Citizenship and Immigration Canada
Citoyenneté et Immigration Canada

ENF 24

Ministerial Interventions

Canada

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Updates to chapter

Listing by date:

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Changes made to reflect 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 the C&I Minister and the PSEP Minister were made where appropriate, and other minor changes were made.

2004-04-26

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

1. What this chapter is about

This document deals with the priorities, strategies and procedures that surround interventions in the refugee protection determination process, vacations and cessations at the Refugee Protection Division (hereinafter "RPD") of the IRB. Since interventions are an important instrument for ensuring the integrity of the program, it is essential that a clear and understandable framework be established for them. The CBSA's or CIC's role in ministerial interventions is to help the IRB to make the best-informed decisions possible, while fulfilling its mandate to enforce the Act. The approach used in this chapter will serve as a guide for hearings officers, leaders and any officers whose job is to process files of refugee protection claimants.

2. Program objectives

The ministerial intervention program has the following objectives:

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

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

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

The procedures identified in section 8 will concern the internal operational perspective on case management. These procedures have the following objectives:

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

3. The Act and Regulations

3.1. The Immigration and Refugee Protection Act

A3 specifies that with respect to refugees, the objects of the Act are as follows:

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

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

The principal international instruments on human rights can be found at:

http://www.unhchr.ch/html/intlinst.htm

http://www.dfait-maeci.gc.ca/foreign_policy/human-rights/menu-en.asp

Table 1 below summarizes the provisions of the *Immigration and Refugee Protection Act* (IRPA) that are applicable to refugees and to persons in need of protection.

Table 1: Legislative provisions concerning the protection of refugees

For information on:	Refer to section(s):
PSEP or C&I Minister's right to intervene at the RPD	A170
Definition of refugee protection	A95(1)
Definition of person in need of protection	A95(2) and A97
Definition of refugee	A96
Exclusion from the definition of refugee or of person in need of protection	A98
Application for refugee protection	A99
Eligibility of refugee protection claim	A100 and A102
Grounds of ineligibility	A101
Suspension of a refugee protection claim by the RPD	A103
Notice of ineligibility at the RPD	A104
Extradition procedure	A105
Undocumented claimants	A106
Determination on refugee claims by the RPD	A107
Cessation of refugee protection	A108
Vacation of refugee protection	A109
Loss of permanent resident status	A46
Inadmissibility standard of proof	A33
Inadmissibility security reasons	A34
Inadmissibility for violation of human or international rights	A35
Inadmissibility for serious criminality	A36
Inadmissibility for organized criminality	A37
Inadmissibility report	A44
Admissibility hearing by the Immigration Division	A45, A172, and A173
Pre-removal risk assessment	A112 to A116

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

Table 2: Legislative provisions concerning the Immigration and Refugee Board

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

3.2. Rules of the IRB concerning the Refugee Protection Division

The Immigration and Refugee Board is responsible for writing its own rules of procedure for its various sections. A copy of the RPD rules is available on the IRB Web site at http://www.irb-cisr.gc.ca/index.htm.

Note: Hearings officers must be familiar with the IRB rules, reference documents, the Chairperson's guidelines, and the practice notices that are available on the IRB Web site (http://www.irb-cisr.gc.ca/index.htm)

3.3. Forms required

Form IMM 5354B, Request for Consideration of Minister's Intervention, is used to inform hearings officers of the reason for referring the case to their attention.

4. Instruments and delegations

4.1. Members of the IRB: Powers and authorities

Members of the IRB have the powers and authority of a commissioner, and may do anything they consider necessary to provide a full and proper hearing [A165]. This includes the power to receive in evidence any information, whether adverse or not, and to question the refugee protection claimant about any matter concerning their application.

4.2. PSEP or C&I Minister's right to appear before the RPD

The PSEP or C&I Minister has the right to be represented in all matters before the RPD, to produce evidence, question witnesses and make representations [A170]. The PSEP or C&I Minister may exercise these rights by appearing in person at hearings or by filing evidence and/or written representations with the RPD, if the panel orders filing of representations. The hearings officer must abide by the provisions of the *Refugee Protection Division Rules* (RPDR), in particular regarding intervention notices and the time limit for disclosing evidence.

4.3. Authority to form a panel of three members

If the Chairperson thinks that a hearing before three members is necessary, they may authorize it in accordance with A163.

4.4. Powers of the hearings officer during a ministerial intervention

A hearings officer has delegated powers to represent the PSEP or C&I Minister at hearings of the IRB.

4.5. Finding of ineligibility: Powers delegated to the Immigration Division or to the Minister

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

5. Departmental policy

5.1. Hearings at the RPD: Regular hearing

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

A person applying for refugee protection may be represented by a lawyer or other counsel [A167].

A person claiming refugee protection is also entitled to an interpreter, and may choose to have the hearing conducted in English or French [rule 14 of the RPD Rules].

The RPD must notify the PSEP or C&I Minister of any matter before it and must give the PSEP or C&I Minister an opportunity to produce evidence, to question witnesses and to make representations, in accordance with A170 and rule 22 of the RPDR.

5.2. Expedited process without a hearing

According to A170, the Refugee Protection Division (RPD) may allow a claim for refugee protection without holding a hearing if the PSEP or C&I Minister has not notified the RPD of the Minister's intention to intervene within the time limit prescribed by rule 19 of the RPDR. In such cases, a refugee protection officer will conduct an interview with the claimant and will submit a recommendation to the member.

5.3. Nature of the refugee protection determination process

When there is ministerial intervention, the process may be described as hybrid. The hearings officer attends and conducts a thorough examination of the refugee protection claim based on specific information contained in the CBSA's or CIC's file, in order to provide the panel with a maximum amount of information. If a rigorous examination of the claim reveals reasonable grounds for opposing a refugee protection claim, the hearings officer objects to the claim on the PSEP or C&I Minister's behalf. If the examination does not reveal arguments giving rise to opposition on the PSEP or C&I Minister's part, the hearings officer has the latitude to withdraw from the case or to make representations accordingly.

When the PSEP or C&I Minister does not intervene at a hearing of the RPD, the determination process is non-adversarial in nature. Members of the IRB have the powers and authority of a commissioner and may do any thing that they consider necessary to provide a full and proper hearing [A165]. This includes the power to receive any information in evidence, whether adverse or not, and to question the refugee protection claimant on any matter concerning their claim.

5.4. Priorities and strategies for hearings at the Refugee Protection Division (RPD)

The priorities and strategies identified by the CBSA are described in the following table.

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

Table 3: Priorities and strategies for ministerial intervention cases

Priority	Type of case	Strategy (type of intervention)
First priority: • Cases involving security and criminality issues • Cases in which a member of the RPD requests the PSEP Minister's intervention	Cases where there may be a finding of ineligibility: • 1F(a) exclusions* • 1F(b) exclusions* • 1F(c) exclusions* * See section 5.7, section 5.8, section 5.9 and section 5.10 below	• Favour the option of obtaining an ineligibility ruling leading to inadmissibility over the intervention option • Intervention in person • Intervention in person or by filing documents
Second priority: • Cases where the outcome would have a very great impact on the integrity of the program	• Cases that establish a new trend in the movement of persons, that affect a large population of refugee protection claimants and that involve misrepresentation, fraud or trafficking in persons • Cases that involve a single individual with a particular profile	• Intervention in person in the first cases, and intervention by filing of documents thereafter, if circumstances permit • Intervention in person, apart from exceptional cases
Third priority: • Credibility cases that involve program integrity considerations but have less of an impact on the program as a whole	• 1E exclusions and other credibility cases (see section 5.18 below)	• Intervention by filing of documents, apart from exceptional cases To be considered in choosing the type of intervention: • complexity and credibility of the evidence • need to obtain testimonies and to cross-examine • impact of the decision on future cases

5.5. Criteria for evaluating cases

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

Table 4: Factors to consider in cases not involving exclusion grounds under Article 1F

Individual factors	Factors that influence the	Factors that influence illegal

	program	movements and smugglers' networks
The identity or nationality of the claimant is cast into doubt, multiple identities (e.g., seizure of documents in the mail, checking of fingerprints)	The intervention will not unduly delay the determination process	The application has resulted from trafficking in persons
There are false statements or contradictory statements regarding important aspects of the claim (e.g., declaration at port of entry, visa application)	The country of nationality is one of the 10 most important source countries for refugees in Canada, or is increasing in importance at an accelerated rate	The application has resulted from the use of a dangerous or unconventional means of transportation to reach Canada
There is a question of status in a safe third country (e.g., visitor authorization renewed for several years)	In the region, the acceptance rate is higher than the national rate, and is there an explanation (e.g, different profile of claimants in the region, compared to the rest of the country)?	
Possibilities of removal	The issues to be resolved are common to a particular group of claimants (e.g., arrival en masse of claimants all alleging the same reasons)	
There are other immigration applications in process that would allow the claimant to remain in Canada (e.g., sponsorship application)	The application has come from an individual from a country exempted from the obligation to obtain a Canadian visitor visa	
The claimant has a criminal record in Canada for serious crimes	The CBSA's policy on the basis for the claim	
No acceptable identity documents, with no reasonable justification (e.g., the person had status in a third country and had to submit identity documents to obtain status)	A question of legal interpretation is raised that might lead to an application for judicial review (e.g., interpretation of a legislative provision)	
Sensitive, high-profile issues (e.g, child abduction case publicized in the media)	The information provided by the intervention mechanism will help to provide additional details concerning the claim	

Table 5: Particular factors to consider for each type of case

Type of case	Particular factors
1F(b) exclusion	• The seriousness of the crime • The fact that the claimant has served his or her sentence in full, including the parole period, has been pardoned or has benefited from an amnesty • The weight of the evidence available in the file

	• The resources that are necessary to follow up on the case
Cases that establish a new trend in the movement of persons, that affect a large population of refugee protection claimants and that involve misrepresentation, fraud or trafficking in persons	• The number of refugee protection claims that are part of the movement • The documentary evidence available on the subject • The existence of precedents in other regions
1E exclusion	• The nature of the claimant's status in the country of residence, and the rights attached to that status • The claimant's rights and obligations in the country of residence, especially the claimant's possibility of returning to the country of residence as a resident • The ties (family or other) between the claimant and the country of residence • The possibility of obtaining citizenship in the country of residence • The presence of potential agents of persecution in the country of residence
Vacation of a refugee protection claim [A109]	• The nature and importance of the false declarations or withholding of facts, taking the circumstances of the case into account • The period of time elapsed since the claimant's arrival in Canada, and since refugee protection was granted • The presence of a spouse or children who benefit from status in Canada • Does the country of nationality abide by international obligations in the area of human rights? • Does there remain enough evidence, among the pieces of evidence considered at the time of the initial decision, to justify giving refugee protection? [A109(2)]
Cessation of refugee protection [A108]	Two stages: • Is the person a permanent resident? • Is there a cause of ineligibility that would make it possible to obtain a removal order? If the answer to the first question is "yes," there is no need to pursue the application for cessation of refugee protection. If the answer is "no," evaluate the additional factors indicated below. If the answer to the second question is "yes," it is probably appropriate to pursue the application for cessation. The following factors must be evaluated: • the period of time elapsed since the claimant's arrival in Canada, and since refugee protection was granted • the presence of a spouse or children who benefit from status in Canada

	• the frequency and duration of trips to the country of nationality • evidence of settlement in the country of nationality (e.g., work, school, properties, family) • the existence of mitigating factors (e.g., illness of a family member) • the nature and frequency of contacts with the authorities of the country of nationality • does the country of nationality abide by international obligations in the field of human rights? • the existence of compelling reasons involving persecution, torture or previous punishments, which give the person justification for refusing to avail himself or herself of the protection of the country of nationality

5.6. Finding of ineligibility

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

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

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

- conviction in Canada for an offence under an act of Parliament punishable by a maximum term of imprisonment of at least ten years for which a term or imprisonment of at least two years has been imposed; or

- conviction outside Canada for an offence which, if committed in Canada, would be an offence under an act of Parliament punishable by a maximum term of imprisonment of at least ten years, and the PSEP Minister deems the claimant to be a danger to the public in Canada.

