Citizenship and Immigration Canada
Citoyenneté et Immigration Canada

# ENF 3

## Admissibility, Hearings and Detention Review Proceedings

Canada

# ENF 3 Admissibility, Hearings and Detention Review Proceedings

## Updates to chapter

**Listing by date:**

**Date: 2006-02-16**

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

**2005-11-29**

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

**2003-09-04**

Minor changes/clarifications were made to chapter ENF 3.

## 1. What this chapter is about

This chapter provides functional direction and guidance to hearings officers when acting as counsel for the Public Safety and Emergency Preparedness (PSEP) Minister at admissibility hearings and detention reviews before the Immigration Division of the Immigration and Refugee Board.

This chapter highlights various provisions of the Act and Regulations that may apply, from a hearings officer's perspective, when a case before the Immigration Division is being prepared and presented.

It also provides assistance to Minister's counsels in the preparation and presentation of their cases, by identifying procedural and evidence requirements.

**Note:** References to the *Immigration and Refugee Protection Act (IRPA)* appear in the text in this chapter with an "A" prefix followed by the section number. References to the *Immigration and Refugee Protection Regulations* appear with a "R" prefix followed by the section number.

## 2. Program objectives

The security of Canadian society and the protection of the health and safety of Canadians are two very important objectives of IRPA and are also part of the objectives of the Canada Border Services Agency (CBSA)

Through their work, hearings officers help to achieve other important objectives of the Act, such as:

- to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and
- to ensure that decisions taken under *the Immigration and Refugee Protection Act* are consistent with the *Canadian Charter of Rights and Freedoms*.

## 3. The Act and Regulations

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

| For more information about | Refer to | Notes |
|---|---|---|
| "Foreign national" | A2(1) | |
| "Canadian citizen" | R2 | *Citizenship Act*, Section 3(1) |
| "Permanent resident" | A2(1) | |
| Residency obligation | A28(1) and (2) | |
| Temporary resident | A22(1) and (2), A29 | |
| Status document | A31 | |
| Permanent resident card | R53 to R60 | |
| Refugee protection | A95 | |
| Security | A34 | |
| Public health and safety | A3(1)(h) | |
| Human or international rights violations | A35 | |
| Serious criminality | A36(1) | |

| | | |
|---|---|---|
| Criminality | A36(2) | |
| Organized criminality | A37(1) | |
| Health grounds | A38(1) | |
| Financial reasons | A39 | |
| Misrepresentation | A40 | |
| Non-compliance with Act | A41 | |
| "Family member" | R1(3) | |
| Inadmissible family member | A42 | |
| Examination | A18 | |
| Permanent resident - Loss of status | A46 | |
| Reasonable grounds | | See ENF 2, Evaluating inadmissibility, section 3.1 |
| Reasonable grounds to believe | | See ENF 2, Evaluating inadmissibility, section 3.11 |
| Detention and release | A54 - A60 | |
| Place of detention | | See ENF 20, Detention, section 11 |
| Right to appeal | A63 | |

### 3.1 Objectives and application

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

### 3.2. Inadmissibility

Part I, Division 4 of IRPA contains the core provisions relating to inadmissibility and identifies the facts that constitute inadmissibility under the Act, making distinctions based on categories of inadmissibility as outlined in the following table:

**Categories of inadmissibility**

| For information about | Refer to this section of the Act |
|---|---|
| Security grounds | A34 |
| Human or international rights violations | A35 |
| Serious criminality | A36 |
| Organized criminality | A37 |
| Health grounds | A38 |
| Financial reasons | A39 |
| Misrepresentation | A40 |
| Non-compliance with Act | A41 |
| Inadmissible family member | A42 |

### 3.3. Report of inadmissibility

Part I, Division 5 of *IRPA* refers to the report of inadmissibility under section A44(1), the making of a removal order by the Minister's delegate or a referral to the Immigration Division for an admissibility hearing, the loss of status and the enforcement of removal orders.

| For more information about | Please refer to this chapter |
|---|---|
| Inadmissibility grounds | ENF 1, Inadmissibility |
| How an officer decides if an applicant is inadmissible to Canada | ENF 2, Evaluating inadmissibility |
| Reports on inadmissibility | ENF 5, Writing Section A44(1) Reports |

| | |
|---|---|
| Minister's Delegate decisions and administrative removals | ENF 6, Review of Reports under A44(1) |

### 3.4. Referral to the Immigration Division for an admissibility hearing

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

### 3.5. Decisions by the Immigration Division

A45 identifies the different decisions that the Immigration Division may come to at the conclusion of an admissibility hearing.

R229(1) identifies the applicable removal orders made by the Immigration Division for the purposes of paragraph A45(d). Further information about detention and release is referenced in the following tables.

### 3.6. Detention and release

| For more information about | Please see the Act |
|---|---|
| Legal grounds for arrest and detention of foreign nationals or permanent residents | A55 |
| The release by an officer or by the Immigration Division | A56 |
| The review of detention and conditions of release and the detention as a last resort of a minor child | A57 - A60 |

| For more information about | Please see chapter ENF 20, Detention |
|---|---|
| The authority to arrest and detain a person including the various situations for detention and appropriate sections related to detention | Section 3.1 |
| Regulatory factors and conditions | Section 3.2 |
| CBSA policy governing the treatment of persons detained and grounds for detention | Section 5 |

**Note:** For more information on arrest see chapter ENF 7, Investigations and arrests

The factors to be taken into consideration when assessing the detention or the release of a person who is either unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order, is a danger to the public, or is a foreign national whose identity has not been established are set out in R245 to R248.

