounds set out in paragraph A108(1)(a), A108(1)(b), or A108(1)(d), and the officer does not know whether there is a *prima facie* case for paragraph A108(1)(e), then the officer is not required to conduct an assessment for a possible case on the ground set out in paragraph A108(1)(e). In this circumstance, the officer should bring an application to the RPD on the ground(s) identified. In this circumstance, it is up to the person concerned to raise any possible ground for cessation set out in paragraph A108(1)(e). The RPD has the jurisdiction to decide on the applicability of any possible grounds set out in paragraph A108(1)(e) and on the temporal aspect of the ground set out in paragraph A108(1)(e),

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should it be raised by the person concerned. If the RPD decision that any ground set out in paragraph A108(1)(e) occurred prior to the other ground(s), is well reasoned and justified, then the Minister will be satisfied, should the IRB find cessation only on the basis of paragraph A108(1)(e).

2. When a *prima facie* case has been identified on a ground set out in paragraph A108(1)(a), A108(1)(b), or A108(1)(d) **and (e)**, but the officer does not know if the ground set out in paragraph A108(1)(e) occurred first, then the officer is not required to conduct an assessment on the temporal nature of the ground set out in paragraph A108(1)(e). In this circumstance, the officer should bring an application to the RPD on all the grounds identified. The RPD has the jurisdiction to decide on the applicability of paragraph A108(1)(e) and on the temporal aspect of the ground set out in paragraph A108(1)(e). If the RPD decision that the ground set out in paragraph A108(1)(e) occurred prior to the other ground(s) is well reasoned and justified, then the Minister will be satisfied, should the IRB find cessation only on the basis of paragraph A108(1)(e).
3. When a *prima facie* case has been identified on a ground set out in paragraph A108(1)(e), and the officer knows that it occurred prior to the other ground(s) for cessation, which has/have been identified under paragraphs A108(1)(a), A108(1)(b), or A108(1)(c), then the officer should not bring forward an application for cessation to the RPD. This is only when the officer has such knowledge.

The rationale behind this position is that a **prior** change in country conditions or personal circumstance, as the case may be, which led to the conclusion that the reasons for which the person sought refugee protection have ceased to exist, would by necessary implication be the basis for the person concerned having later re-availed themselves of the protection of the country against which they had claimed refugee protection, reacquired their nationality, or re-established themselves in this country.

## 6.12 Consequences of cessation of refugee protection

### Loss of permanent residence and inadmissibility

On June 28, 2012, the IRPA was amended to provide for the loss of permanent resident status by operation of law when protected person status is lost as a result of a final determination by the RPD under subsection A108(2) that refugee protection has ceased for the reasons outlined in paragraphs A108(1)(a) to A108(1)(d) [A46(1)(c. 1)]. In *Silvia Olvera Romero v. Minister of Citizenship and Immigration* 2014 FC 671, par. 130, the Federal Court stated that "the fact that the applicant was granted refugee protection and permanent residency status at a time when the disputed provisions [A46(1)(c. 1)] were not in effect does not mean that new legislation would not apply to her. Further, while the facts that may underlie the RPD's determination occurred before the subject amendments came into force, this would not, in my view, change their effect" (see also *Li v. Canada (Citizenship and Immigration)*, 2015 FC 459).

All persons who lose their permanent resident status under paragraph A46(1)(c. 1) are, therefore, foreign nationals for the purposes of the admissibility provisions set out in section A40.1.

Subsection A40.1(1) states that a foreign national is inadmissible on a final determination by the RPD for any of the grounds cited in subsection A108(1) [A40.1(1)]. It is the Minister's position that subsection A40.1(1) applies to foreign nationals who were ceased under paragraphs A108(1)(a) to A108(1)(e) as well as to foreign nationals who were former PRs who lost their permanent resident status under paragraph A46(1)(c. 1) as a consequence of being ceased under paragraphs A108(1)(a) to A108(1)(d). Consequently, a removal order for inadmissibility under section 40.1 need only make reference to subsection 40.1(1).

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Paragraph R228(1)(b.1) establishes that a departure order is the appropriate removal order when a foreign national is inadmissible under subsection A40.1(1) on grounds of the cessation of refugee protection.

### Various bars

Because cessation is considered a rejection of the claim for refugee protection (see subsection A108(1)), the one-year Humanitarian and Compassionate Considerations bar under paragraph A25(1.2)(c) and the one- or three-year Pre-Removal Risk Assessment bar—depending whether or not the foreign national is from a designated country of origin—under paragraph A112(2)(b.1) apply.

A decision of the RPD allowing or rejecting a cessation application by the Minister cannot be appealed to the RAD pursuant to paragraph A110(2)(e).

## 6.13 Cessation within a refugee hearing

The grounds for cessation set out in subsection A108(1) can be invoked in the context of a refugee hearing as well as of an application to cease a person's protected status.

The following are examples of when paragraph A108(1)(e) would apply in a refugee hearing context:

- A person had a well-founded fear of persecution at the time of fleeing their country and/or at the time of making their refugee claim, but the reasons for which the person sought refugee protection have ceased to exist prior to the conclusion of the RPD hearing.

## 7 Vacation

Pursuant to subsection A109(1), the RPD may, on application by the Minister, vacate a decision to allow a claim for refugee protection if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts.

In *Bayat v. Canada (Minister of Citizenship and Immigration)*, 1999, FCA 9354 [Imm 338-95], the Federal Court upheld the order of the Convention Refugee Determination Division (CRDD) (now the RPD) to vacate the Convention refugee status of Mr. Bayat and his family, who had been determined to be Convention refugees by a visa officer.

### By PRRA under section A114

The Minister of IRCC has the authority to annul or set aside a decision to allow a PRRA application that was obtained as a result of directly or indirectly misrepresenting or withholding material facts on a relevant matter. The authority to vacate a decision is contained in subsection A114(3). When a PRRA decision is vacated, the decision is nullified, and the application for protection is deemed to have been rejected at the time of the decision to vacate [A114(4)] (refer to PP3).

## 7.1 Direct vs. indirect misrepresentation

Section A109 includes misrepresentations made by one claimant on behalf of all of the members of their

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family.

*Wang v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059, in the context of an appeal from an Immigration Appeal Division (IAD) decision, the court found that indirectly misrepresenting means misrepresentation by another person.

## 7.2 Misrepresentation or withholding material facts

The concept of "misrepresentation of a material fact" is broader than simple fraud or fraudulent means. It includes both intentional and unintentional concealment or suppression of facts. Where a misrepresentation has the effect of "averting further inquiries," it can be said to be material.

- *Canada (Minister of Manpower and Immigration) v. Brooks*, [1974] S.C.R. 850 at 873.
- *Mohammed v. Canada (Minister of Citizenship and Immigration)*, [1997] 3 FC 299.
- *Nur v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 636.
- *Canada (Minister of Citizenship and Immigration) v. Pearce*, 2006 FC 492.

The court held that whether or not the respondent had the intellectual capacity to understand or the intention to misrepresent the facts or withhold material facts is not relevant. Withholding material facts occurs when certain facts are omitted in the application for refugee protection.

The case of *Khamsei v. Canada (Minister of Employment and Immigration)*, [1981] 1 F.C. 222 (Fed. C.A.) addressed the question of material misrepresentation as follows:

"Materiality, in my opinion, is a question of fact. But that does not mean that there must be direct evidence that, but for the misrepresentation, the visa would not have been granted. The fact of materiality may be inferred."

In *Singh Chahil v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1214, the court stated the issue of identity is fundamental to a refugee claim.

## 7.3 Relevant matter

A relevant matter is a fact that, if not disclosed, could result in an error in the administration of the IRPA in relation to granting Convention refugee protection.

In *Zheng v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 619, the court found that the misrepresentation of the claimant's original entry to Canada by using a valid passport issued by the Commonwealth of Dominica was a misrepresentation of fact on a relevant issue because its disclosure would reasonably have called for the original panel to examine whether or not the Commonwealth of Dominica was a country of reference.

## 7.4 Application to vacate

The application to vacate must be in writing and must follow the format outlined in rules 50 and 64 of the RPDR.

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For general principles applying to vacation, see *Wahab v. Canada (MCI)*, 2006 FC 1554.

A vacation application is adversarial, and the burden of proof rests on the Minister to show why the person's refugee protection should be vacated according to *Nur v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 636.

### Standard of proof

The Minister's application has to create a *prima facie* case for the RPD to grant the application. The burden then shifts to the respondent to rebut the Minister's case. The standard of proof required to create a *prima facie* case is a balance of probabilities. A *prima facie* case is one in which the Minister's evidence would reasonably allow the conclusion that the Minister seeks and, in fact, compels such a conclusion if the claimant produces no evidence to rebut it.

- *Haji-Dodi v. Canada (Minister of Citizenship and Immigration)* [1996] IMM-2908-94, F.C.J. No. 438.

The Minister sought to call the respondent as a witness to support the application to vacate. The respondent's counsel objected that the respondent was not a compellable witness and that he had been given no notice that he would be called to testify. The court held that the tribunal did not err in law in determining that the respondent should not be compelled to testify in circumstances where no evidence had been presented at the hearing by the Minister, and the documentary evidence presented in support of the vacation application in advance of the hearing was not entirely satisfactory. In other words, the Minister's materials must establish a *prima facie* case to which the respondent might be expected to reply.

If the Minister's application does not establish a *prima facie* case, the hearings officer may not be allowed to question the respondent. However, if counsel for the respondent calls their client as a witness, the hearings officer will be in a position to question. Finally, if counsel for the respondent does not call the respondent to rebut, the hearings officer can rest the Minister's case based on the documentation filed in the application.

**Note:** If the person is a Canadian citizen, before taking any actions, the hearings officer is to contact the Case Management Branch at IRCC, Citizenship Unit, via email to coordinate the approach for these cases.

## 7.5 Rejection of application – Subsection A109(2)

The RPD may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first refugee determination to justify refugee protection.

The application to vacate is a two-step process (see *Shahzad v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 905). The RPD must decide if

1. the misrepresentation is material; and
2. there is any untainted evidence from the first hearing that would justify refugee protection.

## 7.6 New evidence

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New evidence is excluded from the vacation hearing. The claimant cannot introduce new evidence to support the refugee claim but can introduce evidence to rebut the Minister's evidence.

The principle of new evidence was articulated in the Federal Court of Appeal decisions of *Coomaraswamy v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153, [2002] 4 FC 501 and *Annalingam v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 281. When attempting to establish that a claimant made misrepresentations at the refugee determination hearing, the Minister may adduce evidence at the vacation hearing that was not before the IRB at the initial hearing, and the claimant may present new evidence in an attempt to persuade the IRB that they did not make the misrepresentations according to *Waraich v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1257 and *Gunasingam v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 181.

According to *Thambipillai v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-5279-98, July 22, 1999), the Minister can introduce evidence which was available at the time of the first hearing but of which the Minister was not aware during that hearing (for instance, CSIS reports that have become available after the original hearing).

The Minister can also introduce and rely on new developments in areas of law to be considered during the vacation hearing, such as new jurisprudence in the area of exclusion [*Duraisamy v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-6216-99, November 24, 2000)].

In *Sethi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1178 (CanLII) and *Bortey v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 190, the Federal Court held that the RPD must determine if any of the evidence cited in support of the original positive decision is left "untainted."

This refers to situations where there has been a misrepresentation or withholding of material facts by the person concerned, but there is sufficient evidence remaining from the original hearing after the misrepresentations or omissions have been subtracted to justify continued refugee protection.