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

Officers must keep the following factors in mind:

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

- the standard of proof at the RPD regarding exclusion under section 1F is “serious reasons for considering” as per Article 1 of the *1951 Convention and the 1967 Protocol relating to the Status of Refugees* (the Geneva Convention), which is equivalent to “reasonable grounds for believing.” The Geneva Convention may be found at: http://www.ufsia.ac.be/~dvanheul/migration/genconv.html

Note: This is a lesser standard than the burden of proof in criminal cases (beyond any reasonable doubt) or under civil law (on the balance of probabilities). The standard of proof to apply is thus

greater than mere doubt, but less than the balance of probabilities. In other words, the applicable standard is below the standard of greater probability.

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

Note: The PSEP Minister must assume the burden of proof, but if there is *prima facie* evidence that the clause should apply, the burden of proving that it does not apply then falls upon the person claiming refugee protection.

There is no right of appeal to the Immigration Appeal Division for persons found to be inadmissible on grounds of security, violating human rights or international rights, serious criminality or organized criminality [A64].

A refugee protection claimant who has been found inadmissible, in Canada or outside Canada, on grounds of security, violating human or international rights, serious criminality [A112(3)(b)] or organized criminality [A95(1)(c) and A112(3)], or a claimant who has been refused status under section F of Article 1 of the Geneva Convention, may not obtain refugee status at the time of the pre-removal risk assessment, in either case, but may benefit from a stay of the removal order [A114 and A112(3)]. See PP 3 – Pre-Removal Risk Assessment.

Note: If an officer thinks that a claimant may be found inadmissible, so that the claim is ineligible, the officer must follow the appropriate procedure. See ENF 5 – Writing section 44(1) reports and ENF 6 – Review of reports under A44(1).

To sum up:

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

Note: Officers must keep in mind that they can invoke an exclusion clause and present arguments in this regard, even if the Immigration Division has determined that there was no basis for a finding of inadmissibility.

5.7. Highest priority: Cases involving security and criminality issues [1F(a), 1F(b) and 1F(c) exclusions under the *Convention Relating to the Status of Refugees*]

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

A98 reads as follows:

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

Section F of Article 1 of the Geneva Convention is contained in a schedule to the IRPA, and reads as follows:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

5.8. 1F(a) exclusion

This exclusion is the subject of an in-depth analysis in Chapter ENF 18 – War Crimes and Crimes Against Humanity.

5.9. 1F(b) exclusion

The primary purpose of this provision is to protect the population of the host country from a person who has committed a serious non-political crime before their admission. We can relate this provision to the IRPA's objective of protecting Canadians and denying access to Canadian territory to serious criminals. The wording of this provision concerns the committing of a crime.

Note: It is not necessary that the claimant have been convicted of a serious non-political crime. All that is necessary is that there be serious reasons for believing that the person has committed such a crime.

The exclusion clauses must be interpreted restrictively.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (the UNHCR Handbook) notes at paragraph 157:

> "In evaluating the nature of the crime presumed to have been committed, all the relevant factors—including any mitigating circumstances— must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates."

An assessment, uncompleted full parole or deportation before the completion of the sentence or full parole does not constitute a situation where the sentence may be deemed to have been served.

See Appendix C for case law on 1F(b) exclusion.

1. Concept of serious non-political crime

According to the UNHCR Handbook, at paragraph 155:

> "What constitutes a "serious" non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term "crime" has different connotations in different legal systems. In some countries the word "crime" denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to

> murder. In the present context, however, a "serious" crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F *(b)* even if technically referred to as "crimes" in the penal law of the country concerned."

The Department is of the opinion that "serious crime" is to be understood to mean indictable offences under the *Criminal Code* of Canada (including mixed offences). The decision as to whether to invoke the exclusion clause or not depends on the seriousness of the offence committed. Application of the exclusion clause is warranted in the case of offences that directly or indirectly affect a person's physical integrity, and also for such offences as fabrication of false passports, impersonation and white-collar crimes. The CBSA's policy is to exclude any individual who is a serious criminal, in order to promote security and international justice. Where a hearings officer deems that sufficient evidence exists to raise the question of exclusion, and that this evidence might allow the RPD to make a finding of exclusion, the hearings officer must intervene in the case.

Note: To give officers some indicators for analyzing the seriousness of the crime committed, it is relevant to look at the provision of A36, which defines inadmissibility for serious criminality.

More details on the concept of serious non-political crime are to be found in Appendix C.

2. Concept of political crime

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

See Appendix C for more details on the political nature of a crime.

3. Concept of complicity in a non-political crime

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

Complicity includes aiding or inciting a person to commit the crime likely to result in exclusion, and may be defined as associating with a person or organization responsible for international crimes, if there is personal participation or voluntary tolerance. Mere membership in a group responsible for international crimes is not sufficient to establish complicity, unless that organization pursues limited, brutal ends.

For more details on complicity, see Appendix C and ENF 18, section 7.2 – War Crimes and Crimes Against Humanity.

Note: It should be noted that the complicity described under exclusion 1F(a) also applies to the 1F(b) exclusion.

4. Means of defence

Under certain conditions, the perpetrator of a crime or the accomplice will be able to argue that he or she acted under duress, to avoid application of the exclusion clause.

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

5. Extradition

If a person who applies for refugee protection is the subject of an originating order made under section 15 of the *Extradition Act* for a foreign offence punishable under an act of Parliament by a

maximum term of imprisonment equal to or greater than ten years, the RPD must suspend consideration of the matter until such time as the panel makes a final ruling on the extradition application [A105(1)].

If the panel makes an order concerning a person imprisoned under the scheme of the *Extradition Act* for an offence contemplated in A105(1), that person's refugee protection application is treated like a refusal of a refugee protection application based on paragraph (b) of section F of Article 1 of the Convention on Refugees [A105(3)].

Note: The RPD is thus unable to proceed with the refugee claim in that case, and the decision is not subject to appeal or judicial review, except under the scheme of the *Extradition Act* [A105(4)].

If, however, the panel does not make an extradition order, the matter will be continued at the RPD [A105(2)].

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

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

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

- the marital status of the parents;
- the age of majority in the country of nationality;
- the need to obtain the consent of the two parents or of the legal guardian to have the child travel outside the country of nationality;
- the existence of consent by the parent of guardian;
- the existence of a custody order in favour of the other parent;
- the existence of a credible defence (s. 285 c.c.), namely that the acts were necessary to protect the child from imminent danger or the parent was fleeing imminent danger;
- the existence of communications between the child and the other parent since the child's arrival in Canada.

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

5.10. 1F(c) exclusion

This provision concerns acts contrary to the purposes and principles of the United Nations that are not covered by the exclusions under paragraphs 1F(a) and (b).

Note: The purposes and principles of the United Nations are stated in the preamble and Articles 1 and 2 of the United Nations Charter. See http://www.un.org/aboutun/charter/

This exclusion applies for acts that constitute very serious and repetitive violations of human rights. Terrorism, kidnapping, torture, hostage-taking and apartheid are considered to be acts of

this kind. These crimes may be committed in Canada after the person arrives here, or in another country before the person's arrival.

In the *Pushpanathan* case, [1998] 1 S.C.R. 982, the Supreme Court established the following:

- drug trafficking is not included in the 1F(c) exclusion;
- the 1F(c) exclusion applies to senior government officials, and also to individuals who have no connection with government;
- the 1F(c) exclusion applies to individuals who have been convicted and to persons who have committed a crime but have not been convicted.

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

Note: The comments relating to complicity and to the means of defence indicated in the section on 1F(b) exclusions also apply to 1F(c) exclusions. See Appendix C.

For the case law on 1F(c) exclusions, see Appendix D.

5.11. Strategy to adopt for exclusion cases

In exclusion cases, it is imperative that the hearings officer be present in the room for the hearing of the matter.

The hearings officer's task is to:

- ensure that the panel, in dealing with matters that lie outside its specialized purview, is properly informed about the terms specific to the Department (e.g., FOSS, CAIPS, documents of the USINS) and about the contents of the documents produced by the officer;
- question the claimant about the grounds of exclusion and, where necessary, about questions of credibility.

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

5.12. Cases where a member of the RPD requests the PSEP Minister's intervention

Since the RPD may or, in some cases, must inform the PSEP Minister of matters pertaining to exclusion and certain inadmissibilities (rules 24 and 25 of the RPDR), it is important that officers take the panel's requests for intervention into account and be available to help ensure the proper conduct of the hearing, in accordance with the member's instructions.

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

Second priority cases are cases that:

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

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

Note: Cases giving rise to such monitoring are those where certain indications suggest that these groups of persons are not authentic refugees. In this regard, it is useful to refer to the criteria in the tables. See section 5.5 – Criteria for evaluating cases.

Membership in a group of individuals does not in itself justify automatic intervention. What is important is to identify groups of individuals who are using the refugee protection determination process in a fraudulent way.

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

The objective in monitoring this type of case is to enable those who are fleeing persecution to benefit from due process, and to offer refugee protection to those who have a well-founded fear of persecution by reason of their race, religion, nationality, membership in a particular social group or political opinion, and to those who risk torture or cruel and unusal punishment.

5.14. Strategy to adopt in second priority cases

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

If there is an arrival en masse, it is important to develop expertise regarding the country concerned and the alleged events. On this subject, the regions must consult the documentation centre of the IRB to obtain the available information on these topics. The officer must then determine whether additional research is necessary, to add to the evidence in support of our position.

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

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

Note: It should be remembered that if a precedent is created, it is more difficult to have it changed.

If attendance in the hearing room is deemed essential, the results are satisfactory and a trend has developed, the team leaders must determine whether attendance is still necessary in subsequent cases to attain the desired objectives.

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

5.15. Cases involving a single individual

This type of case usually concerns just one claimant (and their family). Due to its particular profile, however, there are compelling considerations in favour of intervention by the CBSA.

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

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

5.16. Strategy to adopt in cases involving a single individual

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

5.17. Third priority: Credibility cases whose impact on the program is minimal

Third priority cases are those that involve program integrity considerations, but have less of an impact on the program as a whole.

For more information, see section 5.18 (1E exclusion cases) and section 5.20 (Other cases involving credibility, identity or nexus issues).

5.18. 1E exclusion cases

A98 excludes persons referred to in paragraph E of Article 1 of the Convention, which reads as follows:

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

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

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

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

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

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

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

See Appendix E for the case law on 1E exclusion.

5.19. Strategy to adopt in 1E cases

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

5.20. Other cases involving credibility, identity or nexus issues

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

These cases may involve some of the following situations:

- multiple or fraudulent identities;
- fraudulent declarations in the claim for refugee protection;
- refugee protection claim for reasons that cannot be associated with the definition of convention refugee or of person in need of protection;
- prolonged stay in a country that is a signatory of the convention, without any claim being made for refugee protection;
- application for a canadian visa outside canada for reasons that contradict the reasons contained in the form submitted to the irb;
- previous declarations that are contradictory;
- the refugee claims of members of the family have been rejected;
- a denunciation has been received;
- seizure of documents in the mail.

5.21. Strategy to adopt in cases involving credibility, identity and nexus issues

In these cases, most interventions are done by filing documents and making written submissions because the case does not involve general program integrity issues. In some cases, however, intervention in person is appropriate.

5.22. Disclosure of personal information from the refugee claim of a third party

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

Generally, personal information (as defined in section 3 of the *Privacy Act*) of a third party cannot be disclosed without that party's consent (section 8 of the *Privacy Act*). However, rule 17 of the *Refugee Protection Division Rules* (RPDR) gives the Refugee Protection Division (RPD) the authority to allow the disclosure of information from any other claim, including personal information protected by the *Privacy Act*.

If the PSEP or C&I Minister, as a "party" to the claim concerned (rule 1 of the RPDR), wishes information from the claim of a third party to be disclosed pursuant to rule 17, the PSEP or C&I Minister must make an application to the RPD to allow that disclosure, as per rule 43, and subject to rule 44, of the RPDR.

In determining whether to allow the disclosure of information from another claimant's claim, the RPD must, as per rule 17 of the RPDR, consider two major questions. First, the RPD must consider whether, as per rule 17(1), the information to be disclosed involves "similar questions of fact or if the information is otherwise relevant. . . ." Second, the Division must consider, as per rule 17(4), whether a serious possibility exists that the disclosure of the information concerned would "endanger the life, liberty or security of any person or is likely to cause an injustice."

In light of those requirements, the PSEP or C&I Minister should consider, prior to making an application for disclosure, whether the conditions set out in rule 17 are likely to be met. If the PSEP or C&I Minister believes that the information concerned does meet the relevancy criteria, and that there does not exist a serious possibility that the disclosure of said information would endanger the life, liberty or security of any person, the PSEP or C&I Minister should proceed with an application to have the information disclosed.

