Citizenship and Immigration Canada
Citoyenneté et Immigration Canada

ENF 23

Loss of Permanent Resident Status

Canada

ENF 23 Loss of Permanent Resident Status

ENF 23 Loss of Permanent Resident Status

Updates to chapter

Listing by date:

Date: 2005-11-25

Changes were made to reflect the transition from CIC to the CBSA.

- Section 4 under Instruments and delegations clarifies the roles of respective ministers in the administration of IRPA.
- The coming into force of R259 is addressed in 3.2
- Transitional provisions were deleted from section 3.1, 7.13 and 8.1.
- Modification of section 7.7 on humanitarian and compassionate grounds to clarify intent was made.
- Clarification to section 7.8 on examination of permanent residents at ports of entry was made.

Date: 2004-11-17

Section 7.7 has been updated to address the effects of a recently made favourable humanitarian and compassionate decision on a residency determination as well as the circumstances of adults who left Canada as children in order to accompany their parents.

There were also minor modifications to the last two bullets under “Extent of non-compliance” (at section 7.7) to omit the age of the client in those circumstances.

2003-09-02

Chapter ENF 23, entitled Loss of Permanent Resident Status, has been updated and is now available on CIC Explore.

The amendments that were made clarify the circumstances in which voluntary relinquishment may be considered. They also provide more detailed procedures for ports of entry (POEs) and inland offices when processing voluntary relinquishment of permanent resident (PR) status.

Among the changes to this chapter, the highlights include:

- Section 5 has been updated to provide departmental policy on voluntary relinquishment of PR status.
- Section 7.8 provides guidance on examining a permanent resident at a Port of Entry.
- Section 7.9 explains the consequences of a voluntary relinquishment under the former Act and when the person should be considered a foreign national.
- Section 7.10 provides the guidelines for voluntary relinquishment of PR status under IRPA including the guidelines to follow in writing up an A44(1) report for non-compliance prior to allowing relinquishment. This section also provides guidelines for cases where a person withdraws their declaration of voluntary relinquishment. Guidance is also provided for the exceptional circumstances where voluntary relinquishment is allowed despite compliance with A28.
- Section 7.11 explains where to record the determination of obligations under A28 in FOSS.

ENF 23 Loss of Permanent Resident Status

- Section 7.12 explains the guidelines to follow as per a certificate of departure when an order is not yet in force.

- Section 7.13 refers to the previous section 7.8, entitled Permanent Resident Card, to which no amendments have been made.

- Section 9 has been updated to provide guidance on the issue and authority of seizing permanent resident documents.

1. What this chapter is about

This chapter explains:

- when and why determinations of permanent resident status are required;
- the factors to be considered when making a determination relating to permanent resident status;
- what to do if a permanent resident is determined to have complied with the residency obligation in the *Immigration and Refugee Protection Act* (IRPA);
- what to do if a permanent resident is determined not to have complied with the residency obligation in IRPA; and
- what to do if a permanent resident wishes to relinquish their status.

2. Program objectives

IRPA establishes a residency obligation with respect to each five-year period after permanent resident status has been granted.

The provisions governing the residency obligation intend:

- to prescribe clear and objective, yet flexible, rules and criteria for establishing and determining compliance with the residency obligation provisions of IRPA;
- to assist decision-makers in assessing fundamental factors related to determinations of residency status, as well as to enhance transparency and consistency in decision making; and
- to prescribe rules for calculating days of physical presence in Canada to determine compliance with the residency obligation under A28.

3. The Act and Regulations

3.1. Statutory provisions of IRPA

Provision	Reference
Permanent resident: A person who has acquired permanent resident status and has not subsequently lost that status under A46.	A2(1)
Enter and remain: A permanent resident of Canada has the right to enter and remain in Canada, subject to the provisions of IRPA.	A27
Residency obligation: A permanent resident must comply with a residency obligation with respect to every five-year period (namely, test of 730 days/5 years).	A28(1), A28(2)(a)
Physical presence: Calculating days physically present in	A28(2)(a)(i)

Canada.	
Accompanying a spouse or common-law partner or parent who is a Canadian citizen.	A28(2)(a)(ii)
Employed abroad, on a full-time basis, by a Canadian business or in the public service of Canada or of a province.	A28(2)(a)(iii)
Accompanying a spouse, common-law partner or parent abroad, who is a Canadian permanent resident and employed on a full-time basis by a Canadian business or in the public service of Canada or of a province.	A28(2)(a)(iv)
Permanent residents for less than five years: How to assess compliance with the residency obligation in those cases where the person concerned has been a permanent resident for less than five years.	A28(2)(b)(i)
Permanent residents for 5 years or more: How to assess compliance with the residency obligation in those cases where the person concerned has been a permanent resident for five years or more.	A28(2)(b)(ii)
Humanitarian and compassionate considerations (H&C): When determining whether a permanent resident has complied with the residency obligation with respect to being physically present in Canada for 730 days within a five-year period, an officer must consider H&C grounds (including the best interests of a child directly affected by such a determination) prior to making a determination that the person has lost their permanent resident status. When an officer determines that H&C considerations relating to a permanent resident justify the retention of permanent resident status, then such a determination will overcome any breach of the residency obligation made before the H&C determination.	A28(2)(c)
A31(3) Travel document – *R* is the category coding that will be used on counterfoils involving permanent residents and residency obligation decisions made overseas: Permanent residents being issued an A31(3) travel document will have, as a general indicator of the category of case, the alpha letter *R* notated on the counterfoil. Note: some currently used category of case codes include: *T* = students; *E* = temporary workers; and *V* = visitors).	A31(3)
A31(3) Travel document *R-1* counterfoil coding: Permanent residents without a permanent resident card who comply with the residency obligation: In those cases where an overseas applicant for an A31(3) travel document is issued this travel document, and an officer overseas has made a determination that the permanent resident has complied with the residency obligation under A31(3)(a), the counterfoil coding is *R-1*.	A31(3)(a)
A31(3) Travel document *RC-1* counterfoil coding: Permanent residents without a permanent resident card/positive H&C case: In those cases where an overseas applicant is issued an A31(3) travel document and an officer overseas has made a determination under A28(2)(c) on the basis of H&C considerations, the counterfoil coding is *RC-1*.	A31(3)(b)
A31(3) Travel document *RX-1* counterfoil coding: Permanent residents without a permanent resident card/Decision made overseas that the permanent resident has not complied with the residency obligation/A63(4) appeal: In those cases where an overseas applicant is issued an A31(3) travel document and an	A31(3)(c)

officer overseas is satisfied that the permanent resident was physically present in Canada at least once within the 365 days before the examination under A31(3)(c), and the applicant has appealed or may appeal to the Immigration Appeal Division (IAD) under A63(4), the counterfoil coding is *RX-1*.	
A31(3) Travel document *RA-1* counterfoil coding: Permanent residents without a permanent resident card/Decision made overseas that the permanent resident has not complied with the residency obligation, and has not been physically present in Canada at least once within the 365 days before the examination/A63(4) appeal/IAD orders the presence of the permanent resident: In those cases where an officer overseas issues an A31(3) travel document as a consequence of a permanent resident appeal to the IAD and a resultant IAD order that the permanent resident physically appear at the hearing, the counterfoil coding is *RA- 1*.	A175(2)
Inadmissibility for failing to comply with A27(2) or A28.	A41(b)
Inadmissibility report based on non-compliance under A41(b).	A44(1)
Permanent resident card (PR card): IRPA provides that a permanent resident shall be provided with a document indicating their status in Canada.	A31(1)
General presumptions—unless an officer determines otherwise: A person in possession of a permanent resident card is presumed to have permanent resident status. A person who is outside Canada and who does not present a permanent resident card is presumed not to have permanent resident (PR) status.	A31(2)(a) and A31(2)(b)
Loss of PR status: When permanent resident status is lost.	A46(1)
Right to appeal removal order: A permanent resident may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.	A63(3)
Right of appeal – residency obligation: A permanent resident may appeal to the Immigration Appeal Division against a decision made outside Canada on the residency obligation under A28.	A63(4)
Removal order made by the IAD: If the Immigration Appeal Division dismisses an appeal made under A63(4) and the permanent resident is in Canada, it shall make a removal order.	A69(3)
IAD jurisdiction: In any proceeding before it, the Immigration Appeal Division must, in the case of an appeal under A63(4), hold a hearing.	A175(1)(a)
Presence of permanent resident at an IAD hearing: In the case of an appeal by a permanent resident under A63(4), the Immigration Appeal Division may, after considering submissions from the Minister and the permanent resident and if satisfied that the presence of the permanent resident at the hearing is necessary, order the permanent resident to physically appear at the hearing, in which case an officer shall issue a travel document for that purpose.	A175(2)

3.2. Regulatory provisions of IRPA

Provision	Reference
Definition of a common-law partner	R1(1) and R(2)
Definition of a dependent child	R2

ENF 23 Loss of Permanent Resident Status

Definition of guardianship	R2
Definition of a Canadian business	R61(1)
Exclusion of certain businesses in the context of the residency obligation under IRPA.	R61(2)
Employment outside Canada, in the context of a permanent resident's residency obligation, for the purposes of A28(2)(a)(iii) and (iv).	R61(3)
Accompanying outside Canada (ordinarily residing with) a Canadian citizen or permanent resident who is the spouse or common-law partner or parent	R61(4)
Obligation of an accompanied permanent resident to maintain their residency obligation under IRPA.	R61(5)
Definition of a child for the purposes of A28(2)(a)(ii) and (iv).	R61(6)
Calculation of residency obligation The five-year period does not include any day after: • a report is prepared under A44(1) on the grounds that the permanent resident has failed to comply with the residency obligation; or • a decision is made outside Canada that the permanent resident has failed to comply with the residency obligation, unless the permanent resident is subsequently determined to have complied.	R62(1) and R62(2)
Permanent resident card: The permanent resident card provided or issued by the Department remains at all times the property of Her Majesty in right of Canada and must be returned to the Department on the Department's request.	R53(2)
Periods of validity – Permanent resident cards: Permanent resident cards are generally valid for five years. Exceptions: A permanent resident card is valid for one year from the date of issue if the permanent resident at the time of issue: • is subject to the process as set out in paragraph A46(1)(b) (final determination of a decision made outside Canada); • is the subject of an inadmissibility report prepared under A44(1); • is subject to a removal order made under A44(2) and the period for filing an appeal from the decision has not expired or, if an appeal is filed, there has been no final determination of the appeal; or • is the subject of an A44(1) report referred to the Immigration Division under A44(2) for an admissibility hearing, and the period for filing an appeal to the IAD from any decision of the Immigration Division has not expired or, if an appeal is filed, there has been no final determination of the appeal.	R54(1) R54(2)
Renewal and revocation of permanent resident cards: • renewal results in the revocation of the previously issued permanent resident card; • officers must revoke a permanent resident card if the card is lost, stolen or destroyed, or if the permanent resident becomes a Canadian citizen, loses permanent resident status or is deceased.	R59(2) R60