In *Canada (Minister of Citizenship and Immigration) v. Fouodji*, 2005, FC 1327, the Federal Court determined that the RPD failed to observe a principle of natural justice and procedural fairness by failing to provide adequate reasons to support its decision to reject the Minister's application to vacate. "The panel did not set out clearly and explicitly what part of the remaining evidence filed before the first panel remained credible and why it was credible". "In fact, the evidence relied on by the member involves the situation of women in Cameroon in general and does not relate to the respondent in particular. Without evidence relating to the respondent in particular, the IRB could not in this way find a reason to justify allowing the respondent's refugee claim. According to subsection A109(2), the existence of documentary evidence regarding the general situation of a country is not in itself sufficient to justify a person's refugee protection."

It should be noted that the Minister and the person concerned do not have a right to appeal a rejected application to the RAD pursuant to paragraph A110(2)(f).

### 7.7 Allowance of an application: Subsection A109(3)

If the application is allowed, the claim of the person is deemed rejected, and the decision that led to the conferral of refugee protection is nullified.



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The effect of vacating a refugee claim and the consequent nullification of refugee protection would render a claimant ineligible, under paragraph A101(1)(b), to make a further claim.

Pursuant to paragraph A46(1)(d), vacation of refugee protection also leads to a loss of permanent resident status.

In order to effect the removal of the person concerned, a subsection A44(1) report is written as follows:

- Subsection 40(1) misrepresentation – A permanent resident or a foreign national is inadmissible for misrepresentation.
- Paragraph 40(1)(c) misrepresentation – A permanent resident or a foreign national is inadmissible for misrepresentation on a final determination to vacate a decision to allow their claim for refugee protection or application for protection.
- Pursuant to subsection A40(2), a permanent resident or a foreign national is inadmissible for misrepresentation for five years.
- A Minister's delegate has the authority to issue a deportation order under paragraph R228(1)(b) for this allegation in the case of a foreign national.

## 7.8 Exclusion in the context of a vacation application

An assessment of evidence that may exclude a refugee claimant from protection pursuant to articles E and F of the Refugee Convention is part of any hearing determining whether a person is a Convention refugee. This means that the decision maker considering the application to vacate may consider any new evidence adduced by either the Minister or the individual in order to determine whether article 1F of the Refugee Convention applies.

Refer to: *Thambipillai v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8413 (F.C.); *Mahdi v. Canada (Minister of Citizenship and Immigration)*, (1995), 191 N.R. 170 (F.C.A.); *Aleman v. Canada (Minister of Citizenship and Immigration)*, 2002 FC 710; and *Canada (Minister of Citizenship and Immigration) v. Yaqoob*, 2005 FC 1017.

In the case of *Aleman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 710, the court held that the vacation panel was clearly entitled to consider the new evidence regarding the alleged crimes against humanity of the applicant (a member of the Salvadoran army), which was not before the original panel. The panel must be able to establish whether or not the applicant would have been excluded from Convention refugee status under article 1F(a) of the Refugee Convention, had he revealed such evidence at the original hearing.

Once the RPD concludes that the applicant is excluded under article 1F or 1E of the Refugee Convention, the remaining evidence does not have to be examined with regard to the application of subsection A109(2), since the RPD cannot grant refugee protection to an individual described in section A98.

Also refer to *Parvanta v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1146 (CanLII) concerning vacation and exclusion under article 1E of the Refugee Convention and *Frias v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 753 for exclusion under article 1F(b) of the Refugee Convention.

## 8 Procedure: Roles and responsibilities

IRCC is responsible for ministerial interventions involving program integrity and credibility issues as well as for cases where exclusion under article 1E of the Refugee Convention arises.

The CBSA continues to intervene in cases that involve serious criminality and security concerns and is responsible for hybrid cases (i.e., combined program integrity/credibility issues and criminality or security concerns). Where a case is determined to be a hybrid case, and the Minister of PSEP elects not to pursue the criminality or security ground, the CBSA has made a commitment to IRCC to go forward on grounds of credibility or program integrity.

Refer to Appendix E for the national directive regarding credibility and program integrity interventions.

### 8.1 Hearings officers representing the Minister of PSEP or the Minister of IRCC

Hearings officers represent the Minister of PSEP or the Minister of IRCC in hearings before all divisions of the IRB.

In this capacity, hearings officers

- are in direct contact with counsel and clients;
- are the representatives of the Minister; and
- must show professionalism at all times, in particular in their telephone manner, their written correspondence, their conduct at hearings, and all other interactions with the public.

**Note:** Professionalism shall be exhibited by preparing adequately for cases and by treating all participants at a hearing, including claimants, members, counsel, witnesses, interpreters, and observers, with dignity and respect.

### 8.2 Roles and responsibilities of hearings officers at RPD hearings

The hearings officer is responsible for presenting evidence, cross-examining witnesses, and defending the position of the Minister of PSEP or the Minister of IRCC, as the case may be, in arguments relating to jurisdictional matters or questions raised by the Charter.

The hearings officer may address questions that concern the merits of the refugee protection claim, but this task is normally left to the RPD member.

Claimants are more likely to be cooperative if they are not frightened and confused. Refugee hearings are usually non-adversarial; however, when the Minister intervenes, the hearing may become adversarial.

In performing their responsibilities, hearings officers have a duty to treat all parties, including the claimant, with respect. This includes

- showing sensitivity, especially towards claimants, many of whom have had traumatic

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- experiences, including torture or rape;
- obtaining the relevant facts and bringing forward arguments (such steps are perfectly compatible with respectful and sensitive communication);
- adopting a moderate and respectful tone and being aware of body language that may be perceived as aggressive;
- considering carefully if any questions concerning sensitive points are really necessary before asking them; and
- monitoring the claimant's reaction to the questions posed and, if the claimant seems to be distressed, considering modifying the approach in order to make the claimant more comfortable.

When making comments, the hearings officer must respect the dignity of the refugee claimant by avoiding

- sarcasm or insults;
- references to aspects that are not relevant to the case; and
- a condescending tone.

### 8.3 Role of hearings officers in preparing a case

In preparing a case, a hearings officer must

- research and gather evidence pertaining to the exclusion ground, credibility, or program integrity issue; this may involve contacting visa offices overseas, requesting an inland investigation, searching the internet for particular groups, and/or determining jurisprudence relating to the exclusion issue, etc.;
- ensure that all documents on which the Minister intends to rely during the hearing are disclosed to all parties pursuant to the RPDR.
- ensure that all documents on which the RPD and counsel intend to rely have been disclosed to the hearings officer; the hearings officer should request the RPD exhibit list before the hearing and check it closely to ensure that the hearings officer has all the documents;
- review all documents pertaining to the claim and take note of inconsistencies; and
- plan the issues to be addressed in cross examination and determine potential witnesses.

The hearings officer has a duty to determine if there are any particularly sensitive issues. For example, the claimant may

- allege having been tortured;
- have been a witness to a massacre; or
- have been detained in a place where torture was practised or have been in contact with military forces accused of systematic rape.

Where a pre-hearing conference is held, there is an opportunity to reduce the number of sensitive issues that will have to be dealt with at the hearing.

Hearings officers should read the IRB's *Chairperson's Guidelines*, which provide guidance on child refugee claimants, detained claimants, and vulnerable persons. The *Chairperson's Guidelines* are available at the following link: <http://www.irb-cisr.gc.ca/Eng/brdcom/references/pol/guidir/Pages/index.aspx>.

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**Note:** Hearings officers should be aware that behaviour that seems off-putting may have rational explanations. For example, post-traumatic stress disorder or cultural differences may account for some behaviours.

# 9 Procedure: Maintaining the integrity of the program at the RPD

## 9.1 File triage and assessment

IRCC and CBSA refugee intake officers are required to scan all intake documents, including the Basis of Claim form, the appropriate IMM 0008 form, Schedule A, and officer notes, if applicable, and send them through the electronic sharing folder to the triage office closest to where the RPD hearing will be held. Once CBSA and IRCC officers have access to GCMS, all the aforementioned documents will be downloaded in GCMS instead of sending them through the electronic sharing folder.

Port of entry, CBSA inland and IRCC refugee intake officers should flag and note in FOSS/GCMS any potential cases which may warrant an intervention by the Minister.

Triage offices to review all claims for possible intervention have been set up in Vancouver (CBSA), Montréal (CBSA), and Toronto (IRCC).

IRCC and the CBSA have developed the following list of triggers or screening criteria for cases to be referred for potential intervention:

### Referrals to IRCC

- possible status in a third country (exclusion under article 1E of the Refugee Convention);
- multiple nationalities;
- possible multiple identities;
- high-profile case with no criminality or security issues;
- previous Canadian immigration history (e.g., adverse, visa-related information; previous misrepresentation);
- migration trends (officers must be told which trends to look for, as this will vary over time);
- claim initiated more than 6 months after entry to Canada;
- claimant was subject to a Safe Third Country Agreement (STCA) exception at intake; or
- file was transferred for other reasons (e.g., major discrepancy, contradictions in dates provided, story changes between port of entry and basis of claim forms).

### Referrals to the CBSA

- an indication of criminality;
- an indication of participation in or membership in a group that has engaged in espionage, subversion of a government, or terrorism;
- an indication of involvement in war crimes or crimes against humanity;
- an indication of organized criminality (i.e., human smuggling or human trafficking);
- present or past detention of the claimant;
- an irregular arrival designation (DFN);

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- Charter challenges; or
- hybrid cases.

Once the electronic file containing the refugee intake documents is sent to the triage centre, the file review is conducted to identify potential intervention by the CBSA or IRCC. **The triage workflow is as follows:**

1. Receive the initial refugee claim intake documents.
2. Prioritize case (e.g., designated country of origin vs. non-designated country of origin; detained vs. non-detained; port of entry vs. inland).
3. Conduct triage activities using the relevant departmental triage checklists.
4. Record findings on the Triage Checklist and in NCMS/GCMS.
5. Refer to the CBSA or IRCC R&I Unit, retain for further review within own department, or put away (i.e., no further action required).

When the claim is made at the port of entry, the claimant will have 15 days to send the completed basis of claim form to the IRB. Once the IRB receives this form, they will send a copy of the completed basis of claim form to the appropriate triage centre for screening.

Cases determined to have program integrity and/or credibility issues or exclusion grounds under article 1E of the Refugee Convention will be referred to the appropriate IRCC R&I office via the managed secure file transfer (MSFT) for further review and potential intervention.

All identified cases excluded under article 1F of the Refugee Convention (i.e., serious criminality, war crimes, crimes against humanity, acts contrary to the purposes and principles of the United Nations), all types of criminality, irregular arrivals, Charter challenges, security (i.e., subversion, terrorism), organized crime (i.e., human smuggling or trafficking), and detained and/or hybrid cases (i.e., combined program integrity/credibility issues and security/criminality) will be referred to the appropriate CBSA hearings office via the MSFT within five (5) calendar days of receipt for further review for intervention.

If the triage centre does not identify potential exclusion or program/credibility issues, the case will be closed and put away. The triage staff will make the appropriate entries in NCMS and will send the paper file to the appropriate IRCC or CBSA inland office.

If additional documents, including port of entry basis of claim forms and amended basis of claim forms, are received by the triage centre after the triage is completed, and no intervention grounds were previously identified, another triage will be conducted. An additional triage checklist will be completed and sent, along with the new document(s), to the appropriate IRCC R&I Office or the appropriate CBSA hearings office if the new information leads to a referral for possible intervention.