6. Definitions

A97 defines the term "person in need of protection." This definition includes the obligation to determine whether there are substantial grounds for believing that a person is subject to a danger of torture within the meaning of Article 1 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention against torture), or whether there is a risk to the person's life or a risk of cruel and unusual treatment or punishment.

Note: Appendix F defines the case law and the interpretation of the provisions relating to persons in need of protection.

Table 6: Acronyms

Acronyms	Meaning
IRB	Immigration and Refugee Board
C.C.	*Criminal Code* of Canada
UNHCR	Office of the United Nations High Commissioner for Refugees
IA	*Immigration Act* (Bill C-86)
IRPA	Immigration and Refugee Protection Act
RPDR	Refugee Protection Division Rules
RPD	Refugee Protection Division
RAD	Refugee Appeal Division
WCU	War Crimes Unit

7. Procedure: Roles and responsibilities

7.1. Responsibilities of hearings officers at hearings of the RPD

The hearings officer is responsible for presenting evidence, cross-examining witnesses and defending the PSEP or C&I Minister's position in arguments relating to jurisdictional matters or questions raised by the Charter.

The hearings officer may address questions that concern the merits of the refugee protection claim, but this task is usually reserved for the refugee protection officer (RPO) employed by the RPD.

7.2. Hearings officers representing the PSEP or C&I Minister

Hearings officers represent the PSEP or C&I Minister in hearings before all divisions of the IRB.

In this capacity, hearings officers:

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

Note: Professionalism shall be exhibited by preparing properly for cases and by treating all parties at a hearing with dignity and respect. All parties include claimants, members, counsel, witnesses, interpreters and observers.

In performing their responsibilities, hearings officers have a duty to treat all other parties, including the claimant, in a respectful manner. This includes:

- showing sensitivity, especially towards claimants, many of whom have had traumatic experiences (including torture or rape);
- obtaining the relevant facts and bringing forward arguments. Such steps are perfectly compatible with respectful and sensitive communication.

Note: In fact, claimants are more likely to be cooperative if they are not frightened and confused.

7.3. Role of hearings officers in preparing the case:

The hearings officer has a duty to determine whether there are any particularly sensitive issues. For example:

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

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

7.4. Role of hearings officers during the hearing:

Hearings officers:

- must adopt a moderate and respectful tone, and be aware of body language that may be perceived as aggressive;
- before asking any questions concerning sensitive points, will consider carefully whether or not these questions are really necessary;
- will monitor the claimant's reaction to their questions and, if the claimant seems to be becoming distressed, consider modifying their approach in order to make the claimant more comfortable.

Note: Hearings officers should be aware that behavior that seems offputting may have rational explanations. For example, a post-traumatic stress disorder or cultural differences may account for some behaviors.

In any comments they make, hearings officers must respect the dignity of the person concerned by avoiding:

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

7.5. The refugee protection officer (RPO), employed by the IRB

The refugee protection officer has a neutral role and does not take a position regarding the refugee protection claim.

The RPO's task is to ensure that the panel has all the relevant information required to make the best possible decision. The duties of the RPO (rule 16 of the RPDR) are as follows:

- examine files to determine the questions raised in a refugee protection claim or in any other matter;
- research, obtain and communicate information;
- hold interviews, write reports and complete recommendation forms;
- take part in hearings and conferences;
- present evidence, and call and examine witnesses;
- make submissions to the RPD; and
- perform any other task to ensure a full and proper examination of a refugee protection claim or any other matter.

8. Procedure: Maintaining the integrity of the program at the RPD

To maintain the integrity of the ministerial intervention program, eight tools are available:

- file assessment;
- investigation;
- intervention in person;
- intervention by filing documents and submissions;
- vacation of a refugee protection claim;
- cessation of status;
- review of reasons for RPD decisions; and
- application for judicial review.

Detailed information on each of these tools is provided in section 8.1 to section 8.8.

8.1. Tool 1: File assessment

The first tool available to help fulfil the objectives of the ministerial intervention program is file assessment. At this stage, officers must determine whether a file contains information that might require investigation or intervention (see Tables 4 and 5). If the refugee protection claim does not require any more particular attention, the file will not involve intervention and the claim will follow the normal course at the RPD for determination of the right to refugee protection without ministerial participation.

8.2. Tool 2: Investigation

If information has to be checked, officers or investigators may undertake verifications before determining whether an intervention is required. These verifications are useful for adding to the information already on file or for confirming or refuting certain facts. The result of the investigations will determine whether intervention is or is not necessary to pursue the case.

Special cases of verifications with foreign authorities

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

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

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

8.3. Tool 3: Intervention in person

A170 gives the PSEP Minister the right to present evidence, to question witnesses and to make representations in all cases, without restricting rightful intervention in exclusion cases, as under Bill C-86. In cases that are identified as requiring a PSEP ministerial presence in the room, the hearings officer is not restricted, and may present any evidence, reply to any argument, question any witness and make any representation deemed to be useful. Officers must serve notice of their intention to intervene by sending a notice of intervention in accordance with rule 25 of the RPDR and by disclosing the evidence no later than 20 days before the hearing date [rule 29 of the RPDR].

8.4. Tool 4: Intervention by filing documents and submissions

A170 gives the PSEP Minister the right to present evidence, to question witnesses and to make representations in all cases, without restriction. This right implies that the PSEP Minister may choose to present evidence and representations in writing, by filing documents in accordance with the requirements of rule 25 of the RPDR.

8.5. Tool 5: Vacation of a refugee protection claim

The IRPA allows the PSEP Minister to make an application for vacation of refugee status pursuant to A109 which reads:

> **109.**(1) The Refugee Protection Division may, on application by the PSEP Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.
> (2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.
> (3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

Vacation of a refugee claim also leads to loss of permanent resident status according to A46(1)(d) which reads:

> **46.**(1) A person loses permanent resident status
> [...]
> (d) on a final determination under section 109 to vacate a decision to allow their claim for refugee protection or a final determination under subsection 114(3) to vacate a decision to allow their application for protection.

There is thus no need to complete another formality for loss of permanent residence, which operates automatically by the effect of the Act.

Note: The IRPA has eliminated the need to obtain leave to apply for vacation of a refugee claim. Consequently, officers do not have to first file a motion with the Chairperson of the IRB to request vacation of a refugee protection claim.

This provision is not intended to prevent application of an exclusion clause in connection with a vacation, since the effect of such an interpretation would allow refugee protection claimants to protect themselves against exclusion by deliberately concealing certain facts that might raise the application of the exclusion clauses at the time of the initial application.

Since the IRPA only adds the element of assessment of evidence at the time of the initial hearing, in comparison with the provisions of the *Immigration Act* (Bill C-86), it is reasonable to assume that the case law applicable under Bill C-86 will also be applicable under Bill C-11, without any major change.

See the case law in Appendix B.

See Appendix H for arguments in favour of a restrictive interpretation of the provisions concerning vacation of a decision made in a transitional case under the IRPA.

8.6. Tool 6: Cessation of status

A108 sets out the circumstances in which cessation of refugee protection occurs.

> **108.** (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:
>
> (a) the person has voluntarily reavailed themself of the protection of their country of nationality;
> (b) the person has voluntarily reacquired their nationality;
> (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
> (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or
> (e) the reasons for which the person sought refugee protection have ceased to exist.
>
> (2) On application by the [C&I] Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).
> (3) If the application is allowed, the claim of the person is deemed to be rejected.
> (4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the county which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.“

The exception described in A108(4) comes into play where a person has succeeded in proving that they have serious reasons for refusing the protection of their country of nationality.

Note: Where the RPD rules that the person has proved sufficient reasons, the person does not lose the status of refugee or person in need of protection. For example, the RPD might grant a person who has been tortured by the authorities of their country the exception of having compelling reasons for not wanting to return to their country.

In accordance with A108(1)(d), a protected person must return voluntarily to become re-established in their country of origin. The re-establishment must cover a significant period of time, not just occasional or chance returns. Mitigating factors relating to re-establishment may also be taken into consideration.

As a general rule, a period of one year or more is considered a significant period, but each case has its own particular characteristics and must be examined on its own merits.

Note: If the person has returned to their country, a cessation application is possible *in absentia* if the evidence shows that the person left Canada to become established in their country of nationality. However, this does not remove the obligation to serve the application in accordance with rule 57 of the RPDR.

A108(1)(a) applies if the following three conditions are fulfilled:

- the person acted voluntarily;
- the person intended to perform the act by which they claimed the protection of their country of nationality; and
- the person has obtained this protection and has not failed.

The person must have the desire to establish normal relations with their country of nationality or to benefit from the advantages of the nationality of their country.

The UNHCR Handbook states at paragraph 121:

". . . If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality. . . ."

To defeat this presumption, the protected person must prove that he does not meet the three criteria cited above by showing that he " may also be constrained, by circumstances beyond his control, to have recourse to a measure of protection from his country of nationality. He may, for instance, need to apply for a divorce in his home country because no other divorce may have the necessary international recognition. . . ." [Paragraph 120 of the UNHCR Handbook]

The principle stated in A108(1)(c) arises from the fact that if a person benefits from national protection, that person no longer needs international protection.

A108(1)(b) applies where a person voluntarily reacquires their nationality. Cases of automatic reacquisition, such as those that occur through marriage ties or failure to exercise a right of option, do not automatically lead to loss of refugee status, since they are involuntary.

For A108(1)(e) to be invoked, there must be a durable, effective, substantial and non-transitory change in the country of nationality.

According to the UNHCR Handbook, at paragraph 135, this condition refers to ". . . fundamental changes in the country, which can be assumed to remove the basis of the fear of persecution. . . ."

Note: It is generally recognized that CIC will not undertake a cessation application where the reasons that caused the person concerned to claim refugee protection no longer exist, unless the circumstances are exceptional.

This provision usually applies when the conditions in the country of nationality change. Since the purpose of the IRPA is to foster the settlement of refugees and protected persons, systematically applying for cessation when conditions change in the country of nationality would make the status of all refugees unstable.

Note: It is thus recommended that this provision be employed with caution, for example, in cases of criminality where a removal could not otherwise be effected.

8.7. Tool 7: Review of reasons for RPD decisions

Officers may review the RPD's written reasons to determine whether or not a judicial review should be requested. In cases where a refugee protection claim has been granted and written reasons have not been provided, officers must send a request for written reasons to the RPD registry within 10 days of receiving the notice of decision [rule 62 of the RPDR].

8.8. Tool 8: Application for judicial review

The PSEP or C&I Minister may appeal RPD decisions to the Federal Court, and then to the Federal Court of Appeal under certain conditions.