Other regulatory provisions – Transportation regulations: The permanent resident card is included in a list of prescribed documents in R259(f) of the Transportation Regulations that oblige transportation companies to request the permanent resident card before boarding passengers who claim to be permanent residents.	
Removal orders/Returning resident permits	
Returning resident permits: R328(2): Any period spent outside Canada within the five years preceding the coming into force of R328 by a permanent resident holding a returning resident permit is considered to be a period spent in Canada for the purpose of satisfying the residency obligation under A28 if that period is included in the five-year period referred to in that section. R328(3): Any period spent outside Canada within the two years immediately following the coming into force of R328 by a permanent resident holding a returning resident permit is considered to be a period spent in Canada for the purpose of satisfying the residency obligation under A28 if that period is included in the five-year period referred to in that section.	R328(2) and (3)
These subsections of the Regulations came into force on 31 December 2003. It refers to the necessity to have a travel document pursuant to A31(3) and a permanent resident card.	R259(a) and R259(f) R365(3)

3.3. Immigration Appeal Division (IAD) Rules

IAD Rules	Reference
Definitions	Rule 1
Appeal from Removal Orders Made at Examination	Rule 7
Appeal Record (for appeals under Rule 7)	Rule 8
Appeal from a Decision Made outside Canada on the Residency Obligation	Rule 9
Appeal Record (for appeals under Rule 9)	Rule 10
Stay of Removal Order	Rule 26
Return to Canada to Appear at a Hearing	Rule 46

3.4. Forms

The forms required are shown in the following table.

Form name	**Form number**
Certificate of Departure	IMM 0056B
Immigrant Visa and Record of Landing	IMM 1000B
Confiscated or Voluntarily Surrender IMM 1000B	IMM 1342B
Questionnaire: Determination of Permanent Resident Status	IMM 5511B
Declaration: Voluntary Relinquishment of Permanent Resident Status/Residency Obligation Not Met	IMM 5538B
Declaration: Relinquishment of Permanent Resident Status/Residency Obligation Met	IMM 5539B

4. Instruments and delegations

Pursuant to A6(1) and A6(2), the Minister has designated persons or classes of persons as officers to carry out any purpose of any provision, legislative or regulatory, and has specified the

powers and duties of the officers so designated. These delegations and designations may be found in IL 3.

The Minister of Citizenship and Immigration (C&I) is responsible for the administration of the Act and for assessments of the residency obligation. Officers of CIC and the CBSA are designated to carry out this assessment..

The Minister of Public Safety and Emergency Preparedness is responsible for the administration of IRPA as it relates to

(a) the examination at ports of entry;

(b) the enforcement of the Act, including arrest, detention and removal;

(c) the establishment of policies respecting the enforcement of the Act and inadmissibility on grounds of security, organized criminality or violating human or international rights; and

(d) determinations under subsections A34(2), A35(2) and A37(2).

The Minister of PSEP is responsible for A44 reports and the authority to write and review reports is delegated to officers of CIC and the CBSA.

5. Departmental policy

Policies related to assessments of compliance with the residency obligation [A28] are the responsibility of CIC.

IRPA establishes a residency obligation with respect to each five-year period after permanent resident status is granted.

IRPA also specifies situations in which time spent outside Canada can be deemed to be time spent in Canada for the purpose of retaining permanent resident status.

The provisions governing the residency obligation are based primarily on the requirement of physical presence in Canada or on prescribed linkages to Canada that include employment with a prescribed Canadian institution operating outside Canada.

The Act also prescribes circumstances wherein permanent resident spouses, common-law partners and children can maintain their status while accompanying abroad a Canadian citizen or another permanent resident who complies with their own residency obligation and who is employed on a full-time basis with a prescribed Canadian institution.

No specific provisions exist to exempt students from the residency obligation provisions. Under the former *Immigration Act, 1976*, it was practice to allow persons to voluntarily relinquish permanent resident status when they declared they had ceased to be a permanent resident in accordance with the criteria in section 24, that is, they had remained outside Canada with the intention of abandoning Canada as their place of permanent residence.

Unlike the former *Immigration Act*, the criteria in IRPA for loss of status require that an officer conduct a determination on the residency obligation under A28 before loss of status can occur. Outside Canada, the loss of status occurs when the appeal period of 60 days expires, in the case of a person who does not challenge a negative residency obligation determination [A46(1)(b)]. At ports of entry (POEs) or inland, loss of status occurs when the period of 30 days to file an appeal against the removal order expires and the order comes into force [A46(1)(c), A49(1)(c)].

In addition, the Department has decided to allow voluntary relinquishment of permanent resident status in limited circumstances. This may be permitted in situations where an individual does not meet the residency obligation but is seeking to enter Canada only as a temporary resident, or where a person has to abandon permanent resident status in order to accept employment with a foreign government, including a diplomatic posting, or where such voluntary relinquishment is necessary in order to qualify for status in another country. This permission is not to be used in cases where permanent residents are subject to a report under A44(1) that may be or has been

referred to the Immigration and Refugee Board (IRB) for an admissibility hearing on matters other than the residency obligation criteria contained in A28.

Once a determination is made that a person has lost permanent resident status due to the previous voluntary surrender of the Immigrant Visa and Record of Landing (IMM 1000) (namely, signing an IMM 1342B under the former *Immigration Act*), voluntary relinquishment under IRPA, or a determination under A28 and the appeal period has expired, or a waiver of appeal rights has been signed following a negative A28 determination made abroad, they are no longer permanent residents for all purposes under IRPA.

When an officer believes a permanent resident has failed to comply with their A28 residency obligation, then that officer should report the permanent resident under the provisions of A44(1) and recommend the issuing of a departure order. The form Questionnaire: Determination of Permanent Resident Status (IMM 5511B) has been developed specifically to assist officers in making decisions regarding the permanent residency obligation, keeping in mind that the questionnaire alone is not sufficient to determine compliance with the residency obligation, and a detailed interview including examining humanitarian and compassionate criteria under A28(2)(c) is needed. Furthermore, the officer cannot seize the person's documents (such as the IMM 1000, Immigrant Visa and Record of Landing and the IMM 5292B, for example) despite writing an A44(1) report and issuing a removal order unless the officer believes there are reasonable grounds to do so in accordance with A140. The rationale behind this is that the person has a right to appeal the removal order and, until final determination of status, they remain a permanent resident and are the lawful owner of said documents.

It is recognized that in some cases where the person is willing to provide information in order to assist the officer in determining compliance with the residency obligation, the officer and/or the person may need time to gather information/documentation. Therefore, when an examining officer at a port of entry requires further information/documentation from a permanent resident (to enable the officer to make a decision on compliance or non-compliance with the residency obligation), and where the person is willing to submit this information at a later date, the officer may ask the person to come back another day for further evaluation. This is similar to an adjournment as in A23 but is not a formal adjournment, since the person is not obligated to come back and A23 cannot apply to a permanent resident. An officer cannot impose conditions as stated in A23 and R43 on a permanent resident for whom a final determination of loss of status has not been rendered. Specifically, pursuant to A28(2), a permanent resident complies with the residency obligation provisions if, for at least 730 days with respect to every five-year period, the permanent resident is physically present in Canada or:

- is outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent;
- is outside Canada employed on a full-time basis by a Canadian business or in the public service of Canada or of a province;
- is outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the public service of Canada or of a province;
- is referred to in regulations providing for other means of compliance; or
- humanitarian and compassionate considerations, taking into account the best interests of a child directly affected by the determination, justify the retention of the permanent resident status and overcome any breach of the residency obligation prior to determination.

6. Definitions

6.1. Accompanying outside Canada

A28(2)(a)(ii) and A28(2)(a)(iv) provide that each day a permanent resident is outside Canada, accompanying a Canadian citizen spouse, common-law partner or, in the case of a child, a parent with whom they ordinarily reside, is deemed a day of physical presence in Canada. Each day a permanent resident is outside Canada, accompanying a spouse, common-law partner or, in the case of a child, a parent who is also a permanent resident and with whom they ordinarily reside, is also deemed a day of physical presence in Canada provided the spouse, common-law partner or parent of the other permanent resident is employed on a full-time basis by a Canadian business or in the public service of Canada or of a province.

6.2. Canadian business

The definition applies to both large and small businesses, and includes:

- federally or provincially incorporated businesses that have an ongoing operation in Canada;
- other enterprises that have an ongoing operation in Canada, are capable of generating revenue, are carried out in anticipation of profit and in which a majority of voting or ownership interests are held by Canadian citizens, permanent residents or Canadian businesses; and
- enterprises that have been created by the laws of Canada or a province.

Note: The definition does not include businesses that have been created primarily to allow a permanent resident to satisfy their residency obligation while residing outside Canada [R61(2)].

6.3. Child

For the purposes of A28(2)(a)(ii) and A28(2)(a)(iv), a child is defined as a child of a Canadian citizen or permanent resident, including an adopted child, who is not and has never been a spouse or common-law partner and is less than 22 years of age.

