Citizenship and Immigration Canada
Citoyenneté et Immigration Canada

ENF 6

Review of Reports under A44(1)

Canada

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Updates to chapter

Listing by date:

Date: 2005-10-31

Changes were made to reflect the transition from CIC to CBSA. The term “delegated officer” was replaced with “Minister’s delegate” throughout text; references to “departmental policy” were eliminated; references to CIC and CBSA officers and to the C&I Minister and the PSEP Minister were made where appropriate, as were other minor changes.

- **Appendix A was removed since no countries are listed under A102(1);**
- **Appendix B, C & D were renamed A, B & C;**
- **Other minor changes to correct mistakes or relating to terminology were also made.**

2004-08-11

ENF 6 - Review of Reports under A44(1) has been updated to reflect an amendment to R228. The amendment prescribes that inadmissibility reports with respect to unaccompanied minors and persons unable to appreciate the nature of proceedings who are unaccompanied must be referred to the Immigration Division if the Minister's delegate determines that a removal order should be sought.

2004-01-26

The title for section 23 of chapter ENF 6 in French has been amended and now reads as follows:

Statut de citoyenneté/Citoyens canadiens qui présentent une demande d'asile

2003-09-02

A minor change was made to section 3.8 and section 24 of ENF 6.

2003-06-19

Changes to section 3.3 and the addition of section 24 relate to the procedures to follow when issuing administrative removal orders on grounds of misrepresentation pursuant to R228(1)(b).

ENF 6 Review of Reports under A44(1)

1. What this chapter is about

This chapter provides guidance on the topic of administrative removal orders (departure, exclusion and deportation), reviewing reports prepared under A44(1), and referral of A44(1) reports to the Immigration Division (ID) of the Immigration and Refugee Board (IRB).

2. Program objectives

The *Immigration and Refugee Protection Act* (IRPA) allows the Minister's delegates to exercise certain decision-making authorities. In the context of this chapter, key decision-making authorities delegated by the Minister of Public Safety and Emergency Preparedness (PSEP) include the following:

- the authority to determine certain cases of admissibility and certain violations of IRPA; and
- the authority to make administrative removal orders.

As will become evident in this chapter, factors used in determining who is best placed to make certain enforcement decisions include whether the facts to be determined are straightforward or whether there are complex issues to be examined, such as criminality abroad.

Note: The constitutional guarantees available to all persons in Canada under the *Canadian Charter of Rights and Freedoms* apply to decisions made by Citizenship and Immigration Canada (CIC) and the Canada Border Services Agency (CBSA) officers.

3. The Act and Regulations

The Act provides authority to both members of the Immigration Division of the IRB and the Minister's delegates to issue removal orders, depending on the circumstances.

When determining whether a Minister's delegate should have jurisdiction to issue a removal order, the policy considerations to take into account are the complexity of the decision to be made and the latitude to decide the consequences of the order. The more discretion and analysis are required in assessing the situation and making a decision, the more likely the jurisdiction should rest with a member of the Immigration Division.

To streamline the enforcement process in cases involving straightforward decisions, and to maintain the principle that the Minister's delegates may make determinations in cases where there is little need to weigh evidence, IRPA empowers Minister's delegates to issue removal orders under the circumstances prescribed in the Regulations.

Table 1: Sections of the Act and Regulations applying to administrative removal orders

Provision	Section
Humanitarian and compassionate considerations	A25(1)
Inadmissible family member	A42
Preparation of report	A44(1)
Referral or removal order	A44(2)
Conditions	A44(3)
No return without prescribed authorization	A52(1)
Arrest and detention with warrant	A55(1)
Detention on entry	A55(3)
Notice	A55(4)

Release – officer	A56
Review of detention	A57(1)
Further review	A57(2)
Application for judicial review	A72(1)
Convention refugee	A96
Person in need of protection	A97
Criminality (see section 3.2 below)	R228(1)(a)
Misrepresentation (see section 3.3 below)	R228(1)(b)
Failure to comply (see section 3.4 below)	R228(1)(c)
Inadmissible family members (see section 3.5 below)	R228(1)(d)
Permanent residents and their residency obligation (see section 3.6 below)	R228(2)
Eligible claims for refugee protection (see section 3.7 below)	R228(3)
Unaccompanied minors (see section 3.8 below)	R228(4)(a)
Persons unable to appreciate the nature of proceedings (see section 3.8 below)	R228(4)(b)

See also chapter AD 13—Admissibility CPIC and Interpol Procedures for CIC.

3.1. Considerations

The Act provides for three types of removal orders that may be issued:

- departure order;
- exclusion order;
- deportation order.

The Regulations further specify the type of removal order that the Minister's delegate may make in prescribed circumstances. The Minister's delegate is given the power to issue removal orders against permanent residents only in cases where the sole basis for removal is loss of permanent resident status due to the inability to comply with the requirements of A28. In such cases, the order shall be a departure order [R228]. The power of the Minister's delegate does not extend to the loss of permanent resident status on other grounds.

3.2. R228(1)(a) – Criminality

In order to streamline the enforcement process, IRPA provides the Minister's delegates with the authority to issue deportation orders to foreign nationals convicted of an offence in Canada.

Simply put, the Minister's delegates may make a deportation order where a foreign national is inadmissible for having been convicted in Canada of serious criminality, as defined in A36(1)(a), or for having been convicted in Canada of an indictable offence or convicted of two offences under any Act of Parliament not arising out of a single occurrence.

Note: Proof of a conviction in Canada may consist of a certified copy of the conviction certificate or the warrant of committal. A certified copy of the court information containing the accusations against the person concerned, and indicating a conviction, can also be used. Further, if a person is not contesting a criminality allegation, then the person's admission of such criminality, which may also take the form of a statutory declaration, can also constitute sufficient evidence. In Canada, convictions may be confirmed through the Canadian Police Information Centre (CPIC). See ENF 13, CPIC Access and Warrant Management. See also ENF 1, Inadmissibility, and ENF 2, Evaluating Inadmissibility. CIC personnel should refer to AD 13—CPIC and Interpol Procedures for CIC.

3.3. R228(1)(b) – Misrepresentation

This provision allows the Minister's delegates to issue removal orders to foreign nationals who are deemed, under A40(1)(c), to be inadmissible for misrepresentation because the Refugee Protection Division (RPD) has vacated a decision to allow a claim for refugee protection on the basis that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter [A109].

In other words, where a removal order is to be issued, the Minister's delegates will make a deportation order when a foreign national is inadmissible on grounds of misrepresentation and the misrepresentation is the basis for a final decision to vacate the refugee or protected person status.

The Minister's delegate shall not issue the removal order until all court challenges to the decision to vacate the refugee protection claim have been resolved. R228(1)(b) can then be applied. This provision is also applicable to decisions granting applications to vacate that were rendered pre-IRPA, in which the Convention Refugee Determination Division (CRDD) decided that the determination was obtained by misrepresentation of any material fact. See section 24 below for the procedure on administrative removals.

3.4. R228(1)(c) – Failure to comply

The Minister's delegate will make an exclusion order in those instances where a foreign national fails to comply with the following requirements of IRPA:

- failure to appear for further examination or an admissibility hearing;
- failure to establish that they hold the visa or other document required by the Act;
- failure to leave Canada by the end of the period authorized for their stay; and
- failure to comply with any conditions imposed relating to members of a crew [R184].

The Minister's delegate will make a deportation order in the case of a foreign national who is inadmissible for failure to obtain the authorization of an officer before returning to Canada.

3.5. R228(1)(d) – Inadmissible family members

Where a removal order is to be issued, the Minister's delegate will make the following orders:

- a deportation order where a foreign national is inadmissible because of the inadmissibility of a family member and a deportation order has been made against that family member;
- an exclusion order where a foreign national is inadmissible because of the inadmissibility of a family member and an exclusion order has been made against that family member;
- a departure order where a foreign national is inadmissible because of the inadmissibility of a family member and a departure order has been made against that family member.

Note: Where a report relates to a family member, alleging a person to be inadmissible because a family member was deemed inadmissible and made the subject of a removal order by the Immigration Division, the Minister's delegates must first determine if the subject of the A44(1) report was included in the removal order issued by the Immigration Division. This is necessary as IRPA provides that, in certain circumstances, family members in Canada may be deemed by the Immigration Division to be included in a family member's A44(1) report and any resultant removal order issued by the Immigration Division [R227(2)]. Simply put, with respect to a report alleging inadmissibility and involving the family member inadmissibility provision A42, the first thing the Minister's delegates

should ascertain is that the subject of the report is not already included in a removal order issued by the Immigration Division.

3.6. R228(2) – Permanent residents and their residency obligation

The Minister's delegate is given the power to issue removal orders against permanent residents only in cases where the sole basis for removal is loss of permanent resident status due to the inability to comply with the requirements of A28. In such cases, a departure order will be issued. The power of the Minister's delegate does not extend to the loss of permanent resident status on other grounds.

3.7. R228(3) – Eligible claims for refugee protection

A removal order made with respect to a refugee protection claimant is conditional and will come into force only in prescribed circumstances **[**A49(2)].