### 3.7. Removal, removal orders, stays and enforcement of removal orders.

Part 1, Division 5 of IRPA refers to loss of status and removal.

Part 13 of the Regulations refers to removals.

**Division 1- The different types of removal orders (Sections R223 - R227)**

| For more information about | Please see Regulations |
|---|---|
| Departure order | R224 |
| Exclusion order | R225 |
| Deportation order | R226 |
| Removal order effective against a family member | R227(2) |

**Division 2- The specified removal orders under specific circumstances (Sections R228 - R229)**

| For more information about | Please see Regulations |
|---|---|
| Removal orders to be made by the Minister's delegate | R228 |
| For the purposes of Section A44(2) in respect of a foreign national | R228(1) |
| For the purposes of Section A44(2) in respect of permanent residents | R228(2) |
| If a claim for refugee protection is referred to the Refugee Protection Division | R228(3) |
| Removal orders to be made by the Immigration Division for the purposes of paragraph A45(d) | R229 |

**Division 3: Stays of removal orders:**

| For more information about | Please see Regulations |
|---|---|
| Considerations, cancellations and exceptions | R230 |
| Judicial review | R231 |
| Pre-removal risk assessment | R232 |
| Humanitarian and compassionate considerations | R233 |

**Division 4: Enforcement of removal orders**

| For more information about | Please see Regulations |
|---|---|
| Removal order—not void | R235 |
| Providing copies of the removal order to the person concerned | R236 |
| Modality of enforcement | R237 |
| Voluntary compliance | R238 |
| Removal by PSEP Minister | R239 |
| When removal order is enforced | R240 |
| Country of removal | R241 |
| *Mutual Legal Assistance in Criminal Matters Act* | R242 |
| Payment of removal costs | R243 |

### 3.8. Forms

The forms required are shown in the following table:

| Form title | Form number |
|---|---|
| Notice of Rights Conferred by the Vienna Convention | IMM 0689B |
| Request for Admissibility Hearing | IMM 5245B |
| Notice of Admissibility Hearing | IMM 5246B |
| Notice of Admissibility Hearing to Family Members | IMM 5463E |
| FOSS Full Document Entry - Generic | IMM 1442B |

## 4. Instruments and delegations

Please refer to IL 3 Designation of Officers and Delegation of Authority
http://www.ci.gc.ca/Manuals/index_e.asp

## 5. Departmental policy

No information available.

## 6. Immigration Division

### 6.1. General

A member of the Immigration Division of the Immigration and Refugee Board (IRB) presides over admissibility hearings and detention reviews. Immigration Division members are appointed under the *Public Service Employment Act*.

The member of the Immigration Division is an impartial decision-maker who must consider the evidence presented at a hearing by the Minister's counsel and by the person concerned before making a decision.

### 6.2. Administrative tribunal

The Immigration Division is an administrative tribunal, and its decisions are made through the exercise of a quasi-judicial power. This means that the principles of natural justice apply to proceedings before the Immigration Division.

The term "principle of natural justice" is understood to mean the right to a fair hearing by an independent tribunal. This right comprises, in particular:

- the right to be informed of the facts of the case made against oneself;
- the right to know the possible consequences of the hearing; and
- the right to respond to the case made against oneself.

### 6.3. Nature of the proceedings before the Immigration Division

The courts have determined that immigration proceedings are civil, not criminal, in that the purpose of the admissibility hearing is not to determine whether the person concerned is guilty or innocent, but rather to determine the person's status in Canada. This leads to two different implications, on the burden of proof and on the testimony of the person concerned.

**Standard of proof**

Since immigration proceedings are civil in nature, the general standard of proof is the one applicable to civil matters, rather than the criminal standard of proof. Consequently, the PSEP Minister does not have to prove the existence of facts beyond a reasonable doubt, but rather has to demonstrate that the PSEP Minister's version of the facts is more probable than the version of the person concerned (that is, using a standard on a balance of probabilities).

The Act provides for some exceptions to this principle, where in certain cases, the evidence must be evaluated according to a lesser standard of proof, on the basis of reasonable grounds for believing that the facts in question have occurred, are occurring or may occur.

**Person concerned compellable**

Furthermore, the testimony of the person concerned is often the principal source of evidence available to the PSEP Minister in admissibility hearings, and even detention reviews. The courts have indeed determined that the person concerned is compellable because at the admissibility hearing, the person concerned is not the subject of a charge and consequently cannot be an "accused" within the meaning of Section 11 of the Charter.

Consequently,the person concerned cannot refuse to answer questions on grounds of self-incrimination, although the person concerned may seek the protection of the *Canada Evidence Act* to prevent the use of his or her own testimony in criminal proceedings [*Chana*, Appendix A, case 3].

See *Bowen v. Minister of Employment and Immigration, [1984] 2 F.C. 507 (F.C.A.); R. v. Wooten, 5 D.L.R. (4th) 371*.

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

### 6.4. Rules of evidence

The rules governing the admissibility and presentation of evidence before the Immigration Division are much less restrictive than in judicial proceedings, as the member of the Immigration Division is not bound by any legal or technical rules of evidence [A173(c)].

The member may receive and base their decision on any evidence they consider credible or trustworthy [A173(d)].