6.4. Day

For the purpose of calculating the number of days to comply with the residency obligation in A28(2)(a), a day includes a full day or any part of a day that a permanent resident is physically present in Canada. Any part of a day spent in Canada, or otherwise in compliance with A28(2)(a), is to be counted as one full day for the purpose of calculating the 730 days in a five-year period.

6.5. Employment outside Canada

The Regulations enable permanent residents to comply with the residency obligation while working abroad, provided that:

- they are under contract to, or are full-time employees of, a Canadian business or in the public service, where the assignment is controlled from the head office of a Canadian business or public institution in Canada; and
- they are assigned on a full-time basis, as a term of their employment or contract, to a position outside Canada with that business, an affiliated enterprise or a client.

7. Procedure: Residency obligation

7.1. The residency obligation under IRPA

The four principal ways that permanent residents can meet the residency obligation under IRPA are by:

- their physical presence in Canada;
- accompanying abroad (that is, ordinarily residing with) a spouse or common-law partner or parent who is a Canadian citizen;
- being employed abroad, on a full-time basis, by a prescribed Canadian business or in the public service of Canada or of a province; or
- accompanying abroad (that is, ordinarily residing with) a Canadian permanent resident spouse or common-law partner or parent who is also outside Canada and who is employed, on a full-time basis, by a prescribed Canadian business or in the public service of Canada or of a province.

Officers are advised to first assess the cumulative number of days physically present in Canada under A28(2)(a)(i) to determine if the permanent resident has acquired 730 days physical presence in the preceding five-year period.

If the number of days physically present is still less than 730 days, officers may then count and include any other days that may qualify in any of the remaining three categories identified above, for example, the permanent resident may have accompanied a spouse abroad who is a Canadian citizen.

If the combined total of days is still less than 730, the residency obligation may still be met if there are H&C considerations relating to the permanent resident, taking into account the best interests of a child directly affected by the determination, that justify retaining permanent resident status.

Refer to A28(2)(c) and section 7.7 below.

Note: A28(2)(b) and A31(3) provide that the onus rests with the permanent resident to provide information and evidence to satisfy an officer that the residency obligation has been/will be met.

Put simply, this means that the permanent resident bears the full responsibility of demonstrating—with supporting documentation as considered necessary by an officer—that they were physically present in Canada for the required number of days or that they have otherwise met (or will be able to meet) the residency obligation as prescribed in IRPA.

The permanent resident also bears the onus of presenting documentation that is credible, in the opinion of an officer, to support any assertion(s) made by the permanent resident, or that may have been made on behalf of that permanent resident. There is no one document that can categorically establish a permanent resident's physical presence in Canada.

7.2. Calculating days physically present in Canada

The residency obligation contained in IRPA is based primarily on physical presence requirements or on prescribed linkages while outside Canada to prescribed Canadian employers or Canadian citizens, and/or to Canadian permanent residents who reside abroad and are employed on a full-time basis by a prescribed Canadian employer.

This is substantially different from earlier immigration legislation requirements, where retaining permanent resident status was largely dependent on a demonstration of a person's *intent* not to abandon Canada as their place of permanent residence.

The most direct way a permanent resident can show that they have fulfilled their residency obligation under IRPA is to demonstrate that they were physically present in Canada for the specified minimum number of days (that is, 730 days within the previous five-year period immediately preceding examination) pursuant to A28(2)(a)(i).

If a permanent resident can establish having met this 730-day in a five-year period requirement, then it is not necessary to examine or assess any other factor concerning the reasons for any absence from Canada during the five-year period under examination: the permanent resident will have complied with the residency obligation in IRPA.

It is to be noted that under R62(1) and R62(2), the five-year period does not include any day after:

- a report is prepared under A44(1) on the grounds that the permanent resident has failed to comply with the residency obligation; or
- a decision is made outside Canada that the permanent resident has failed to comply with the residency obligation;

unless the permanent resident is subsequently determined to have complied.

In cases involving permanent residents who may hold a returning resident permit under previous immigration legislation, or who may hold an unexpired returning resident permit, transitional provisions in IRPA provide that the period covered by such a permit is applicable to the five-year period. This means that the period covered by such a permit shall be counted as time spent in Canada for the purposes of satisfying the residency obligation in R328(2) and R328(3).

7.3. Persons who have had permanent resident status less than five years

A28(2)(b)(i) provides that if a person has been a permanent resident for less than five years, they must demonstrate, at examination, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident.

In these situations, officers should adhere to the following procedure:

1. Calculate the number of days of physical presence in Canada commencing from the date that the person became a permanent resident.

2. If 730 days remain in the five-year period following the date that the person became a permanent resident, then that person cannot be found to have failed to comply with the residency obligation contained in IRPA.

3. If there are fewer than 730 days remaining in the five-year period, count the number of days remaining and add them to the number of days calculated in step 1; that is, add them to the number of days of physical presence in Canada as calculated in step 1.

If this resultant number equals or exceeds 730 days, the permanent resident complies with the residency obligation in IRPA. Nevertheless, in these cases, officers should inform the person of the possibility of losing their permanent residency in the event that the person does not meet the 730-day threshold at some future time.

When officers advise persons of this information, an entry to this effect should be made in FOSS or CAIPS, as appropriate, based on whether the officer is overseas or in Canada.

Note: A conclusion that a permanent resident has not fulfilled their residency obligation can be made only after an assessment of any H&C factors that have been submitted for consideration. [A28(2)(c)].

7.4. Employment outside Canada

In addition to being physically present in Canada, a permanent resident may satisfy the residency obligation if they are (or were) employed, on a full-time basis, outside Canada by a prescribed Canadian business or in the public service of Canada or of a province [A28(2)(a)(iii)].

In certain situations, the total of 730 days can be accumulated by accompanying a Canadian permanent resident abroad who is (or was) employed on a full-time basis outside Canada by a prescribed Canadian business or in the public service of Canada or of a province [A28(2)(a)(iv)].

R61(1) defines a Canadian business as:

> 61. (1)(a) a corporation that is incorporated under the laws of Canada or of a province and that has an ongoing operation in Canada;
>
> (b) an enterprise, other than a corporation described in paragraph (a), that has an ongoing operation in Canada and
>
> > (i) that is capable of generating revenue and is carried out in anticipation of profit, and
> > (ii) in which a majority of voting or ownership interests is held by Canadian citizens, permanent residents, or Canadian businesses as defined in this subsection; or
>
> (c) an organization or enterprise created by the laws of Canada or a province.

For greater certainty, a Canadian business does not include a business that serves primarily to allow a permanent resident to meet their residency obligation while residing outside Canada [R61(2)].

When determining if an employer meets the definition of a Canadian business, or whether the permanent resident is in the public service of Canada or of a province, officers are encouraged to ask permanent residents to provide one or more of the documents shown below, as considered necessary by the officer. In many cases, a letter of declaration from a Canadian business employer (containing information described as follows) could serve to provide sufficient evidence to enable an officer to make a determination on compliance with A28(2)(a)(iii) requirements. However, where an employer's letter of declaration does not, in the officer's opinion, satisfactorily address or include the information necessary to make a determination, additional supporting documentation will be required.

R61(1)(a): Any corporation that has been federally or provincially incorporated would satisfy the definition stating that the business must have an ongoing operation in Canada.

Suggested information and documentary evidence

A letter of declaration signed by an authorized officer of the Canadian business employer/contractor that states the position and title of the signing officer and indicates the following:

- that the said business is incorporated under the laws of Canada or a particular province, as applicable;
- that the business has an ongoing operation in Canada, and the name and style under which the business is operating in Canada, for example, doing business as: [business name];
- the nature of the business, length of time in operation in Canada and number of employees in Canada;
- details of the permanent resident's assignment or contract abroad such as the duration of the assignment; confirmation that the permanent resident is a full-time employee of the Canadian business working abroad on a full-time basis as a term of their employment, or that the

person is on contract working on a full-time basis abroad as a term of their contract; and a description or copy of the position profile regarding the assignment or contract abroad;

- details about the nature of the relationship between the Canadian business and the business abroad, indicating if the employment is with the Canadian business's office abroad, an affiliated enterprise or a client; and

- confirmation that the Canadian business has not been created primarily for the purpose of allowing a permanent resident to satisfy their residency obligation while residing outside Canada.

Additional supporting documentary evidence may include, as applicable:

- articles of incorporation;

- business licence(s);

- corporate annual report(s);

- corporate Canadian Income Tax Notice of Assessment;

- financial statement(s);

- a copy of the Employee Assignment Agreement or Contract; and

- a copy of any agreement or arrangement between the Canadian business and the business or client abroad concerning the permanent resident's assignment to that business or client.

R61(1)(b): An enterprise may be a legal entity other than a corporation

Examples include a proprietorship, partnership, joint-partnership, etc. Many small businesses and professional businesses, such as law and engineering firms and some banks, may be included in this category. Some banks and other financial institutions could also be described in R61(1)(a). In order to qualify under this definition, these businesses must also have an ongoing operation in Canada that is capable of generating revenue and is carried out in anticipation of profit. Canadian citizens, permanent residents or Canadian businesses must hold the majority of voting or ownership interests in the business.

Suggested information and documentary evidence

Suggested information and documentary evidence would include a letter of declaration signed by an authorized officer of the Canadian business employer/contractor that states the position and/or title of the signing officer and indicates the following:

- whether the said business is a proprietorship, partnership, joint partnership, etc., as applicable;

- the name, citizenship and residency status of the proprietor or, in the case partnerships, each partner;

- a breakdown of voting or ownership interests of each partner in the business;

- that the business has an ongoing operation in Canada, and the name and style under which the business is operating in Canada, for example, doing business as: [business name];

- the nature of the business, length of time in operation in Canada and number of employees in Canada;

- details of the permanent resident's assignment or contract abroad such as the duration of the assignment; confirmation that the permanent resident is a full-time employee of the Canadian business working abroad on a full-time basis as a term of their employment, or that the person is on contract working on a full-time basis abroad as a term of their contract; and a description or copy of the position profile regarding the assignment or contract abroad;

- details about the nature of the relationship between the Canadian business and the business abroad indicating if the employment is with the Canadian business's office abroad, an affiliated enterprise or a client; and

- confirmation that the Canadian business has not been created primarily for the purpose of allowing a permanent resident to satisfy their residency obligation while residing outside Canada.