3.8. R228(4) – Reports in respect of unaccompanied minors and persons unable to appreciate the nature of the proceedings

If a Minister's delegate is of the opinion that an A44(1) inadmissibility report is well-founded and the case involves a minor who is not accompanied by a parent or adult legally responsible for them, the Minister's delegate does not have jurisdiction to issue a removal order, regardless of the grounds. If the Minister's delegate determines that a removal order is warranted, the report must be referred to the Immigration Division of the IRB for an admissibility hearing. This also applies in the case of persons who are unable to appreciate the nature of the proceedings and who are not accompanied by a parent or adult legally responsible for them.

3.9. Administrative removal orders and their effects

IRPA contains provisions regarding the issuance of removal orders for persons who are found to be inadmissible on one of the grounds listed in the Act. A44(2) provides that the Minister's delegate may issue a removal order in the circumstances prescribed by the Regulations. A49(2) provides that removal orders made with respect to a refugee protection claimant are conditional and specifies the circumstances in which the order comes into force.

The Regulations specify the type of removal order that may be issued for each of the inadmissibility provisions. In establishing the type of removal order to be issued in relation to particular circumstances, the Regulations do not distinguish between removal orders that, under the Act, are conditional and those that are not.

The Minister's delegates are authorized to make removal orders at ports of entry and at inland offices. A44(2), R228(1), R228(2) and R228(3) allow the Minister's delegates to resolve uncomplicated cases of inadmissibility at ports of entry and uncomplicated infractions of IRPA at inland offices.

Departure orders

The Minister's delegate may make a departure order against a foreign national who makes a claim for refugee protection and is eligible to make such a claim, if the basis for the order is

- failure to appear for further examination or for an admissibility hearing;
- failure to leave Canada by the end of the period authorized for their stay; or
- failure to establish that they hold the visa or other document required by IRPA.

The Regulations provide that a departure order shall also be made where

- a foreign national is inadmissible because of the inadmissibility of a family member and a departure order has been made against that family member, or

- the Minister's delegate finds a permanent resident inadmissible for failing to comply with the residency obligations of A28.

The Act provides the Minister's delegate with the power to issue a removal order to permanent residents only in cases where the sole basis for removal is loss of permanent resident status due to the inability to comply with the requirements of A28. The power of the Minister's delegate does not extend to the loss of permanent resident status on other grounds.

The Regulations provide that a departure order requires foreign nationals to either leave or be removed from Canada. Departure orders become deportation orders where departure is not confirmed. The provisions respecting departure orders specify the following:

- an enforced departure order does not oblige a foreign national to obtain the authorization of an officer in order to return to Canada;

- a foreign national who is issued a departure order must satisfy the requirement related to departure from Canada within 30 days of the order becoming enforceable, failing which the order becomes a deportation order; and

- if the foreign national is detained within the 30-day period or the removal order is stayed, the 30-day period is suspended.

Exclusion orders

The Minister's delegate may make an exclusion order where a foreign national fails to comply with the following requirements of IRPA:

- failure to appear for further examination or an admissibility hearing;

- failure to establish that they hold the visa or other document required by the Act; or

- failure to leave Canada by the end of the period authorized for their stay.

An exclusion order may also be made where

- a foreign national is inadmissible because of the inadmissibility of a family member and an exclusion order has been made against that family member.

R225(1) & R225(3) respecting exclusion orders specify the following:

- an exclusion order obliges the foreign national to obtain the written authorization of an officer in order to return to Canada for a period of one year after the order has been enforced; and

- a foreign national who is issued an exclusion order as a result of being found inadmissible for misrepresentation must obtain the written authorization of an officer to return to Canada before a period of two years has elapsed since the order was enforced.

Deportation orders

The Minister's delegate has the authority to issue deportation orders to foreign nationals who are convicted of a criminal offence in Canada when the evidence is straightforward and does not require extensive analysis or weighing of evidence.

Persons who are deemed inadmissible under IRPA for misrepresentation, based on a decision by the Immigration and Refugee Board to vacate refugee status, will also be issued a deportation

order by the Minister's delegate without the need to re-establish the grounds of misrepresentation at an admissibility hearing.

The Regulations also give the Minister's delegate the power to issue deportation orders to foreign nationals who have previously been removed from Canada and who return without prior authorization.

Consequently, Minister's delegates may make a deportation order against a foreign national if they are inadmissible for the following reasons:

- on grounds of serious criminality in Canada, as defined in IRPA, or for having been convicted in Canada of an indictable offence or convicted of two offences under any Act of Parliament not arising out of a single occurrence;
- on grounds of misrepresentation where the misrepresentation is the basis of a final decision to vacate the refugee or protected person status;
- for non-compliance with the requirement to obtain the authorization of an officer before returning to Canada; or
- because of the inadmissibility of a family member where a deportation order has been made against that family member.

The provisions respecting deportation orders specify that

- receipt of a deportation order obliges a foreign national to obtain the written authorization of an officer to return to Canada at any time after the order is enforced.

3.10. Forms

The forms required are shown in the following table:

Table 2: Forms

Form title	Form number
Denial of Authorization to Return to Canada Pursuant to Subsection 52(1) of the *Immigration and Refugee Protection Act*	IMM 1202B
Authorization to Return to Canada Pursuant to Section 52(1) of the *Immigration and Refugee Protection Act*	IMM 1203B
Exclusion Order	IMM 1214B
Deportation Order	IMM 1215B
Notice to Appear for a Proceeding under Subsection 44(2)	IMM 1234B
Review of Detention by Officer - (Pursuant to Section 56 of the *Immigration and Refugee Protection Act*)	IMM 1439E
Subsection A44(1) Highlights - Port of Entry Cases	IMM 5051B
Subsection 44(1) and A55 Highlights - Inland Cases	IMM 5084B
Departure Order	IMM 5238B
Request for Admissibility Hearing/Detention Review	IMM 5245B

4. Instruments and delegations

Pursuant to A6(1), both the Minister of Citizenship and Immigration (C&I) and the Minister of Public Safety and Emergency Preparedness (PSEP) have the authority to designate specific persons as officers to carry out any purpose of any provision of the *Immigration and Refugee Protection Act* (IRPA) with respect to their respective mandate as described in A4, and have specified the powers and duties of the officers so designated. In addition, A6(2) authorizes that anything that may be done by each Minister under the Act and

Regulations may be done by a person that the Minister authorizes in writing. This is referred to as a delegation of authority.

While the PSEP Minister has the policy lead for enforcement with respect to the IRPA as per A4, Citizenship and Immigration Canada (CIC) continues to be responsible for screening applicants for inadmissibility and for acting on that responsibility according to their delegated authority.

The PSEP Minister has designated officers of both the Canada Border Services Agency (CBSA) and CIC to write reports and has delegated the review of those reports to officers of both the CBSA and CIC. For full information, the Designation of Officers and Delegation of Authority documents signed by the PSEP Minister and by the C&I Minister can be found in IL 3 at http://www.ci.gc.ca/Manuals/index_e.asp. As a general rule, CIC officers have been designated the authority to write reports for all allegations except A34 (security grounds), A35 (grounds of violating human or international rights), and A37 (grounds of organized criminality), which cases will be referred to the CBSA. The Minister's delegates at CIC will review all reports written by CIC officers and have the authority to either issue removal orders or refer the reports to the Immigration Division.

5. Departmental policy

5.1. Procedural fairness

The principles of procedural fairness apply to the exercise of a Minister's delegate's powers. In this context, it includes the right of persons affected by a decision to a fair process; the opportunity to know the case one has to meet and respond to it; and the right to be tried by an independent and impartial decision-maker (that is, as a disinterested decision-maker).

The decisions of the Minister's delegates about admissibility may be subject to judicial review, with leave, by the Federal Court of Canada. Certain decisions that the Minister's delegates make may be subject to appeal to the Immigration Appeal Division (IAD).

It is important for the Minister's delegates to make notes detailing the process followed in exercising their decision-making powers. The Minister's delegates have case highlight forms for both port-of-entry and inland processes [IMM 5051B and IMM 5084B, respectively]; these forms should be completed in as much detail as possible.

Persons must be informed of the nature of the allegations made against them in the report(s) at the earliest opportunity, and must be given a reasonable opportunity to respond to those allegations before a removal order is issued.

Where persons have been detained, they must also be informed of their right to retain and instruct counsel.

The Minister's delegates should put on file any additional notes detailing, for example, the identity and presence of counsel, circumstances relating to detention or release, and the basis for any decision they might take.

In reaching a decision, the Minister's delegates must take into account any representations made by persons or by their counsel and make particular note of the nature and content of these representations.

Officers will usually conduct examinations, interviews and/or reviews in the presence of the person concerned (and counsel, where applicable); however, in certain circumstances, such a proceeding may also be conducted by telephone or by other means of live telecommunication with the person concerned.

5.2. Burden of proof

The burden of proof is the obligation to demonstrate that a fact at issue is proved or disproved. The burden of proof, in the context of immigration legislation, refers to who is responsible for establishing admissibility to Canada.

A45 is the legislative authority regarding who has the burden of establishing admissibility (see also sections A21 and A22 for foreign nationals).

Pursuant to A45(d), the burden of establishing admissibility depends on whether or not the person has been authorized to enter.

In immigration matters, unless otherwise specified, the standard of proof is the balance of probabilities. This means that the evidence presented must show that the facts as alleged are more probable than not.