Once a file is referred to a hearings office for possible intervention, the hearings officer should review the triage checklist and the reasons for the referral to determine if the file contains information that might require further investigation and/or if there is sufficient information on file to warrant filing an intervention. Section 5.5 and Tables 4 and 5 of this manual chapter list factors to consider for each type of case, but this is not an exhaustive list. Pursuant to rule 29 of the RPDR, if the Minister wishes to intervene in a claim, the Minister must provide both the claimant and the RPD with the notice to intervene and must indicate the following:

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- a) the purpose of the Minister's intervention;
- b) whether the Minister will intervene in person, in writing, or both; and
- c) contact information for the Minister's representative (hearings officer).

If the hearings officer is of the opinion that an exclusion clause applies, the notice of intervention must include the facts and law on which the Minister relies. All documents provided in the notice of intervention must be received no later than 10 days prior to the date fixed for the hearing.

If the hearings officer, after reviewing the case, is of the opinion that the refugee protection claim does not require intervention or other action, the reasons for non-participation should be noted, and NCMS and GCMS should be updated accordingly. The claim will follow the normal course at the RPD for determination of the right to refugee protection without ministerial participation.

## 9.2 Investigation

If information has to be checked, officers or investigators may undertake verifications before determining if an intervention is required. These verifications are useful for adding to the information already on file or for confirming or refuting certain facts. The result of the investigation will determine if an intervention is necessary to pursue the case.

- Criminal and security checks

Criminal, security, and medical checks are completed for all refugee claimants at the time of their arrival in Canada and at the triage centre that reviewed the claim. Criminal checks include

- CPIC (Canadian Police Information Centre) check; and
- NCIC (National Crime Information Center) check.

**Note:** After receiving a file from the triage center, if further checks are necessary, the hearings officer should request these checks, notate the file accordingly, and place the results on file.

## 9.3 Five country conference (FCC) checks

Under the *High Value Data Sharing Protocol*, IRCC and the CBSA exchange biometric and biographical information with FCC partners: Australia, New Zealand, the United Kingdom, and the U.S. In certain situations, IRCC and CBSA officers may submit a request to have a client's fingerprints searched against the immigration fingerprint holds of an FCC partner country. Requests may be sent when there are reasonable grounds to believe that a refugee claimant may have come into contact with an FCC partner country and where confirmation of that contact would have an impact on any proceedings carried out under the IRPA.

## 9.4 Interpol checks

Interpol checks are conducted when there is a suspicion that the claimant has been involved in criminal activity in another country. To request Interpol checks in the country of alleged persecution, the approval of a supervisor is required.

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Interpol requests are sent to the Royal Canadian Mounted Police (RCMP), who supply criminal information obtained through the Interpol network. When the RCMP advises that a refugee claimant has been identified as having a criminal history, additional information on foreign charges, criminal statute interpretations, and penalties related to the offence should also be requested from the liaison officer at the visa office in the relevant country.

### 9.5 Front-end security screening (FESS) refugee protection claimants who made a claim at a port of entry or at a CBSA or IRCC inland office

The purpose of the FESS program is to strengthen the integrity of the refugee determination process and enhance public security by identifying and filtering potential security cases from the refugee claimant stream as early as possible.

At ports of entry, security screening is requested via the Refugee Monitoring screen in FOSS. Once entered, the information is stored in FOSS and sent to screening partners. At CBSA and IRCC inland offices, the security screening request is sent via GCMS.

- The National Security Screening Division (NSSD) of the CBSA conducts security screening on all refugee claimants over the age of 18 for inadmissibility pursuant to sections A34, A35 and/or A37.
- The Canadian Security Intelligence Service (CSIS) screens all refugee protection claimants over the age of 18, pursuant to section 13 of the *Canadian Security Intelligence Service Act*, for individuals who may pose threats to the security of Canada.

**Note:** CSIS does not screen applications with respect to a person's admissibility to Canada.

**Note:** The RPD will be notified via interface with FOSS that security screening is completed and that the case can proceed to a hearing.

If no adverse information is discovered, the NSSD will complete the Refugee Monitoring screen accordingly, and the RPD can proceed with the hearing.

If the NSSD collects sufficient adverse information to support inadmissibility pursuant to sections A34, A35 and/or A37, the NSSD will contact the relevant hearings office by email to advise that a recommendation is forthcoming.

The RPD monitors FESS for all claimants and will not proceed to a hearing if FESS has not been completed. If FESS is not completed six months after the file was referred to the RPD, the RPD will schedule a hearing with due notification to the CBSA.

### 9.6 Potential intervention

It is at this stage that the hearings officer should consider if an intervention is warranted and whether or not to submit a change date and time (CDT) application to the IRB to postpone the hearing.

#### Visa office requests

At the triage centres, all claims undergo a GCMS check to determine if the claimant has applied for or

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received status under another application under the IRPA (e.g., a temporary resident visa [TRV]). If a TRV was issued by a visa office abroad, the triage centre may print a report containing pertinent information from the application.

If the original application is required, the hearings officer should send an email to the visa office specifying the need for a copy of the application. The message must not include any personal information identifying the claimant. It should be formatted as follows:

***Request for IC3 information:*** TRP V970100012 issued on 02Jan03

Provide details of temporary resident visa request for subject and forward a copy of the temporary resident visa application by fax to (your name and fax number).

All other information relating to immigration matters should be obtained through the liaison officer at the appropriate visa office. Files at visa offices are retained for two years.

**Note:** All liaison officer related assistance requests must be directed to the International Network Section (INS). For urgent matters, the hearings officer may contact a liaison officer directly and copy INS.

## 9.7 Special cases of verification with foreign authorities

Officers and investigators must always keep in mind the importance of not disclosing personal information to the authorities of the country of nationality or of any other country where there is an allegation of persecution or mistreatment. Secure checking mechanisms that do not compromise the safety of the claimant or the claimant's family must be used, since disclosure of information to the authorities of the country of nationality may lead to the creation of refugees *sur place*.

When making contact with foreign authorities, it is important not to disclose the fact that the claimant is applying for refugee protection in Canada; that the claimant is presently in Canada; the claimant's name, address, and telephone number; etc., unless the claimant has expressly consented to such disclosure or this information is provided to authorities of a country where there is no allegation of persecution.

Where possible, officers are urged to ask the claimant to sign a declaration authorizing the disclosure of personal information. Some foreign authorities require such authorization before they will share personal information.

## 9.8 Intervention in person

Paragraph A170(e) gives the Minister of PSEP the right, without restricting rightful intervention in exclusion cases, to present evidence, question witnesses, and make representations in all cases. In cases that are identified as requiring the presence of a hearings officer (to represent the Minister of PSEP), the hearings officer is not restricted and may present any evidence, reply to any argument, question witnesses, and make representation deemed to be useful.

Hearings officers must serve notice of the intention to intervene by sending a notice of intervention no later than 10 days before the date fixed for the hearing, in accordance with rule 29 of the RPDR and by disclosing the evidence no later than 10 days before the hearing date (rule 29 of the RPDR) or 5 days



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before the hearing if responding to a document filed by a party or the RPD (subrule 34(3) of the RPDR).

### 9.9 Intervention by filing documents and submissions

Section A170 gives the Minister of PSEP the right to present evidence, question witnesses and make representations in all cases, without restriction. This right implies that the Minister of PSEP may choose to present evidence and representations in writing by filing documents in accordance with the requirements of subrule 29(2) of the RPDR.

### 9.10 Review of reasons for RPD decisions

Officers may review the RPD's written reasons to determine whether or not an appeal to the RAD or an application for leave and judicial review should be requested. In cases where a refugee protection claim has been granted, and written reasons have not been provided, officers must send a request for written reasons to the RPD registry within 10 days of receiving the notice of decision (rule 67 of the RPDR).

### 9.11 Appeal to RAD

The Minister may appeal RPD decisions to the RAD if there is reason to believe that there was an error in law, fact, or mixed law and fact. However, pursuant to subsection A110(2), certain decisions may not be appealed to the RAD, including decisions of the RPD rejecting the Minister's application to vacate or cease a claim.

Refer to ENF 26 for RAD procedures.

### 9.12 Application for judicial review

The Minister of PSEP or the Minister of IRCC, as the case may be, may file an application for leave and judicial review of RPD decisions to the Federal Court and to the Federal Court of Appeal under certain conditions.

**Note:** Officers who think that a decision should be the subject of a judicial review must follow the procedure set out in ENF 9, *Judicial Review*.

### 9.13 Operational procedures for interventions

In all ministerial intervention cases, officers must follow the procedures indicated below to ensure complete follow-up of the case and proper conduct of the intervention.

**Table 7: Operational procedures for interventions**

Stage	Action
1. Determine whether a finding of ineligibility is possible.	<ul style="list-style-type: none"><li>• Issue a report under A44 and refer it.</li><li>• Notify the RPD for suspension of the hearing, in accordance with section A103.</li></ul>

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<p>2. Determine whether an intervention is required.</p>	<ul style="list-style-type: none"> <li>• Identify priorities.</li> <li>• If the case is not excluded under article 1F of the Refugee Convention, assess the criteria of Section 5.5, Tables 4 and 5.</li> <li>• Will the intervention be in person or by filing of documents?</li> <li>• Send a notice of intervention to the RPD and to the claimant (counsel for the claimant), in accordance with rule 29 of the RPDR.</li> <li>• If an exclusion clause applies, give the notice required by subrule 29(3) of the RPDR.</li> <li>• Make a disclosure of the evidence at least 10 days before the date set for the hearing, in accordance with rule 34 of the RPDR.</li> </ul>
<p>3. If necessary, assign the case to an investigator to obtain additional evidence.</p>	<ul style="list-style-type: none"> <li>• Ensure databases have been checked (e.g., CPIC, CAIPS, FOSS/GCMS, NCMS).</li> <li>• Check for a criminal record (e.g., Interpol, fingerprints).</li> <li>• Check status outside of Canada (e.g., USINS, embassies, foreign authorities, FCC partners, liaison officers).</li> <li>• Appraise documents.</li> <li>• Conduct an additional interview.</li> </ul>
<p>4. Determine whether an arrest at the hearing is necessary.</p>	<ul style="list-style-type: none"> <li>• Have an arrest warrant issued.</li> <li>• Notify IRB security personnel in advance of the intention to proceed with an arrest.</li> <li>• Notify the detention centre in advance of the intention to proceed with an arrest.</li> </ul>
<p>5. Determine whether witnesses (ordinary or expert) are necessary.</p>	<ul style="list-style-type: none"> <li>• Fulfill the conditions of rule 44 of the RPDR.</li> <li>• Determine if there is a need to obtain an IRB summons to appear, in accordance with rule 45 of the RPDR, and/or an arrest warrant, in accordance with rule 47 of the RPDR</li> </ul>
<p>6. If necessary, make a request for written reasons in accordance with rule 67 of the RPDR.</p>	<ul style="list-style-type: none"> <li>• Review the decision and evaluate the possibility of filing an appeal to the RAD or an application for leave and judicial review to the Federal Court.</li> </ul>
<p>7. Review the written reasons for the decision and assess the possibility of filing an appeal to the RAD.</p>	<ul style="list-style-type: none"> <li>• Discuss the case with local management and then contact the Litigation Management Unit at the CBSA to receive their concurrence regarding cases that are being considered for RAD appeal.</li> <li>• Refer to ENF 9 for procedures related to applications for leave and judicial review.</li> </ul>
<p>8. Enter data in the various systems at every stage of the intervention.</p>	<ul style="list-style-type: none"> <li>• Ensure date has been entered in FOSS, NCMS, and regional systems.</li> </ul>
<p>9. Follow up on cases that establish a new trend in the movement of persons that affect</p>	<ul style="list-style-type: none"> <li>• Inform the regional intelligence service of the trend.</li> <li>• Draw up a list of cases that are part of the movement, including the</li> </ul>

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a large population of refugee protection claimants and that involve misrepresentation, fraud, or human trafficking.	<p>file numbers included on the list.</p> <ul style="list-style-type: none"> <li>Notify the Monitoring, Analysis and Country Assessment Unit in the Refugees Branch at IRCC and the Hearings Unit of the Enforcement and Intelligence Programs Directorate at the CBSA.</li> </ul>
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### 9.14 Operational procedures for vacation or cessation proceedings

In all vacation or cessation cases, officers must follow the procedures indicated below to ensure complete follow-up of the case and proper conduct of the intervention.