Additional supporting documentary evidence may include, as applicable:

- partnership agreement(s);

- business licence(s);

- Canadian Income Tax Notice of Assessment for the business;

- financial statement(s);

- a copy of the Employee Assignment Agreement or Contract; and

- a copy of any agreement or arrangement between the Canadian business and the business or client abroad concerning the permanent resident's assignment to that business or client.

R61(1)(c): An organization or enterprise that is created by the laws of Canada or a province

Examples may include Crown corporations, municipal bodies, certain agencies, universities, hospitals, etc. These organizations do not necessarily operate in anticipation of profit nor are they necessarily capable of generating revenue.

Suggested information and documentary evidence

Suggested information and documentary evidence would include a letter of declaration signed by an authorized officer of the Canadian business employer/contractor that states the position and title of the signing officer and indicates the following:

- that the said business has been created by the laws of Canada or a particular province;

- the name and style under which the business is operating in Canada, for example, doing business as: [business name];

- the nature of the business, length of time in operation in Canada and number of employees in Canada;

- details of the permanent resident's assignment or contract abroad, such as duration of the assignment; confirmation that the permanent resident is a full-time employee of the Canadian business working abroad on a full-time basis as a term of their employment, or that the

person is on contract working on a full-time basis abroad as a term of their contract; and a description or copy of the position profile regarding the assignment or contract abroad;

- details about the nature of the relationship between the Canadian business and the business abroad indicating if the employment is with the Canadian business's office abroad, an affiliated enterprise or a client; and

- confirmation that the Canadian business has not been created primarily for the purpose of allowing a permanent resident to satisfy their residency obligation while residing outside Canada.

Additional supporting documentary evidence may include, as applicable:

- articles of association;

- articles of incorporation;

- business licence(s);

- annual report(s);

- financial statement(s);

- a copy of the Employee Assignment Agreement or Contract; and

- a copy of any agreement or arrangement between the Canadian business and the business or client abroad concerning the permanent resident's assignment to that business or client.

Note: The aforementioned listings of Canadian employer documentation are not meant to be all-encompassing or exhaustive. Consequently, an officer is encouraged to ask permanent residents to provide such documentation as that officer deems necessary in order to make a determination that a permanent resident is (or was) employed, on a full-time basis, by a prescribed Canadian business or in the public service of Canada or of a province.

R61(3)**: Determining if permanent residents are employed on a full-time basis by a prescribed Canadian business**

When determining if permanent residents are employed on a full-time basis by a prescribed Canadian business, officers are encouraged to ask permanent residents to provide such information, documentation and/or evidence to satisfy the officer that the permanent resident's employment abroad complies with:

- the R61(3) regulatory provisions pertaining to qualifying criteria for employment abroad; and

- the R61(1) definition of a Canadian business.

Suggested information and documentary evidence

Suggested information and documentary evidence includes a letter of declaration and, as considered necessary by the officer, supporting documentation from the Canadian government body or Canadian business employer/contractor indicating compliance with the definitions/provisions of R61(1) and R61(3).

See also preceding guidelines pertaining to examining information and documentary evidence under R61(1)(a), (b) and (c).

Additional supporting documentary evidence may include:

- pay statement(s);
- Canadian Income Tax Notice of Assessment;
- T4 slips;
- proof that the permanent resident is (or was) working abroad on a full-time basis;
- details and particulars concerning the assignment, secondment, contract or whatever other name might be given to that document, if such document exists, that requires (or required) the permanent resident to work abroad (in those cases where a copy of the document is not specific in itself); and
- the duration of the above-mentioned assignment, secondment or contract (as appropriate).

Days worked abroad for a prescribed Canadian employer are to be added to the number of days of physical presence in Canada in order to determine if the combined number of days equals or exceeds the 730-day threshold.

Note: A28(2)(b) and A31(3) provide that the onus rests with the permanent resident to provide information and evidence to satisfy an officer that the residency obligation has been met. This includes demonstrating that the permanent resident's employment abroad is (or was) in compliance with R61(3) concerning qualifying criteria for employment abroad and the R61(1) definition of a Canadian business.

7.5. Accompanying a Canadian citizen outside Canada

R61(4) provides that each day a permanent resident is outside Canada accompanying (that is, ordinarily residing with) a Canadian citizen constitutes a day of physical presence in Canada, provided that the Canadian citizen they are accompanying is a spouse or common-law partner or parent.

In the case of a permanent resident outside Canada accompanying a Canadian citizen, it is not necessary to determine who is accompanying whom, nor is it necessary to determine for what purpose. In other words, under A28(2)(a)(ii) and R61(4), as long as a permanent resident is accompanying a Canadian citizen, the intent and purpose of their absences are not relevant as the residency obligation is met.

For the purposes of A28(2)(a)(ii) and A28(2)(a)(iv), R61(6) defines a child as being a child of a parent referred to in those subparagraphs who is not and has never been a spouse or common-law partner and is less than 22 years of age.

Note: The provisions respecting the age of a child apply equally to both permanent resident children of Canadian citizens and permanent resident children of permanent residents.

7.6. Accompanying a permanent resident outside Canada

In accordance with R61(5), and in connection with A28(2)(a)(iv), a permanent resident complies with the residency obligation so long as the permanent resident they are accompanying is their spouse or common-law partner or parent, and that spouse or common-law partner or parent is in compliance with their residency obligation.

Put another way, an accompanying permanent resident may count days of physical presence in Canada—while accompanying another permanent resident—only if the permanent resident they are accompanying meets the prescribed conditions as specified in A28(2)(a)(iv) and is in compliance with their own residency obligation.

R1(1) defines common-law partner to mean, in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year. R1(2) provides for "Interpretation – common-law partner."

"Spouse" is not defined in IRPA.

"Spouse," as defined by the *Merriam-Webster Online Dictionary* (http://www.m-w.com) means "married person: husband, wife."

For the purposes of A28(2)(a)(ii) and A28(2)(a)(iv), R61(6) defines a child as being a child of a parent referred to in those subparagraphs who is not and has never been a spouse or common-law partner and is less than 22 years of age.

Note: The provisions respecting the age of a child apply equally to both permanent resident children of Canadian citizens and permanent resident children of permanent residents.

7.7. Humanitarian and compassionate determinations

A28 provisions require the consideration of H&C factors before making a determination that may lead to a loss of permanent resident status.

Specifically, A28(2)(c) provides that when an officer determines that H&C considerations relating to a permanent resident justify the retention of permanent resident status, then such a determination will overcome any breach of the residency obligation made before the determination.

Accordingly, each decision-maker involved in a residency obligation determination case should, as part of the decision-making process, assess any H&C factors brought to their attention to determine whether such factors justify retention of permanent resident status, notwithstanding a breach of A28.

Note: The best interests of a child directly affected by the determination must also be considered when assessing H&C factors and, as a result, may justify the retention of permanent resident status.

Officers should consider whether sufficient H&C factors have been brought to their attention to justify the retention of permanent resident status before making a decision that there has been a failure to comply with the residency obligation. Officers should remember that the onus is on the permanent resident to satisfy an officer that there are grounds to justify retention of status. Officers are not required to satisfy the permanent resident that such grounds do not exist. Officers should consider the objectives of IRPA and that A28(2)(c) exists to allow flexibility for approving deserving cases not anticipated in the legislation.

For more information, see the subsections below.

Humanitarian and compassionate grounds

A28(2)(c) provides the flexibility for allowing the retention of permanent resident status, in deserving cases, under circumstances that were not anticipated in the legislation.

A positive decision on retaining permanent resident status, based on H&C grounds, is an exceptional response to a particular set of circumstances.

An examination of H&C factors includes an evaluation of reasons given and supporting evidence of events and circumstances that have occurred in the five-year period immediately preceding an examination.

While "intent" is no longer the determinative factor that it was under the previous act, the applicant's intent can be taken into consideration as an element of humanitarian and compassionate assessment.

The permanent resident bears the onus of satisfying the decision-maker that there are compelling H&C factors in their individual circumstances that justify retention of permanent resident status.

The permanent resident also bears the onus of explaining why they were not able to comply with the residency obligation and the extent of any hardship that the loss of permanent resident status may cause to the individual or family members who would be directly affected by the decision. The resulting hardship from loss of status may be unusual and undeserved, or disproportionate.

The following definitions are not meant as absolute rules; rather, they are an attempt to provide guidance to decision-makers when they exercise their discretion in determining whether sufficient H&C considerations exist to justify the retention of permanent resident status.

Unusual and undeserved hardship

The hardship (of losing permanent resident status) that the permanent resident would face should be, in most cases, unusual. In other words, it should be a hardship not anticipated by IRPA. This hardship should be, in most cases, the result of circumstances beyond the permanent resident's control.

Disproportionate hardship

H&C grounds may exist in cases that would not meet the criteria of *unusual and undeserved* but would be met where the hardship would have a disproportionate impact on the permanent resident due to personal circumstances.

Minors who left in order to accompany parents

Under the former *Immigration Act, 1976,* if a child under 18 years of age left Canada with their parents and, after becoming an adult, sought to re-enter Canada as a permanent resident, jurisprudence dictated that the person could not have formed the intent to abandon Canada as a child and therefore retained permanent resident status.

Under IRPA, intent to abandon is no longer the test for retaining permanent resident status. Therefore, the inability to form intent no longer results in automatic retention of permanent resident status. The new test requires that H&C considerations be taken into account. Although the reasons for leaving and remaining outside Canada may be considerations, the fact that a minor did not have the intention to abandon Canada or left as a dependent child is not determinative.