At a port of entry, the burden of proving whether a person has a right to enter Canada, or is or may become authorized to enter and remain in Canada, rests with that person. Officers must ensure that all admissibility decisions can be supported in fact and in law.

Generally, the burden of proving that a person in Canada should not be allowed to remain, and should therefore be removed, rests with the PSEP Minister.

Table 3: Burden of proof for authorization of persons to enter Canada

Persons authorized/not authorized to enter	Details
Permanent residents and foreign nationals authorized to enter	A45(d) requires the Immigration Division to make a removal order against a permanent resident, or a foreign national who has been authorized to enter Canada, if satisfied that they are inadmissible. Consequently, in cases involving persons with lawful status in Canada, including permanent residents, the onus rests with the PSEP Minister to establish that the person is inadmissible. Once an admissibility hearing has commenced, an officer must be prepared to offer evidence to support the allegation(s) of inadmissibility and rebut any statements that may be made by the person concerned.
Foreign nationals not authorized to enter	A45(d) requires the Immigration Division to make a removal order if it is not satisfied that a foreign national who has not been authorized to enter Canada is not inadmissible. A21(1) and A22(1) provide that a foreign national may obtain permanent or temporary resident status if an officer is satisfied that, *inter alia*, the person is not inadmissible. This applies to persons seeking entry into Canada and those persons who have entered illegally. Consequently, the onus is on these persons to establish that they are not inadmissible. Synopsis: In cases where the Minister's delegate has jurisdiction under A44(2) to make a removal order and the person does not hold status, the burden of proof lies with the person.

5.3. Duty to provide information

A person claiming at a port of entry or who makes an application at an inland office that they should be allowed to come into or be authorized to enter or remain in Canada, as the case may be, must truthfully provide such information as an officer may require for the purpose of the examination [A16(1), A20(1)].

The same obligation applies to persons claiming to be refugees who are referred for a determination of eligibility [A100(4)].

These sections of IRPA place the person concerned under a legal obligation. Although there is no way of compelling persons to provide truthful information, knowingly providing false or misleading information is an offence under A127 [Misrepresentation].

5.4. Notification to persons of their right to appeal/file an application for judicial review

If a statutory appeal, as may be provided for by IRPA, has not been resolved, neither the PSEP Minister nor the person concerned may appeal to the Federal Court.

Where no statutory right of appeal exists, or those rights have been exhausted, there is a right to seek judicial review with respect to any matter arising from the application of IRPA by filing an application for leave and judicial review to the Federal Court pursuant to A72(1).

Notice of right to appeal to the Immigration Appeal Division

When a Minister's delegate makes a removal order against a person who may have a right to appeal that decision to the IAD, the officer must advise the person of that right.

This is easily accomplished by giving the person concerned a notification of appeal form and informing them of their right to appeal.

The Minister's delegate is also to provide the person with the address and telephone number of the IAD registry office so that the person, if they so choose, may file a notice of appeal with the Registrar.

The Minister's delegate should obtain a written acknowledgement from the person that they have been advised of their right to appeal to the Immigration Appeal Division and place it in the case file.

For example, a written acknowledgment may take the following form:

> I acknowledge being informed that I have a right to appeal the removal order issued against me to the Immigration Appeal Division of the Immigration and Refugee Board, and that I have 30 days from the date of the removal order to file such notice of appeal with the Immigration Appeal Division.
>
> I also acknowledge having received a notice of appeal form, which I understand is the form to be used to file an appeal with the Immigration Appeal Division.
>
> Signature:
>
> Date:

Note: The Minister's delegates may also choose to add an interpreter's block, where applicable, and include a paragraph concerning interpretation standards (for example, a paragraph detailing that the information was interpreted truthfully, an area for the interpreter's signature, etc.).

Notice of right to file an application for leave and judicial review

When a Minister's delegate makes a removal order against a person who does not have the right to appeal to the Immigration Appeal Division, the officer is to advise the person of their right to file an application for leave and judicial review with the Federal Court.

There is only one valid way to serve an application for leave and judicial review upon the PSEP Minister: it must be delivered to the appropriate office of the Department of Justice.

The Minister's delegates should obtain a written acknowledgment from the person stating that they have been advised of their right to file an application for leave and judicial review, and place it in the case file.

Applications for leave and judicial review must be filed within 15 days of the date of the removal order.

See also ENF 19, Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB); ENF 9, Judicial Reviews; and ENF 10, Removals.

5.5. Official Languages Act

Members of the public have a right to communicate with employees of Citizenship and Immigration Canada and the Canada Border Services Agency (CBSA) in the official language of their choice, either French or English. A Minister's delegate who speaks the official language requested will be made available .

5.6. Interpreters

The Minister's delegates must be satisfied that the person concerned is able to understand and communicate in either of the official languages in which the proceeding is being held. If need be, an interpreter is to be provided to enable the person to understand and communicate fully. When the services of an interpreter cannot be obtained, the Minister's delegates may adjourn on grounds of operational necessity.

5.7. Counsel

A person does not have a right to counsel at removal order determinations and eligibility determinations, unless the individual is detained.

Notwithstanding the lack of a right to counsel, the Minister's delegates should permit counsel to attend an administrative removal order determination or eligibility determination, as long as counsel is ready, willing and able to proceed immediately.

Counsel includes a barrister, solicitor, family member, consultant or friend.

Note: Participation by counsel involves speaking on the client's behalf, presenting evidence and making submissions on the issues. Allowing counsel to participate, if ready to do so, does not mean that the Minister's delegates are required to tolerate disruptive or discourteous behaviour by counsel. Where such conduct is encountered, the proceeding may be terminated.

6. Definitions

Minor

A minor may be defined as a person under the age of 18 years. Persons claiming to be less than 18 years of age are to be treated as minors unless there is conclusive evidence that they are 18 years old or older.

Persons unable to appreciate the nature of proceedings

This phrase refers to persons who cannot understand the reason for the hearing or why it is important, or cannot give meaningful instructions to counsel about their case. An opinion regarding competency may be based on the person's own admission, the person's observable behaviour at the proceeding, or an expert opinion on the person's mental health or intellectual or physical faculties.

Adult legally responsible

An adult legally responsible for a minor or suspected incompetent person may be their parent or legal guardian. If the accompanying adult is not a parent or guardian, reasonable efforts must be

made to contact a parent or guardian. For more information on accompanying adults, please refer to ENF 21, Recovering Missing, Abducted and Exploited Children.

7. Procedure: Unaccompanied minors and persons unable to appreciate the nature of the proceedings

If a Minister's delegate is of the opinion that an A44(1) inadmissibility report is well-founded and the case involves a minor who is not accompanied by a parent or adult legally responsible for them, the report must be referred to the Immigration Division of the IRB for an admissibility hearing. This also applies in the case of persons who are unable to appreciate the nature of the proceedings and are not accompanied by a parent or adult legally responsible for them. If it is questionable whether a person is an unaccompanied minor or unable to appreciate the nature of the proceedings, the Minister's delegates should err on the side of caution and refer the report to the Immigration Division so that a representative may be appointed.

The Minister's delegate must include in the information provided to the Immigration Division that the person is less than 18 years of age or is suspected of being unable to appreciate the nature of the proceedings. In accordance with Immigration Division Rule 18, if counsel for a party believes that the Immigration Division should designate a representative for the subject of the hearing, they must, without delay, notify the Division and the other party in writing. If counsel for a party is aware of a person in Canada who meets the requirements to be designated as a representative, counsel must provide the person's contact information in the notice.

The IRB member presiding at the proceeding will determine whether to designate a representative and who that representative will be. The Immigration Division Rules specify that a designated representative must be:

- 18 years of age or older;
- able to understand the nature of the proceedings;
- willing and able to act in the best interests of the person concerned; and
- without interests that conflict with those of the person concerned.

8. Procedure: Handling possible claims for refugee protection

Although there is no requirement in IRPA for the Minister's delegates to ask whether the subject of a determination wishes to make a claim for refugee protection, the Minister's delegates should be aware of Canada's obligation under the *United Nations Convention relating to the Status of Refugees*, and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

A99(3) excludes persons under removal order from making a claim for refugee protection. Therefore, the Minister's delegates should satisfy themselves that removal would not be contrary to the spirit of Canada's obligations before issuing an order, even when the subject does not explicitly request access to the refugee determination process.

It must also be recognized that some people who may have a legitimate need of Canada's protection are unaware of the provision for claiming refugee status.

There is a set of procedures for handling a possible claim for refugee protection:

- Where the subject of a determination for an administrative removal order has not made a claim, the Minister's delegates should ask the person how long they intend to remain in Canada.

- If the person indicates that their intention is or was to remain temporarily, the Minister's delegates should proceed with the removal order decision and issue the removal order, if appropriate.

- If the person indicates that their intention is or was to remain in Canada indefinitely, the Minister's delegates are to inquire about their motives for leaving their country of nationality and the consequences of returning there before making a decision on issuing a removal order.

- Where the responses indicate a fear of returning to the country of nationality that may relate to refugee protection, the Minister's delegates are to inform the subject of the definition of a "Convention refugee" or "person in need of protection" as found in A96 and A97 and ask whether they wish to make a claim.