The Immigration Division is not bound by the rule of the best evidence, and may in particular accept and consider hearsay evidence. [*Dan-Ash*, Appendix A, case 1].

### 6.5. Public hearings

Hearings before the Immigration Division are, in principle, held in public.

However, all proceedings concerning a claimant of refugee protection must be held in private, which includes admissibility hearings, detention reviews, pre-hearing conferences and any other applications heard by the Immigration Division.

The Immigration Division may, however, make an exception to the rules regarding the conduct of hearings, on request, or even on its own initiative. The Immigration Division may:

- in the case of a person claiming refugee protection, order that a hearing be held in public;
- in other cases, order that a hearing be held in private or make any other order to ensure the confidentiality of the proceedings [A166 and following].

“Refugee protection claimant” means:

- a refugee protection claimant whose eligibility has not yet been determined; or
- a refugee protection claimant whose claim has been determined to be eligible; or
- a refugee protection claimant whose claim has been decided, but has not exhausted the appeals to the courts of this decision;

but not

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

According to the interpretation of the Court in *Gervasoni v. Canada,* 30 Imm L.R. (2d) 219, the objectives of the Act pertaining to public hearings are met if interested members of the public are not unreasonably restricted from attending the hearing.

For more information on applications to hold a proceeding in private, see section 13.5, below.

Hearings before the Immigration Division must be held in the presence of the person concerned, who may be physically present in the hearing room or by means of a teleconferencing or videoconferencing device [A164].

### 6.6. Rights of the person concerned

In the interest of fairness, the person concerned should fully understand the nature and purpose of the admissibility hearing. The IRPA and its Regulations respect the rights to which an individual is entitled under the *Canadian Charter of Rights and Freedoms*. The Charter guarantees the person concerned the following rights:

- The right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice [section 7 of the Canadian Charter].
- The right on arrest or detention [section 10 of the Canadian Charter]:
  - to be informed promptly of the reasons for the arrest or detention;
  - to be informed without delay of the right to retain and instruct counsel;
  - to have the validity of a detention determined and to be released from detention if the detention is not lawful.
- The right to the assistance of an interpreter

in any proceedings in which the person concerned is a party or a witness before a court or tribunal, and does not understand or speak the language in which such proceedings are being conducted or who is deaf [section 14 of the Charter; Immigration Division Rules, rule 17].

- The right to be represented by a lawyer

The person concerned has the right to obtain the services of a barrister or solicitor or other counsel and to be represented by any such counsel for any proceedings before the Immigration Division. Although the Act does not specifically provide for it, the right to be represented by counsel implies that the person concerned shall be informed of such right and shall be given a reasonable opportunity to obtain a counsel at their own expense, if they so desire [A167].

The person concerned does not have to be represented by a lawyer; the person may choose a friend, or a representative of an organisation or association with an interest in the welfare of the person concerned.

- The right to a hearing held in the official language of their choice Immigration Division Rules, rules 3(g), 8(d) and 16.

### 6.7. Minister's counsel role

The Minister's counsel is a hearings officer who represents the Minister of Public Safety and Emergency Preparedness (PSEP) in admissibility hearing proceedings and detention reviews before a member of the Immigration Division.

The hearings officer’s main role is to present the PSEP Minister's position to the member of the Immigration Division. The hearings officer is a firm advocate of the PSEP Minister's position, and is subject to the direction of the PSEP Minister. The hearings officers should always be aware that they are speaking and acting on behalf of the PSEP Minister, and the positions and actions taken should reflect CBSA‘s departmental policy. The hearings officers should always be professional and respect decorum and maintain professionalism in their telephone manner, written correspondence, conduct at hearings and all other interactions with the public.

Professionalism should be exhibited through properly preparing for cases and treating all parties at a hearing with dignity and respect. All parties include members, counsel, witnesses, interpreters, and observers.

At an admissibility hearing and/or a detention review, Minister's counsels have an obligation to set all the relevant evidence fairly before the member of the Immigration Division. Minister's counsels should be particularly cautious about this in cases where the person concerned is not represented by legal counsel.

## 7. Definitions

No information available.

## 8. Procedures - The admissibility hearing

### 8.1. General

An admissibility hearing means a hearing held under Section A44(2) of the Act concerning a person who is alleged to be inadmissible to Canada, or who is alleged to have violated at least one of the provisions of the Act or its Regulations. The mandate of the Immigration Division (ID) (formerly known as the Adjudication Division) is to conduct these hearings with respect to persons alleged to be inadmissible to Canada.

Pursuant to Section A44(1), an officer who is of the opinion that a person who is seeking to enter Canada or who is in Canada is inadmissible may prepare a report setting out the relevant facts, and should specify the particular provisions of the Act or the Regulations under which the person is believed to be inadmissible. The report is the legal document that gives the Minister's delegate the authority to make an administrative removal order or to refer the matter for an admissibility hearing.

Following the officer 's report under A44(1), an admissibility hearing is triggered when the Minister's delegate is of the opinion that the report is well-founded and considers that there are no circumstances justifying the use of discretionary power and refers the report to the Immigration Division :

1. in the case of a foreign national inadmissible to Canada on one or more grounds for which the Minister has no jurisdiction to make a removal order;

2. in the case of a permanent resident, except for a report solely based on non-compliance of permanent resident obligations under A28.

For more information on the preparation and writing of A44(1) reports see, ENF 5, Writing 44(1) Reports.