Factors for consideration

The range of factors to be considered should not be restricted by these guidelines. Officers are obliged to consider all the information presented by a permanent resident.

H&C factors must be reviewed on a case-by-case basis. Permanent residents are free to make submissions on any aspect of their personal circumstances that they feel would warrant retention of their permanent resident status.

The following are examples of the kinds of factors or combinations of factors that an officer might consider in determining whether H&C grounds justify the retention of permanent resident status. Officers are to examine circumstances and events that occurred in the last five-year period that led to the permanent resident's breach of the residency obligation. As required by A28(2)(c), officers are also to take into account the best interests of a child directly affected by the determination and the degree of hardship that may be caused because of a loss of permanent resident status.

Examples of factors to weigh and consider:

- Extent of non-compliance:
    - How many days of physical presence in Canada within the five-year period under examination has the permanent resident spent in Canada?

- Was the permanent resident outside Canada for more than three years in the last five-year period because of a medical condition or the medical condition of a close family member?
- Could alternative arrangements for the care of the family member have been made or was it the permanent resident's choice to remain outside Canada?
- Circumstances beyond the permanent resident's control: are the circumstances that led to the permanent resident remaining outside Canada compelling and beyond their control?
- Was the permanent resident prevented from returning to Canada and, if so, by whom or by what event?
- Is the permanent resident now returning to Canada at the earliest possible opportunity?
- Did the permanent resident leave Canada as a child accompanying a parent?
- Is the permanent resident who left as a dependent child or family member returning at the earliest opportunity?
- Is the permanent resident dependent on the parent they are accompanying because of a mental or physical disability?

- Establishment in and outside Canada:
  - Is the permanent resident a citizen or permanent resident of a country other than Canada?
  - Has the permanent resident taken steps to establish any permanence in a country other than Canada or the country they resided in immediately before becoming a permanent resident of Canada (that is, any third-country status)?
  - To what degree has the permanent resident established in Canada?
  - What linkages and ties has the permanent resident maintained in Canada?
- Presence and degree of consequential hardship:
  - A loss of permanent resident status will have the consequence of either having to voluntarily leave or be removed from Canada. The removal of a statusless person may have an impact on family members who do have the legal right to remain in Canada (for example, Canadian citizens and/or permanent residents). Officers should consider the person's degree of hardship in relation to personal circumstances (that is, impact on family members, especially children).

Effects of the Supreme Court of Canada decision in *Baker v. M.C.I.*

Although the *Baker* case did not specifically concern an appeal based on an A28 residency obligation determination, it does pertain to administrative law principles and how H&C factors are to be applied and given consideration.

Therefore, officers involved in assessing H&C factors are to remain cognizant of the issues that were raised in the *Baker* case and the resultant summary of issues and impact on CIC, as outlined in Appendix A.

See also Appendix B and IP 5, section 5.23.

Onus rests with the permanent resident

As indicated throughout this chapter, the onus rests with the permanent resident to provide the necessary information and evidence to satisfy an officer that they are in compliance with the legislation. An officer, when deciding whether a permanent resident complies with A28(2)(a)(iv), may address the following factors, among others:

- whether the permanent resident is a *bona fide* spouse or common-law partner or child of the person they are accompanying abroad;
- whether the permanent resident normally resides with the person they are accompanying abroad;
- whether the person whom the permanent resident is accompanying is a Canadian citizen or a permanent resident of Canada; and
- if the person concerned is accompanying a permanent resident, whether that permanent resident is in compliance with their own residency obligation.

Documentation and information presented by a permanent resident that may be considered by an officer may include a marriage licence; a child's birth certificate or baptismal document; adoption or guardianship documents; school and/or employment records; passport and/or other travel documents or documentation; employment letters; and such other documentation from the permanent resident being accompanied that an officer considers necessary to confirm that the permanent resident being accompanied is in compliance with their own residency obligation.

Note: The above list is not meant to be all-encompassing or exhaustive. Officers may ask permanent residents to provide such documentation as deemed necessary in the circumstances to allow for a determination to be made with respect to the residency obligation provision of IRPA

The effect of a recent, favourable humanitarian and compassionate decision

Officers will sometimes make residency determinations for permanent residents who were the subject of favourable decisions under A28(2)(c) for H&C reasons in the recent past, either by an officer or the Immigration Appeal Division of the IRB. In this situation, officers are required to exercise their statutory authority and render independent decisions. However, officers should be mindful that the intent of the legislation was to enable persons to retain permanent resident status where it is determined that, having regard to all circumstances, retention of status is warranted. Therefore, unless circumstances have changed significantly or new information is available, it would not be consistent with the intent of the legislation for these persons to receive a negative determination.

7.8. Examining permanent residents at a POE

When a permanent resident appears at a POE for examination, the officer must confirm that the person is a permanent resident. Officers must remain cognizant of the fact that the Act gives permanent residents of Canada the right to enter Canada at a port of entry once it is established that a person is a permanent resident, regardless of non-compliance with the residency obligation in A28 or the presence of other grounds of inadmissibility.

Port of entry (POE) officers can refuse entry to a permanent resident only when the person has already lost the status in accordance with the provisions of A46 (such as when a final determination has been made that they have failed to comply with the residency obligations or when a removal order comes into force). In other words, once a permanent resident's status is established, the person may enter Canada by right and the immigration examination under IRPA concludes.

If an officer has concerns that a permanent resident has not complied with the residency obligation of A28, the officer should advise the permanent resident when the examination is concluded that they are authorized to enter Canada; however the permanent resident may wish to answer additional questions so the officer may determine whether their concerns are well founded or not.

In cases where:

- permanent resident status is established;
- the permanent resident refuses to provide any further information and enters Canada; and
- the officer believes, on a balance of probabilities that the person is in non-compliance with the residency obligation,

officers may report the person, pursuant to A44(1). if there is sufficient evidence to support an inadmissibility allegation. In the absence of sufficient evidence to support the writing of an inadmissibility report, officers may enter any available information into FOSS (date of entry, last country of embarkation, current address in Canada etc.).

7.9. Voluntary relinquishment of permanent resident status under the former *Immigration Act, 1976*

Where a person signed an IMM 1342B under the former *Immigration Act*, the person may be treated as a foreign national, if:

- they formally signed a document (usually an IMM 1342B – Confiscated or Voluntarily Surrendered IMM 1000B) voluntarily declaring abandonment of Canada as their place of permanent residence. This is normally indicated by the FOSS NCB code 10: vol relinq of status;
- they are now seeking to enter or remain in Canada as a temporary resident; and
- they acknowledge that in signing the IMM 1342B they were relinquishing permanent resident status. This should be recorded in the officer's notes and retained on the file.

If all of the above conditions have been met, the officer may treat the person as a foreign national. Where a person maintains they signed an IMM 1342B and there is no record in FOSS or no paper documentation to support their claim, an officer should conduct a determination on the residency obligation under A28 or follow the procedures for voluntary relinquishment below if applicable.

All other persons who were landed under the former *Immigration Act* and did not lose their status pursuant to section 24(1)(b) of that Act as a result of a removal order should be treated as permanent residents under IRPA, subject to the residency obligation stated in A28.

7.10. Voluntary relinquishment of permanent resident status under IRPA

The following section provides guidance on the procedures to follow in the limited circumstances in which a permanent resident may be allowed to relinquish status voluntarily.

Person applying to enter or remain in Canada as a temporary resident and who does not meet the residency obligation

As mentioned above, the officer must first determine if the person is a permanent resident or not. If the person does not meet the residency obligation under A28 but still wishes to enter as a foreign national and clearly states the intention of relinquishing permanent resident status, the officer may write the A44(1) report, using the guidelines below.

A44(1) report and voluntary relinquishment

Where a person does not meet the residency obligation, an A44(1) report should be prepared [A41(b) for A28 cases]. Once a report is prepared, the provisions of R62(1)(a) take effect so that any time spent in Canada subsequent to the report will not count as days towards the residency obligation under A28(2) in the event the person rescinds their declaration within 30 days.

Provided the person has made it clear from the beginning and throughout the examination that they are interested in temporary resident status only and that they truly and voluntarily wish to relinquish status, the officer may allow the person to complete the Declaration: Voluntary Relinquishment of Permanent Resident Status/Residency Obligation Not Met (IMM 5538B). A copy of the IMM 5538B should be sent to the Query Response Centre (QRC) to be stored on microfiche. This procedure is not to be used in any situation where the person indicates at any time a desire to be considered a permanent resident, even if they subsequently maintain they no longer wish to be a permanent resident.

The officer must first determine whether the person has fulfilled the residency obligation [A28]. Once the officer has established that the person does not meet the residency obligation, the officer allows the person to make submissions on H&C considerations, which may lead the officer to determine that the person remains a permanent resident despite non-compliance with the residency obligation. If the person declines to produce any evidence of compliance, does not wish to make submissions on H&C grounds at the time of the examination, or if their submissions are not sufficient to overcome the officer's decision that they have not fulfilled the residency obligation, then the officer may allow the person to sign a voluntary relinquishment.

The officer must personally provide counselling to the person on the significance of the declaration and should ensure that the person fully comprehends the content of the declaration. The officer should further counsel the person to ensure that they understand that if they withdraw the declaration within 30 days, a departure order may be issued and they would have a right to appeal that order.

During counselling, the officer must provide, in writing, the full CIC address where the person is to send the notice to withdraw relinquishment of permanent resident status. The officer must clearly note on file that the person did not wish to produce evidence or submissions, or produced insufficient evidence or submissions to allow the officer to conclude that the person satisfies A28, despite non-compliance with residency obligations. Details of the evaluation of humanitarian and compassionate grounds can be found in section 7.7 above.

Once the A44(1) report and the IMM 5538B are completed, they must be given to the Minister's delegate for review. The Minister's delegate may either dispose of the A44(1) report at that time by coding the disposition "14" (no further action) or, alternatively, the Minister's delegate may hold the report in abeyance for final disposition for a period of 37 days (30 days during which the person may withdraw the IMM 5538B declaration, plus seven days for delivery). If the 37 days pass without a withdrawal, the report may then be disposed of with code 14 (no further action).