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

8.9. Operational procedures for interventions

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

Table 7: Operational procedures for interventions

Stage	Action
1. Determine whether a finding of ineligibility is possible	• Issue a report under A44 and refer it • Notify the RPD for suspension of the hearing, in accordance with A103
2. Determine whether intervention is required	• Identify priorities • If the case is not a 1F exclusion case, assess the criteria of Tables 4 and 5 • Will the intervention be in person or by filing of documents? • Send a notice of intervention to the RPD and to the claimant (counsel for the claimant), in accordance with rule 23 of the RPDR • If an exclusion clause applies, give the notice required by rule 25 of the RPDR • Make a disclosure of the evidence at least 20 days before the date set for the hearing, in accordance with rule 29 of the RPDR
3. If necessary, assign the case to an investigator to obtain additional evidence	• Check databases (CPIC, CAIPS, FOSS) • Check for criminal record (Interpol, fingerprints) • Check status outside Canada (USINS, embassies, foreign authorities, Migration integrity officer (MIO)) • Appraise documents • Conduct additional interview
4. Determine whether an arrest is necessary at the hearing	• Have an arrest warrant issued • Notify IRB security personnel in advance of the intention to proceed with an arrest • Notify the detention centre in advance

5. Determine whether witnesses (ordinary or expert) are necessary	• Fulfil the conditions of rule 38 of the RPDR • Determine need to obtain an IRB summons to appear in accordance with rule 39 of the RPDR and/or an arrest warrant in accordance with rule 41 of the RPDR
6. If necessary, make a request for written reasons in accordance with rule 62 of the RPDR	• Review the decision and evaluate the possibility of appeal
7. Review the written reasons for the decision and assess the possibility of taking the decision to judicial review	• Inform the Litigation Management Unit of the cases that deserve more in-depth analysis for possible judicial review
8. Enter data in the various systems, at every stage of the intervention	• FOSS, NCMS, regional systems
9. For cases that establish a new trend in the movement of persons, that affect a large population of refugee protection claimants and that involve misrepresentation, fraud or trafficking in persons	• Inform the regional intelligence service of the trend • Draw up a list of cases that are part of the movement, including the file numbers in the list • Notify the Refugees and Enforcement branches at National Headquarters, and send them the relevant information

8.10. Operational procedures for vacation or cessation proceedings

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

Table 8: Operational procedures for vacation or cessation proceedings

Stage	Action
1. Determine whether a vacation or cessation is appropriate	• Identify the priorities • If the case is not a 1F exclusion case, assess the criteria of Table 5 • Send a notice of intervention to the RPD and to the claimant (counsel for the claimant), in accordance with rule 57 of the RPDR • Make a disclosure of the evidence at least 20 days before the date set for the hearing, in accordance with rule 29 of the RPDR • If an exclusion clause applies, give the notice required by rule 25 of the RPDR
2. If necessary, assign the case to an investigator in order to obtain evidence	• Check databases (CPIC, CAIPS, FOSS) • Check criminal record (Interpol, fingerprints) • Check status outside Canada (USINS, embassies, foreign authorities, Migration Integrity Officer (MIO)) • Appraise documents
3. Determine whether an arrest is necessary at the hearing	• Have an arrest warrant issued

	• Notify IRB security personnel in advance of the intention to proceed with an arrest • Notify the detention centre in advance
4. Determine whether witnesses (ordinary or expert) are necessary	• Fulfil the conditions of rule 38 of the RPDR • Determine need to obtain an IRB summons to appear, in accordance with rule 39 of the RPDR and/or an arrest warrant in accordance with rule 41of the RPDR
5. Review the written reasons for the decision and assess the possibility of taking the decision to judicial review	• Inform the Litigation Management unit of the cases that deserve more in-depth analysis for possible judicial review
6. Enter data in the various systems, at every stage in the application for vacation of the refugee claim or for a cessation finding	• FOSS, NCMS, regional systems

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

Refugee law

- Convention Relating to the Status of Refugees
- Protocol Relating to the Status of Refugees

Law on women

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

Law on children

- Convention on the Rights of the Child
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
- Optional Protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography (adopted on May 25, 2000 and came into force on January 18, 2002)
- Convention (No. 182) on the Worst Forms of Child Labour (International Labour Organization)

Torture, slavery and forced labour

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

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Economic, civil and political rights

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

Humanitarian law

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
- Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- Geneva Convention Relative to the Treatment of Prisoners of War
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of International Armed Conflicts (Protocol I)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of Non-International Armed Conflicts (Protocol II)
- Convention on Conventional Weapons (1980)

Miscellaneous

- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Reduction of Statelessness
- Convention on the Prevention and Punishment of the Crime of Genocide
- The Rome Statute of the International Criminal Court
- United Nations Convention against Transnational Organized Crime (came into force on September 29, 2003) and its two protocols:
    - ♦ Protocol to the United Nations Convention against Transnational Organized Crime, to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (came into force on December 25, 2003)
    - ♦ Protocol against the Smuggling of Migrants by Land, Sea and Air, an additional protocol to the United Nations Convention against Transnational Organized Crime (came into force on January 28, 2004)

ENF 24 Ministerial Interventions

The following site indicates the ratification dates for the most important instruments:
http://www.unhchr.ch/pdf/report.pdf

Appendix B Case law

Vacation of refugee status

In *Mahdi v. Canada* (1995), 191 N.R. 170 (F.C.A.), the Federal Court of Appeal examined the issue of exclusion at a vacation hearing. The Refugee Division had vacated the refugee status of the respondent, and had excluded him from the definition of Convention refugee under section 1E. The Federal Court of Appeal found that the CRDD had erred, not only in applying the exclusion clause, but also in improperly assessing the evidence for exclusion factors. In the Court's opinion, there were insufficient reasons to make an exclusion finding.

In *Thambipillai*, the Federal Court examined exclusion under section 1F(a). CRDD had made the exclusion finding at a hearing for vacation of status, but had not considered the application of subsection 69.3(5) IA. The Court ruled that, because exclusion removed any opportunity to examine the validity of the claim, subsection 69.3(5) IA did not apply. The Court also determined that the panel that heard the vacation application was not obliged to analyze the evidence as it would be required to do when examining aspects included in the definition of Convention refugee. The Court also repeated that neither the Trial Division nor the Appeal Division of the Federal Court had objected in Madhi (supra) to analysis of an exclusion clause by a panel examining vacation.

In *Coomaraswamy v. M.C.I.* [2002] 4 F.C. 501, the Federal Court of Appeal determined that when the CRDD evaluates the criteria of s. 69.3(5) IA, it may take into consideration the evidence submitted by the Minister for the vacation application under s. 69.2(2) IA, to identify and not consider the evidence that was the subject of the misrepresentation. The person concerned may not submit evidence that was not before the first panel at the vacation hearing, to establish that enough facts remain to warrant the granting of refugee status.

In *Annalingam et al. v. MCI,* [2003] 1 F.C. 586, [2002] F.C.J 971, [2002] FCA 281, the Federal Court of Appeal examined the question of the expedited process and the right to a hearing on the merits. The Court found that s. 7 of the Charter does not guarantee a second hearing *de novo* at the IRB to individuals who have obtained refugee status by fraudulent means. Furthermore, vacation of refugee status does not necessarily mean that a removal will take place, and the rights protected by s. 7 of the Charter are not yet in play. If claimants choose to use their hearing to deceive the IRB, they cannot assert that they have not been entitled to a hearing when their lies are discovered. This reasoning also applies to expedited process cases. In these cases, claimants have been allowed to dispense with a hearing on the merits in order to speed up the acceptance of their claim. If the claimants had disclosed their stay in Germany, they would likely not have been eligible for the expedited process. Since they were granted an exemption from having a hearing on the basis of their lies, the claimants cannot now invoke a right to a hearing that they would have had if they had told the truth.

Appendix C Case law on 1F(b) exclusion

Serious non-political crime

In *Gil v. M.E.I.,* [1995] 1 F.C. 508; (1994) 174 N.R. 292 (F.C.A.) at 309, the Federal Court of Appeal declared that the crimes contemplated in section F(b) of Article 1 are serious by definition, and will consequently result in severe punishment.

In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; (1998), 160 D.L.R. (4th) 193; 11 Admin. L.R. (3d) 1; 43 Imm. L.R. (2d) 117; 226 N.R. 201; amended reasons [1998] 1 S.C.R. 1222; (1998), the general principle developed was that serious non-political crimes giving rise to a 1F(b) exclusion are those that can result in extradition. On the other hand, doctrine and the international case law sometimes interpret this exclusion and the right to extradition as two different things.

In *Zrig v*. *Minister of Citizenship and Immigration*, F.C.T.D., IMM-601-00, September 24, 2001, reported as [2002] 1 F.C. 559, Madam Justice Tremblay-Lamer cites the remarks of Justice Bastarache in *Pushpanathan* (*supra*) and expresses the opinion that caution must be exercised in comparing serious non-political crimes with crimes subject to extradition. The approach of Justice Bastarache, if interpreted restrictively, would make it impossible to consider criminals who have committed crimes outside Canada in a country with which Canada does not have an extradition treaty. Justice Tremblay-Lamer emphasizes that the intention is not to restrict the application of the exclusion clause.

Consequently, it is considered that serious non-political crimes that are not subject to extradition may give rise to a 1F(b) exclusion in certain cases. An example would be a crime committed in a country with which Canada has not signed an extradition treaty, or in a country where a particular crime is not punishable under the law but is punishable in Canada (a crime of honour, for example).

The Federal Court of Appeal recently dismissed the appeal in *Zrig v. M.C.I.* 2003 FCA 178.

According to the Federal Court, Trial Division, in *Brzezinski v. M.C.I.,* F.C.T.D., IMM-1333-97, July 8, 1998, reported as [1998] 4 F.C. 525, minor crimes, even if they are committed repetitively, are not included in the definition of serious crime.

Political crime

In the *Gil* decision (*supra*), the Federal Court of Appeal considered the ancillary nature of an offence to determine whether or not it was political in nature. In the first place, to be political a crime must have been committed during political troubles, in a struggle to overthrow the government (political change or violent repression of political opposition). There must also be a second aspect, namely the relationship between the crime committed and the attainment of the political goal sought. The Court declared that violent acts committed randomly for political purposes may not be regarded as “political” acts due to the lack of a causal connection between the crime committed and the alleged political end. The Court also stressed that violent acts committed against unarmed civilians, which inevitably result in the death or in a serious injury of the civilians, are completely disproportionate to the legitimate political objective sought, regardless of what that is.

In the *Zrig* decision (*supra*), the Federal Court of Appeal dismissed the appeal. The rules laid down by the FCA in *Sivakumar* v. Canada (Minister of Employment and Immigration) (C.A.), [1994] 1 F.C. 433, related to the principle of complicity by association, and are to be applied by the Tribunal when it is considering an exclusion under 1F(a) and they are equally applicable when the Tribunal is considering an exclusion under 1F(b). Zrig's association with Ennahda entailed his complicity, simply because he knowingly tolerated his organization's 1F(b) crimes.

1F(b) – Serious non-political crime

For a crime to be considered serious for the purposes of section F(b) of Article 1, it has to be a capital crime or a very grave punishable act. There is a strong presumption that any crime, the equivalent of which carries a maximum penalty of more than ten years, is a serious crime.

Moreno v. M.C.I. (F.C.T.D., IMM-1447-98, February 5, 1999)
Chan, San Tong v. M.C.I. (F.C.A., A-294-99, July 24, 2000, reported as [2000] 4 F.C. 390)
Zrig v. M.C.I. (F.C.T.D., IMM-601-00, September 24, 2001, reported as [2002] 1 F.C. 559)

Drug trafficking in cocaine or heroine, sexual assault, bombing, coups d'état (including activities such as delivering weapons and seizing radio and TV stations), kidnapping and terrorist acts have been held to be serious crimes for the purposes of article 1F(b). Shoplifting, even when committed in a habitual fashion, is not a serious 1F(b) crime.

Malouf v. M.E.I. (1994) 26 Imm. L.R.(2d) 20, 86 F.T.R. (F.C.T.D.); overturned (1995) 190 N.R. 230 (F.C.A.)
Shamlou v. M.C.I. (1995) 32 Imm. L.R. (2d) 135, 103 F.T.R. 241 (F.C.T.D.)
Gil v. M.E.I. [1995] 1 F.C. 508; (1994) 174 N.R. 292 (F.C.A.) at 309
Brzezinski v. M.C.I. (F.C.T.D., IMM-1333-97, July 9, 1998, reported as [1998] 4 F.C. 525)
Moreno v. M.C.I. (F.C.T.D., IMM-1447-98, February 5, 1999)
Taleb v. M.C.I. (F.C.T.D., IMM-1449-98, May 18, 1999)
Chan, San Tong v. M.C.I. (F.C.A., A-294-99, July 24, 2000, reported as [2000] 4 F.C. 390)
Zrig v. M.C.I. (F.C.T.D., IMM-601-00, September 24, 2001, reported as [2002] 1 F.C. 559)

Not only persons are who committed serious, non-political crimes personally captured by section 1F(b) but also persons who have been complicit in committing such activities. There is extensive case law with respect to the meaning of "complicity" in the context of section F(a) of Article 1.

Moreno v. M.C.I. (F.C.T.D., IMM-1447-98), February 5, 1999)
Zrig v. M.C.I. (F.C.T.D., IMM-601-00, September 24, 2001, reported as [2002] 1 F.C. 559)
Chong v. M.C.I. (F.C.T.D., IMM-4038-00, December 4, 2001) (which supports the proposition in paragraph 9 that Hong Kong triads have a single, brutal purpose, namely the commission of crime for financial gain)

See Rikhof, J., *Exclusion Clauses, The First Hundred Cases in the Federal Court*, 34 Imm. L.R. (2nd) 137, at 157-158.