**Table 8: Operational procedures for vacation or cessation proceedings**

Stage	Action
1. Determine whether a vacation or cessation is	<ul style="list-style-type: none"> <li>Identify the priorities.</li> <li>If the case is not excluded under article 1F of the Refugee Convention, assess the criteria listed in section 5.5, Table 5.</li> <li>Send an application to vacate or cease to the RPD and to the claimant (counsel for the claimant), in accordance with rule 64 of the RPDR.</li> <li>Disclose evidence at least 10 days before the date set for the hearing, in accordance with rule 34 of the RPDR.</li> <li>If an exclusion clause applies, give the notice required by rule 29 of the RPDR.</li> </ul>
2. If necessary, have the case assigned to an investigator in order to obtain evidence.	<ul style="list-style-type: none"> <li>Check databases (e.g., CPIC, CAIPS, FCC, FOSS/GCMS).</li> <li>Check criminal record (e.g., Interpol, fingerprints).</li> <li>Check status outside of Canada (e.g., USINS, embassies, foreign authorities, liaison officers).</li> <li>Appraise the documents.</li> </ul>
3. Determine whether an arrest at the hearing is necessary.	<ul style="list-style-type: none"> <li>Have an arrest warrant issued.</li> <li>Notify IRB security personnel in advance of the intention to proceed with an arrest.</li> <li>Notify the detention centre in advance of the intention to proceed with an arrest.</li> </ul>
4. Determine whether witnesses (ordinary or expert) are necessary.	<ul style="list-style-type: none"> <li>Fulfil the conditions of rule 44 of the RPDR.</li> <li>Determine if there is a need to obtain an IRB summons to appear, in accordance with rule 45 of the RPDR, and/or an arrest warrant, in accordance with rule 47 of the RPDR.</li> </ul>
5. Review the written reasons for the decision and assess the possibility to file an application for leave and judicial review of	<ul style="list-style-type: none"> <li>Inform the Litigation Management Unit of the cases that deserve more in-depth analysis for possible judicial review.</li> <li>Refer to ENF 9 for procedures related to applications for leave</li> </ul>

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the decision.	and judicial review.
6. Enter data in the various systems at every stage in the application for vacation or cessation of the refugee claim.	<ul style="list-style-type: none"><li>• Ensure data has been entered in FOSS or GCMS and in NCMS and the regional systems.</li></ul>

## **Appendix A: List of the principal conventions concerning human rights to which Canada is a signatory**

### **Refugee law**

- United Nations Convention and Protocol Relating to the Status of Refugees

### **Laws on women**

- United Nations Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Political Rights of Women
- Convention on the Nationality of Married Women

### **Laws on children**

- Convention on the Rights of the Child
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
- Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography
- Worst Forms of Child Labour Convention (No. 182)

### **Torture, slavery, and forced labour**

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Slavery Convention
- Protocol amending the Slavery Convention signed at Geneva on September 25, 1926
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery
- Forced Labour Convention
- Abolition of Forced Labour Convention

### **Economic, civil, and political rights**

- International Covenant on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights
- Optional Protocol to the International Covenant on Civil and Political Rights

### **Humanitarian law**

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
- Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- Geneva Convention relative to the Treatment of Prisoners of War
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War

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- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of International Armed Conflicts (Protocol I)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of Non-International Armed Conflicts (Protocol II)
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects

## Miscellaneous

- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Reduction of Statelessness
- Convention on the Prevention and Punishment of the Crime of Genocide
- The Rome Statute of the International Criminal Court
- United Nations Convention against Transnational Organized Crime and the protocols thereto
  - Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
  - Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime
- *Refugee Protection and Human Trafficking, Selected Legal Reference Materials, First Edition – December 2008*, Protection Policy and Legal Advice Section, Division of International Protection Services, UNHCR

## Appendix B: Case law on exclusions pursuant to article 1 F of the Refugee Convention

### 1. Article 1F(a) of the Refugee Convention: Crimes against peace, war crimes, and crimes against humanity

In order to define crimes under article 1F(a) of the Refugee Convention, decision makers should refer to international instruments as well as other sources. Canadian courts generally rely on the Charter of the International Military Tribunal, the Statutes of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, the Rome Statute of the International Criminal Court as well as the jurisprudence of the *ad hoc* tribunals.

Where a claimant has not personally committed a crime, but has had a role in aiding, instigating, or counselling someone else to commit a war crime or crime against humanity, the claimant may be held responsible as an accomplice and may be excluded from refugee protection. An accomplice is as guilty as the person who committed the crime. Canadian courts have defined complicity as

- being present at an international crime if combined with authority (also known as command responsibility/superior orders);
- voluntary, significant, and knowing contribution; and
- aiding and abetting.

#### 1.1 SCC decision in *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40

The SCC ruling in the matter of *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40 has reformulated the legal test by which to assess complicity in the context of exclusions that were previously established in *Ramirez*<sup>2</sup> as follows:

- eliminated complicity by association;
- eliminated the assumption that membership in an organization with a limited, brutal purpose makes an individual complicit in the crime the group is alleged to have committed; and
- added one new factor to the existing list of factors to be considered when assessing complicity (see section 1.3 below).

The SCC proposes that a contribution-based test be used when assessing complicity in the context of exclusions pursuant to article 1F of the Refugee Convention. This test requires that there are serious reasons for considering that the individual made a voluntary, knowing, and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime.

#### 1.2 Key components of the contribution-based test for complicity

- **Voluntary** contribution to the crime or criminal purpose: Decision makers are to consider the method of recruitment by the organization and any opportunity the claimant has had to

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<sup>2</sup> *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.) is the seminal decision addressing complicity in the context of exclusion.

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disassociate from the organization. The requirement to show that the contribution was voluntary covers the defense of duress. The contribution to the crime or criminal purpose must be voluntarily made; it cannot be made under duress.

- **Significant**<sup>3</sup> contribution to the group's crime or criminal purpose: The mere association factor is replaced with a culpable complicity factor when an individual makes a significant contribution to the crime or criminal purpose of a group. The degree of contribution must be carefully assessed to prevent an unreasonable extension of criminal participation in international criminal law.
- **Knowing** contribution to the crime or criminal purpose: The individual must be aware of the group's crime or criminal purpose and aware that their conduct will assist in the furtherance of the crime or criminal purpose.

### 1.3 Revised factors to be applied when assessing complicity in the context of exclusions

- The size and nature of the organization
- The part of the organization with which the refugee claimant was most directly concerned (**looks new, but already applied in practice**)
- The refugee claimant's duties and activities within the organization (**new**)
- The refugee claimant's position or rank in the organization
- The length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose
- The method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization

**Note:** The SCC has made it clear that the above factors are not necessarily exhaustive and are not given the same weight in each case. The focus of the assessment must remain on the individual's contribution to the crime or criminal purpose, and any viable defences should be taken into account. The weight of each factor will depend on the context of the case at hand.

**Note:** In applying the new test, the focus must always remain on the individual's voluntary, significant, and knowing contribution to the crime or criminal purpose.

### 1.4 What does this mean in the context of exclusions?

In its decision on *Ezokola*, the SCC eliminated guilt by association, and, as a result, being a member of an organization with a limited, brutal purpose no longer leads automatically to exclusion from refugee protection. Decision makers must now establish a nexus between the refugee claimant and the crime or criminal purpose of the group [para. 9, 30] to exclude the claimant from refugee protection.

While the new contribution-based test for complicity set out in *Ezokola* replaces the former personal and knowing participation test, it does not replace other potential modes of partial liability for the commission of international crimes such as aiding and abetting, inciting, ordering, commanding, or having superior responsibility, etc., as set out in international instruments.

### 1.5 Relevant case law following *Ezokola*

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<sup>3</sup> The Court has not defined "significant" in this context, but it should be assessed in the context of each individual case.



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### 1.5.1 Organizations with a limited, brutal purpose

Following the SCC decision on *Ezokola*, individuals can no longer be excluded from refugee protection simply because they were associated with an organization with a limited, brutal purpose. Instead, decision makers have to show that the individual made a significant, voluntary, knowing contribution to the crime or criminal purpose of the organization. That is, the claimant's conduct and role within the organization must be carefully established on an individualized basis to show that the contribution was voluntarily made and had a significant impact on the crime or criminal purpose of the group.

Jurisprudence with respect to the nature of an organization remains relevant, since establishing that an organization has a limited, brutal purpose may assist decision makers in assessing the factors related to the size and nature of the organization. The link between the contribution and the criminal purpose will be easier to establish.

The following cases remain relevant when assessing complicity using the factors established by the SCC in *Ezokola*:

- *Rutayisire v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1168, par. 35.
- *Canada (Minister of Citizenship and Immigration) v. Hajjalikhani*, [1999] 1 FC 181, par. 24.
- *Yogo v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 90.

### 1.5.2 Non-brutal organizations

Non-brutal organizations are entities that have a legitimate purpose but have committed war crimes or crimes against humanity outside of their main function.

Complicity in non-brutal organizations must be established on a voluntary, knowing, and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime.

The cases below on identifying non-brutal organizations remain relevant in establishing complicity for the purpose of exclusion, as part of the aiding and abetting type of involvement, which should theoretically apply and be captured by the contribution-based test established by the SCC in *Ezokola*.

**Please see the following cases as examples of handing over persons as a form of aiding and abetting:**

- *Sulemana v. Canada (Minister of Citizenship and Immigration)*, (1995) F.T.R. 53.
- *Gutierrez v. Canada (Minister of Employment and Immigration)*, IMM-2170-93.
- *Januario v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 527.
- *Gracias-Luna v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 812.
- *Guardado v. Canada (Minister of Citizenship and Immigration)*, IMM-2344-97.
- *Yang v. Canada (Minister of Citizenship and Immigration)*, IMM-1372-98.
- *Villegas Lumocso v. Canada (Citizenship and Immigration)*, 2012 FC 905.