- Where the subject indicates an intention not to make a claim, the Minister's delegate should proceed with the decision and issue a removal order, if appropriate.

- Where the subject is uncertain, the Minister's delegates are to inform the person that they will not be able to make a claim for refugee protection after a removal order has been issued [A99(3)] and provide the person with an opportunity to make the claim before proceeding with a removal order decision.

- If the person does not express an intent to make a claim, despite the explanation that this is the person's last opportunity, the Minister's delegates should proceed with the decision and issue the removal order, if appropriate.

- Whenever the person indicates a fear of returning to their country of nationality, the Minister's delegates are to refrain from evaluating whether the fear is well-founded. As well, the Minister's delegates must not speculate on the person's eligibility before they have made a refugee claim, nor speculate about the processing time or eventual outcome of a claim.

These procedures do not preclude any subject from making a claim to Convention refugee status at any time before a removal order is issued, regardless of the responses provided to the officer.

In order to address concerns that may arise subsequent to the issuing of a removal order, it is important that the notes accurately reflect—in detail—the questions asked and the information provided by the subject during an exchange such as the aforementioned.

9. Procedure: Adjournment

Adjournment of an administrative removal order determination proceeding will rarely be necessary. In exceptional circumstances, the Minister's delegates may have to consider a request for adjournment to ensure that a person has a reasonable opportunity to provide more evidence.

The Minister's delegates may have to initiate adjournment for operational reasons, such as the lack of an interpreter. Adjournment should not be used as a tool of administrative convenience.

The Minister's delegates should not consider a request for adjournment to provide additional information unless all of the following conditions have been met:

- there are strong indications that the person can easily produce additional documents relevant to the inadmissibility report determination;

- the Minister's delegates believe the person's indications to be credible; and

- the person has not yet been given a reasonable chance to present additional documents.

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The Minister's delegates should keep in mind the provisions of A44(3), A55(3) and A56, which provide authority to detain and release persons, and impose conditions—including the payment of a deposit or the posting of a guarantee—following the adjournment of an examination of a person who is the subject of a report made under A44(1).

See also ENF 8, Deposits and Guarantees.

10. Procedure: Completing orders

The Minister's delegates must remember that any removal order made may ultimately be subject to a judicial review proceeding. It is important that the Minister's delegates complete these documents fully and accurately.

Removal orders will normally be generated by full document entry in the Field Operational Support System (FOSS). If FOSS is temporarily unavailable, the Minister's delegates are to proceed as follows:

- complete a hardcopy of a Departure Order [IMM 5238B], an Exclusion Order [IMM 1214B] or a Deportation Order ÎMM 1215B] using clear, legible bold print or a typewriter (if available);
- ensure that the subject's name is spelled correctly;
- complete the subject's date of birth in the format indicated on the form;
- insert the applicable country name in the country of birth and country of citizenship fields—country codes are not to be used;
- complete the allegation section on the order using the allegation wording found in the Immigration FOSS User Guide;
- check off the box on the departure order indicating whether it is an enforceable order;
- sign and date the document;
- ensure that the order is interpreted and that the interpreter declaration is completed and signed, if appropriate;
- ask the subject of the order, if present, to sign and date the order indicating receipt of a copy. If the subject refuses to sign, the Minister's delegates should make the notation "refused to sign" in the space reserved for the person's signature;
- complete the "Date Delivered" and "Delivered by (Mail or in Person)" fields in all cases. If the subject of the order is present and receives a copy of the order, the date delivered is the effective date of the departure, exclusion or deportation order. If the subject of the order is not present, the date delivered is the date the order is mailed and will always be the same as, or later than, the date signed (it must be remembered that the subject of the order is deemed to have been notified of the order seven days after the decision is mailed); and
- distribute the form as follows:
    - for departure orders, give copy 2 to the client, send copy 3 to CIC National Headquarters (CIC NHQ) for microfilming and send copy 5 to counsel, if available. Retain the other copies on file;

- for unenforceable departure orders, give copy 2 to the client and copy 5 to counsel, if available. Retain the other copies on file;
- when the departure order becomes enforceable, complete the bottom portion of copy 3 and send it to CIC NHQ for microfilming;
- for exclusion orders, distribute as indicated on the form and send copy 3 to CIC NHQ immediately for microfilming; and
- for deportation orders, distribute as indicated on the form and send copy 3 to CIC NHQ immediately for microfilming.

11. Procedure: Obligations under the *Immigration Division Rules*

Under Rule 24(1) of the *Immigration Division Rules*, any document to be used in a proceeding must be typewritten or be a clear and readable photocopy on one side of a 21.5 cm x 28 cm (8 ½" x 11") paper.

With the exception of original documents such as photographs, handwritten notes, letters, birth certificates or documents that cannot be made conform to the requirements set out in Immigration Division rule 24(1), all documentation destined for the Immigration Division (for example, an officer's statutory declaration), must be in compliance with the Immigration Division's designated size requirements.

In those cases where a document destined for the Immigration Division exceeds or does not otherwise comply with the Immigration Division's exceptions or designated size requirements, officers must use the office photocopier to reduce or enlarge the document, as appropriate.

12. Procedure: Obligations under the *Immigration Appeal Division Rules*

The Minister's delegates will encounter three circumstances in which a person against whom they have made a removal order may have a right of appeal to the Immigration Appeal Division:

- a foreign national who holds a permanent resident visa;
- a permanent resident; and
- a protected person.

When the Minister's delegates make a removal order against a person who may have a right to appeal that decision to the IAD, the Minister's delegates must advise the person of that right.

The Minister's delegates simply have to give the person concerned a notification of appeal form and inform them of their right to appeal.

The Minister's delegates are also to provide the person with the address and telephone number of the IAD registry office so that the person may file a notice of appeal, if they so choose, with the Registrar.

The Minister's delegates should obtain a written acknowledgment from the person stating that they have been advised of their right to appeal to the Immigration Appeal Division and place it in the case file. See also section 5.4 above.

Where a person has a right to appeal, removal orders are stayed until the end of the appeal period expires (30 days) if no appeal is made, and until the day of final determination of the appeal, if an appeal is made.

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If an appeal proceeds, pursuant to the *Immigration Appeal Division Rules*, all parties must be served with a certified true copy of the record. An appeal record consists of the following:

- a certified true copy of the removal order;
- any documents that are relevant to the removal order or to any other issue in appeal, including a copy of any report and/or direction or any statement of arrest concerning the appellant;
- any written reasons for the decision to make a removal order; and
- a table of contents.

A certified copy of the appeal record must be filed with the Immigration Appeal Division registry office. A certified copy must also be provided to the appellant. One copy should be retained in the case file, and a further copy should be forwarded to the regional appeals office as quickly as possible.

Note: The IAD Rules require that a written statement indicating how and when the appellant was provided with the record be included with their copy of the record. A sample statement of service can be found in Appendix E, chapter ENF 19, Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB).

See also ENF 19, and ENF 10, Removals.

13. Procedure: Handling persons who are detained

Persons who are detained must be given full reasons for their detention, be informed without delay of their right to retain and instruct counsel for the purpose of a detention review, and be given a reasonable opportunity to exercise that right.

A reasonable opportunity would include, for example, providing access to a telephone and telephone directory (with an interpreter, if needed) and informing the individual of the possibility of applying for such legal aid as may be available in the applicable province or territory.

The Minister's delegates must respect the strict time frames for detention review. If counsel for detention review is not yet retained or cannot be present within the prescribed period of time, the detention review must proceed in the absence of counsel.

13.1. Taping proceedings

Courts have not imposed an obligation to record proceedings or to allow proceedings to be recorded. There is, therefore, no obligation to allow a request to tape or digitally record an administrative removal order determination proceeding or an eligibility proceeding.

13.2. Providing counsel

For more information, see section 5.7 above.

14. Procedure: Detention and release authority

14.1. Detention

A CBSA officer's authority to detain after making a removal order can be found in A55.

If officers are of the opinion that the reasons for the detention no longer exist, and if the Immigration Division has not yet conducted a review of the reasons for continued detention, officers may order a permanent resident or a foreign national to be released from detention [A56].

The authority for officers to impose conditions on release, including the payment of a deposit or the posting of a guarantee for compliance with conditions, can be found in A56.

See also ENF 8, Deposits and Guarantees.

The Act provides that if a permanent resident or a foreign national is taken into detention, an officer must without delay give notice to the Immigration Division [A55(4)].

The Act further provides that where a person has been detained because an officer has grounds to believe the person to be inadmissible and a danger to the public or unlikely to appear for examination, an admissibility hearing, removal from Canada or a proceeding that could lead to the making of a removal order by the Minister, and such an occurrence does not take place within 48 hours after detention, or without delay afterward, the person must be brought before the Immigration Division for a review of the reasons for continued detention [A57(1)].

Thereafter, a detention review by the Immigration Division shall take place at least once during the seven days following and at least once during each 30-day period following each previous review [A57(2)].

The test that officers use to reach decisions concerning detention and release is “reasonable grounds to believe.” This expression means more than mere suspicion but less than the civil test of “balance of probabilities.” It is a lower threshold than the criminal standard of “beyond a reasonable doubt.” It is a *bona fide* belief in a serious possibility based on credible evidence.