In *Gil v. Canada (Minister of Employment and Immigration)*, the Federal Court of Appeal upheld the decision of the Refugee Division to exclude an individual who had been involved five or six times in placing Molotov cocktails in crowded business premises owned by wealthy supporters of the Khomeini government in Iran and by members of the local revolutionary committees.

Gil v. Canada (Minister of Employment and Immigration) [1995] 1 F.C. 508; (1994) 174 N.R. 292 (F.C.A.) at 309 (1994); 25 Imm. L.R. (2d) 209, 119 D.L.R. (4th) 497 (F.C.A.).

In referring to the issue of whether the actions of the appellant amounted to non-political crimes, the Court of Appeal was of the view that there was no objective rational connection between injuring the commercial interests of certain wealthy supporters of the regime, and any realistic goal of forcing the regime itself to fall or change its ways or politics. This nexus was too tenuous to justify the kind of indiscriminate violence admitted to by the appellant. In *Moreno*, however, this requirement was met.

Gil (supra), at 232, Imm. L.R.
Moreno v. M.C.I. (F.C.T.D., IMM-1447-98, February 5, 1999)
Taleb v. M.C.I. (F.C.T.D., IMM-1449-98, May 18, 1999)
Vergara v. M.C.I. (F.C.T.D., IMM-1818-00, May 15, 2001)

Furthermore, the means employed by the appellant were such as to exclude his crimes from any claim to be political in nature, not because of the fact that innocent bystanders were killed, but because of the circumstance that the attacks were not carried out against armed adversaries and

were bound to injure the innocent. Violence of a sort where deadly force is directed against unarmed civilian commercial targets, in circumstances where serious injury or death to innocent bystanders is simply inevitable, is wholly disproportionate to any legitimate objective.

Ibid., at 233, Imm. L.R.
Moreno v. M.C.I. (F.C.T.D., IMM-1447-98, February 5, 1999)

See: Rikhof, J., *Exclusion Update: Three Years of Federal Court Decisions*, (1995) 27 Imm. L.R. (2d) 29 at 46-47.

The Supreme Court of Canada has stated *in obiter* that this exclusion clause would not apply in a situation where a person had already been convicted of the crimes under consideration and had already served his sentence. This statement appeared to have been eroded somewhat until recently, when the Federal Court of Appeal came to the conclusion that the Supreme Court should be followed on this point.

Canada v. Ward (Minister of Employment & Immigration) [1993] 2 S.C.R. 689, 20 Imm. L.R.(2d) 85, 103 D.L.R. (4th) 1, 153 N.R. 321
Malouf v. M.E.I. (1994) 26 Imm. L.R.(2d) 20, 86 F.T.R. (F.C.T.D.), overturned (1995) 190 N.R. 230 (F.C.A.)
Shamlou v. M.C.I. (1995) 32 Imm. L.R. (2d) 135, 103 F.T.R. 241 (F.C.T.D.)
Chan, San Tong v. M.C.I. (F.C.A., A-294-99, July 24, 2000, reported as [2000] 4 F.C. 390)
Vergara v. M.C.I. (F.C.T.D., IMM-1818-00, May 15, 2001)

In *Chan (supra)*, the Federal Court of Appeal determined that section 1F(b) does not apply to claimants who were found guilty of committing a crime outside Canada and served their sentence before coming to Canada. The Court was of the opinion that the contrary interpretation would make it possible to thwart the Minister's obligation to issue a notice of danger if the Minister wants the refugee claim of a person who has committed a crime outside Canada not to be considered acceptable. It should be noted that escape, uncompleted parole or deportation before the completion of a sentence or parole do not constitute a situation where the sentence may be deemed to have been served.

Complicity

Introduction

In *Ramirez v. M.E.I.*, [1992] 2 F.C. 306, 89 D.L.R. (4th) 780, 135 N.R. 390 (F.C.A.), the Federal Court of Appeal interpreted the concept of "committing" the crimes contemplated in section F(a) of Article 1 of the Convention by stating the following principles:

(a) mere membership in an organization involved in international offences is not sufficient for exclusion from refugee status;
(b) personal and knowing participation in persecutorial acts is required;
(c) membership in an organization which is directed to a limited, brutal purpose, such as secret police activity, may by necessity point to personal and knowing participation;
(d) mere presence at the scene of persecutorial acts does not qualify as personal and knowing participation;
(e) presence coupled with being an associate of the principal offenders amounts to personal and knowing participation; and
(f) the existence of a shared common purpose and the knowledge that all the parties have of it is sufficient evidence of complicity.

In fact, this means that complicity can be found in three types of situations, namely:

- being present at a scene of a war crime or crime against humanity;
- being a member of an organization involved in "international offences"; or
- being a member of an organization with a limited, brutal purpose.

Some organizations are of a hybrid nature in that they are involved in reprehensible activities and at the same time exercise legitimate functions.

Organization directed to a limited, brutal purpose

Where it deals with membership in organizations, the case law suggests that one should look at the type of organization first. If the main purpose of the organization is to be involved in perpetrating crimes against humanity or war crimes (such as secret police or security organizations, terrorist groups, death squads or security courts), membership is usually sufficient.

Nejad v. M.C.I, (1994) 85 F.T.R. 312 (F.C.T.D.)
Saridag v. M.C.I, (1994) 85 F.T.R. 307 (F.C.T.D.)
Diaz v. M.C.I., (1995) 94 F.T.R. 237 (F.C.T.D.)
Mohamud v. M.E.I., (1994) 83 F.T.R. 267 (F.C.T.D.)
Demiye v. M.E.I. (F.C.A., A-137-93, September 6, 1995)
Aden v. M.C.I. (F.C.T.D., IMM-2912-95, August 14, 1996)
Zoya v. M.C.I. (F.C.T.D., IMM-5256-99, November 20, 2000)
El-Kachi v. M.C.I. (F.C.T.D., IMM-3177-00, April 10, 2002

For an organization to have as a main purpose involvement in participating in crimes against humanity, it must be an organization where most of its activities amount to crimes against humanity.

Shakarabi v. M.C. I. (F.C.T.D., IMM-1371-97, April 1, 1998)
Mendez-Leyva v. M.C.I (F.C.T.D, IMM-4677-00, May 24, 2001)
Mukwaya v M.C.I (F.C.T.D., IMM-5752-99, June 13, 2001)

It is not necessary to be an official member of a group pursuing a limited, brutal purpose; simply belonging to such an organization is sufficient. An individual is a member of an organization if the individual devotes themselves full-time or almost full-time to the organization or is associated with members of the organization, especially for long periods of time. Belonging to an organization is assumed where people join voluntarily and remain in the group for the common purpose of actively adding their personal efforts to the group's cause.

Saridag v. M.C.I., (1994) 85 F.T.R. 307 (F.C.T.D.)
Shakarabi v. M.C. I. (F.C.T.D., IMM-1371-97, April 1, 1998)
Suresh v. M.C.I. (F.C.T.D., DES-3-95, November 14, 1997, page 12)(decided outside the parameters of 1F(a), namely in the context of paragraph 19(1)(f) of the *Immigration Act*)
Chiau v M.C.I. (F.C.T.D., IMM-1441-96, February 23, 1998, pages 17/18, reported as [1998] 2 F.C. 642, upheld by F.C.A., A-75-98, December 12, 2000, reported as [2001] 2 F.C. 297) (decided outside the parameters of 1F(a), namely in the context of paragraph 19(1)(c.2) of the *Immigration Act*)
M.C.I. v. Mohsen (F.C.T.D., IMM-3246-99, August 15, 2000)

There is no need to identify the specific acts in which the individual has been involved because of the notoriety and singular purpose of the group.

Hajialakhani v. M.C.I. (F.C.T.D., IMM-3105-97, September 11, 1998)

If there is a finding that membership or close association is tantamount to complicity, the evidence as to the nature of that organization must be free of doubt and, in the case of an organization that changes over time, it is important to assess the nature of the organization in the period when the individual was associated with it.

Hajialakhani v. M.C.I. (F.C.T.D., IMM-3105-97, September 11, 1998)
Yogo v. M.C.I. (F.C.T.D., IMM-4151-99, April 26, 2001)
Mukwaya v. M.C.I. (F.C.T.D., IMM-5752-99, June 13, 2001)

Knowledge of the limited, brutal purpose of an organization can be imputed from the activities an individual is involved in, and is presumed if the individual belongs to that type of organization. This presumption can be rebutted or evidence can be adduced as to why this inference should not be drawn.

Saridag v. M.C.I., (1994) 85 F.T.R. 307 (F.C.T.D.)
Aden v. M.C.I. (F.C.T.D., IMM-2912-95, August 14, 1996)
M.C.I. v. Mohsen (F.C.T.D., IMM-3246-99, August 15, 2000)
Zoya v. M.C.I. (F.C.T.D., , IMM-5256-99, November 20, 2000)
Mukwaya v. M.C.I. (F.C.T.D., IMM-5752-99, June 13, 2001)

Non-brutal organizations

If an organization is not pursuing a limited, brutal purpose, and committing war crimes and crimes against humanity is not its main function but is incidental to its mandate and a regular part of its operations, determination of complicity requires an approach that jointly analyzes the type of organization, the activities of the person who is a member of the organization and that person's intention in relation to the organization.

Gutierrez v. M.E.I., (1994) 30 Imm. L.R. (2d) 106, 84 F.T.R. 227 (F.C.T.D.)
Rahal v. Solicitor General (F.C.T.D., IMM-6894-93, January 26, 1995)
Cibaric v. M.C.I. (1995) 105 F.T.R. 304 (F.C.T.D.)

To date, the following types of organizations have been considered in the case law:

- regular armed forces

  Ramirez v. M.E.I., [1992] 2 F.C. 306, 89 D.L.R. (4th) 780, 135 N.R. 390 (F.C.A.)
  Moreno v. M.E.I., [1994] 1 F.C. 298; 21 Imm. L.R.(2d) 221; 107 D.L.R. (4th) 424; 159 N.R. 210 (F.C.A.)
  Osagie v. M.C.I. (F.C.T.D., IMM-3394-99, July 13, 2000)
  Albuja v. M.C.I. (F.C.T.D., IMM-3562-99, October 23, 2000, reported as [2000] 2 F.C. 538)
  Ariri v. M.C.I. (F.C.T.D., IMM-2111-01, March 6, 2002)
  Osayande v. M.C.I. (F.C.T.D., IMM-3780-01, April 3, 2002)

- militia

  Rahal v. Solicitor General (F.C.T.D., IMM-6894-93, January 26, 1995)
  Srour v. Solicitor General, (1995) 91 F.T.R 24 (F.C.T.D.)
  Harb v. M.C.I. (F.C.T.D., IMM-425-01, May 6, 2002)

- ministries of the interior, including prisons

  Gutierrez v. M.E.I., (1994) 30 Imm. L.R. (2d) 106, 84 F.T.R. 227 (F.C.T.D.)
  Mohammad v. M.C.I., (1995) 115 F.T.R. 161 (F.C.T.D.)