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**Please see the following cases as examples of providing information about persons as a form of aiding and abetting:**

- *Bamlaku v. Canada (Minister of Citizenship and Immigration)*, IMM-846-9.
- *Canada (Minister of Citizenship and Immigration) v. Bazargan*, F.C.A., no. A-400-95.
- *Shakarabi v. Canada (Minister of Citizenship and Immigration)*, IMM-1371-97.
- *Albuja v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 538.
- *Sumaida v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 66.
- *Hovaiz v. Canada (Minister of Citizenship and Immigration)*, IMM-2012-01.
- *Lalaj v. Canada (Minister of Citizenship and Immigration)*, IMM-4779-99.
- *Goncalves v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 806.
- *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39.
- *Alwan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 807.
- *Salami v. Canada (Minister of Citizenship and Immigration)*, IMM-6023-02.
- *Diab v. Canada (Minister of Employment and Immigration)*, IMM-3162-93.
- *Kathiravel v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 680.
- *Uriol Castro v. Canada (Citizenship and Immigration)*, 2011 FC 1190, 27 October 2011.

**Please see the following cases as examples of providing support functions as a form of aiding and abetting:**

- *Bukumba v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 93.
- *Carrasco v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 436.
- *Zadeh v. Canada (Minister of Employment and Immigration)*, IMM-3077-94.
- *Cibaric v. Canada (Minister of Citizenship and Immigration)*, IMM-1078-95.
- *Fletes v. Canada (Minister of Employment and Immigration)*, 83 F.T.R. 49.
- *Penate v. Canada (Minister of Employment and Immigration)*, [1994] F.C. 79.
- *Guardado v. Canada (Minister of Citizenship and Immigration)*, IMM-2344-97.
- *Aguilar v. Canada (Minister of Citizenship and Immigration)*, IMM-4491-99.
- *Rojas v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 394.
- *Mupenzi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1304.
- *Mata Mazima v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 698.
- *Nsika v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1026.
- *"Mr. MJS" v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 293.
- *Kamanzi v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 1261.

**Please see the following cases as examples of increasing the efficiency of an organization as a form of aiding and abetting:**

- *Torkchin v. Canada (Minister of Employment and Immigration)*, A-159-92.
- *Alza v. Canada (Minister of Citizenship and Immigration)*, IMM-3657-94.
- *Chen v. Canada (Minister of Citizenship and Immigration)*, IMM-541-00.
- *Ordonez v. Canada (Minister of Citizenship and Immigration)*, IMM-2821-99.
- *Salgado v. Canada (Minister of Citizenship and Immigration)*, IMM-2463-05.
- *Aguilar v. Canada (Minister of Citizenship and Immigration)*, IMM-4491-99.
- *Chitrakar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 888.
- *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867.

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- *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1170.
- *Kuruparan v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 745.

## 2 Article 1F(b) of the Refugee Convention – Serious, non-political crimes

In *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, the court summarized its reading of the general purposes of article 1F of the Refugee Convention and article 1F(b) of the Refugee Convention in particular as ensuring that the

- perpetrators of international crimes or acts contrary to certain international standards will be unable to claim the right of asylum;
- perpetrators of ordinary crimes committed for fundamentally political purposes can find refuge in a foreign country;
- right of asylum is not used by the perpetrators of serious, ordinary crimes in order to escape the ordinary course of local justice; and
- country of refuge can protect its own people by closing its borders to criminals whom it regards as undesirable because of the seriousness of the ordinary crimes which it suspects such criminals of having committed. (para.119)

In Canada for a crime to be considered serious in the context of exclusion under article 1F(b) of the Refugee Convention, it must be a capital crime or a very grave, punishable act.

The notion of what is to be considered a serious crime is to be considered in relation to the criminal law system of the country of refuge rather than the country of origin.

- *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178.
- *Lai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125.
- *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404.
- *Canada (Minister of Citizenship and Immigration) v. Li*, 2010 FCA 75.

In addition to examining the *Criminal Code of Canada* regarding the seriousness of the crime, it is also permissible to canvas international instruments that deal with the subject matter of the crime in question.

- *Kovacs v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1473 (child abduction).
- *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404. (drug trafficking that makes reference to legislation of other western countries).

**Note:** Decision makers may consider as evidence the criminal charges and convictions in a foreign country; however, they should be cautious when doing so [*Biro v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 776 and *Arevalo Pineda v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 454].

### 2.1 Federal Court of Appeal decision in *Jayasekara*

There is a strong tendency to consider any crime, the equivalent of which carries a maximum penalty of at least ten years in Canadian criminal law as a serious crime, even though the actual sentence imposed in the country in which the crime was committed may be considerably less than the maximum penalty,

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had the crime been committed in Canada, the application of the methodology adopted in *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC238/2008 FCA 404 may rebut this presumption.

In *Jayasekara*, the Federal Court of Appeal established that in interpreting article 1F(b) of the Refugee Convention with respect to seriousness of a crime, an evaluation of the following factors should be considered:

- the elements of the crime;
- the mode of prosecution;
- the penalty prescribed;
- the facts; and
- the mitigating and aggravating circumstances underlying the conviction.

Since 2010, the Federal Court has dealt mostly with the application of the methodology adopted by the Federal Court of Appeal in *Jayasekara*.

**Note:** In *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC, the SCC provided the following comments: “The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390 (C.A.) and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed, had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded. Article 1F(b) of the Refugee Convention is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (G. S. Goodwin-Gill, *The Refugee in International Law* (3rd ed. 2007), at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion; the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.”

### 2.2 Mode of prosecution

The Federal Court has held that the mode of prosecution relates to the choice made by a foreign prosecutor in deciding to proceed in the case of hybrid offences, with the more serious offence(s) in question by way of indictment or with the less serious offence(s) by laying a charge using a summary or misdemeanour offence with the implication that going ahead with the less serious charge is a factor in favour of the asylum seeker. The cases below dealt with minor sexual offences in the U.S., resulting in the persons not being excluded in Canada, as these offences did not meet the threshold of serious criminality.

- *Canada (Minister of Citizenship and Immigration) v. Lopez Velasco*, 2011 FC 627.

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- *Canada (Minister of Citizenship and Immigration) v. Ammar*, 2011 FC 1094.
- *Vucaj v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 381.

For an example where exclusion was upheld, refer to

- *Hernandez Gomez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 271. (weapons offences in the U.S.)

On the other hand, if an offence is committed outside of Canada, but the behaviour amounts to a hybrid offence in Canada of which the summary variation has a maximum penalty much higher than other summary offences in Canada, such as the offence of sexual interference, a person can be excluded pursuant to article 1F(b) of the Refugee Convention.

- *Canada (Minister of Citizenship and Immigration) v. Raina*, 2012 FC 618.

### 2.3 Penalty prescribed

Decision makers should **not** take into account the cumulative effect of the penalties that could be imposed for all of the offences committed by a person.

- *Vucaj v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 381.

Maximum penalties that can be imposed for the commission of an offence with a mandatory minimum sentence should **not** be taken into consideration in the assessment of what constitutes a serious crime.

- *Canada (Minister of Citizenship and Immigration) v. Nwobi*, 2014 FC 520.

### 2.4 Aggravating and mitigating circumstances (including rehabilitation)

The aggravating and mitigating circumstances go to the nature of the crime committed, not what might be later considered as factors to be taken into account in determining whether the offender has been rehabilitated.

- *Rojas Camacho v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 789.

**Note:** It is important for the decision maker to actually consider these contextual factors in a meaningful way and reflect how the competing factors have been assessed and weighed in determining if a crime was serious for the purpose of exclusion pursuant to article 1F(b) of the Refugee Convention. It is not enough for the decision maker to simply list the factors and then state a conclusion.

- *Aguilar v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 959.
- *Mohamad Jawad v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 232.
- *Poggio Guerrero v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 384. (drug trafficking in the U.S.)
- *Valdespino Partida v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 359. (theft in the U.S.)
- *Vucaj v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 381. (drug trafficking in the

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- U.S.)
- *Canada (Minister of Citizenship and Immigration) v. Nwobi*, 2014 FC 520. (drug trafficking in Germany and killing in Nigeria)

### 2.4.1 Mitigating factors

A constraint short of duress may be a relevant mitigating factor in assessing the seriousness of the crime committed.

- *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, para.45.

However, a full defence such as duress goes beyond being a mitigating factor and negates liability under article 1F(b) of the Refugee Convention.

- *Guerra Diaz v. Canada (Minister of Citizenship and Immigration)* 2013 FC.

The claimant's admission of guilt, a favourable plea bargain and a troubled childhood may be relevant mitigating factors.

- *Gudima v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 382.

The claimant's age and lack of previous convictions, the limited amount of drugs, and the fact that the substance contained methamphetamine as opposed to pure methamphetamine along with the claimant's refugee status and life in a marginalized neighbourhood may be relevant mitigating factors.

- *Shire v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 97.

The claimant's addiction to painkillers, resulting from an injury sustained during a criminal gang fight, the claimant's cooperation with authorities, their role as an instrumental key witness for the Crown, the lack of weapons involved in the drug trafficking offence, and the absence of serious injury resulting from the offence may be relevant mitigating factors.

- *Vucaj v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 381.

Mitigating circumstances are only relevant if they directly relate to the commission of the offence at that time and not to issues related to the character of the refugee claimant after the commission of the offence. To this end, the seriousness of a crime is to be assessed at the time the crime was committed.

Rehabilitation and current lack of dangerousness are irrelevant considerations in determining if a person should be excluded under article 1F(b) of the Refugee Convention and do not need to be taken into account. In other words, the seriousness of the crime is not to be balanced against factors that are extraneous to the commission of the offence, such as current dangerousness, expiation, or rehabilitation. Only factors related to the commission of the criminal offences can be considered.

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- *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68.

**Note:** Rehabilitation is not taken into account and is not balanced against the presumed seriousness of the crime arising from the fact that, if committed in Canada, the crime is punishable by at least ten years imprisonment.

- *Rojas Camacho v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 789. (drug trafficking in the U.S.)
- *Hernandez Febles v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1103. (assault with a deadly weapon in the U.S.)
- *Martinez Cuero v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 191. (drug trafficking in the U.S.)
- *Feimi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 262. (murder in Greece)
- *Poggio Guerrero v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 384. (drug trafficking in the U.S.)
- *Cho v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 45. (various serious crimes in Korea as a member of a gang)
- *Ospina Velasquez v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 273. (armed robbery and drug offences in the U.S.)
- *Valdespino Partida v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 359.
- *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2013 FC. (This case also makes it clear that a change in legislation in Canada making an offence more or less serious later than at the time it was committed is not relevant for this proposition, but what is relevant is that the seriousness of the crime is measured at the time of refugee determination; this was confirmed on appeal in *Sanchez v. Canada (Minister of Citizenship and Immigration)* 2014 FCA 157.)

When assessing seriousness of a crime in the context of exclusions under article 1F(b) of the Refugee Convention, the fact that the person is not a danger to the security of Canada after arrival is also not to be taken into account.

- *Hernandez Febles v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1103.
- *Feimi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 262.

The court also indicates that serving a sentence in the country where the crime was committed is not conclusive.

- *Rojas Camacho v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 789.
- *Abu Ganem v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1147. (manslaughter in Israel)
- *Radi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 16. (domestic assault in the U.S.)
- *Cho v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 45.
- *Ospina Velasquez v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 273.

Conduct after the conviction that sheds light on the *Jayasekara* factors, such as probation and

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parole violations related to the offence in question, are relevant factors to be considered in the context of article 1F(b) of the Refugee Convention.

- *Chernikov v. Canada (Minister of Citizenship and Immigration)* 2013 FC 649. (drunk driving causing bodily harm in the U.S.)

### 2.4.2 Aggravating factors

The harm caused to the victim or society, the use of a weapon, and the fact that the crime is committed by an organized criminal group could be relevant aggravating factors to be considered.