For more information on administrative removal orders see, ENF 6, Administrative removal orders.

### 8.2. Onus and standard of proof at admissibility hearings

**Onus**

The onus points to the party responsible for establishing the case. The onus may lie with the PSEP Minister or with the person concerned, depending upon whether or not the person has legal status in Canada. The wording used in A45(d) suggests that the onus must be assumed by:

1. the person concerned, in the case of a foreign national who is seeking to enter Canada. In such cases, it is up to the foreign national to prove that they are not inadmissible.

2. the PSEP Minister, in the case of a foreign national who has been authorized to enter Canada, or in the case of a permanent resident. In such cases, it is up to the PSEP Minister to prove that the person concerned is inadmissible.

**Standard of proof**

Unless there is an express indication to the contrary in the Act, the general standard of proof before the Immigration Division is the standard applicable in civil matters, namely, the balance of probabilities.

A34 to A37 list a number of cases of inadmissibility that are subject to a lesser standard, namely, on the basis of reasonable grounds to believe that the facts have occurred, are occurring or may occur.

The applicable standard, according to the type of inadmissibility, may thus be summarized as follows:

**Standard of proof**

| Reasonable grounds to believe | Balance of probabilities |
|---|---|
| • Security (A34)<br>• Violation of human or international rights (A35)<br>• Criminality (A36), except for A36(1)(c) for permanent residents<br>• Organized crime (A37) | • Act or omission committed outside Canada, for permanent residents [A36(1)(c)]<br>• Health reasons (A38)<br>• Financial reasons (A39)<br>• Misrepresentation (A40)<br>• Non-compliance with the Act (A41)<br>• Inadmissible family member (A42) |

The courts have determined that “reasonable grounds” is a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes “a *bona fide* belief in a serious possibility based on credible evidence”.

**Note:** For more information on the notion “reasonable grounds to believe”, see *Chiau v. Canada [2001] 2 F.C. 297;* Jolly, Appendix A, case 23; *Ikhlef v. Canada 2002 FCT 263*.

Where the standard of proof applicable to a specific inadmissibility is expressly determined by the Act to be evaluated on the basis of reasonable grounds, the burden of proof may be described as follows:

**Where the onus rests on the PSEP Minister**:

The PSEP Minister must prove that there are reasonable grounds to believe in the existence of facts that constitute inadmissibility. If the PSEP Minister is unable to meet this burden, the member shall determine that the person concerned is not inadmissible, even if the person does not produce any evidence.

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

The member does not have to be satisfied that the PSEP Minister’s version is more probable than the version of the person concerned, but simply that according to the evidence as a whole, there are reasonable grounds to believe in the existence of the facts that constitute the inadmissibility.

**Where the onus rests on the person concerned**:

When the onus lies with the person concerned, the PSEP Minister does not have to establish that there are reasonable grounds to believe in the existence of facts that constitute inadmissibility. Rather, it is up to

the person concerned to prove that the facts constituting inadmissibility do not exist. Since the PSEP Minister is the party that initiated the admissibility hearing process, the PSEP Minister must nonetheless present their evidence first, introducing evidence of producing the facts which constitute the basis for inadmissibility.

### 8.3. Rules of evidence

Although the member of the Immigration Division at an admissibility hearing is not bound by the strict rules of evidence that are found in judicial proceedings, the hearings officer should be aware of:

- the admissibility of evidence;
- the relevance of evidence;
- the weight of evidence;
- the different types of evidence; and
- documentary evidence and testimony.

For more information about rules of evidence, see Appendix A.

### 8.4. Criminality inadmissibility

Section A36 establishes two types of inadmissibility, for:

- serious criminality, in the case of foreign nationals and permanent residents; and
- criminality in the case of a foreign national.

Also, inadmissibility for criminality or serious criminality results from three types of acts, namely:

- a conviction in Canada;
- a conviction outside Canada equivalent to a criminal offence in Canada;
- an act or omission outside Canada that would constitute a criminal offence in Canada.

**1) A conviction in Canada**

A conviction in Canada may be proved by producing any court documents recording the plea or conviction. This evidence may also be confirmed by the testimony of the person concerned.

A36(3)(a) provides that a hybrid offence (that is, an offence that may be prosecuted either by way of indictment or by summary proceeding) is deemed to be an indictable offence, regardless of the type of prosecution actually employed. This treatment applies even if the person concerned has in fact been prosecuted summarily.

For example, a conviction in Canada for theft under $5,000, which is a hybrid offence, is regarded as an offence punishable by indictment even if the court record indicates that the offence was prosecuted by summary proceeding.

**2) A conviction outside Canada equivalent to a criminal offence in Canada**

“Equivalency” can be determined in three ways:

(1) by a comparison of the precise wording in each statute, both through documents and, if available, through the evidence of an expert or experts in the foreign law, and determining therefrom the essential ingredients of the respective offences;

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

See *Dayan*, Appendix A, case 6; *Steward*, Appendix A, case 32.

This implies that in preparing a case, the hearings officer must quickly determine if the text of the foreign statute is available and make a request for translation, if necessary. The foreign law must be proved during the admissibility hearing by producing all the extracts relevant to the offence, which will be entered as an exhibit. The relevant extracts should, as a rule, include the sections that define the terms used in describing the offence.

In the examination of equivalence, a determination is made as to whether each of the essential elements of the foreign offence is present.