In either case, the Minister's delegate must keep in mind that if the person withdraws their declaration relinquishing status, a removal order should be issued. Therefore, the Minister's delegate's notes on file should clearly demonstrate that the person was duly informed that a removal order could be issued against them in the event of a determination of permanent residency status due to withdrawal of the declaration of relinquishment. Essentially, the Minister's delegate should record in their notes that it is their decision that, based on the information available at the time of the review of the A44(1) report, such an order is to be issued if the person withdraws their declaration within the 30 days during which this is allowed.

A non-computer-based entry (NCB) with code 10 for relinquishment of status is to be entered when the A44(1) report disposition is entered.

Withdrawal of IMM 5538B – Declaration: Voluntary Relinquishment of Permanent Resident Status/Residency Obligation Not Met

If the person subsequently withdraws the voluntary relinquishment within the 30-day period, they have already been given the opportunity to make H&C submissions. Therefore, any additional evidence relating to the residency obligation and H&C considerations under A28(2)(c) (see section 7.7 above) must be considered by the Minister's delegate before it is determined that the report remains well-founded and before proceeding to issue a departure order. File notes should reflect that the considerations of A28(2) were assessed before the final decision. Consequently, the Minister's delegate is to review the file as if the person had refused to sign a voluntary relinquishment at the original determination at which the officer had determined a non-compliance with the residency obligation.

If no additional information is received with the notice of withdrawal of the declaration, then the Minister's delegate should refer to the officer's original notes and decision of non-compliance. Consequently, the A44(1) report should be reviewed, and the Minister's delegate should enter the disposition of a removal order in FOSS. The Minister's delegate issues the removal order and sends a copy to the person. The person must be advised that it is possible to appeal the removal order. If, at the initial examination that led to the relinquishment, an A44(1) report was prepared by the examining officer but the Minister's delegate's disposition was *no further action*, the Minister's delegate should amend this report and change the disposition to reflect the appropriate removal order.

As long as the officer's examination and notes are thorough and complete, there is no need to send a further invitation to the person for submissions regarding H&C grounds since the person has already been given a full opportunity to make such submissions to the officer prior to being allowed to sign the declaration of voluntary relinquishment.

If the person withdraws the declaration at a CIC other than the initial POE where they signed the declaration, the CIC that received the withdrawal notice must ensure that it has the person's complete address and that it sends a copy of the withdrawal and any submissions regarding residency obligations and H&C considerations to the Minister's delegate who reviewed the report at the initial POE. The Minister's delegate will issue a decision and inform the person.

In the event that the person has left Canada and sends the notice to withdraw the voluntary relinquishment to a Canadian visa office abroad, the officer at the visa office will clearly note this in FOSS by inputting the NCB entry code 01: "watch for" and will put in all relevant notes and observations stating that the person has given notice of withdrawal of voluntarily relinquishment. Furthermore, the visa office will advise the Minister's delegate (who received the initial report and entered the disposition of no further action) that the person filed the notice of withdrawal at a visa office abroad. These procedures will allow the next POE officer who deals with this person to understand why an A44(1) report for non-compliance with the residency obligation was written but no removal order was issued, since such an order cannot be issued while the permanent resident is abroad and counselling regarding the appeals rights cannot be given.

Where a copy of the IMM 5538B has already been forwarded to the QRC, the Minister's delegate is responsible for informing the QRC of the withdrawal and returning it to the local file.

Person satisfies the residency obligation in A28 but wishes to relinquish status for other reasons

As mentioned in section 5 above, a person may be allowed to voluntarily relinquish their status despite satisfying the residency obligation in A28, for the following reasons:

- they have to relinquish permanent resident status in order to accept employment with a foreign government, including a diplomatic posting; or

- it is necessary to qualify for status in another country.

When a person approaches CIC and requests to relinquish their status, they may be allowed to complete the IMM 5539B (Declaration: Relinquishment of Permanent Resident Status/Residency Obligation Met) provided they are truly voluntarily relinquishing their status and fully understand the consequences. The person can then be treated as a foreign national. A copy of the IMM 5539B should be sent to the QRC to be stored on microfiche.

Officers should always conduct an interview in person when accepting voluntary relinquishment of permanent resident status. This procedure is not to be used in lieu of completing a residency obligation determination for persons who might satisfy the residency obligation in A28 and where they are only seeking to come to Canada temporarily.

7.11. Recording determination of obligations under A28

At visa offices, all determinations made under A28 are to be recorded in CAIPS. At the POE and inland CIC offices, all decisions are to be entered in FOSS as “FDE – PR - PERMANENT RESIDENT DETERMINATION.”

7.12. Certificate of Departure (IMM 0056B) when an order is not yet in force

If a negative determination under A28 has been made and a removal order issued, the loss of status becomes effective upon completion of the appeal period of 30 days if no appeal is made.

If the person wishes to leave Canada before the order comes into force under A49(1)(b) prior to the 30-day appeal period, the following steps should be taken:

- The officer must ensure that the person concerned is aware that the removal order is not yet in force and understands the implications. The officer should obtain a statutory declaration indicating that the person concerned understands and declares the following:
  - ♦ that the officer has made a negative determination on their permanent resident status;
  - ♦ the criteria for this determination (A28);
  - ♦ they agree with the officer's conclusions;
  - ♦ they are aware of their right to appeal this decision to the IAD; and
  - ♦ they have no intention to appeal the decision. (A sample statutory declaration is found in Appendix C.)
- The officer should obtain an address or facsimile number for serving the Certificate of Departure (IMM 0056B) that will be completed and sent to the person concerned once the removal order becomes enforceable after the expiration of the 30-day appeal period under A49(1)(b). The person concerned will not have signed the IMM 0056B as they will have left Canada prior to their order becoming enforceable. If the officer obtains a statutory declaration, the address or facsimile number for service could be noted in the declaration.
- The officer should ensure that an NCB in FOSS contains detailed notes explaining the circumstances. FOSS notes should indicate:
  - ♦ that the person wanted to leave Canada voluntarily;
  - ♦ their reasons for leaving;
  - ♦ whether a statutory declaration was obtained;

- ♦ whether the statutory declaration was translated; and
- ♦ where and when the IMM 0056B should be sent.

- The officer should follow up on the case and mail or fax the IMM 0056B to the address or fax number provided by the person concerned after the removal order has come into force under A49(1)(b).
- Should the person return to Canada before the end of the period, the Certificate of Departure (IMM 0056B) should not be issued and the order will come into force at the end of the appeal period.

7.13. Permanent resident cards

IRPA provides that permanent residents of Canada will be issued with a document indicating their status [A31].

The Regulations define the term *status document* by designating the permanent resident card as the document issued to permanent residents to indicate their status under IRPA [R53].

The requirement in A31(1) to provide permanent residents and protected persons with a document indicating their status is new in immigration law, as is the presumption that a person in possession of such a document is a permanent resident unless an officer determines otherwise.

Also new is the presumption that a person outside Canada who is not in possession of a permanent resident document is presumed not to have permanent resident status [A31(2)(b)]. Officers should note that although the absence of a card creates a presumption that a person is not a permanent resident, officers should still complete an examination to determine if the person concerned has the requisite number of days present in Canada that would justify retention of permanent resident status.

Under the previous Act, the Department provided permanent residents with proof of landing in the form of an Immigrant Visa and Record of Landing (IMM 1000B). Legally, the IMM 1000B served only as evidence of the fact of landing (that is, lawful permission to live in Canada permanently), as possession of a Record of Landing was not regarded as presumptive proof of status.

Permanent resident cards will be provided or issued only in Canada [R55]);. they will not be provided or issued outside of Canada.

Permanent residents outside Canada who are not in possession of a status document may be issued a travel document under the provisions of A31(3). An A31(3) travel document serves as a temporary travel document for permanent residents outside Canada who are without a permanent resident card and require a document to allow for travel back to Canada.

Officers should revoke permanent resident cards under the following circumstances:

- the permanent resident becomes a Canadian citizen [A46(1)(a) and R60(a)];
- under A46(1)(b), on final determination of a decision made outside Canada that a permanent resident has lost their permanent resident status for failing to comply with the residency obligation under A28;
- when a removal order made against the holder of a permanent resident card comes into force [A46(1)(c)];
- a final determination under A109, where the Refugee Protection Division of the IRB has vacated a person’s protected status;

- a final determination under A114(3), where a pre-removal risk assessment has vacated a person's protected status.

See also ENF 1 and ENF 27.

8. Overview: A31(3) travel documents; IAD processes; overseas decisions and their effect at a POE

8.1. A31(3) Travel documents

An officer outside Canada may issue a travel document in four circumstances:

1. After an examination, an officer overseas determines that a permanent resident has complied with the residency obligation under A28. The permanent resident has lost or is otherwise unable to use their IMM 1000B for travel back to Canada before December 31, 2003 and the permanent resident is not in possession of a permanent resident card [A31(3)(a)].

2. After an examination, an officer overseas determines that a permanent resident has failed to comply with the residency obligation under A28. The officer, however, has determined that the H&C factors overcome the breach of the residency obligation and justify the retention of permanent resident status [A31(3)(b)].

3. After an examination, an officer overseas has arrived at a decision that a permanent resident has failed to comply with the residency obligation under A28. The permanent resident is not in possession of a permanent resident card. The officer is satisfied that the permanent resident was physically present in Canada at least once within the 365 days before the examination. An appeal to the IAD filed under A63(4) has not been finally determined or the period for making such an appeal has not yet expired [A31(3)(c)].

Note: IAD Rule 9(3) – In the case of a permanent resident who wants to appeal a decision made outside Canada concerning the residency obligation, the IAD must receive the notice of appeal no later than 60 days after the appellant received the written reasons for the decision.