- *Jayasekara v. Canada (Minister of Citizenship and Immigration)*

Aggravating factors include habitual criminal conduct as well as possible psychological harm to victims.

- *Poggio Guerrero v. Canada (Minister of Citizenship and Immigration)* 2012 FC 384.
- *Canada (Minister of Citizenship and Immigration) v. Raina* 2012 FC 618. (sexual offences in New Zealand)
- *Gamboa Micolta v. Canada (Minister of Citizenship and Immigration)* 2013 FC 367. (burglary and evading arrest in the U.S.)
- *Gudima v. Canada (Minister of Citizenship and Immigration)* 2013 FC 382. (assault in the U.S.)
- *Canada (Minister of Citizenship and Immigration) v. Pierre* 2013 FC 810. (burglary in the U.S.)
- *Unachuk wu v. Canada (Minister of Citizenship and Immigration)* 2014 FC 199. (spousal assault in the U.S.)

Aggravating factors also include absconding from the jurisdiction where the crime was committed.

- *Gamboa Micolta v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 367.
- *Unachuk wu v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 199. (spousal assault in the U.S.)

**Note:** In paragraph 44 of *Jayasekara*, the Federal Court of Appeal confirmed that “no balancing is required with factors extraneous to the facts and circumstances underlying the conviction, such as the risk of persecution in the state of origin.”

## 2.5 Examples of serious crimes (in addition to the ones mentioned above in the context of other issues under article 1F(b) of the Refugee Convention

### Murder

- *Feimi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 262.
- *A.C. v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1500.

### Drug Trafficking



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- *Rojas Camacho v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 789.
- *Martinez Cuero v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 191.
- *Poggio Guerrero v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 384.
- *Malouf v. Canada (Minister of Citizenship and Immigration)*, A-19-95.
- *Chan v. Canada (Minister of Citizenship and Immigration)*, A-294-99.
- *Canada (Minister of Citizenship and Immigration) v. Maan*, 2005 FC 1682.
- *Garcia Médina v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 62.
- *Canada (Minister of Citizenship and Immigration) v. Jan*, 2006 FC 40.
- *Garcia Rodriguez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 462.
- *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404.
- *Chawah v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 324.
- *Betancour v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 767.

### **Assault**

- *Hernandez Febles v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1103.
- *Canada (Minister of Citizenship and Immigration) v. Nyari*, 2002 FCT 979.
- *Nava Flores v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1147.

### **Sexual Assault**

- *Shamlou v. Canada (Minister of Citizenship and Immigration)*, IMM-4967-94.

### **Bombing**

- *Gil v. Canada (Minister of Employment and Immigration) (C.A.)*, [1995] 1 FC 508.

### **Coup d'états, including activities such as delivering weapons and seizing radio and TV stations**

- *Gregorio v. Canada (Minister of Citizenship and Immigration)*, IMM-1447-98.

### **Kidnapping**

- *Taleb v. Canada (Minister of Citizenship and Immigration)*, IMM -1449-98.

### **Sabotage**

- *Vergara c. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 474.

### **Armed Robbery**

- *Ospina Velasquez v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 273.
- *Vergara c. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 474.
- *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 289.

### **Arson**

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- *Zrig v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 1043.

## Terrorist Acts

- *Zrig v. Canada (Minister of Citizenship and Immigration)* 2003 FCA 178.

## Child Abduction

- *Kovacs v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1473.
- *Paris Montoya v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1674.

## Miscellaneous

- *Cho v. Canada (Minister of Citizenship and Immigration)* 2013 FC 45. (various serious crimes in Korea as a member of a gang)
- *Valdespino Partida v. Canada (Minister of Citizenship and Immigration)* 2013 FC 359.
- *Sanchez v. Canada (Minister of Citizenship and Immigration)* 2013 FC. (This case also makes it clear that a change in legislation in Canada making an offence more or less serious later than at the time it was committed is not relevant for this proposition, but what is relevant is that the seriousness of the crime is measured at the time of refugee determination; this was confirmed on appeal in *Sanchez v. Canada (Minister of Citizenship and Immigration)* 2014 FCA 157.)

## Economic crimes, which can also be crimes under article 1F(b) of the Refugee Convention

- *Simkovic v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 113. (tax evasion in Slovakia)
- *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250. (embezzlement)
- *Lai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125. (smuggling, tax evasion and offering bribes)
- *Florea v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1472. (customs smuggling)
- *Vlad v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 172. (taking bribes)
- *Rudyak v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1141. (usury)
- *Iliev v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 395; *Hany Zeng v. Canada (Minister of Citizenship and Immigration)* 2008 FC 956; *Xu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 970; *Codas Martin v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 994; *Noha v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 683 (fraud)
- *Ivanov v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1210
- *Farkas v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 277 (theft involving large amounts of money)

## 2.6 Foreign convictions and charges

Decision makers can rely on a foreign conviction, as long there is no challenge to the integrity of the applicant's conviction or the judicial system of the foreign country.

- *Abu Ganem v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1147.

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If the judicial system in question is allegedly corrupt, a decision maker can go behind the record of conviction.

- *Canada (Minister of Citizenship and Immigration) v. Toktok*, 2013 FC 1150. (writing a false cheque in Turkey; the non-exclusion finding was upheld)
- *Biro v. Canada (Minister of Citizenship and Immigration)*, F.C. IMM-5574-06, July 26, 2007. (This case dealt with assessing fairness of a foreign criminal process for determination as to whether a crime was committed.)
- *Florea v. Canada (Minister of Citizenship and Immigration)*, F.C.T.D., IMM- 5443-04, November 3, 2005. (This case dealt with pardon and civil fines in the context of criminal proceedings.)

**Note:** The fact that charges were dismissed in a foreign jurisdiction by itself does not mean that a serious crime was not committed. If this is the case, the decision maker can rely on other evidence, as well as the evidence adduced in the criminal trial, that did not result in a conviction.

To assess if exclusion pursuant to article 1F(b) of the Refugee Convention applies, the following factors should be taken into consideration:

- whether the dismissal was for technical legal reasons; and
- the country in which the charges that did not lead to a conviction were laid.
  - *Arevalo Pineda v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 454. (sexual assault in the U.S.)
  - *Naranjo v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1127. (money laundering in the U.S.)
  - *Radi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 16.

An allegation whereby a police report referred to trafficking in drugs, but a later criminal conviction was for the reduced charge of possession, combined with a short period of probation, was held not to be a serious offence.

- *Mohamad Jawad v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 232. (drug possession; the exclusion finding was overruled)
- *Simkovic v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 113.

## 2.7 Political crime

In *Gil v. Canada (Minister of Employment and Immigration) (C.A.)*, [1995] 1 F.C. 508, the Federal Court of Appeal held that, for a crime to be characterized as political and, therefore, to fall outside the scope of article 1F(b) of the Refugee Convention, it must meet a two-pronged incidence test as follows:

1. the existence of a political disturbance related to a struggle to modify or abolish either a government or a government policy; and
2. a rational nexus between the crime committed and the potential accomplishment of the political objective sought.

The Court of Appeal considered and rejected the notion of balancing the seriousness of the persecution the claimant is likely to suffer against the gravity of the crime they committed.

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In *Gil*, the court upheld a tribunal decision to exclude an individual who had been involved five or six times in placing Molotov cocktails in crowded business premises owned by wealthy supporters of the Khomeini government in Iran and by members of local revolutionary committees.

The court noted that violent acts committed randomly for political purposes may not be regarded as political acts, due to the lack of a causal connection between the crime committed and the alleged political end. The court also stressed that violent acts committed against unarmed civilians, which inevitably result in the death or serious injury of civilians, are completely disproportionate to the legitimate political objective sought, regardless of what that is.

The court states that, while the political offence exception occurs in both extradition and refugee law, there are substantial differences between the two systems, as a result of which these considerations “would seem to point to a need for even greater caution in characterizing a crime as political for the purposes of applying article 1F(b) [of the Refugee Convention] than for the purpose of denying extradition” (*Gil v. Canada*).

After considering in detail the extradition law of other countries, the court decided that the incidence test from extradition law was also the most appropriate to assess the political offence exception in refugee law. In applying this test to the facts of the case, the court was of the opinion that there was no objective rational connection between injuring the commercial interests of certain wealthy supporters of the regime and any realistic goal of forcing the regime itself to fall or change its ways or politics. This nexus was too tenuous to justify the kind of indiscriminate violence the refugee claimant admitted to (*Gil v. Canada*).

In *Durango v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1081, the court found that the political offence exception did not apply in this case because the crime was not committed in Colombia, where the political activities took place, but in the country of refuge. In addition, there was no evidence that the person actually had engaged in political activities when returning to Colombia with a false passport that had been obtained in the U.S.

*A.C. v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1500 involved the killing of the president of Bangladesh in the early seventies as part of an attempt to overthrow the government and also the killing of his family and entourage. The political defence exemption was found to be not applicable, but it is not clear whether this decision was based on only the lack of proportionality or also the lack of nexus (see also *A. Kaushal and C. Dauvergne*<sup>4</sup>).

Other cases where the claimant was unable to convince a court that their criminal activities fit the political offence exception, primarily by already failing this first part of the test, which was said not to apply, include the following:

- *Gregorio v. Canada (Minister of Citizenship and Immigration)*, IMM-1447-98. (during a coup d'état in Venezuela)
- *Taleb v. Canada (Minister of Citizenship and Immigration)*, IMM-1449-98. (kidnapping of a terrorist for the FBI in exchange for 2 million dollars and U.S. citizenship)
- *Vergara c. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 474. (armed robbery and

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<sup>4</sup> A. Kaushal and C. Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions”, Metropolis British Columbia, Centre of Excellence for Research on Immigration and Diversity (2011) [<http://mbc.metropolis.net/assets/uploads/files/wp/2011/WP11-06.pdf>]

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- acts of sabotage against the Chilean government as a member of the communist party)
- *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 289. (involvement in armed robberies in Nepal as a member of the communist party)
- *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1043. (arson committed as part of the political goal of establishing a fundamentalist government in Tunisia)
- *Lai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125. (economic crimes, such as fraud, smuggling, and tax evasion, in China)

### 2.8 Completion and length of a sentence when considering exclusion under 1F(b)

In *Jaysekara*, the Federal Court of Appeal confirmed that serving a sentence for a serious crime prior to coming to Canada does not exclude the application of article 1F(b) of the Refugee Convention (para. 57).

In *Nava Flores v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1147, the Federal Court upheld the RPD's decision to exclude a refugee claimant under article 1F(b) of the Refugee Convention, even though he had completed his sentence for the crime in question (paras. 54 and 58). See also

- *Arevaldo Pineda v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 454;
- *Chawal v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 324; and
- *Shire v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 97.

In *Jaysekara*, the Federal Court of Appeal agreed that if the length or completion of a sentence is considered in the context of exclusion under article 1F(b) of the Refugee Convention, it should not be considered in isolation for the following reasons:

- There are a number of reasons why a lenient sentence may actually be imposed in the country where the crime was committed, even for a serious crime. The sentence, however, would not diminish the seriousness of the crime committed.
- On the other hand, in some countries, a person may be subjected to substantial prison terms for behaviour that is not considered criminal in Canada (para. 41, *Jaysekara* FCA 404.).

### 2.9 Complicity

**Note:** The legal test established by the SCC in *Ezokola* also applies to establishing complicity pursuant to exclusions under article 1F(b) of the Refugee Convention.