- If each of the elements exists in the two statutes, the offences are equivalent. It is not necessary that the terms of the two laws be identical. For example, the term “knowingly” may be equivalent to “knowing”, and the term “whoever” may be equivalent to “any person”.

- If the foreign enactment is more restrictive than the Canadian enactment, both offences are equivalent, since the Canadian statute covers all the situations contemplated in the foreign statute.

- If the foreign enactment is broader than the Canadian statute, or if the text includes situations that do not lead to a criminal offence in Canada, there is no textual equivalence. It is then necessary to examine the circumstances of the offence to see if there is an equivalency nonetheless. When this situation arises, evidence should be submitted regarding the facts that were proved in the criminal trial held outside Canada. If every essential element of the Canadian offence was established in the foreign trial, there is an equivalence.

When a hearings officer has to submit such evidence in an admissibility hearing, they should indicate it clearly to the member of the Immigration Division that, in order to establish the equivalence, the third method suggested by the court in *Danyan* is used. The hearings officer should identify for the benefit of the Immigration Division which constituting element(s) of the Canadian offence is not found in the text of the foreign offence. The hearings officer should then identify each element of the evidence (whether these elements are exhibits or part of a testimony) entered in the record that establishes that the Canadian constituting elements are facts that were established in the foreign trial.

**Example:** An equivalence between the foreign offence of possession of instruments used to commit a criminal offence, and the Canadian offence of possession of break-in instruments

The Canadian offence is more restrictive since the instruments described under the Canadian offence have to be suitable for breaking into a place, while the instruments described in the foreign offence can be suitable for the purpose of committing any offence (including but not limited to breaking and enter).

Therefore, the textual equivalence is not perfect, and it is necessary to introduce additional evidence showing that the instruments found in possession of the person concerned when the offence was committed were, in fact, instruments that can be used for breaking into a place, for example a hammer, counterfeit keys, etc.

In this case, the evidence on the equivalence could consist of the following:

- introduction of the relevant sections of the foreign statute; and

- testimony of the person concerned who will described the instruments found in their possession; or

- extracts of the transcript of the foreign trial showing the nature of the instruments; or
- copy of the foreign indictment which contains a description of the instruments found; or
- any documentary evidence providing a description of the instruments.

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

- evidence of the conviction, such as a certificate of conviction, a police report or a statutory declaration outlining a telephone conversation with a police officer, court reporter, court records clerk, or any document originating from the authorities of the country where the conviction was handed down;
- the legal description of the foreign offence; that is, the text of the statutory provision under which the person was convicted; and
- evidence (obtained from the charge or indictment or a similar document) of the particulars of the offence. In some cases, the certificate of conviction may contain sufficient information for the certificate to be used instead of the indictment [*Brannson*; Appendix A, case 5].

For more information on presenting documentary evidence, see ENF 2, Evaluating inadmissibility.

**3. An act or omission outside Canada that would constitute a criminal offence in Canada**

In the case of an act or omission, it suffices to prove that the act or omission was committed outside Canada, and that the act or omission would constitute an offence in Canada. It is not, however, necessary to prove any of the following facts:

- that the person concerned was convicted of the offence outside Canada;
- that charges or an indictment were laid.;
- that the wording of the foreign statute is equivalent to the wording of the Canadian legislation.

There is nothing in the Act that prevents the same facts from being the subject of two different allegations in the same report. In such cases, the member presiding the admissibility hearing would be responsible for determining whether the facts constitute either of the inadmissibility grounds alleged in the report.

It may be worthwhile to proceed in such manner in the case of criminality outside of Canada. The report may include two allegations, one relating to an equivalence ([A36(1)(b) or A36(2)(b)] and one to an act or omission [A36(1)(c) or A36(2)(c)]. This could be done in order to avoid situations where an allegation fails due to a technicality pertaining to the conviction outside Canada, which may sometimes be difficult to overcome.

**The standard of proof**

In the case of an act or omission committed by a permanent resident, the standard of proof is a balance of probabilities; in other words, the PSEP Minister must prove that his version of the facts is more probable than the version of the person concerned.

In all other cases, the case must be proved in accordance with a lesser standard of proof, namely the existence of reasonable grounds to believe that the facts have occurred, are occurring or may occur.

**Pardons**

The effect of a foreign pardon does not necessarily render the person admissible to Canada.

The following factors must be taken into account:

If the country's legal system is based on similar foundations and values as Canada's, the foreign legislation must be examined to determine whether the effect of the pardon is to erase a conviction or merely recognize that rehabilitation has taken place. If the latter case, the applicant is inadmissible and an application for rehabilitation should proceed.

### 8.5. Family inadmissibility

According to Section A42, a foreign national is inadmissible on grounds of an inadmissible family member in the following two instances:

1. The principal applicant is inadmissible because of the inadmissibility of a family member A42(a), namely:

- a foreign national who is accompanying a family member who is inadmissible, or;

**Example:** A father who is accompanying a dependent son who is inadmissible.

- a foreign national whose non-accompanying family member is otherwise inadmissible when the conditions in R23 are met:

a) a foreign national made an application for a permanent resident visa or applied to remain in Canada as a permanent resident (for the concept of applying to remain in Canada as a permanent resident, see R66 and R68); and

b) the non-accompanying family member is:

(i) the spouse of the foreign national, except were the relationship between the spouse and foreign national has broken down in law or in fact,

(ii) the common-law partner of the foreign national,

(iii) a dependent child of the foreign national and either the foreign national or an accompanying family member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or written agreement or by operation of law, or

(iv) a dependent child of a dependent child of the foreign national and the foreign national, a dependant child of the foreign national or any other accompanying family member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or written agreement or by operation of law

**Example:** A father, who is in Canada, applies to remain in Canada as a permanent resident and his dependent son, who is abroad, is inadmissible.