- regular police forces

  Randhawa v. M.E.I., (1995) 93 F.T.R. 151 (F.C.T.D.)
  Kiared v. M.C.I. (F.C.T.D., IMM-3172-97, August 24, 1998)
  Cabrera v. M.C.I. (F.C.T.D., IMM-4657-97, December 23, 1998)
  Quinonez v. M.C.I. (F.C.T.D., IMM-2590-97, January 12, 1999)
  Allel v. M.C.I. (F.C.T.D., IMM-6593-00, April 3, 2002)

- liberation movements and political parties

  M.C.I. v. Solomon, (1995) 31 Imm. L.R.(2d) 27 (F.C.T.D.)
  Goncalves v. M.C.I. (F.C.T.D., IMM-3140-00, July 19, 2001)

- other state organisms which have the capacity to affect large numbers of people, such as ministries and courts

  Aden v. M.E.I., (1993) [1994] 1 F.C. 625, 23 Imm. L.R. (2d) 50 (F.C.T.D.)
  Mohamud v. M.E.I., (1994) 83 F.T.R. (F.C.T.D.)
  Imama v. M.C.I. (F.C.T.D., IMM-118-01, November 6, 2001) (for senior officials of the diplomatic service)

Acts committed by individuals that the Courts have found to amount to complicity are:

- handing over people to organizations with a limited, brutal purpose or organizations involved in the commission of crimes against humanity, with the knowledge that the people handed over would come to harm

  Srour v. Solicitor General, (1995) 91 F.T.R 24 (F.C.T.D.)
  Sulemana v. M.C.I., (1995) 91 F.T.R. 53 (F.C.T.D.)
  Rasuli v. M.C.I. (F.C.T.D., IMM-3119-95, October 25, 1996)

- providing information to similar organizations which might result in harm to people about whom this information was provided

  M.C.I. v.Solomon, (1995) 31 Imm. L.R.(2d) 27 (F.C.T.D.)
  Diab v. M.E.I. (F.C.T.D., IMM-3162-93, June 10, 1994)
  Bazargan v. M.E.I. (F.C.T.D, A-51-93, May 30, 1995, overturned by F.C.A., A-400-95, September 18, 1996)
  Suliman v. M.C.I. (F.C.T.D., IMM-2829-96, June 13, 1997)
  Szekely v. M.C.I. (F.C.T.D., IMM-6032-98, December 15, 1999)
  Albuja v. M.C.I. (F.C.T.D., IMM-3562-99, October 23, 2000, reported as [2000] 2 F.C. 538)
  Lalaj v. M.C.I. (F.C.T.D., IMM-4779-99, December 19, 2000)
  Goncalves v. M.C.I. (F.C.T.D., IMM-3144-00, July 19, 2001)
  Harb v. M.C.I. (F.C.T.D., IMM-425-01, May 6, 2002)

- providing support functions, such as being an intelligence officer, a guard, a dispatcher of police vehicles, a driver or a bodyguard to members of either limited, brutal organizations or non-brutal organizations

  Ramirez v. M.E.I., [1992] 2 F.C. 306, 89 D.L.R. (4th) 780, 135 N.R. 390 (F.C.A.)
  Moreno v. M.E.I., [1994] 1 F.C. 298; 21 Imm. L.R.(2d) 221; (1993) 107 D.L.R. (4th) 424; 159 N.R. 210 (F.C.A.)
  Torkchin v. M.E.I. (F.C.A., A-159-92, January 24, 1995)
  Zadeh v. M.E.I., (1995) 90 F.T.R. 210 (F.C.T.D.)
  Guardado v. M.C.I. (F.C.T.D., IMM-2344-97, June 2, 1998)
  Cabrera v. M.C.I. (F.C.T.D., IMM-4657-97, December 23, 1998)
  Khera v. M.C.I. (F.C.T.D., IMM-4009-98, July 8, 1999)
  Allel v. M.C.I. (F.C.T.D., IMM-6593-00, April 3, 2002)

- helping to increase the efficiency of the organization, such being a policeman in charge of political prisoners in a military hospital, being a hospital security guard where forced abortions are carried out, being in charge of the legal training unit with a police force or providing maintenance and loading ordinance onto planes used to bomb civilians

  Alza v. M.C.I., (1996), 110 F.T.R. 187 (F.C.T.D.)
  Say v. M.C.I. (F.C.T.D., IMM-2547-96, May 16, 1997)
  Ordonez v. M.C.I. (F.C.T.D., IMM-2821-99, August 30, 2000)
  Chen v M.C.I. (F.C.T.D., IMM-541-00, June 1, 2001

Furthermore, the higher a function a person occupies in an organization, the more likely it is that the person's responsibility will be inferred.

Sivakumar v. M.E.I., [1994] 1 F.C. 433; (1993) 163 N.R. 197 (F.C.A.)
Mohammad v. M.C.I., (1995), 115 F.T.R. 161 (F.C.T.D.)
Berko v. M.C.I. (F.C.T.D., IMM-4462-96, September 29, 1997)
Ofuq v. M.C.I. (F.C.T.D., IMM-1828-97, May 29, 1998)
Paz v. M.C.I. (F.C.T.D., IMM-226-98, January 6, 1999)
Yang v. M.C.I. (F.C.T.D., IMM-1372-98, February 9, 1999)
Imama v. M.C.I. (F.C.T.D., IMM-118-01, November 6, 2001) (for senior officials of the diplomatic service)
Rome Statute, Article 28
Crimes against Humanity and War Crimes Act, SC 2000, c. 24, sections 5 and 7

The more intentional elements are centred around the following factors:

- having a common purpose, which means, in the negative, refusing to commit war crimes or crimes against humanity or complaining about the commission by others of such activities, which is then followed by disciplinary action or resignation combined with the timing of such refusal or resignation

  Randhawa v. M.E.I., (1995) 93 F.T.R. 151 (F.C.T.D.)
  Bahamin v. M.E.I., (1994) 171 N.R. 79 (F.C.T.D.)
  Bazargan v. M.E.I. (F.C.T.D, A-51-93, May 30, 1995, overturned FCA A-400-95, September 18, 1996)
  Nagra v. M.C.I. (F.C.T.D., IMM-5534-98, October 27, 1999)

- knowledge of war crimes or crimes against humanity, which also includes the fact that the person concerned must have known about the activities committed by the organization to which the person belonged, or else was wilfully blind to it

  Bahamin v. M.E.I., (1994) 171 N.R. 79 (F.C.T.D.)
  Castillo v. M.C.I., (1996) 106 F.T.R. 145 (F.C.T.D.)
  M.C.I. v. Cordon, (1995) 94 F.T.R 208 (F.C.T.D.)
  Mohammad v. M.C.I., (F.C.T.D., IMM-4227-94, October 25, 1995)
  Shakarabi v. M.C. I. (F.C.T.D., IMM-1371-97, April 1, 1998)
  Cortez Cordon v. M.C.I. (F.C.T.D., IMM-1889-97, April 14, 1998)
  Salazar v. M.C.I. (F.C.T.D., IMM-977-98, April 16, 1999)

- forcible recruitment, although in and by itself this does not appear to be a conclusive factor

  Moreno v. M.E.I. [1994] 1 F.C. 298; 21 Imm. L.R.(2d) 221; (1993) 107 D.L.R. (4th) 424; 159 N.R. 210 (F.C.A.)
  Fletes v. M.E.I., (1994) 83 F.T.R. 49 (F.C.T.D.)
  Gracias-Luna v. M.C.I. (F.C.T.D., IMM-1139-92, May 25, 1995)

- number of events involved

  Moreno v. M.E.I., [1994] 1 F.C. 298; 21 Imm. L.R.(2d) 221; (1993) 107 D.L.R. (4th) 424; 159 N.R. 210 (F.C.A.)

- duration of the involvement

  Gracias-Luna v. M.C.I. (F.C.T.D., IMM-1139-92, May 25, 1995)
  Moreno v. M.E.I., [1994] 1 F.C. 298; 21 Imm. L.R.(2d) 221; (1993) 107 D.L.R. (4th) 424; 159 N.R. 210 (F.C.A.)
  Osagie v. M.C.I. (F.C.T.D., IMM-3394-99, July 13, 2000)
  Osayande v. M.C.I., (F.C.T.D., IMM-3780-01, April 3, 2002)

- the circumstances surrounding the association

  Moreno v. M.E.I., [1994] 1 F.C. 298; 21 Imm. L.R.(2d) 221; (1993) 107 D.L.R. (4th) 424; 159 N.R. 210 (F.C.A.)
  Gutierrez v. M.E.I., (1994) 30 Imm. L.R. (2d) 106, 84 F.T.R. 227 (F.C.T.D.)
  M.C.I. v. Cordon, (1995) 94 F.T.R 208 (F.C.T.D.)
  Mohammad v. M.C.I., (1995) 115 F.T.R. 161 (F.C.T.D.)
  Cibaric v. M.C.I., (1995) 105 F.T.R. 304 (F.C.T.D.)
  Berko v. M.C.I. (F.C.T.D., IMM-4462-96, September 29, 1997)
  Osagie v. M.C.I. (F.C.T.D., IMM-3394-99, July 13, 2000).

Hybrid organizations

To determine whether an organization should be considered to have a limited, brutal purpose if it has not only a nefarious purpose, but also pursues other activities with such aims as education and charity, one must look at what the organization's *sine qua non* is, in other words, whether the organization could exist only for its benign projects.

Mehmoud v. M.C.I. (F.C.T.D., IMM-1734-97, July 7, 1998)

Being a member of a non-violent organization or movement that has not severed its ties drastically with an affiliated sister organization, wing or section will bring a person within the parameters of membership in the entire organization which is then considered violent.

Cardenas v. M.E.I., (1994) 23 Imm. L.R.(2d) 244, 74 F.T.R. 214 (F.C.T.D.)
Kudjoe v. M.C.I. (F.C.T.D., IMM-5129-97, December 4, 1998)
Chiau v. M.C.I. (F.C.A., A-75-98, December 12, 2000, reported as [2001] 2 F.C. 297, paragraph 59, decided in the context of section 19(1)(c.2) of the *Immigration Act*)

The principle of complicity can be summarized by stating that active membership in an organization is not required but that a person is complicit if this person contributes, directly or indirectly, remotely or immediately, while being aware of the activities of the organization, to this organization or makes these activities possible.

Bazargan v. M.E.I. (F.C.T.D, A-51-93, May 30, 1995, overturned F.C.A., A-400-95, September 18, 1996)
Ledezma v. M.C.I. (F.C.T.D., IMM-3785-96, December 1, 1997)

Complicity in a serious non-political crime

In *Sivakumar* (*supra*), complicity is defined as association with a person or organization responsible for international crimes, if the person has personally participated in these crimes or has consciously tolerated them. Mere membership in a group responsible for international crimes is not sufficient, unless this organization pursues limited and brutal ends, as defined in *Ramirez (supra)*. It may be presumed that the higher the position or echelon occupied by the person in the organization, the more likely the person is to have been aware of the crimes committed and to have participated in planning to commit them.

In *Mohammad (supra)*, Mr. Justice Nadon summarized the remarks of Linden J. as follows:

- the person who commits a crime must be held responsible for the crime;
- a person may be held responsible for a crime without having committed it personally, namely as an accomplice;
- the factor required for complicity to exist is personal and conscious participation of the person in question;
- the mere fact of being present at a crime scene is not equivalent to complicity;
- a person who assists or encourages the perpetration of a crime may be held responsible for that crime;
- a superior may be held responsible for crimes committed by their subordinates, provided that the superior knew about the crimes;
- a person may be held responsible for crimes committed by other persons, because of their close association with the perpetrators of that crime;
- the more important the duties that a person performs within an organization that has committed one or more crimes, the more likely the person’s complicity is;
- a person may be judged to be an accomplice if the person continues to hold a management position in such an organization, while being fully aware that the organization is responsible for crimes;

- to determine the responsibility of a person, the fact must be considered that the person opposed the crime or attempted to prevent the perpetration of the crime or crimes, or to withdraw from the organization.

No balancing required

It is submitted that the definition of "Convention refugee" and "protected person" in A98 clearly excludes from entitlement to the protection of status as a Convention refugee and a protected person all individuals to whom the *United Nations Convention Relating to the Status of Refugees*, signed at Geneva on July 28, 1951, and the Protocol thereto, signed at New York City on January 31, 1967, do not apply pursuant to section E or F of Article 1 thereof. As such, it is submitted that the Refugee Division is under no legal obligation to consider or to determine whether the Applicant might be included in the definition but for the fact that there are serious reasons for considering that he/she fell within the parameters of exclusion clauses E and F(b).

Kroon v. M.E.I., (1995), 28 Imm. L.R. (2d) 164 (F.C.T.D.) at 167-168
Gil v. Minister of Employment and Immigration, (1994) 174 N.R. 292 (F.C.A.) at 309.
Malouf v. M.C.I., (1995) 190 N.R. 230 (F.C.A)
Pushpanathan v. the Minister of Citizenship and Immigration and the Canadian Council of Refugees (S.C.C., [1998] 1 S.C.R. 982, paragraphs 73 and 157)
Moreno v. M.C.I. (F.C.T.D., IMM-1447-98, February 5, 1999)
Nonetheless, see:*Brzezinski v. MCI* (F.C.T.D.,IMM-1333-97,July 8, 1998)
Aquilar v. M.C.I. (F.C.T.D., IMM-3118-99, June 8, 2000)
Chan, San Tong v. M.C.I. (F.C.A., A-294-99, July 24, 2000, reported as [2000] 4 F.C. 390)

Evidence

The burden of proof in exclusion cases is on the PSEP Minister, while the standard of proof for such cases is serious reasons for considering, which is a standard between mere suspicion or conjecture and the balance of probabilities. After the *prima facie* evidence has been produced, the onus shifts to the person concerned to show why the exclusion clause should not apply in the circumstances of their particular case.