## 3 Article 1F(c) of the Refugee Convention – Acts contrary to the purposes and principles of the United Nations

Article 1F(c) of the Refugee Convention only applies to acts that amount to sustained, systematic, and serious violations of human rights or acts of terrorism, forced disappearance, torture, hostage taking, and apartheid. Exclusion under article 1F(c) of the Refugee Convention applies to acts committed in or outside of Canada, whether these persons were private individuals or acting with government authority. Drug trafficking is not an activity captured by article 1F(c) of the Refugee Convention.

**Note:** The legal test established by the SCC in *Ezokola* also applies to establishing complicity pursuant to exclusions under article 1F(c) of the Refugee Convention.

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**Note:** For applicable case law, refer to section 5.14 of this manual chapter.

## Appendix C: Case law for exclusion under article 1E of the Refugee Convention

### 1 Article 1E of the Refugee Convention – Recognition by competent authorities

Pursuant to the definition of “Convention refugee” in section A96, the applicability of the Refugee Convention is subject to article 1E of the Refugee Convention, which reads as follows:

“E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.”

The purpose of article 1E of the Refugee Convention is to exclude persons who do not require the protection of refugee status. Therefore, it supports the purposes of the IRPA by limiting refugee claims to those who clearly face the threat of persecution.

- *Kroon v. Canada (Minister of Citizenship and Immigration)* (1995), Imm. L.R. (2d) 164 (F.C.T.D.) at 167-168.

The rationale for the enactment of article 1E of the Refugee Convention in 1951 was to exclude refugees and expellees of German ethnic origin in the Federal Republic of Germany, who, by virtue of article 116 of the Basic Law for the Federal Republic of Germany, were treated as German nationals. The reason for excluding these persons was that the signatories to the Convention considered they should be the responsibility of Germany.

- Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 1, Sijthoff-Leyden, 1966, pp. 267–270.
- James C. Hathaway, *The Law of Refugee Status*, Toronto: Butterworths, 1991, pp. 211-212.

In order to be excluded under article 1E of the Refugee Convention, the person must have a status in another country that is in no way inferior to that of Convention refugee (Grahl-Madsen, *supra*, p. 270).

- Goodwin-Gill, *The Refugee in International Law*, Oxford: Clarendon Press, 1983, p. 58

Article 1E of the Refugee Convention requires the RPD to engage in an analysis of the rights and obligations of the refugee claimant in the successor state. The IRB must determine whether the claimant enjoys the same rights as a national, which depends on the country of residence.

- *Mahdi v. Canada (Minister of Citizenship and Immigration)* (1994), 26 Imm. L.R. (2d) 311, 86 F.T.R. 307 (F.C.T.D.), affirmed, (1995) 32 Imm. L.R. (2d) 1, 199 N.R. 170 (F.C.A.).
- *Hamdan v. Canada (Minister of Citizenship and Immigration)* (F.C.T.D., IMM-1346-96, March 27, 1997).

The following rights are considered rights for the purposes of article 1E of the Refugee Convention:

- the right to return;
- the right to work freely without restrictions;
- the right to study; and

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- the right to full access to social services in the country of residence.
  - *Shamlou v. Canada (Minister of Citizenship and Immigration)*, (1995), 103 F.T.R 241, 32 Imm. L.R. (2d) 135 (F.C.T.D.).
  - *Mahdi v. Canada (Minister of Citizenship and Immigration)*, (1994) 26 Imm. L.R. (2d) 311, 86 F.T.R. 307 (F.C.T.D.), affirmed, (1995) 32 Imm. L.R. (2d) 1, 199 N.R. 170 (F.C.A.).
  - *Hassanzadeh v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-707-95, August 23, 1996).
  - *Hamdan v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-1346-96, March 27, 1997).
  - *Kamana v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-5998-98, September 22, 1999).

If a person comes to Canada directly from a third country where this person has received a form of unconditional protection or the right to stay, and the person has not abandoned the protection of that country, article 1E of the Refugee Convention does apply to that person.

- *Hurt v. Canada (Minister of Manpower and Immigration)*, [1978] 2 F.C. 340 (F.C.A.).
- *Mahdi v. Canada (Minister of Citizenship and Immigration)*, (1994), 26 Imm. L.R. (2d) 311, 86 F.T.R. 307 (F.C.T.D.), affirmed, (1995) 32 Imm. L.R. (2d) 1, 199 N.R. 170 (F.C.A.).
- *Hadissi v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-5210-94, March 29, 1996).
- *Mohamed v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-2248-96, April 7, 1997).
- *Wassiq v. Canada (Minister of Citizenship and Immigration)*, (1996), 112 F.T.R. 143, 33 Imm. L.R. (2d) 238 (F.C.T.D.).
- *Kanesharan v. Canada (Minister of Citizenship and Immigration)*, (1996), 35 Imm. L.R. (2d) 185, 120 F.T.R. 67 (F.C.T.D.).
- *Shahpari v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-2327-97, April 3, 1998).
- *Agha v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-4282-99, January 12, 2001).
- *Nepete v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-4471-99, January 11, 2002).
- *Hakizimana v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-1327-02, February 26, 2003).
- *Vifansi v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-2366-02, March 17, 2003).
- *Hassanzadeh v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-3545-03, December 18, 2003).
- *Choezom v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-1420-04, September 30, 2004).
- *Canada (Minister of Citizenship and Immigration),v. Manoharan* (F.C.T.D., IMM-5617-04, August 22, 2005).
- *Murcia Romero v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-3370-05, April 21, 2006).
- *Canada (Minister of Citizenship and Immigration)v Choovak (Choubak)*, (F.C.T.D., IMM-3462-05, April 26, 2006).
- *Parvanta v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-266-06, September 27, 2006).



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- *Canada (Minister of Citizenship and Immigration) v. Tajdini*, (F.C., IMM-1270-06, March 1, 2007).
- *Parshottam v. Canada (Minister of Citizenship and Immigration)*, (F.C., IMM-192-07, January 15, 2008).
- *Binyamin v. Canada (Minister of Citizenship and Immigration)*, (F.C., IMM-2018-07, February 28, 2008).
- *Parshottam v. Canada (Minister of Citizenship and Immigration)*, (FCA, A-73-08, November 14, 2008).
- *Zeng v. Canada (Minister of Citizenship and Immigration)*, (FC, IMM-4183-08, May 8, 2009). (also as to timing of the status in the other country)
- *Udeh v. Canada (Minister of Citizenship and Immigration)*, (FC, IMM-02-09, August 13, 2009).
- *Li v. Canada (Minister of Citizenship and Immigration)*, (FC, IMM-585-08, August 24, 2009).
- *Mai v. Canada (Minister of Citizenship and Immigration)*, (FC, 1155-09, February 22, 2010).
- *Canada (Minister of Citizenship and Immigration) v. Zeng*, (FCA, A-275-09, May 10, 2010). (also as to timing of the status in the other country)
- *Zhong v. Canada (Minister of Citizenship and Immigration)*, (FC, IMM-3909-10, March 9, 2011).

Article 1E of the Refugee Convention may be applied to persons who come to Canada when asylum shopping or persons who take actions that are intended to result in them not being able to return to the country where they have refugee status.

- *Mohamed v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-2248-96, April 7, 1997).
- *Wassiq v. Canada (Minister of Citizenship and Immigration)*, (1996), 112 F.T.R. 143, 33 Imm. L.R. (2d) 238 (F.C.T.D.).
- *Shahpari v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D., IMM-2327-97, April 3, 1998).

Evidence must be presented to show the rights a permanent resident possesses in the country of residence and must be similar if not the same as the rights of nationals in that country. In order for article 1E of the Refugee Convention to be invoked, the rights enjoyed cannot be conditional on certain events.

## 2 Case summaries related to exclusions under article 1E of the Refugee Convention

In *Olschewski v. Canada (Citizenship and Immigration)*, (FCTD, A-1424-92, October 20, 1993), the judge merely stated that the exclusion clause under article E of the Refugee Convention did not apply to the claimant, who had lost the citizenship of the USSR when he emigrated to Israel but had the right to reapply for citizenship of the Ukraine, although it was not clear if he was able to return.

In *Canada (Minister of Citizenship and Immigration) v. Mahdi, Roon Abdikarim* (F.C.A., no. A-632-94), (*supra*), the Federal Court, Trial Division, overruled the CRDD decision excluding a person from Somalia who was in possession of a U.S. residency card, based on exclusion on the ground set out in article 1E of the Refugee Convention, because the CRDD, while stating that the claimant had most of the rights enjoyed by citizens, did not inquire whether the right to return was extinguished by the fact that she had given up her residency in the U.S. The case is presently under appeal as the result of certification.

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In *Kroon v. Canada (Minister of Employment and Immigration)* (F.C.T.D., no. IMM-3161-93) (*supra*), the CRDD decision excluding a person who was a national of Russia but had residency in Estonia was upheld. The judge indicated that exclusion under article 1E of the Refugee Convention should be not be confined to those cases where applicants have moved from their own country of nationality to seek refugee status in another country, where they then reside with essentially similar rights to those of nationals of the second country.

The court found that, in this case, the person would have a status comparable to that of Estonian nationals and consistent with international conventions and treaties relating to rights and obligations of individuals. It also held that the person could be expected to be restored to his rights of residency in Estonia as a registered non-citizen and that, upon his return within a reasonable time, he would be entitled to apply for citizenship and, in the meantime, had a right to remain there with rights similar to most enjoyed by citizens.

In *Shamlou (supra)*, the CRDD decision to exclude a person from Iran who had permanent resident status in Mexico and who had been convicted of attempted sexual battery in the U.S. after a guilty plea, based on articles 1E and 1F(b) of the Refugee Convention, was upheld by the court. In agreeing with the CRDD on the exclusion under article 1E of the Refugee Convention, the judge relied on Hathaway (*supra*), Waldman (Lorne Waldman, *Immigration Law and Practice*, vol. 1, Toronto: Butterworths Canada Ltd., 1992), and the UNHCR Handbook for the parameters of article E of the Refugee Convention and referred to the *Olschewski (supra)*, *Kroon (supra)*, *Hurt (supra)*, and *Mahdi (supra)* cases regarding the rights and obligations for nationals. The court accepted Waldman's criteria for this exclusion clause as the rights to return, to work freely without restrictions, to study, and to full access to social services in the country of residence. With respect to the assertion that the claimant had lost his permanent resident status as the result of the operation of Mexican law, the decision indicated that, since there was no conclusive evidence to that effect, it was not unreasonable for the CRDD to exclude the person.

The *Mahdi (supra)* case was decided as a result of certification of a judgment of the Federal Court, Trial Division, which had overturned a CRDD decision excluding a Somalian person who had been granted permanent resident status in the U.S. and who had returned to Somalia and had then come to Canada in order to claim refugee status. The Federal Court of Appeal upheld the decision of the Trial Division judge primarily as a result of the peculiar factual situation. The court indicated that this was not a case where a person had voluntarily renounced the protection of one country in order to seek refuge elsewhere. The evidence did not show that the person had left the U.S. for Somalia with the intention of coming to Canada. In these circumstances, the person was not precluded from claiming refugee status in Canada, as she still had good reasons to fear persecution in Somalia.

With respect to the question of whether the person was still recognized as a permanent resident by the competent authorities of the U.S., the court held that the evidence that showed that there was a possibility that U.S. authorities would no longer recognize her as a permanent resident and would, therefore, deny her the right to return should be taken into account in deciding if it would be established, on a balance of probabilities, that the U.S. authorities still recognized her as a permanent resident.