4. After an examination, an officer overseas has arrived at a decision that a permanent resident has failed to comply with the residency obligation under A28. The permanent resident is not in possession of a permanent resident card. The officer is not satisfied that the permanent resident was physically present in Canada at least once within the 365 days before the examination. The permanent resident has filed an appeal with the IAD under A63(4) within the prescribed time period, and the IAD has ordered the presence of the permanent resident in Canada to attend at their appeal hearing [A175(2)].

Further, on item No. 4 above, and pursuant to A175(2), when an appellant is not eligible for a travel document under A31(3), they must make an application to the IAD requesting that they be allowed to return to Canada for their hearing [IAD Rule 46(1)]. Applications must be filed with the IAD and the Minister no later than 60 days after the notice of appeal is filed.

If the IAD is satisfied that the presence of the permanent resident at the hearing is necessary, it will order that the permanent resident physically appear at the hearing. Where the IAD has ordered that the appellant be physically present, an officer shall issue a travel document for that purpose pursuant to A175(2).

It is to be noted that the validity period of an A31(3) travel document will be set by the officer overseas approving the case. Generally, the validity of an A31(3) travel document will be short;

for example, between one to three months. However, it is also recognized that there might be good reason for the validity period to be longer.

Accordingly, CAIPS will not prevent longer periods of validity if an officer overseas deems them to be warranted. Notwithstanding this, officers should remain cognizant that *the purpose of the A31(3) travel document is to facilitate travel to Canada. It is not intended to serve as a document to guarantee the ability of a permanent resident to return to Canada for an extended period in the future.*

8.2. IAD appeal requirements

Permanent residents may appeal to the IAD against a decision made outside Canada on the residency obligation under A28 [A63(4)].

IAD Rule 9 requires:

- that the notice of appeal be filed with the IRB registry office for the region in Canada where the appellant last resided;
- the written reasons for the residency obligation – non-compliance decision must be filed with the notice of appeal;
- if the appellant wants to return to Canada for the hearing of the appeal, they must indicate it on the notice of appeal;
- appellants have 60 days after they receive the written reasons for the decision to file a notice of appeal and the written reasons with the IRB registry office.

It is important to note that a permanent resident does not lose their status under A46(1)(b) until there is a final determination of the decision made outside Canada that they have failed to comply with the residency obligation under A28. Permanent residents are not finally determined to have lost their permanent resident status until the right of appeal has been exhausted.

Note: If a permanent resident does not submit an appeal to the IAD within the time period allowed for the filing of such an appeal (relating to permanent residents who want to appeal a decision made outside Canada that they have failed to comply with the residency obligation under A28), then the decision made outside Canada will become a final determination in accordance with A46(1)(b), once the time period for filing such an appeal has expired. Officers overseas will inform permanent residents of this information by way of a residency determination refusal letter.

Note: The consequence of this determination will be that the permanent resident loses their permanent resident status and will no longer be considered a permanent resident of Canada. Furthermore, they will no longer be accorded any of the rights of a permanent resident of Canada, including the right of entry as provided for in A19(2).

See also OP 10.

8.3. Decisions made overseas on loss of PR status and their effect at a port of entry

If an overseas A28 non-compliance decision has been made, then a record of it should exist in FOSS.

The record would be in FOSS because the officer overseas would have completed a “Permanent Resident Determination” input screen in CAIPS. As CAIPS information is routinely uploaded to FOSS, this will effectively give officers the information they require on matters relating to an overseas A28 non-compliance decision.

It is important to note that it will not be necessary for POE officers to write A44(1) inadmissibility reports on permanent residents who arrive at the POE and have been determined outside Canada to have failed to comply with the residency obligation under A28. Under A69(3), the IAD

has the authority to make a removal order without need of an A44(1) inadmissibility report where an A63(4) appeal is dismissed and the permanent resident is in Canada.

It should be noted that in A31(3)(c) travel document cases, a permanent resident will have 60 days to file a notice of appeal with the IAD [IAD Rule 9]. This means that some holders of A31(3) travel documents may well arrive at a port of entry without having yet filed their notice to appeal.

Therefore, in all cases involving an overseas A28 non-compliance decision, the approach to be maintained is that POE officers will conduct a FOSS query to check and confirm the status of the permanent resident's appeal notification and to confirm that the permanent resident is still within the 60-day time period within which an appeal may be filed.

If the 60-day appeal period has/has not elapsed:	**The officer will:**	**Note:**
If the 60-day appeal period has elapsed:	Inform the person of this fact and advise them that they no longer hold permanent resident status. This is due to the fact that if a permanent resident does not submit an appeal to the IAD within the time period allowed to file such an appeal (relating to permanent residents who want to appeal a decision made outside Canada that they have failed to comply with the residency obligation under A28), then the decision made outside Canada will become a final determination in accordance with A46(1)(b) once the time period for filing an appeal has expired. Consequently, such persons will be considered foreign nationals whether at a POE or inland. See also OP 10.	Permanent residents who arrive at the POE and have been determined outside Canada to have failed to comply with the residency obligation under A28 will generally know of this loss of status information already as overseas officers make mention of this in their residency determination refusal letter.
If the 60-day appeal period has not elapsed:	1. Allow the permanent resident to enter Canada during the 60-day appeal period even if they have not yet filed their notice of appeal. 2. Confirm in FOSS the date the permanent resident received a decision made outside Canada that they had not complied with the residency obligation under A28. 3. Update FOSS with either an address or a contact's address in Canada, if known, where the permanent resident may be reached for all matters relating to their IAD hearing. 4. Notify the appropriate hearings office of the permanent resident's arrival and provide address/contact information if available. Hearings offices should monitor the file from then on to determine if a notice of	

	appeal is filed. When a notice of appeal is received, the hearings office will: (a) ensure that the FOSS and NCMS "Appeals" screens are completed promptly; and (b) enter any motions or applications associated with the appeal in the FOSS "Motions" screen. If an appeal is not filed within the 60-day period allowed, FOSS is to be updated by the hearings office with appropriate remarks and the case file referred to the appropriate investigations office for follow-up to locate the person.	

Failure to appear at an appeal hearing

If an appellant fails to appear for their appeal, hearings officers should ask the IAD to dismiss the appeal. Where an appellant was determined to have failed to comply with the residency obligation outside Canada, hearings officers should ask that the IAD issue the appropriate removal order *in absentia*. It is extremely important, from the standpoint of program integrity, that appeals not be declared abandoned in cases where persons have returned to Canada and fail to appear for their appeal. Hearings officers should maintain a position such that the issuance of a removal order is preferable to having the appeal declared abandoned.

Dismissed appeals—Type of removal order

A69(3) requires that if the IAD dismisses an appeal made under A63(4) and the permanent resident is in Canada, it shall make a removal order. IRPA does not specify what type of removal order should be issued by the IAD. For that reason, hearings officers should request that the IAD issue a departure order (for failure to comply with the residency obligation) so as to ensure consistency with in-Canada determinations involving failure to comply with the residency obligation.

See also ENF 19.

9. In-Canada procedures pertaining to A44(1) reports: Reports on permanent residents and persons claiming to be permanent residents

Where an officer concludes that a person who claims to be a permanent resident is not a permanent resident, or has lost their permanent resident status, and for that reason decides to report the person under the provisions of A44(1), the officer—depending on the circumstances—will cite as grounds for the report, either:

- that the person is a permanent resident in Canada who is, in the officer's opinion, inadmissible pursuant to A41(b) because they failed to comply with the residency obligation of A28; or

- in the case of a person who is unable to present any evidence of permanent resident status, that the person is a foreign national in Canada who has not been authorized to enter and who is, in the officer's opinion, inadmissible pursuant to A41(a) because the person has failed to comply with a requirement of IRPA, specifically, the requirement of A20(1)(a) that every foreign national who seeks to enter or remain in Canada must establish, to become a permanent resident, that they hold the visa or other document required under the regulations.

The A44(1) inadmissibility report should then be transmitted to a Minister's delegate. Furthermore, the officer cannot seize the person's documents, such as the Immigration Visa, Confirmation of Permanent Residence or Record of Landing (IMM1000), despite the writing of an A44(1) report and the issuance of a removal order unless the officer believes there are reasonable grounds to do so in accordance with A140. The rationale behind this is that the person has a right to appeal the removal order and, until final determination of status, they remain a permanent resident and lawful owner of said documents.

See also ENF 1, ENF 2, ENF 5 and ENF 6.

Appendix A Supreme Court of Canada decision in *Baker v. M.C.I.* [1999] 2 S.C.R. 817

See also IP 5.

The following summarizes the issues and impact on CIC as a result of the Supreme Court of Canada decision in the case of *Baker*, an appeal against a negative decision on an application for permanent residence made in Canada on H&C grounds.

Case details

- In 1981, Ms. Baker came to Canada as a visitor. She worked illegally for the next 11 years as a domestic worker.
- In December 1992, a deportation order was issued against her for working illegally and overstaying visitor status.
- In January 1993, an H&C application was submitted. Factors put forward included Ms. Baker's medical condition, lack of medical treatment in her country of origin and the effect of deportation on four Canadian-born children (born 1985; twins in 1989; 1992).
- In April 1994, Ms. Baker was advised of the negative H&C decision by letter stating that there were insufficient H&C grounds to warrant processing from within Canada. According to procedures, no written reasons were given.
- Upon request by Ms. Baker's counsel, the immigration officer's notes were provided.
- In May 1994, Ms. Baker was directed to report for removal in mid-June.
- In June 1994, the Federal Court – Trial Division (FCTD) stayed the deportation order pending disposition of an application for leave to commence judicial review.
- In June 1995, the FCTD dismissed the application for judicial review and certified one question: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s.114(2) of the Immigration Act?"
- In November 1996, the Federal Court of Appeal dismissed the appeal from the Trial Division and held that the question was not properly before the Court and that the certified question be answered in the negative.
- In November 1998, the appeal was heard before the Supreme Court of Canada.

Note: Once before the Supreme Court, there is no limitation to address only a certified question. The Court may consider all aspects of an appeal lying within its jurisdiction.