Put another way, the reasonable grounds test is a set of facts and circumstances that would satisfy an ordinarily cautious and prudent person, and that are more than mere suspicion. Information used to establish reasonable grounds should be specific, credible and received from a reliable source.

See also section 13 above and ENF 20, Detention.

14.2. Release

As indicated in section 14.1 above, if officers are of the opinion that the reasons for the detention no longer exist, and if the Immigration Division has not yet conducted a review of the reasons for continued detention, officers may order a permanent resident or a foreign national to be released from detention [A56].

When officers review a detention, a Release Hearing form (IMM 1439E) should be completed so that a record may be kept of what took place. Officers may release the person on conditions considered appropriate, including the payment of a deposit or the posting of a guarantee for compliance with conditions that the officer considers necessary.

See also ENF 20, Detention, and ENF 8, Deposits and Guarantees.

15. Procedure: Issuing removal orders when a Minister’s delegate is not on-site

A44(1) requires that inadmissibility reports be transmitted to the Minister after being prepared. Upon receipt of an A44(1) report, the Minister’s delegate may, if of the opinion that the report is well-founded, refer the report to the Immigration Division for an admissibility hearing or, in specific circumstances, issue a removal order.

As officers cannot prepare and then review/determine their own report, in those instances where a Minister’s delegate is not physically on-site and/or otherwise available to conduct a review and determination in person, officers must contact a Minister’s delegate by telephone for the purposes of reviewing and determining the A44(1) report.

All A44(1) report reviews and determinations conducted by telephone must have an A44(1) case highlights form [IMM 5051B or IMM 5084B] completed by the officer. The officer who contacts the Minister's delegate must also undertake to make full and complete notes throughout all phases of the review and determination proceeding conducted by the Minister's delegate.

The officer must ensure that all notes made are kept with the case file so that a proper record exists. The officer, on behalf of the Minister's delegate, must also append to the case highlights form a written narrative of the Minister's delegate's decision and, if applicable, any other comments and/or instructions that the Minister's delegate wishes to have recorded.

In those cases where the Minister's delegate has jurisdiction to issue a removal order, officers must be particularly diligent to ensure that all matters relating to natural justice and procedural fairness are satisfied.

If, for any reason, the opportunity does not exist for the person concerned to talk to the Minister's delegate via speakerphone or if, for any reason, the Minister's delegate is of the opinion that the person concerned does not truly appreciate the nature of the proceedings, then no decision on the report is to be rendered until a Minister's delegate is physically on-site and able to conduct a review and determination of that report in person.

With respect to all manner of documentation that a Minister's delegate might issue, including a removal order, an officer must issue such documents on behalf of the Minister's delegate only after having received the express verbal authorization from the Minister's delegate to do so, and then only on condition that the officer signs such documents on behalf of the Minister's delegate.

Note: If, for any reason, a Minister's delegate does not wish to proceed with or otherwise continue with a telephone review and determination of an A44(1) report, the officer must either conclude the case as though no Minister's delegate were involved, or must deal with the case as though an in-person Minister's delegate review is required. In other words, the officer is not to contact other Minister's delegates by telephone if one such delegate has already been contacted and, for whatever reason, has declined to conduct an A44(1) telephone review.

16. Procedure: Issuing removal orders to persons *in absentia*

In absentia is Latin for "in absence," or more fully, in one's absence.

In the context of IRPA, the practical application of an *in absentia* proceeding will be in those occasional instances when a person who is subject to a Minister's proceeding has a removal order made against them without being present when the removal order was issued.

It should be noted that, in the context of an *in absentia* proceeding, the Minister's delegates should not issue a removal order against someone with whom no contact has been had with CIC or the CBSA. Where there are reasonable grounds to believe that a person is unlikely to appear for a determination proceeding by the Minister's delegate, it is suggested that a notice be provided immediately to the person concerned, indicating that failure to appear for their determination proceeding may result in the issuance of a removal order in their absence.

In addressing the issue of procedural fairness, the following *in absentia* procedures meet the principles of procedural fairness so long as reasonable efforts have been made to give the person concerned an opportunity to be cooperative. Procedural fairness requires that the person concerned be given an opportunity to be heard. Where a person is not cooperative and reasonable efforts have been made to give them the opportunity to be heard, it is not contrary to the principles of procedural fairness to proceed *in absentia*.

The following guidelines require that a minimum of two notices be made to a person before an order may be issued.

Officers should note that *in absentia* proceedings are not without precedence. For instance, in criminal trials in some jurisdictions, when a person walks out or escapes after a trial has begun,

the accused is viewed as having waived their constitutional right to face their accusers. *In absentia* proceedings are also quite common in other civil proceedings, such as minor traffic violations.

16.1. Handling *in absentia* proceedings

There are three stages for *in absentia* proceedings.

Stage one

In some cases, a person may be reported pursuant to A44(1), and the review of that report by the Minister's delegate will not take place until a Minister's delegate is available.

In such cases, unless the person is detained, after writing the report, officers will give or otherwise mail to the person a Notice to Appear for a Proceeding under subsection 44(2) [IMM 1234B], notifying them of the location, date and time for a Minister's determination proceeding.

Officers will also inform the person that a Minister's proceeding may lead to a removal order against them and that, if they do not appear for the scheduled proceeding, a Minister's delegate may determine the report in their absence.

Stage two

If the person does not appear for the scheduled A44(2) Minister's proceeding, has not contacted the responsible officer or office where the A44(1) report originated (to state why they were unable to attend the scheduled Minister's determination proceeding), and has not been detained, then an officer will either hand-deliver to the person a second Notice to Appear for a Proceeding under subsection 44(2) IMM 1234B) or mail it to their last known address as it appears on record. This form will indicate a location, date and time for a Minister's proceeding.

Officers must clearly write or otherwise indicate "second notice" on this second notification.

If a second notification is being mailed, officers are to ensure that all reasonable efforts have been made to verify the accuracy of the person's address; this includes checking FOSS for specific client address information.

The second notification will inform the person concerned that they are the subject of an A44(1) report; that a Minister's proceeding has consequently been scheduled for a specific date, time and location; that, if they do not appear for the scheduled proceeding, a Minister's delegate may determine the report to be well-founded in their absence; and that, as a result of that determination, a Minister's delegate may make a removal order against them.

Final stage

If, after a second scheduled Minister's proceeding, the person concerned has still not appeared and the responsible officer and/or office where the A44(1) report originated has received no notice or other indication from the person stating why they were unable to attend the second proceeding, then an A44(2) proceeding may be conducted by a Minister's delegate in the person's absence.

All *in absentia* proceedings will require a Minister's delegate to conduct a paper review of the report with all relevant evidence available at the time of the review. If, after such review, the Minister's delegate determines the report to be well-founded, and if all grounds of inadmissibility are those for which the Minister's delegate has jurisdiction, a removal order may be made against the person concerned even though that person is not present at the time the removal order is issued.

At this point, officers should also consider issuing a warrant for the arrest and detention of the person concerned pursuant to A55(1) for removal from Canada.

See also ENF 7 Investigations and Arrests.

17. Procedure: Included family members and persons accompanying family members

Officers may need to assemble information about the family members of a person who is the subject of a report, or persons whose family member is the subject of a report, and decide whether the family member(s) should also be reported and/or made subject to a removal order by the Minister's delegate or the Immigration Division.

Officers should always consider including family members in order to avoid separating families or having family members abandoned when one member must be removed from Canada.

R1(3) provides that:

> For the purposes of the Act, other than section 12 and paragraph 38(2)(*d*), and for the purposes of these Regulations, other than sections 159.1 and 159.5, "family member" in respect of a person means
> (*a*) the spouse or common-law partner of the person;
> (*b*) a dependent child of the person or of the person's spouse or common-law partner; and
> (*c*) a dependent child of a dependent child referred to in paragraph (*b*).

In cases involving allegations within the Minister's delegate's jurisdiction, a separate A44(1) inadmissibility report is required for each family member. In cases where the Immigration Division is involved, family members may be included in a removal order, unless the family member is a Canadian citizen or a permanent resident, without the need for a separate inadmissibility report.

R227(2) provides that in the case of a report and a removal order made by the Immigration Division against a foreign national who has family members in Canada, the removal order may be made effective against the family member(s) provided that:

- an officer informed the family member(s) of the report;
- an officer informed the family member(s) that they are the subject of an admissibility hearing and, consequently, have the right to make submissions or representations at the admissibility hearing; and
- the family member is subject to a decision that they are inadmissible under A42 on grounds of being an inadmissible family member.

Note: For the purposes of A52(1), the making of a removal order against a foreign national on the basis of inadmissibility under A42(b), that is, being an inadmissible family member, is prescribed as a circumstance that does not oblige the foreign national to obtain the authorization of an officer in order to return to Canada.

Synopsis:

In cases involving allegations within the jurisdiction of the Minister's jurisdiction, each family member must be the subject of an individual report; that is, a separate A44(1) inadmissibility report is required for each family member.

The Minister's delegates can make removal orders only against persons about whom a report has been written—the Minister's delegates cannot include family members in an administrative removal order relating to another member of the family.