The Immigration Division cannot assume jurisdiction for an A44(1) report regarding a foreign national if the only grounds for inadmissibility are those set out in Section A42(a). In fact, R228(1)(d) provides that the Minister's delegate not refer the A44(1) report in cases of inadmissibility on the grounds of family inadmissibility under Section A42 and make the same order against the foreign national as was made against the inadmissible family member. There is no section in the Regulations that gives such jurisdiction to the Immigration Division.

This means that, even when the decision regarding the inadmissibility of a family member is within the jurisdiction of the Immigration Division, the Minister's delegate has the authority to make a removal order against the principal applicant referred to in Section A42(a). In this case however, the Minister's delegate must wait until the Immigration Division has made a removal order against the family member before making one against the foreign national.

**Example:** A father and his son apply to be admitted as temporary residents. The son is inadmissible on grounds of serious criminality and the officer prepares an A44(1) report based on A36(1)(b) allegation . The officer prepares a separate A44(1) report regarding the father on grounds of family inadmissibility under A42(a). The Minister's delegate refers the son's report for an admissibility hearing. At the end of the hearing, the Immigration Division decides that the son is inadmissible on

grounds of serious criminality and makes a deportation order under R229(1)(c). Once the removal order has been made against the son, the Minister's delegate can make a deportation order against the father, that is, the same order that was made against the son [R228(1)(d)].

2. Inadmissibility of a family member on grounds of inadmissibility of the principal applicant [A42(b)], namely:

- a foreign national who is a member of an inadmissible person's family and who is accompanying the inadmissible person to Canada

**Example:** A dependent son who is accompanying his inadmissible father.

If the inadmissibility of the principal applicant comes under the Minister's jurisdiction, the officer must prepare two separate reports, one regarding the principal applicant and the other regarding the family member for family inadmissibility under A42(b). If the Minister then decides to make a removal order against the principal applicant and his son, the Minister must do so by making two separate removal orders.

**Example:** The father and his dependent son apply for admission as temporary residents. The father is inadmissible under Section A41 because he failed to obtain authorization from the officer before coming to Canada. The officer prepares an A44(1) report regarding the father for inadmissibility under A41(1)(a) and A52(1) and the Minister's delegate makes a deportation order against him. The officer may also prepare a separate report regarding the son for family inadmissibility under A42(b), in which case, the Minister's delegate can make a deportation order against the son [R228(d)].

If, on the other hand, the principal applicant's inadmissibility comes under the jurisdiction of the Immigration Division, the A44(1) report regarding the foreign national is sufficient and a separate report does not have to be prepared for family members. In fact, R227(1) provides for the report prepared regarding the foreign national to also apply to accompanying family members.

Therefore, the Immigration Division responsible for the A44(1) report concerning the principal applicant must decide on the inadmissibility on grounds of family inadmissibility of all family members – within the meaning of the Regulations – accompanying him. According to R227(2), the removal order made by the Division against the principal applicant will also cover family members if the conditions in R227(2)(a) and (b) are met, namely:

> a) an officer informed the family member of the report, that they are the subject of an admissibility hearing and of their right to make submissions and be represented, at their own expense, at the admissibility hearing; and
>
> b) the family member is subject to a decision of the Immigration Division that they are inadmissible under A42 of the Act on grounds of the inadmissibility of the foreign national.

At an admissibility hearing, the fact that the condition in R227(2)(a) was met will be proven by producing the Notice of Admissibility Hearing to Family Members [form IMM 5463E]. To meet the condition in R227(2)(b), it is sufficient to show that the family member fits the definition of "family member" in R1(3). If these two conditions are met, the family members will automatically be covered by the removal order made against the principal applicant.

R1(3) provides that the foreign national's "family members" are:

> a) the spouse or common-law partner of the person;
>
> b) a dependent child of the person or of the person's spouse or common-law partner; and
>
> c) a dependent child of a dependent child referred to in paragraph (b)
>
> The terms "common-law partner" and "dependent child" are defined in R1(1) and R2 respectively.

**Example:** A father and his dependent 18-year-old son apply for admission as temporary residents. The father is inadmissible on grounds of serious criminality under A36(1)(b). The officer prepares a single

A44(1) report regarding the father, which also serves as a report with respect to the son. The officer issues a form, Notice of Admissibility Hearing to Family Members (IMM 5463E), to the son. The Minister's delegate refers the report for an admissibility hearing. At the end of the hearing, the Immigration Division decides that the father is inadmissible under A36(1)(b) and makes a deportation order against the father. This deportation order will also automatically include the son if the evidence shows that:

- he was issued an IMM 5463E form; and
- the son is the father's family member within the meaning of the Regulations.

## 9. Preparing a case: General guidelines

### 9.1. Verifying the technical details

When preparing for the admissibility hearing, the hearings officer should ensure that the person concerned has received a duly completed Notice of Admissibility Hearing (form IMM 5246B), a Notice of Rights Conferred by the Vienna Convention (IMM 0689B), if applicable, a Request for Admissibility Hearing (IMM 5245B) and a copy of the report that resulted in an admissibility hearing. If the person concerned has retained counsel, the hearings officer will ensure that duplicates of the relevant notices and documents are sent to counsel.