- In July 1999, the Supreme Court released the decision in the case of *Baker*. The appeal was allowed on the grounds of violation of the principles of fairness owing to a reasonable apprehension of bias and because the exercise of discretion was unreasonable. The matter was returned to the Minister for redetermination by a different immigration officer.

Court's reasons for deciding to return for redetermination

The following excerpts from the Court's decision explain some of the rationale for deciding to return the application for redetermination by another officer.

> The notes of [Officer L.] in relation to the consideration of H&C factors read as follows:
>
> > "The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. So we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity."
>
> In my opinion, the approach taken to the children's interests shows that this decision was unreasonable in the sense contemplated in *Southam*, *supra*. The officer was completely dismissive of the interests of Ms. Baker's children.
>
> As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the decision conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer.
> Professor Dyzenhaus has articulated the concept of "deference as respect" as follows:
>
> > "Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision…" (D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286).
>
> The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.
>
> Emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the 'humanitarian' and 'compassionate' considerations that guide the exercise of the discretion.
>
> I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned.
>
> In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given the fact that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children.
>
> Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H&C discretion was unreasonable, I would allow this appeal.

Why the *Baker* decision was not upheld

The Court concluded that the officer's decision in the case of *Baker* was unreasonable.

The officer's notes pertaining to the Canadian-born children were completely dismissive of their interests or needs. Failure to give serious weight and consideration to the interests of the children constituted an unreasonable exercise of discretion.

Specifically, the Court stated: "... the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision ..."

Also, the comments made in the notes to file gave rise to a reasonable apprehension of bias on the part of the immigration officer as they did not disclose the existence of an open mind or a weighing of the particular circumstances of the case, free from stereotyping.

The statements made by the officer gave the impression that the decision was made not on the evidence before him but because Ms. Baker was a single mother with several children and she had been diagnosed with a psychiatric illness.

The use of capital letters highlighting the number of children suggested this was a reason for making the negative decision. Comments about the (immigration) *system* and Canada's *generosity* reflected the officer's frustration and a lack of impartiality.

As reflected in the officer's notes, inattention to the interests of the children and his lack of impartiality led the Court to find that, in the circumstances of the case, his exercise of discretion could not be upheld as it was an unreasonable decision.

Note: The complete text of the Supreme Court's decision in *Baker* can be found at: http://www.lexum.umontreal.ca/csc-scc/en/index.html under Judgments for 1999, Volume 2.

Summary of issues and impact on CIC

The following summarizes the issues and the impact of the decision on CIC:

- Participatory rights (right to an interview) – There is no general requirement to hold interviews prior to making H&C decisions. There is no requirement for Canadian-born children to receive separate notices of H&C decision-making or a separate opportunity to make their own submissions.

- Appropriateness of H&C guidelines – The Court noted that the guidelines in IE 9 (in effect at the time Ms. Baker's application was refused), were consistent with the approach that decisions must consider H&C values. The principles underlying the IE 9 guidelines have been expanded in the current version of the immigration manual chapter dealing with H&C applications (IP 5).

- Consideration of children's interests – While the best interests of children must always be taken into account as an important factor that is given substantial weight, this does not mean that they will outweigh other factors of the case. There may be grounds for refusing an H&C application even after considering the best interests of children.

- Written reasons for decision and impact on note-taking – The issue of written reasons for a decision is dealt with extensively in OM IP 00-07. The Court's willingness to accept notes to file as reasons for a decision does not mean that note-taking practices have to change or become more elaborate. Adhering to the principles of note-taking as set out in IP 5, section 9, is all that is required.

- Appropriate standard of review for discretionary H&C decisions: Reasonableness *simpliciter* – The rule of administrative law relating to the review of discretionary decisions has traditionally been on limited grounds, such as decisions made in bad faith or for improper purposes, irrelevant considerations or, from time to time, a decision that was considered unreasonable. Discretion must be exercised in a manner that is within a reasonable interpretation of the statute, in accordance with general principles of rule of law and

administrative law governing discretion, reflective of the fundamental values of Canadian society and consistent with the *Canadian Charter of Rights and Freedoms*.

- The Court concluded that significant deference should be accorded to immigration officers exercising discretionary H&C authority; however, the standard of reviewing H&C decisions should be reasonableness *simpliciter*. This means that decisions must be supported by reasons that can withstand a *somewhat probing examination*; that is, there must be a solid foundation of evidence and the conclusions drawn must be logical.

- Certified question: Canada's international obligations **–** Although Canada may be a signatory to international treaties and conventions, they are not part of Canadian law unless they have been implemented by statute; that is to say, they have no direct application within Canadian law. They may, however, help inform the context of statutory interpretation and judicial review. In the instance of the *Convention on the Rights of the Child*, it is an indicator of the importance of considering the interests of children when making H&C decisions.

Appendix B Strengthening decisions/guidelines on taking notes

Objectivity: facts, not opinions or an interpretation of the facts should be recorded

Clarity and concision: common language should be used and jargon avoided.

Complete words should be used and extraneous comments avoided.

Notes should contain:

- how the decision was made (for example, if the decision was based on a paper file review or an interview);
- the exact time period being examined;
- if an interpreter was used, the name of the interpreter and their relationship to the person concerned, the language of interpretation and instructions given to the interpreter should be included;
- summary of correspondence and communication;
- contents of all non-routine correspondence, form numbers of routine correspondence sent and summaries of any telephone conversations. FOSS and CAIPS notes should represent a complete record of all action taken in the case. No information should appear only in the paper file.

Description of the interview

Notes should include:

- who was present;
- the person's disposition;
- any significant occurrences, if applicable;
- the duration of the interview.

Officers' notes should be dated and initialed

Guidelines on reasons for decisions:

- all the factors considered in making the decision, both positive and negative, should be recorded;
- the thought process should be explained and no assumptions made. The gap between the facts listed and the decision should be filled in. It is possible to divide the facts into two categories: compelling reasons for H&C grounds, including a finding of hardship; and those facts that were not considered to be justifiable reasons and do not favour a finding of hardship. Some facts will be more important than others;
- absolute statements like *there is no evidence* or *there would be no hardship* should be avoided; usually what is meant is that there is insufficient evidence or insufficient hardship;

- neutral terms should be used; for example, it is preferable to say, *he states* rather than *he claims* or *he admitted*;

- where possible, strong comments on the credibility of the information should be avoided; for example, if an officer were to use the phrase *I am not satisfied* instead of the phrase *I do not believe*, it is less contentious and keeps the onus on the person concerned to satisfy an officer;

- officers should comment on evidence rather than drawing any inference from it;

- officers' notes should be written in simple, straightforward and dispassionate language;

- officers should record how the person concerned was given the opportunity to be heard; that is, how the permanent resident was provided with an opportunity to satisfy an officer that there were H&C considerations in relation to the case.

Appendix C Declaration

DECLARATION

CANADA

Province of

Province de

City of

Ville de

In the matter of the *Immigration and Refugee Protection Act* and in the matter of

Concernant la *Loi sur l'immigration et la protection des réfugiés* et concernant

I Je, soussigné(e)(Full name)(Nom au complet)

of , de

solemnly declare that déclare solennellement que

Acknowledgment of decision

I understand that the Minister's delegate has determined that I have not complied with the requirements of the residency obligation under section 28 of the *Immigration and Refugee Protection Act*. I further understand that a departure order has been issued to me pursuant to section 28(2) of the Act and, if I do not file an appeal to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board pursuant to section 63(3), I will lose permanent residence status in accordance with section 46(1)(c) of the Act.

Loss of residency criteria

Paragraph 28(2)(a) of the Act reads:

> 28.(2)(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are
> (i) physically present in Canada,
> (ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,
> (iii) outside Canada employed on a full-time basis by a Canadian business or in the public service of Canada or of a province,
> (iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the public service of Canada or of a province, or
> (v) referred to in regulations providing for other means of compliance.

Regulation 328 of the *Immigration and Refugee Protection Regulations* reads:

> 328. (1) A person who was a permanent resident immediately before the coming into force of this section is a permanent resident under the *Immigration and Refugee Protection Act*.
>
> (2) Any period spent outside Canada within the five years preceding the coming into force of this section by a permanent resident holding a returning resident permit is considered to be a period spent in Canada for the purpose of satisfying the residency obligation under section 28 of the *Immigration and Refugee Protection Act* if that period is included in the five-year period referred to in that section.

(3) Any period spent outside Canada within the two years immediately following the coming into force of this section by a permanent resident holding a returning resident permit is considered to be a period spent in Canada for the purpose of satisfying the residency obligation under section 28 of the *Immigration and Refugee Protection Act* if that period is included in the five-year period referred to in that section.

Loss of status

Subsection 46(1)(c) of the Act reads:

46.(1) A person loses permanent resident status
(c) when a removal order made against them comes into force.

Appeal rights

Subsection 63(3) of the Act reads:

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

I understand that pursuant to section 63(3) of the *Immigration and Refugee Protection Act*, I have a right to appeal the decision to issue a removal order against me to the Immigration Appeal Division of the Immigration and Refugee Board.

SOLEMN DECLARATION

I, of the city of , in the province of , Canada SOLEMLY DECLARE THAT:

I agree with the Minister's delegate's decision that I have not met the residency obligation under section 28 of the *Immigration and Refugee Protection Act*.

I understand that as a consequence of this decision I have been issued a departure order.

I am fully aware of my appeal rights pursuant to section 63(3) of the Act and I will not be submitting an appeal to the Immigration Appeal Division. I fully understand that if I do not appeal the decision, I will no longer have the right to enter Canada or remain as a permanent resident without first obtaining a permanent resident visa.

I am signing this declaration of my own volition, not due to force or the influence of any other person and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

Deponent

Declared before me at

in the city of

in the province of , Canada

this day of ,

Minister's Delegate

Interpreter's declaration

I, _____, solemnly declare that I have faithfully and accurately interpreted in the _____ language the information provided above. I make this declaration conscientiously believing it to be truth and knowing that it is of the same force and effect as if made under oath.

Signature of Interpreter _____