18. Procedure: Charter arguments

The Minister's delegates may occasionally be asked, in the course of an administrative removal order proceeding, to rule on the constitutionality of certain provisions of IRPA. The Minister's delegates may also be asked to delay eligibility or admission procedures so that the person

concerned may make an application to the Federal Court on the constitutionality of a provision of IRPA.

Legal advice has been received to the effect that the scheme of the Act does not envision decisions by the Minister's delegates on constitutionality. Under IRPA, officers have very limited jurisdiction. Additionally, the decision-making process is not a formalized court-like hearing process and involves applying rather than interpreting the Act.

This situation is in contrast to the Immigration and Refugee Board tribunals, which have been granted sole and exclusive jurisdiction to hear all questions of law and fact.

As a result of the legal analysis received, the Minister's delegates should use the following phrase if they are asked to rule on the constitutionality of a provision under IRPA:

> Officers do not have jurisdiction to deal with Charter issues under section 52 of the *Constitution Act*. Furthermore, officers are not considered a court of competent jurisdiction and as such cannot grant remedies sought under section 24 of the Charter.

If the Minister's delegates are requested to delay eligibility or admissibility procedures so that persons may make an application to the Federal Court on the constitutionality of a provision of IRPA, the Minister's delegates are to advise such persons that the legal process permits application to the Court to be made following the decision on eligibility or admissibility. Consequently, there is no reason, based on a Charter argument, to permit a delay of procedures for the purpose of pursuing any Federal Court application.

To view the *Canadian Charter of Rights and Freedoms*, see the Department of Justice Web site at http://laws.justice.gc.ca/en/charter/index.html.

19. Procedure: Decisions to refer a report to the Immigration Division of the IRB

In cases where the Minister's delegate does not have jurisdiction to issue a removal order, the Minister's delegate may refer the report to the Immigration Division of the Immigration and Refugee Board if satisfied that the report is well-founded. At the end of the admissibility hearing, the member of the Immigration Division will, pursuant to A45(d) of IRPA, make the applicable removal order against the person, if satisfied that the person is inadmissible.

Before referring a report that is believed to be well-founded to the Immigration Division for an admissibility hearing, the Minister's delegate must assess each case on its own merits. This section is intended to assist officers in making decisions that are consistent with the objectives of IRPA; it is not intended to restrict Minister's delegates in the lawful exercise of their discretion. What follows are guidelines only.

19.1. A44(1) reports concerning foreign nationals

Decisions to refer a report to the Immigration Division for an admissibility hearing should be guided by the same factors considered when determining whether to write an inadmissibility report concerning a foreign national, or whether to issue a removal order in cases where the Minister's delegate has jurisdiction to do so.

[See also ENF 5, Writing A44(1) Reports; specifically, section 8.1, Considerations before writing an A44(1) report.]

19.2. A44(1) reports concerning permanent residents of Canada

The relative weight of the factors involved in determining whether to recommend a referral to the Immigration Division will vary depending on the circumstances of the case. The following non-exhaustive list of factors may be considered in both criminal and non-criminal cases:

- **Age at time of landing—**Has the person been a permanent resident of Canada since childhood? Was the permanent resident an adult at the time of admission to Canada?

- **Length of residence—**How long has the permanent resident resided in Canada after the date of admission?

- **Location of family support and responsibilities—**Are family members in Canada emotionally or financially dependent on the permanent resident? Are all extended family members in Canada?

- **Conditions in home country—**Are there any special circumstances in the likely country of removal, such as civil war or a major natural disaster?

- **Degree of establishment—**Is the permanent resident financially self-supporting? Are they employed? Do they have a marketable trade or skill? Has the permanent resident made efforts to establish themselves in Canada through language training or skills upgrading? Is there any evidence of community involvement? Has the permanent resident received social assistance?

- **Criminality—**Has the permanent resident been convicted for any prior criminal offence? Based on reliable information, is the permanent resident involved in criminal or organized crime activities?

- **History of non-compliance and current attitude—**Has the permanent resident been cooperative and forthcoming with information? Has a warning letter been previously issued? Does the permanent resident accept responsibility for their actions, are they remorseful, or have they supplied any necessary documentation requested by an officer?

Criminal Cases

With respect to criminality, the seriousness of the offence will be an important consideration in assessing whether to refer a report to the Immigration Division.

Three principal factors indicate the seriousness of an offence:

- the circumstances of the particular incident under consideration;

- the sentence imposed; and

- the maximum sentence that could have been imposed.

The fact that a conviction falls within A36(1) is itself an indication of its seriousness for immigration purposes.

Sentences imposed by the courts may have been subject to plea bargaining. The Crown may agree to a reduced sentence if the person pleads guilty. The circumstances of the crime are not viewed less seriously, but the person is compensated for agreeing to save the court the time and expense of a full trial.

It is strongly urged that, whenever possible, officers who write the report obtain proper documentation (independent evidence or supplementary documentation) to support the assessment. The officer will also find this documentation essential when presenting the case before the Immigration Division or when defending a removal order that is challenged.

The best documentation is a transcript of the trial judge's remarks on conviction or sentencing, commonly known as the *Judge's Reasons for Sentence.* Also, reports from probation officials, police agencies, correctional facilities, etc., provide valuable information regarding the circumstances of the offence and sometimes the potential for rehabilitation.

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Seriousness of offence

The following factors should be considered:

- Is it a crime that involves violence?
- Did the crime include the use of a firearm?
- Was it a crime against a person (specifically, was it a crime against a child or children, mentally or physically challenged persons, or senior citizens), a racially motivated crime, a crime of violence, or a crime involving trafficking in large quantities of drugs or in hard drugs (for example, heroin)?
- How serious were the consequences for the victim?

Criminal history

The following factors should be considered:

- Is the permanent resident a first-time offender?
- Is there a pattern of committing offences (recidivist) and, if so, are the offences committed becoming more serious?
- Was the permanent resident influenced by others in the commission of the crime?

Length of sentence

The following factors should be considered:

- What type of sentence was imposed on the permanent resident?
- Was jail imposed?
- Has probation or parole been denied?

Potential for rehabilitation

The following factors should be considered:

- What is the potential for rehabilitation?
- How much time has passed since the last conviction?
- Has the permanent resident already been released? For how long?
- Has the permanent resident accepted culpability, expressed remorse, enrolled in or completed educational, skills upgrading or rehabilitation programs (for example, Alcoholics Anonymous, Narcanon, Anger Management Program, life skills)?
- Are family members willing and able to support/assist, etc.?

Non-criminal cases involving permanent residents

In cases of misrepresentation, the rights accorded with the granting of permanent resident status would never have been bestowed in the first place. Similarly, in cases of non-compliance with conditions, the granting of permanent residence was bestowed with a commitment, without which the privilege of permanent residence would not have been accorded.

Additional factors to consider in non-criminal cases

What follows are some specific factors that could be considered in assessing non-criminal cases. The list is not meant to be, nor should it be considered, exhaustive.

- Would the person concerned have otherwise been granted permanent residence? Does the permanent resident qualify in any of the economic or family classes?
- Are family members also the subjects of an A44 inadmissibility report?
- What are the reasons for failure to comply with conditions? Are there any mitigating or extenuating factors that would explain the permanent resident's breach of conditions? Is there any evidence that the permanent resident (business immigrant) made a genuine attempt to meet the conditions? Are there extenuating and mitigating circumstances? Is there any information gathered from other sources (for example, the sponsor) and is it consistent with that provided by the person concerned?

Simple knowledge of the conditions would be sufficient. In the case of a sponsor who has refused to go through with a marriage, the referral may still be warranted, as the foundation upon which the person was granted permanent resident status no longer exists.

The following factors should be considered:

- What were the reasons for misrepresentation?
- Was the misrepresentation intentional, deliberate or planned?
- Did the misrepresentation involve falsification of documents?
- Was the misrepresentation made on the permanent resident's behalf, without their knowledge?
- Was the person eligible at the time of application and did they render themselves ineligible prior to departure for Canada, such as through a marriage that renders an accompanying family member ineligible?

19.3. Limited delegation for long-term permanent residents

The authority to receive a report and decide whether to refer it to the Immigration Division for an admissibility hearing concerning certain long-term permanent residents has been restricted to the Director, Case Review, Case Management Branch, NHQ.

Therefore, reports concerning long-term permanent residents who:

- became permanent residents before attaining the age of 18 years,
- were permanent residents of Canada for a period of 10 years before being convicted of a reportable offence or, in cases not involving a conviction, the preparation of the A44 report, and

- would not have a right to appeal a decision of the Immigration Division to the Immigration Appeal Division by virtue of A64

must be referred to the Director, Case Review, Case Management Branch, NHQ for a decision.

19.4. Preparation of referral or warning letter

Referral

In the case of permanent residents, the Request for Admissibility Hearing/Detention Review (IMM 5245B) should be completed as follows:

- The form must reflect the complete name of the person as it appears on the Record of Landing/Confirmation of Permanent Residence form. It is preferable that officers not list aliases on the referral. It is not incorrect to do so, but it is not a required piece of information. If aliases are recorded on the referral, they must appear exactly as they do on the A44 inadmissibility report.

- The allegations cited must reflect exactly what appears on the A44(1) inadmissibility report. It is necessary to list the sub-paragraphs, if applicable.