The hearings officer should also make sure that, in compliance with the requirements of R227, the family members accompanying a foreign national, who are the subject of a report under A44(1), have been duly informed of the hearing held concerning them, by remittance of the required form (IMM 5463E).

The hearings officer should also verify that all information intended for the Immigration Division has been sent to their registry.

### 9.2. Additional allegations / amendments of the report

When receiving a case file for preparation, the hearings officer's first duty is to decide whether the case meets the technical, legal and factual requirements for presenting it to a member of the Immigration Division. Depending on the type of case, the hearings officer should verify the report for proper dating, authorizations and signatures, and correctly stated allegations.

At this stage any errors or omissions in the report should be corrected. If it is necessary to return the file to the originating office for their action, it may also be necessary to make an application to the Immigration Division to have the admissibility hearing postponed [Immigration Division Rules, rule 43]. This should only be necessary if the flaw in the report or evidence cannot be rectified before the hearing date and would seriously impact the presentation of the case by the Minister's counsel.

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

If the evidence is insufficient, the hearings officer may:

- complete the file by adding additional evidence;
- change the allegations of the report;
- add additional grounds of inadmissibility; or
- decide to withdraw the application to hold the admissibility hearing.

If time limits permit, the hearings officer should make sure that the person concerned and the Immigration Division have been notified of the changes made to the report before the hearing is held. On the other hand, if the time limits are too short to do this, the hearings officer must make a preliminary statement at the hearing on the changes made to the report. In that case, the Immigration Division may verify whether the person concerned understands the nature of the changes made. In some instances, this could even lead the Immigration Division to grant the person concerned an adjournment, so that they have additional time to prepare.

### 9.3. Including foreign national's family members

In their case preparation, the hearings officer may discover new information about the foreign national's family members in Canada, and may decide that these family members should be included in the removal order of the foreign national. This could be the case, for example, when the hearings officer finds out that a family member is in Canada but did not enter Canada with the inadmissible foreign national. In such case, the hearings officer should prepare and serve a IMM 5463E form to the foreign national's family members.

The hearings officer should thereafter assemble the required information and evidence that will be introduced at the hearing to demonstrate that the family members fall under the definition of "family member" in the Regulations. Hearings officers have to keep in mind that only family members of the foreign national, except Canadian citizens and permanent residents, may be included in the removal order made against the head of the family.

For more information about family inadmissibility, see section 8.5, above.

### 9.4. Witnesses

As part of the pre-hearing analysis of the report, the hearings officer should consider what witnesses will be called to testify on behalf of the PSEP Minister. If the hearings officer decides to call a witness (other than the person concerned), they must notify the person concerned and the Immigration Division in writing, in the form prescribed by rule 32 of the *Immigration Division Rules*.

The personal information concerning the witness and the purpose of their testimony may constitute information requiring special non-disclosure protection. In such a case, the hearings officer should determine whether it is appropriate to make an application for non-disclosure.

For information on application for non-disclosure, see section 11, below.

A witness may appear voluntarily, but if there are reasons to doubt that they will appear as requested, and if time permits, it is possible to make an application in writing to the Immigration Division to summon the witness [*Immigration Division Rules*, rule 33].

Hearings officers may wish to prepare the questions that they intend to put to the witness, in accordance with each of the facts that the hearings officers wish to prove through the testimony. Hearings officers should always establish a plan for questioning a witness. A list of the general areas to cover may be useful and preferable to a mechanical list of questions to be followed rigidly. The hearings officers should be careful about asking questions for which the answer is not known; fishing expeditions can have unexpected results!

### 9.5. Attending a pre-hearing conference

The Immigration Division may require the parties to participate at a pre-hearing conference to discuss issues that would make the admissibility hearing more fair and efficient. Areas of discussion would include exchanging any mandatory information; disclosing other information, documents and statements; and agreeing on facts, issues and procedures [*Immigration Division Rules*, rule 20(1)].

Rule 20(3) of the *Immigration Division Rules* provides that the Immigration Division may state orally or make a written record of any decisions or agreements made at the conference. It is

important that all decisions or agreements made at the conference be clearly indicated in the hearings officer's notes, as the parties at the hearing will be bound by them.

## 10. Presenting the case

### 10.1. Admissibility hearing opening format

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

- The member of the Immigration Division will make an opening statement, indicating the legal basis for the hearing, the place of the hearing, date of the hearing and jurisdiction. He will then ask the parties and their counsel to identify themselves. The member of the Immigration Division will also note the presence of any other people present. The member will exclude any member of the public present if the admissibility hearing concerns a refugee protection claimant.

- At this point, the member of the Immigration Division will confirm that the person concerned can understand and communicate in the official language in which the admissibility hearing is being held. If an interpreter is necessary, the member will ensure that there is effective communication between the interpreter and the person concerned, and the interpreter will swear an oath.

- If the person concerned is not represented by counsel, the member of the Immigration Division will confirm that the person concerned has been made aware of his or her right to counsel.

- In the case of an admissibility hearing with respect to a foreign national, the member of the Immigration Division may ask if family members will be affected by any removal order in accordance with R227(2), in which case, the hearings officer should produce the IMM 5463E that has been given to the family members.