In *Hadissi (supra)*, the CRDD decision excluding a person who was a permanent resident of the U.S. and who had come to Canada to claim refugee status, based on article 1E of the Refugee Convention, was upheld by the court. Hadissi argued that she had abandoned her permanent resident status and that she had no right to entry to the U.S. The court decided that there was no evidence that she had lost her status in the U.S. Based on *Mahdi (supra)* (both the Federal Court, Trial Division, and the Federal Court of

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Appeal), the court found that the CRDD had not made a reviewable error based on the evidence before it in which more weight was given to the Minister's evidence than to the hearsay evidence of the applicant.

In *Wassiq (supra)*, the CRDD decision to exclude a person from Afghanistan who had obtained refugee status in Germany, but whose travel documents from Germany had expired, was overturned. As a result of the expired travel documents and the inability under German law to renew them, the person's residency permit had also expired. The finding of the CRDD that Germany should have assumed responsibility was not sufficient for the application of exclusion under article 1E of the Refugee Convention if, in fact, Germany did not allow the person to return.

In *Hassanzadeh (supra)*, the decision whereby a person who was living in Austria, where he was allowed to work and return, was excluded on the basis of exclusion on the ground set out in article 1E of the Refugee Convention was upheld by the court. The argument used by the applicant that, in order to continue to be able to work in Austria, he was required to have a valid passport from his home country was rejected, as there was no evidence of that assertion, and the onus was on the applicant to prove his statement. *Mahdi (supra)* does not apply in these circumstances.

In *Kanesharan (supra)*, the CRDD decision excluding a person who had temporary status in the U.K., based on exclusion under article 1E of the Refugee Convention, was overturned by the Federal Court, Trial Division. The court found that a person such as the applicant, who had temporary status in the U.K. but was in a situation where the Home Office reserved the right to remove him to his country of nationality should prevailing circumstances change significantly in a positive manner, was eligible to remain after having been on exceptional leave for four years and on renewal for three years, and had the right to make trips to and from the U.K., does not have the rights envisaged by exclusion under article 1E of the Refugee Convention.

*Hamdan (supra)* resulted in a CRDD decision excluding a person who, in the Philippines, had the rights to return to that country and to study and who received a stipend from the UNHCR (as a result, the right to work was not material in this case). The right to social services was not clear on the evidence based on exclusion under article 1E of the Refugee Convention. The CRDD decision was overruled by the court on the basis that it was not necessary to determine whether the above criteria (from *Shamlou, supra*) were fulfilled. What had to be determined was whether the person had all rights and obligations of citizens in the country of residence, which can change depending on the country of residence. In this case, according to the court, it would appear critical that the applicant had neither the right to work nor the right to receive social services. The court also found that the CRDD had applied the wrong standard, namely whether the Philippines was a safe haven and not whether the applicant had the rights and obligations of citizens.

In *Mohamed (supra)*, the court upheld the CRDD decision excluding a person on the ground set out in article 1E of the Refugee Convention to a person who originated from Somalia and who had permanent resident status in Sweden until April 12, 1997. The evidence indicated that permanent residents in Sweden have the same rights as permanent residents in Canada, that the certificate of permanent residency is automatically renewed if the person is still in Sweden, and that, if the person abandons Sweden as their place of residency, their status lapses on the date that the certificate is up for renewal. The court dismissed the application from the bench so that the applicants could return to Sweden in time to renew their certificate. The court indicated that, although the applicants arrived in Canada with no status (they were still waiting on their application for refugee status, which was rejected, but instead became permanent residents after arriving in Canada), the critical time for the question of their status was

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at the CRDD hearing, at which time the applicants had permanent resident status in Sweden. The court also raised the concern of asylum shopping, where a person voluntarily abandons a legal status in a country that has provided protection and goes to another country. This is not what the Refugee Convention intends.

In *Shahpari (supra)*, the Federal Court, Trial Division, upheld a CRDD decision involving exclusion under article 1E of the Refugee Convention, where a person from Iran was given a *carte de résident* in France in 1991, valid for ten years, came to Canada in 1994 after first obtaining a French exit/re-entry visa, and, upon arriving in Canada, destroyed this visa. The court held that, in cases of exclusion under article E of the Refugee Convention, the onus is on the government, but the onus shifts to the applicant to show why the clause should not apply in circumstances where the government has put forward a *prima facie* case that the exclusion clause applies. Expiration of the visa, the impossibility to renew it outside of France, and the destruction thereof are not sufficient reasons to discharge the shifted onus on the applicant. The court also indicated that exclusion under article 1E of the Refugee Convention will be given broad application against claimants who are engaged in asylum shopping.

*In Agha v. Canada (Minister of Citizenship and Immigration)* (IMM-4282-99, January 12, 2001, Nadon J.), the court concluded that the IRB did consider the factual situation regarding the possibility of the applicant returning to the U.S., as his permanent residence status was still active. In doing so, the court departed from the Federal Court of Appeal decision in *Mahdi* and followed Jerome J.'s decision in *Hadissi*. The court also confirmed the principle stated in *Shahpari* (Rothstein J.), i.e., once the Minister submits evidence to the effect that an applicant can return to a given country, the onus shifts to the applicant to show that they cannot. The judicial review was dismissed. Nadon J. made no comments in his reasons as to a possible certification.

## Appendix D: List of useful websites

<b>Federal agencies</b>	<b>Addresses</b>
Foreign Affairs, Trade and Development Canada (DFATD)	<a href="http://www.international.gc.ca/international/index.aspx">http://www.international.gc.ca/international/index.aspx</a>
Immigration and Refugee Board (IRB)	<a href="http://www.irb-cisr.gc.ca/Eng/Pages/index.aspx">http://www.irb-cisr.gc.ca/Eng/Pages/index.aspx</a>
Department of Justice Canada	<a href="http://www.justice.gc.ca/eng/">http://www.justice.gc.ca/eng/</a>
Royal Canadian Mounted Police (RCMP)	<a href="http://www.rcmp-grc.gc.ca">www.rcmp-grc.gc.ca</a>
<b>Principal international organizations</b>	
Amnesty International	<a href="http://www.amnesty.ca">www.amnesty.ca</a>
United Nations High Commissioner for Refugees (UNHCR)	<a href="http://www.unhcr.org/cgi-bin/texis/vtx/home">http://www.unhcr.org/cgi-bin/texis/vtx/home</a>
Documents concerning the guidelines for applying exclusion and cessation clauses are found at this address as well as the <i>Handbook on Procedures and Criteria for Determining Refugee Status</i> .	
United Nations Organization (UNO)	<a href="http://www.un.org">www.un.org</a>
United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)	<a href="http://www.unrwa.org/">http://www.unrwa.org/</a>
<b>Case law</b>	
Immigration and Refugee Board (IRB)	<a href="http://www.irb-cisr.gc.ca/Eng/BoaCom/decisions/pages/index.aspx">http://www.irb-cisr.gc.ca/Eng/BoaCom/decisions/pages/index.aspx</a>
Federal Court of Canada	<a href="http://decisions.fct-cf.gc.ca/site/fc-cf/en/nav.do">http://decisions.fct-cf.gc.ca/site/fc-cf/en/nav.do</a>
Federal Court of Appeal	<a href="http://decisions.fca-caf.gc.ca/fca-caf/en/0/ann.do">http://decisions.fca-caf.gc.ca/fca-caf/en/0/ann.do</a>
Supreme Court of Canada (SCC)	<a href="http://www.scc-csc.gc.ca">www.scc-csc.gc.ca</a>
<b>International law</b>	
International Court of Justice	<a href="http://www.icj-cij.org">www.icj-cij.org</a>
International Criminal Tribunal for Rwanda	<a href="http://www.icttr.org">www.icttr.org</a>
Treaties of the United Nations	<a href="http://treaties.un.org/Home.aspx?lang=en">http://treaties.un.org/Home.aspx?lang=en</a>
<b>Other organizations</b>	
Australian Refugee Review Tribunal	<a href="http://www.rrt.gov.au">www.rrt.gov.au</a>
Canadian Council for Refugees	<a href="http://ccrweb.ca/en/home">http://ccrweb.ca/en/home</a>
European Council on Refugees and Exiles	<a href="http://www.ecre.org">www.ecre.org</a>
U.S. Committee for Refugees	<a href="http://www.refugees.org">www.refugees.org</a>
U.S. Department of Justice	<a href="http://www.usdoj.gov">www.usdoj.gov</a>
U.S. Department of State	<a href="http://www.state.gov">www.state.gov</a>
U.S. Immigration and Naturalization Service	<a href="http://www.uscis.gov/portal/site/uscis">http://www.uscis.gov/portal/site/uscis</a>
<b>The situation in countries</b>	
Immigration and Refugee Board, Responses to Information Requests	<a href="http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx">http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx</a>
U.S. Department of State Report on Human Rights Practices	<a href="http://www.state.gov/j/drl/rls/hrrpt/">http://www.state.gov/j/drl/rls/hrrpt/</a>
<b>Geographic maps</b>	

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National Geographic	<a href="http://plasma.nationalgeographic.com/mapmachine/index.html">http://plasma.nationalgeographic.com/mapmachine/index.html</a>
Texas Tech University Map Collection	<a href="http://www.lib.ttu.edu/maps/">http://www.lib.ttu.edu/maps/</a>

## Appendix E: National directive to hearings officers regarding credibility and program integrity interventions policy statement

The CBSA Inland Enforcement Program is mandated to ensure that the safety and security of Canada is not compromised by individuals who are non-compliant with the IRPA, including investigations; arrests; detentions, as required; and removals.

The Hearings Program consists of hearings officers appearing before the RPD on behalf of the Minister of IRCC or the Minister of PSEP when intervening in a refugee claim made by a foreign national.

This policy addresses the significant decrease in participation of hearings officers in credibility and program integrity interventions by the coming into force of the IRPA, as amended by the *Balanced Refugee Reform Act* (BRRRA) and the *Protecting Canada's Immigration Systems Act* (PCISA).

The purpose of this directive is to inform all regions of the CBSA hearings officers' grounds for intervention before the RPD.

CBSA hearings officers will continue to intervene in cases involving security and criminality, such as those involved in crimes against humanity, war crimes, and serious non-political crimes under article 1F of the Refugee Convention.

Interventions based solely on credibility, program integrity or article 1E of the Refugee Convention will temporarily fall under the responsibility of the Minister of IRCC and should be referred to the new IRCC Review and Intervention (R&I) office in Toronto. The IRCC pilot project has been established as a result of the coming into force of the amended IRPA and will be in place until 2015. IRCC senior immigration officers are located in satellite offices in Vancouver, Montréal, and the main R&I office in Toronto.

The Minister of PSEP will intervene in cases involving credibility, program integrity issues, and exclusion under article 1E of the Refugee Convention only in the following circumstances:

- hybrid cases (combined security or serious criminality and credibility/program integrity issues);
- detained cases;
- constitutional challenges;
- mass arrival cases; and
- people smuggling/human trafficking cases.

However, if a hybrid case is referred to CBSA Hearings and results in a determination that no intervention is warranted under article 1F of the Refugee Convention, CBSA Hearings will maintain carriage of the file and may intervene solely on program integrity or credibility grounds.

### Considerations

The Minister is bound by the new RPDR, and hearings officers should familiarize themselves with the RPDR and follow them accordingly.

This national directive is effective immediately, and ENF 24 has been updated accordingly.