- The referral must be signed by the Minister's delegate who has authority to make a decision in the particular case.

- The Minister's delegate should record in their file notes what factors they considered in arriving at their decision. It is important that discretion be exercised in a way that is reasonable and fair.

No referral: Warning letter—Criminal and non-criminal cases

Where the Minister's delegate believes the report is well-founded but decides not to refer the report to the Immigration Division for an admissibility hearing, a letter is to be sent advising the person that a decision could be made to refer the report at a later date. The inherent value of a warning letter should not be underestimated. Its purpose is twofold: it conveys the decision and it is intended to act as a deterrent.

A warning letter sometimes has a third critical role: if, at some point in the future, the subject becomes reportable again, the file copy, acknowledged and signed by the person concerned, is very persuasive documentation to support a recommendation for referral to the Immigration Division. Officers also rely on the warning letter to demonstrate to the Immigration Appeal Division that the person concerned was duly cautioned as to the negative repercussions if another violation occurred.

- The warning letter should always be an original, as opposed to a form letter. The letter can be stored on computer for easy access and completion. The "blanks" should never be filled in by hand. The letter should be tailored to the individual circumstances of the person concerned and, if possible, on original letterhead.

- Every effort should be made to hand-deliver the warning letter. The person concerned should be asked to sign the file copy acknowledging receipt of the original. This is especially important in criminal cases in the event of a subsequent violation.

- It may happen that the letter cannot be hand-delivered because the inmate has been transferred to an institution outside of the local office's jurisdiction. In this event, officers should forward the letter to the responsible office with a request to hand-deliver the letter on their next visit to the facility. If this is not feasible or practical or the inmate has already been

released, then officers should obtain a current address and forward the letter by registered mail.

For an example of the warning letter for criminal and non-criminal cases, see Appendix D.

20. Procedure: Judicial review

Delegated officers' decisions are subject to judicial review, with leave, by the Federal Court. A review is commenced when an application for leave is filed with the Court.

Neither the Minister nor a person concerned may access the Federal Court if a statutory appeal, as may be provided for in IRPA, has not been decided.

Where no statutory right of appeal exists, or that right has been exhausted, there is a right to seek judicial review with respect to any matter arising from the application of IRPA by filing an application for leave and judicial review to the Federal Court pursuant to A72(1).

When a delegated officer makes a removal order against a person who does not have the right to appeal to the Immigration Appeal Division, they are to advise the person of their right to file an application for leave and judicial review.

Officers should obtain a written acknowledgment from the person that they have been advised of their right to file an application for leave and judicial review and place it in the case file. See also section 5.4 above.

"Service" is a legal term for delivering a document to the opposing party. There is only one way to validly serve an application for leave and judicial review upon the Minister: it must be delivered to the appropriate office of the Department of Justice.

If an officer is served with an application for leave and judicial review, the officer should note when the document was received and send it immediately, by facsimile, to the local Department of Justice office.

If an officer is presented with proof that an application for judicial review has been filed with the Federal Court concerning an order or decision made, the officer should send a copy to the regional Justice Liaison Officer responsible for Federal Court litigation.

Under the *Federal Court Immigration and Refugee Protection Rules*, "tribunal" is defined as "a person or body who has disposed of a matter . . . which is the subject of an application for leave or an application for judicial review." This means that the Minister's delegates are considered to be a tribunal by the Federal Court; consequently, the Minister's delegates are placed under certain obligations to provide information to the Court.

When applications for leave are filed, the Court may ask the Minister's delegates to provide certain documents to the Court registry and to the parties under rules 9, 14 and 17 of the *Federal Court Immigration and Refugee Protection Rules*.

Officers should follow their respective region's standard procedures to comply with whatever order the Court may make for producing documents. If officers need assistance to comply with an order, they are to contact their respective regional Justice Liaison Officer.

The Minister's delegates are likely to encounter three kinds of requests from the Federal Court, as outlined in section 20.1, section 20.2 and section 20.3 below.

20.1. Judicial review—Requests under Rule 9 of the *Federal Court Immigration and Refugee Protection Rules*

If a person indicates in an application for leave that they have not received the reasons for the decision that is to be challenged, the Federal Court will order that they be provided, if they exist.

On receiving such a Court order, the Minister's delegates are required to send a copy of the decision or order and written reasons for it, certified by an appropriate officer to be a true copy, to each of the parties and two copies to the Court registry.

If a Minister's delegate did not give reasons for the decision or order, or reasons were given but not recorded, the Minister's delegate must send an appropriate written notice to all the parties and to the Court registry.

20.2. Judicial review—Requests under Rule 14 of the *Federal Court Immigration and Refugee Protection Rules*

The Minister's delegates may be ordered by a judge to produce and file any additional documents that the judge may feel are necessary to dispose of the leave application before the Court. The order will specify the material to be provided, and the Minister's delegates must provide it without delay. Officers are to send a copy of the material, certified by an appropriate officer to be a true copy, to each of the parties and two copies to the Court registry.

20.3. Judicial review—Requests under rule 17 of the *Federal Court Immigration and Refugee Protection Rules*

When the Federal Court grants an application for leave, officers will be served with a copy of the Court order granting leave immediately after it is made. The order will require that the Minister's delegates prepare and forward a record of the proceedings to the Court and to the parties to the application.

A record consists of the following:

- the decision or order in respect of which the application is made and the written reasons the Minister's delegate gave, if any;
- all papers relevant to the matter that are in the possession of the Minister's delegate's;
- any affidavits, or other such documents, filed during the proceeding; and
- a transcript, if any, of any oral testimony given during the proceeding that gave rise to the decision or order that is the subject of the application.

The Minister's delegates must prepare a record in accordance with the above guidelines. Since the proceedings of Minister's delegates are not a matter of record, there is no need to enclose a transcript in the record.

The Minister's delegate, or the officer designated to fulfil this function, will send a certified true copy of the record to each of the parties and two copies to the Federal Court registry (rule 17 of the *Federal Court Immigration and Refugee Protection Rules*). Any questions concerning the materials to be sent to the Court should be directed to the designated regional Justice Liaison Officer responsible for litigation.

See also ENF 9, Judicial Reviews.

21. Procedure: Written authorization to return to Canada [A52(1)]

If a removal order has been enforced, a foreign national shall not return to Canada unless authorized by an officer or in other prescribed circumstances [A52(1)].

These prescribed circumstances are set out in R224, R225 and R226.

What this means is that under A52(1), a foreign national who is obliged to obtain the written authorization of an officer in order to return to Canada, as a consequence of having been the

subject of a previously enforced removal order, may do so (that is, return to and seek entry to Canada) only after securing authorization from an officer or in other prescribed circumstances.

It should be noted that this authorization only satisfies the requirement that an authorization be obtained before returning to Canada; it does not exempt the person from any other requirement or obligation under IRPA.

An authorization overcomes only that inadmissibility provision that renders a person inadmissible for failing to obtain the authorization of an officer as required by A52(1).

In other words, the reasons why the person was initially made the subject of a removal order may still exist and, consequently, may still render the person inadmissible, regardless of the person being in possession of an authorization from an officer.

For example, if a person were convicted in Canada, and as a consequence of that conviction had a deportation order made against them, the person may still be inadmissible based on a conviction in Canada. Thus, if no authorization was issued, the following two inadmissibility allegations may be in order:

1. inadmissible for having been convicted in Canada; and

2. inadmissible for not being in possession of an authorization to return.

Note: Evidence of the granting of an authorization to return will be in the form of an Authorization to Return to Canada Pursuant to Subsection A52(1) of the *Immigration and Refugee Protection Act* [IMM 1203B], otherwise known as an authorization to return to Canada.

21.1 Requests for authorization to return

Officers must obtain all available information about a person's removal from the responsible office in Canada. Officers should ask for the removing office's recommendation about approving or denying a request for authorization to return to Canada.

Officers are also to ask and/or otherwise determine if the applicant must repay any removal costs [R243]. There is no specific application form for an authorization to return to Canada.

In the case of an overseas office, however, applicants for permanent residence who need authorization will have already completed an application for permanent residence; temporary residents should complete an application for temporary entry.

There is a fee for processing a request for authorization to return to Canada. Officers are advised to refer to the most current cost recovery fee schedule to determine the exact fee.

Generally, requests for authorization to return to Canada are appropriate only if the applicant is not inadmissible for any other reason.

21.2. Denial of Authorization to Return to Canada [IMM 1202B]

For both permanent resident and temporary resident applicants, officers are to record the refusal of an authorization to return to Canada on an IMM 1202B. In the case of an overseas office, only an officer in charge of a visa office can sign this form.

A copy of the IMM 1202B should be given to the person who requested authorization to return.

In the case of an overseas office, if applicants also apply for a visa, overseas officers will generally give applicants a refusal letter for the visa application as well.

21.3. Approval of Authorization to Return to Canada [IMM 1203B]

For both permanent resident and temporary resident applicants, officers are to record the approval of an authorization to return to Canada on an IMM 1203B. In the case of an office

abroad, only an officer in charge of a visa office can sign an IMM 1203B and make the required entry in CAIPS notes.

Officers are to inform applicants that they must present the IMM 1203B at a port of entry.