Ramirez v. M.E.I., [1992] 2 F.C. 306, 89 D.L.R. (4th) 780, 135 N.R. 390 (F.C.A.)
Sivakumar v. M.E.I., [1994] 1 F.C. 433; (1993) 163 N.R. 197 (F.C.A.)
Shahpari v. M.C.I, (F.C.T.D., IMM-2327-97, April 3, 1998)
Kamana v. M.C.I. (F.C.T.D., IMM-5998-98, September 24, 1999)

Expert evidence which incorporates undisclosed hearsay evidence in addition to documentary evidence can still be considered credible and trustworthy.

M.C.I v. Siad (F.C.A., A-226-94, December 3, 1996)

In exclusion cases, documentary evidence concerning the role of an organization involved in perpetrating crimes against humanity as part of government policy can be given more weight than the testimony of the claimant.

Quinonez v. M.C.I. (F.C.T.D., IMM-2590-97, January 12, 1999)
Pushpanathan v. M.C.I. (F.C.T.D., IMM-4427-00, September 3, 2002)
However, see M.C.I. v Asghedom (F.C.T.D., IMM-5406-00, August 30, 2001)

Even if the CRDD makes mistakes in characterizing the evidence before it, as long as these minor mistakes would not have affected the result of the decision as a real possibility, there is no reason to overturn the decision as an error of law.
Paz v. M.C.I. (F.C.T.D., IMM-226-98, January 6, 1999)

If evidence regarding exclusion comes in large part from the testimony of the person concerned before the CRDD and the transcript of that testimony is incomplete, the CRDD cannot make a finding based on exclusion.

Goodman v. M.C.I. (F.C.T.D., IMM-1977-98, February 29, 2000)

Charter arguments

The allegation that s. 7 Charter rights are infringed by the application of the exclusion clause is completely premature, since there is no evidence before the Refugee Division a claimant would be deported from Canada.

Aden v. M.E.I., [1994] 1 F.C. 625; (1993) 23 Imm. L.R. (2d) 50 (F.C.T.D.) at 58-59.
Barrera v. M.E.I., (1992), 18 Imm. L.R. (2d) 81 (F.C.A.) at 98-100.
Rudolph v. M.E.I., [1992] 2 F.C. 653 (F.C.A.) at 657.
Arica v. The Minister of Employment and Immigration (1995) F.C.J. No. 670 (F.C.A.); application for leave to S.C.C. dismissed, (1995) 198 N.R. 239.

As held in *Aden v. M.E.I.* (*supra*) at 58:

> "Turning then to the second issue argued before me, I conclude that the applicant cannot succeed on the ground that his deportation to Somalia would amount to a contravention of ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms*. We are not here dealing with the execution of a deportation order but rather with judicial review of a decision of the CRDD to the effect that the applicant is not a Convention refugee. What would flow from that decision if it were upheld, and I have determined that it should not be, is for consideration in another forum."

See also *Rudolph v. Minister of Employment and Immigration*, [1992] 2 F.C. 653 (C.A.), at 657.

Furthermore, as held in *Arica v. M.E.I.* (*supra)*:

> "The appellant's final argument centres on section 7 of the Charter and the Board's failure to balance the nature of the crime(s) committed by the appellant against the fate that awaits him should he be returned to Peru. The appellant acknowledges that in *Gonzalez* the Court held that balancing is not required. At page 238, Mahoney J.A. concluded:
>
> > I find nothing in the Act that would permit the Refugee Division to weigh the severity of potential persecution against the gravity of the conduct which had led it to conclude that what was done was an Article 1F(a) crime. The exclusion of Article 1F(a) is, by statute, integral to the definition. Whatever merit there might otherwise be to the claim, if the exclusion applies, the claimant simply cannot be a Convention refugee.
>
> The appellant now argues that section 7 of the Charter, which was not in issue in *Gonzalez*, requires the Board to determine whether a claimant would have been declared a Convention refugee but for the exclusion clause and, if so, to balance the seriousness of the crimes in the question against the quality of persecution faced by the claimant if returned to the country which he or she fled. In my opinion, section 7 of the Charter does not alter the extant law. The argument that the appellant's section 7 Charter rights have been infringed is at best premature since there was no evidence before the Board that the appellant would be deported from Canada to Peru. It is trite to note that we are not dealing with the execution of a deportation order but rather with an appeal from a decision in which it was found that the appellant is not entitled to claim refugee status. The exclusion of an individual from claiming such status does not itself imply or lead to any positive act which may affect the life, liberty or security of the person. This conclusion is in keeping with the jurisprudence of this Court; see *Barrera v. M.E.I.* (1992), 18 Imm. L.R. (2d) 81 (F.C.A.). In my view, nothing that was said by the Supreme Court of Canada in *Singh et al. v. M.E.I.* [1985] 1 S.C.R. 177, detracts from this conclusion. That decision should be contrasted with the more recent decision of that Court in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.
>
> For these reasons, the appeal should be dismissed."

Summaries of 1F(b) exclusion case law

In *Malouf v. M.C.I.,* [1995] 1 F.C. 537; (86 FTR 124), the Court overruled a CRDD decision in a situation where a Lebanese person had permanent resident status in the United States but lost it after having been convicted of possession for the purposes of trafficking and trafficking in cocaine, and came to Canada before being sentenced for the above crimes and while on bail. The Court decided on several issues, among which were that:

1) it found that the above crimes were serious and non-political in the context of F(b) without giving reasons; and
2) it found that the comment made in *Canada v.Ward,* [1993] 2 S.C.R. 689; (1993), 103 D.L.R. (4th) 1; 153 N.R. 321, regarding the application of F(b) to fugitives from prosecution does not apply in the above situation where the person is a fugitive from incarceration after having been convicted.

In *Brzezinski v. M.C.I.* (July 9, 1998, IMM-1333-97, reported as [1998] 4 F.C. 525), the CRDD decision excluding a person under F(b) who had been committing thefts throughout his life on a habitual basis in a number of countries was overturned. The Court was of the opinion that "serious" crimes in F(b) does not include theft even if committed on a regular basis. The Court reached this conclusion based on a detailed reading of the *travaux préparatoires* of the Refugee Convention (following the *Pushpanathan (*supra*)* SCC decision), and based on the FCA *Moreno (supra)* case which says that exclusion clauses should be interpreted narrowly.

Since July 1998, the following cases have been decided but not summarized for F(b):

Moreno v. M.C.I. (F.C.T.D., IMM-1447-98, February 5, 1999)
Taleb v. M.C.I. (F.C.T.D., IMM-1449-98, May 18, 1999)
Goodman v. M.C.I. (F.C.T.D. IMM-1997-98, February 29, 2000)
Aquilar v. M.C.I. (F.C.T.D., IMM-3118-99, June 8, 2000)
Chan, San Tong v. M.C.I. (F.C.A., A-294-99, July 24, 2000, reported as [2000] 4 F.C. 390)
Vergara v. M.C.I. (F.C.T.D., IMM-1818- 00, May 15, 2001)
Zrig v. Minister of Citizenship and Immigration (F.C.T.D., IMM-601-00, September 24, 2001, reported as [2002] 1 F.C. 559). The Federal Court of Appeal dismissed the appeal in *Zrig v. M.C.I.* 2003 CAF 178.

In *Zrig (supra)* :

> The Court dismissed the appeal. The rules laid down by the FCA in *Sivakumar* (*supra*), related to the principle of complicity by association, and are to be applied by the Tribunal when it is considering an exclusion under 1F(a) and they are equally applicable when the Tribunal is considering an exclusion under 1F(b). Zrig's association with Ennahda entailed his complicity, simply because he knowingly tolerated his organization's 1F(b) crimes.

Appendix D 1F(c) exclusion case law

1F(c) – Acts contrary to the purposes and principles of the United Nations

Article 1F(c) only applies to acts which amount to sustained, systematic and serious violations of human rights or which are acts of terrorism, forced disappearance, torture, hostage taking and apartheid. This article can be applied against persons whether they committed their acts in or outside Canada or whether these persons were private individuals or acting with government authority. Drug trafficking is not an activity captured by 1F(c).

Pushpanathan v. the Minister of Citizenship and Immigration and the Canadian Council of Refugees, [1998] 1 S.C.R. 982

See Rikhof, J., *Purposes, Principles and Pushpanathan: The Parameters of Exclusion Ground 1F(c) of the 1951 Refugee Convention as seen by the Supreme Court of Canada*, 37. (46) Volume No. 4/1999 AWR (Association for the Study of the World Refugee Problem) Bulletin.

Appendix E 1E exclusion case law

1E – Recognition by competent authorities

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

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

The purpose of Article 1E is to exclude persons who do not require the protection of refugee status. It therefore supports the purposes of the IRPA by limiting refugee claims to those who clearly face the threat of persecution.

Kroon v. M.E.I. (1995), Imm. L.R. (2d) 164 (F.C.T.D.) at 167-168

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

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

In order to be excluded under Article 1E, the person must have a status in no way inferior to that of a convention refugee.

Grahl-Madsen, *supra*, p. 270
Goodwin-Gill, *The Refugee in International Law*, Oxford: Clarendon Press, 1983, p. 58

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

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

It has been held that the following rights are considered rights for the purposes of article 1E:

- the right to return, the right to work freely without restrictions;
- the right to study; and
- the right to full access to social services in the country of residence.

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

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

Hurt v. Canada, [1978] 2 F.C. 340 (F.C.A.)
Mahdi v. Canada (Minister of Citizenship and Immigration) (1994), 26 Imm. L.R. (2d) 311, 86 F.T.R. 307 (F.C.T.D.), affirmed, (1995) 32 Imm. L.R. (2d) 1, 199 N.R. 170 (F.C.A.)
Hadissi v. M.C.I. (F.C.T.D., IMM-5210-94, March 29, 1996)
Mohamed v. M.C.I. (F.C.T.D., IMM-2248-96, April 7, 1997)
Wassiq v. M.C.I. (1996), 112 F.T.R. 143, 33 Imm. L.R. (2d) 238 (F.C.T.D.)
Kanesharan v. M.C.I. (1996), 35 Imm. L.R. (2d) 185, 120 F.T.R. 67 (F.C.T.D.)
Shahpari v. M.C.I. (F.C.T.D., IMM-2327-97, April 3, 1998)
Agha v. M.C.I. (F.C.T.D., IMM-4282-99, January 12, 2001)

Section 1E could be applied to persons who come to Canada when asylum shopping or who take actions which are intended to result in them not being able to return to the country where they have refugee status.

Mohamed v. M.C.I. (F.C.T.D., IMM-2248-96, April 7, 1997)
Wassiq v. M.C.I. (1996), 112 F.T.R. 143, 33 Imm. L.R. (2d) 238 (F.C.T.D.)
Shahpari v. M.C.I. (F.C.T.D., IMM-2327-97, April 3, 1998)

Evidence must be presented as to the rights a permanent resident possesses in the country of residence. Those rights are similar if not the same as the rights of nationals in that country. The person concerned must have these rights. These rights cannot be conditional upon the occurrence of certain events so that section 1E can be applied.

Case summaries for 1E

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

In *Mahdi* (*supra*), the Federal Court, Trial Division overruled the CRDD decision excluding a person from Somalia who was in possession of a US residency card based on exclusion ground E, because the CRDD, while stating that the claimant had most of the rights enjoyed by citizens, did not inquire whether the right to return was extinguished by the fact that she had given up her residency in the U.S. The case is presently under appeal as the result of certification.

In *Kroon* (supra), the CRDD decision excluding a person who was a national of Russia but had residency in Estonia was upheld. The judge indicated that exclusion clause E should be not be confined to those cases where applicants have moved from their own country of nationality to seek refugee status in another country, where they then reside with essentially similar rights to those of nationals of the second country.

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

In *Ilbeigi-Asli* (1995 92 FTR 22), which was a Minister's appeal involving claimants from Iran who had lived in Germany, the CRDD had excluded the father but not the divorced wife and minor child. The major issue dealt with the question whether the Minister had been deprived of a reasonable opportunity to present evidence on the inclusion question. The Court found on the facts of the case that such an opportunity was given. On the exclusion question, the Court stated that the CRDD erred in finding that the minor applicant was not excluded under E because German law states that a child acquires refugee status automatically by birth if either parent is a Convention refugee and that the father was given this status in Germany. The Court went on to say that because the child was only six years old and the mother, who was now divorced from the father, had custody of the child, it was not a reversible error in the particular circumstances.