When completing the IMM 1203B, officers must be sure to check the appropriate box pertaining to either permanent or temporary residents. Officers are to make two copies of the original and give the original to the applicant. One copy must be sent to the office that removed the applicant from Canada. The second copy must be sent to Quality Assurance, Operations (BIO), Information Management and Technologies Branch (BID), CIC NHQ, with a Mailing Details and Acknowledgement form [IMM 1118B] to confirm receipt.

22. Procedure: Admissibility on humanitarian and compassionate grounds

The requirement that persons apply for and obtain a permanent resident visa outside Canada remains basic to IRPA. Circumstances may exist, however, where the requirement to apply for a visa from outside Canada may cause undue hardship for the applicant.

The courts have confirmed that officers are under a duty to consider requests for an exemption from the visa requirement on compassionate or humanitarian grounds [*Minister of Employment and Immigration* v. *Jiminez-Perez*, [1985] 1 W.W.R. 577 (S.C.C.)].

IRPA gives the C&I Minister discretion to grant an exemption from any applicable criteria or obligation of the Act or to grant permanent residence when it is justified by humanitarian and compassionate or public policy considerations [A25(1)].

The purpose of this discretion is to provide the C&I Minister with the flexibility to approve deserving cases. It is not an alternative stream for immigration to Canada, nor is it an appeal mechanism. It is a discretionary tool to enhance the attainment of the objectives of IRPA and to uphold Canada's humanitarian tradition.

For further guidance on the topic of admissibility on humanitarian and compassionate grounds, officers are advised to refer to the relevant manual chapter(s) and the most current published guidelines. (See IP 5)

23. Procedure: Possibility of Canadian citizenship/Canadian citizens making refugee claims

Should an officer detect that an applicant may hold Canadian citizenship, then this officer should investigate or cause an investigation of the matter to be initiated before taking any further steps to cause an admissibility hearing or a removal order to be issued.

When questioning persons in this regard, officers should be fully cognizant of the *Citizenship Act* and/or make contact with a citizenship officer who can provide assistance and guidance.

Should a person claiming to be a Canadian citizen make a refugee claim to an officer, the officer should ascertain whether the person is indeed a Canadian citizen. If such is the case, the officer should advise the person that IRPA does not allow for a determination of refugee status for Canadian citizens who are in Canada.

24. Procedure: Administrative removals under R228(1)(b)

R228(1)(b) allows the Minister's delegates to issue removal orders to foreign nationals who are deemed, under A40(1)(c), to be inadmissible for misrepresentation because the Refugee Protection Division (RPD) has vacated "a decision to allow a claim for refugee protection if the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter." [A109].

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The Minister's delegate shall issue the removal order once all court challenges to the decision to vacate the refugee protection claim have been exhausted and are resolved. R228(1)(b) can then be applied.

Once the RPD has decided to vacate a decision to allow a claim for refugee protection, the person has 15 days to apply for leave to the Federal Court for a judicial review as stipulated in A72(2). Therefore, the Minister's delegate shall wait a minimum of 22 days (seven days for receipt of a decision sent by mail and 15 days for the application under A72(2)) before issuing the removal order following the writing of a report under A44(1) for inadmissibility under A40(1)(c).

Where an application for leave to the Federal Court has been filed, the Minister's delegate shall wait until the final decision is rendered and all legal means of challenging the decision have been exhausted and resolved. Prior to issuing the removal order, the Minister's delegate must look in the litigation screen in FOSS and make sure that no outstanding litigious entries have been made stipulating the person filed an application for leave to the Court or filed a request for an extension of time to serve and file an application for judicial review. In the latter case, it is clear that the person is seeking to have the decision set aside by the Federal Court and that, if the person's request is granted, an application for judicial review will follow. Therefore, the Minister's delegate shall wait until the final decision on the request for an extension of time is rendered and, if it is granted, the Minister's delegate shall wait for the final outcome of the judicial review.

Simply put, in the event that no removal order has been issued and the delay to serve and file the application has expired, and where the person applies to the Federal Court for an extension of the time for filing and serving the application or notice, the Minister's delegate must not issue the removal order until the request for the extension is resolved and, if granted, the Minister's delegate must wait until the final determination to issue the removal order [A72(2)].

Applications to vacate granted pre-IRPA

In the event where the CRDD decided, prior to the implementation of IRPA, to vacate a decision to allow a claim for refugee protection, and in the event where no further action has been taken and no report has been prepared, a report under A44(1) for inadmissibility under A40(1)(c) may be prepared and a removal order issued pursuant to R228(1)(b), even if the misrepresentation was pre-IRPA.

Appendix A Overview—Minister's opinions/interventions

Requesting the C&I Minister's opinion

Information may come to the attention of an officer during an examination, or in the course of an investigation, that may warrant securing the C&I Minister's opinion that a person is a danger to the public.

For example:

- A refugee protection claim where the claimant has been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament that is punishable by at least 10 years' imprisonment [A101(2)(b)].

In such a case, if the C&I Minister is of the opinion that the person is a danger to the public in Canada, and if it is determined at an admissibility hearing that the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years, then that person's claim will be ineligible to be referred to the Refugee Protection Division under A101(1)(f).

- A protected person who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the C&I Minister, a danger to the public in Canada [A115(2)(a)].

In such a case, if the C&I Minister's opinion is issued, then that protected person, or person who is recognized as a Convention refugee by another country to which the person may be returned, will no longer be protected from the non-refoulement provisions [A115(1)].

Intervention, cessation and vacation

Officers may have occasion to deal with information that may support a possible intervention, cessation or vacation process.

If such is the case, the information should be brought to the attention of an officer; the officer will then decide if the information and/or evidence should be brought to the attention of the Immigration and Refugee Board.

In some cases, an officer may receive information that could affect the decision of the Refugee Protection Division. If an officer becomes aware of new information relative to any of the inadmissibility provisions under A34 through A37, or where there is information to suggest that there is a contradiction of any document or statement made by a refugee, the officer should take the following steps:

- conduct an interview with supporting notes (see ENF 7, Investigations and Arrests, section 13.2 - General rules for note-taking) and prepare a statutory declaration (see ENF 7, section 13.6 – Statutory Declarations) recording information or identifying documents received;

- seize any relevant documents under A140(1) that could be used as evidence;

- create a general information non-computer based entry in FOSS and update the National Case Management System (NCMS) to indicate that the case is under investigation and the reason(s) for investigation (for example, "under investigation—grounds to support intervention, cessation or vacation, as appropriate, may exist");

- contact the officer to discuss case details;

- at the request of the officer, conduct further investigation to collect additional evidence;

- when the investigation is complete, transfer the file and all supporting documentation to the officer with a memorandum outlining the case details.

See ENF 7, Investigations and Arrests, and ENF 24, Ministerial Interventions.

Appendix B Noteworthy provisions of the Act

A48. (1) A removal order is enforceable if has come into force and is not stayed.

(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.

A49. (1) A removal order comes into force on the latest of the following dates:

(a) the day the removal order is made, if there is no right to appeal;

(b) the day the appeal period expires, if there is a right to appeal and no appeal is made; and

(c) the day of the final determination of the appeal, if an appeal is made.

A51. A removal order that has not been enforced becomes void if the foreign national becomes a permanent resident.

A52. (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.

A55. (2) An officer may, without a warrant, arrest and detain a foreign national, other than a protected person,

(a) who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection A44(2).

A63. (2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

(4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.

A64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

Appendix C Sample warning letters

Warning letter for criminal cases

Your file

Votre référence

Our File

Notre référence

Date

address

Dear :

This letter is in reference to your interview on (*enter date of interview*) concerning your criminal convictions and status in Canada.

Permanent residents of Canada are reported to the Minister when they have engaged in criminal activity of a serious nature. Your conviction for (*name offence*) is a reportable offence and, consequently, a report has been filed.

This report is now a permanent part of your immigration record. The circumstances of your case have been considered carefully and it has been decided that the report will not be referred to the Immigration Division for an admissibility hearing at this time.

If you have any further criminal convictions registered against you, or if new information comes to light, this decision will be reviewed. A future decision to pursue enforcement action may result in the referral of a report to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing. The outcome of this hearing could result in a deportation order and your permanent removal from Canada.

We trust that you understand the gravity of this matter and we hope that we will not be required to contact you again regarding this matter.

Yours truly,

Minister's delegate

address

Warning letter for non-criminal cases

Your file

Votre référence

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Our File

Notre référence

Date

address

Dear :

This letter is in reference to your interview on (*enter date of interview*) concerning your (*describe violation, i.e., failure to comply with the conditions of your authorization to enter Canada or misrepresentation of a fact material to your confirmation of permanent resident status in Canada*).

Permanent residents of Canada are reported to the Minister when a violation such as yours has been detected. This report is now a permanent part of your immigration record. The circumstances of your case have been considered carefully and it has been decided that you will not be referred to an admissibility hearing before the Immigration Division at this time.

If additional information comes to our attention, this decision may be reviewed. A future decision to pursue enforcement action may result in the referral of a report to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing. The outcome of this hearing could result in a deportation order and your permanent removal from Canada.

We trust that you understand the gravity of this matter and we hope that we will not be required to contact you again regarding this matter.

Yours truly,

Minister’s delegate

Address