In *Mohamud, Layla* (1995) F.C.J. No.782, further to a decision where the CRDD did not apply exclusion clause E in a situation where a person from Somalia had a renewable permit to stay in Italy while the war in Somalia continued, but would need to return when the situation normalized in her home country, the Court felt that, although the respondent had many rights in Italy such as the right to work, to travel and to leave and return, she did not have rights analogous to Italian citizens, specifically the right to remain when the war in Somalia was over. The Court also said that, although exclusion E rights do not have to be identical to those of a national, an important right such as the right to remain (absent unusual circumstances such as a criminal conviction) must be afforded.

In *Shamlou (supra)*, the CRDD decision to exclude a person from Iran who had permanent resident status in Mexico and who had been convicted of attempted sexual battery in the United States after a guilty plea, based on clauses E and F(b), was upheld by the Court. In agreeing with the CRDD on the exclusion E portion, the judge relied on Hathaway (*supra*), Waldman (Lorne Waldman, *Immigration Law and Practice,* vol. 1, Toronto: Butterworths Canada Ltd., 1992) and the UNHCR Handbook for the parameters of E and referred to the *Olschewski (supra)*, *Kroon (supra)*, *Hurt (supra)*, *Boun-Lea* (1981) 1 F.C. 259 *a*nd *Mahdi (supra)* cases regarding the rights and obligations for nationals. The Court accepted Waldman's criteria for this exclusion clause as the right to return, the right to work freely without restrictions, the right to study and full access to social services in the country of residence. With respect to the assertion that the claimant had lost his permanent resident status as the result of the operation of Mexican law, the decision indicated that since there was no conclusive evidence to that effect, it was not unreasonable for the CRDD to exclude the person.

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

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

In *Hadissi (supra)*, the CRDD decision excluding person who was a permanent resident of the U.S. and who had come to Canada to claim refugee status, based on clause E, was upheld by the Court. Hadissi argued that she had abandoned her permanent resident status and that she had no right to entry to the U.S. The Court decided that there was no evidence that she had lost her status in the U.S. Based on *Mahdi* (*supra*)(both FCTD and FCA), the Court found that CRDD had not made a reviewable error based on the evidence before it in which more weight was given to the Minister's evidence than to the hearsay evidence of the applicant.

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

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

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

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

In *Mohamed (supra),* the CRDD decision excluding a person under exclusion ground E who originated from Somalia and who had permanent resident status in Sweden until April 12, 1997, was upheld by the Court. The evidence indicated that permanent residents in Sweden have the same rights as permanent residents in Canada and that the certificate of permanent residency would be automatically renewed if the person were still in Sweden, but that if the person had abandoned Sweden as their place of residency, their status would lapse on the date when the certificate was up for renewal. The Court dismissed the application from the bench so that the applicants could return to Sweden in time to renew their certificate. The Court indicated that although when the applicants arrived in Canada they had no status (they were still waiting on their application for refugee status, which was rejected, but instead became permanent residents after arriving in Canada) their critical time for the question of status was the moment of the CRDD hearing, at which time the applicants had permanent resident status in Sweden. The Court also raised the concern of asylum shopping, where a person voluntarily abandons a legal status in a country which had provided protection and goes to another country. This was not what the Refugee Convention had intended.

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

Since July 1998, the following cases have decided but not summarized for clause E:

Ashari (IMM-5202-97, August 21, 1998); *Ashari* (A-525-98, October 26, 1999)
Kamana v. M.C.I., (F.C.T.D., IMM-5998-98, September 24, 1999)

*In Agha v. M.C.I. (*IMM-4282-99, January 12, 2001, Nadon J.) the Court concluded that the Board did consider the factual situation regarding the applicant's possibility to return to the U.S.A., as his permanent residence status was still active. In doing so, the Court departed from the FCA decision in *Mahdi* and followed Jerome J.'s decision in *Hadissi. T*he Court also confirmed the principle stated in *Shahpari* (Rothstein J.), i.e., once the Minister submits evidence to the effect that an applicant can return to a given country, the onus shifts to the applicant to show that he cannot. The Judicial Review was dismissed. Nadon J. made no comments in his reasons as to a possible certification.

Appendix F Definition of “persons in need of protection” and case law

Persons in need of protection

IRPA has two categories of persons on whom refugee protection can be conferred, Convention refugees and persons in need of protection. A96 incorporates the definition of a Convention refugee from the 1951 *Convention relating to the Status of Refugees.* A97 defines persons in need of protection by use of two additional categories. The first incorporates Canada's international obligations under the Convention Against Torture. It applies to those whose removal to their country of nationality or, in the case of stateless persons, to their country of habitual residence, "would subject them personally to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture."

Article 1 defines torture to include the intentional infliction of severe pain or suffering, whether physical or mental. It must be conducted by or with the consent or acquiescence of a public official or a person acting in an official capacity, with the exception of those imposing lawful sanctions. It must be imposed for one of the following purposes:

- to obtain information or a confession from the person or from a third party;
- to punish, whether for an act carried out by the person or a third party;
- to coerce or intimidate;
- or for any reason based on discrimination of any kind.

A97(1)(a) also incorporates Article 3(1) of the Convention Against Torture which prohibits removal of a person to a State where there are "substantial grounds for believing" that the person "would be in danger of being subjected to torture." For purposes of statutory interpretation, two sources may be helpful.

The first is Article 3(2) of the Convention Against Torture which states that ". . . competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

The second is General Comment Number 1 issued by the Committee against Torture of the United Nations (United Nations, Committee against Torture, General comments on the implementation of Article 3 of the Convention in the context of Article 22 : 21/11/97. General comment No. 1,) At paragraph 6, the Committee indicates that "the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable." Paragraph 7 places the burden of proof on the applicant to establish the risk and to demonstrate that "such danger is personal and present." Other factors identified as being relevant include medical evidence, change of country conditions with respect to human rights, the political activities of the applicant, factual inconsistencies and evidence as to the applicant's credibility.

The second definition of a “person in need of protection” incorporates Canada's international obligations under Articles 6 and 7 of the *International Covenant on Civil and Political Rights* as well as under principles of customary international law as reflected in a number of international instruments, including the *Universal Declaration of Human Rights*. It applies to those whose removal "would subject them personally to a risk to their life or to a risk of cruel and unusual treatment or punishment." Four qualifications are added by A97(1)(b):

1. The applicants must be unable or, because of the risk, unwilling, to avail themselves of State protection. Canadian jurisprudence on State protection in a refugee context may be helpful on this point, given the similarities in language.

2. The risk must be faced by the person in every part of the country and not faced generally by other individuals in or from that country. Refugee case law dealing with the "internal flight alternative" (IFA) may be helpful on this point. An additional requirement is that the risk cannot be based on general social, political or economic conditions. However, if the applicant is a member of a particular social group that has been singled out for abusive treatment that is not directed to other groups in society, this exception may not apply. Refugee jurisprudence pertaining to the definition of a particular social group and to the cumulative grounds for persecution may be of assistance in applying this provision.

3. The risk must not be inherent or incidental to lawful sanction, unless imposed in disregard of accepted international standards.

4. The risk may not be based on the State's inability to provide adequate health or medical care.

Pursuant to A95(1), refugee protection is conferred on a person who has been determined by the Immigration and Refugee Board to be either a Convention refugee pursuant to A96 or a person in need of protection under A97. A98 extends the exclusion clauses referred to in sections E and F of the Refugee Convention to both Convention refugees and to persons in need of protection. A109 permits the PSEP Minister to apply to the Immigration and Refugee Board to vacate refugee protection. If allowed, the respondent loses refugee protection. If the respondent is a permanent resident, this status is also automatically revoked by operation of A46(1)(d). A108 permits the C&I Minister to apply to the Immigration and Refugee Board to set aside refugee protection if the respondent has ceased to need it. In such cases, permanent residency is not lost if the application is allowed. The five grounds for cessation enumerated in A108(1) and consideration of compelling reasons why the respondent should not be removed notwithstanding cessation of risk as outlined in A108(4) are dealt with extensively in Canadian refugee case law.

Appendix G List of useful websites

Federal agencies	Addresses
Foreign Affairs Canada (FAC)	http://www.fac-aec.gc.ca
Immigration and Refugee Board (IRB)	www.irb.gc.ca
Justice Canada	www.canada.justice.gc.ca
Royal Canadian Mounted Police (RCMP)	www.rcmp-grc.gc.ca
Principal international organizations	
Amnesty International	www.amnesty.ca
High Commissioner for Refugees (HCR) Documents concerning the guidelines for applying exclusion and cessation clauses are found at this address as well as the Handbook on Procedures and Criteria for Determining Refugee Status.	www.unhcr.ch
United Nations Organization (UNO)	www.un.org
United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)	www.un.org/unrwa
Case law	
Federal Court of Canada	www.fct-cf.gc.ca/index_e.html
Immigration and Refugee Board	www.irb.gc.ca/en/decisions/reflex/index_e.htm
Supreme Court of Canada	www.scc-csc.gc.ca
International law	
International Court of Justice	www.icj-cij.org
International Criminal Tribunal for Rwanda	www.ictr.org
International Criminal Tribunal for the former Yugoslavia	www.un.org/icty
Treaties of the United Nations	http://untreaty.un.org
Other organizations	
Australian Refugee Review Tribunal	www.rrt.gov.au
Canadian Council for Refugees	www.web.net/~ccr/
European Council on Refugees and Exiles	www.ecre.org
U.S. Committee for Refugees	www.refugees.org
U.S. Department of Justice	www.usdoj.gov
U.S. Department of State	www.state.gov
U.S. Immigration and Naturalization Service	http://www.immigration.gov/graphics/index.htm
The situation in countries	
Immigration and Refugee Board, Responses to Information Requests	www.irb.gc.ca/cgi-bin/foliocgi.exe/refinfo_e
U.S. Department of State Report on Human Rights Practices	www.state.gov/
Geographic maps	
National Geographic	http://plasma.nationalgeographic.com/mapmachine/index.html
Texas Tech University Map Collection	http://www.lib.ttu.edu/maps/

Appendix H Arguments supporting the restricted interpretation of the vacation provisions in transitional cases under the IRPA

A109(1) gives the Refugee Protection Division (RPD) the power to vacate a decision to allow a claim for refugee protection without any power of reconsideration.

The very nature of vacation proceedings, and the temporal element of the test in A109(2) "at the time of the first determination" suggest that only the grounds at the time of the original hearing be considered.

A retrospective application of alternative grounds of protection could not have been intended as the application of the consolidated grounds would have the effect of extending a benefit to dishonest claimants that is not available to those who were denied refugee status before IRPA.

Therefore, to give effect to A109(2) and to avoid the unfairness of “giving more rights to a misrepresenting claimant than a truthful one”, the claimant at a vacation hearing should be put in the same position as a truthful claimant would have been at the time of the original hearing. Which means that, if the original hearing was held prior to June 28, 2002, the old refugee definition should apply, not the consolidated grounds definition.

The phrase ‘’evidence was considered at the time of the first determination…’’ indicates that new evidence is clearly excluded at the vacation hearing. It would be incongruent to restrict evidence while expecting a different criteria to be applied.

The transitional provision of R338 provides that persons found to be Convention refugees under the former Act become protected persons under IRPA. In the context of a vacation application for a person granted Convention refugee status under the former Act, the reference to protected person under A109(2), should therefore be interpreted to mean a protected person who would have otherwise gained such status through the transitional provision (i.e., would the person have become a protected person through the transitional provision without the misrepresentation.)

If the Refugee Protection Division finds there was not other sufficient evidence at the time of the first determination to find the person a Convention refugee, then the person would be comparable to someone who was found not to be a Convention refugee prior to June 28, 2002 and, by virtue of R339, the person would be deemed to have a claim for refugee protection rejected.

Finally, in the alternative, should the RPD decide that the new grounds should be considered in the application of A109(2), in the interest of fairness, the member should exercise the discretion provided for in A109(2) and not reject the application for vacation notwithstanding that there is sufficient evidence to justify protection. Like other claimants rejected pre-IRPA, the person may apply for a pre-removal risk assessment (PRRA) before removal.