### 10.2. Exclusion of witnesses

When the explanations have been given by the member, the hearings officer must determine whether it is appropriate to request that the witnesses that are present in the room be excluded. Such a request applies to all the witnesses present in the room, except for the person concerned and the expert witnesses. The person concerned has the right to attend the admissibility hearing that concerns them.

The hearings officer may wish to have the expert witness present to hear the evidence, since their testimony must be based on the evidence that has been produced.

It may also be appropriate to ask the member to remind people of the rule on exclusion of witnesses, which stipulates that witnesses must refrain from discussing the contents of their testimony with the other witnesses [*Immigration Division Rules*, rule 36].

### 10.3. Evidence : Reading and filing the report, or notice

If the admissibility hearing is based on an A44(1) report for a person seeking entry into Canada or without legal status in Canada, the report may be presented in these suggested terms:

"A Minister's delegate has received a report under Section 44(1) of the *Immigration and Refugee Protection Act* dated at (place) on (date) from (name of the officer), an officer who, after examining (name of person concerned), believes that it would be contrary to the Act and

Regulations to grant admission to or otherwise authorize (name of person concerned) to enter or remain in Canada."

If the admissibility hearing is based on a report under A44(1) on a permanent resident in Canada or a temporary resident permit holder with legal status in Canada, the documents should be presented in these suggested terms:

"A Minister's delegate has received a report under Section 44(1) of the *Immigration and Refugee Protection Act*, dated at (place) on (date) from (name), an officer, concerning (name of person concerned)."

After this statement, the hearings officer asks that the report be filed as an exhibit. The member of the Immigration Division will then explain to the person concerned the purpose of the admissibility hearing, the allegations made and the decision they can render.

### 10.4. Evidence on the identity, citizenship and status of the person concerned

At this point, the Minister's counsel will call the person concerned as a witness. After the person concerned has been sworn in, the person's identity and citizenship must be clearly established. The hearings officer may develop the evidence by way of questions and answers, such as:

- What is your correct name in full?
- Have you ever used any other name?
- What is your date of birth?
- Where were you born?
- Of what country are you a citizen?
- Are you a Canadian citizen?
- Are you a permanent resident of Canada?
- Do you have a passport?
- Do you have other identity documents?
- What is your permanent address?

The hearings officer may also enter any documentary evidence into the record as an exhibit.

The status that the person concerned claims to have, or seeks, may be established by exploring residence and visa issues. The questions should determine whether the person concerned is:

- an applicant for permanent residence with or without a valid visa;
- a returning resident seeking to come into Canada as a returning resident, with or without a permanent resident card or facilitation visa;
- an applicant for temporary resident permit with or without a visa.

### 10.5. Evidence on the allegations

After the usual questions, evidence to substantiate the allegations contained in the report should be presented or asked to be entered as an exhibit.

The evidence may cover one or more of the allegations which are discussed in ENF 1, Inadmissibility, and in ENF 2, Evaluating inadmissibility.

### 10.6. Evidence for inclusion of family members

To have a family member included in the removal order made against the person concerned, the hearings officer will first have to prove the identity, citizenship and status of the family member. It must be clearly established that the family member is a foreign national, as A42 provides that only foreign nationals can be inadmissible on grounds of family inadmissibility.

The hearings officer must then prove that the conditions set forth in R227(2)(a) and (b) were satisfied.

Evidence on R227(2)(a) conditions will generally be made through the production of the IMM 5463E form, and proof of service to the family member.

R227(2)(b) conditions will be satisfied if the evidence shows that:

- the foreign national's family member falls under the definition of "family member" of R1(3);
- the family member is accompanying the inadmissible foreign national.

Once the hearings officer has finished producing evidence, the family member will be given an opportunity to establish the reasons why they should not be included in the foreign national's removal order.

The family member can only avoid being included in the foreign national's removal order if they can introduce evidence that refutes the evidence entered by the hearings officer and demonstrate that they do not meet the definition of "family member" in the Regulations. The fact that the family member is not a dependant of the inadmissible foreign national is irrelevant for the purpose of determining family inadmissibility pursuant to A42(b).

If the Immigration Division comes to the conclusion that the foreign national is inadmissible, and that the conditions set forth in R227(2)(a) and (b) were met, then any removal order made by the Immigration Division against the foreign national will automatically be effective against the family member as well.

See section 8.5 for information about family inadmissibility.

See ENF 2 for information on recommended evidence on inadmissible family members.

### 10.7. Examining and cross-examining witnesses

Examining and cross-examining witnesses, especially those with interests opposed to the PSEP Minister's, is a difficult exercise. The following general rules may be useful to apply:

- Sometimes questioning should be subtle, rather than obvious, in order to obtain as much information as possible. The order and type of questions must adapt to, and vary on the basis of the answers that the person concerned has given to the preceding questions. Also, depending on the answers of the person concerned, it may be necessary to modify the plan for questioning witnesses and introducing evidence.
- Leading questions are those which suggest an answer. They can be a useful method of cross- examination, particularly where the facts are not in dispute or when a witness is proving to be uncooperative.
- Cross-examination should only be used where it is likely to serve some useful purpose, either by clarifying the person's own testimony or adding to it, if it is incomplete. Alternatively, evidence can be introduced through other witnesses.

- It is useful to take notes of the key parts of the testimony given by witnesses as the admissibility hearing proceeds in order to prepare and deliver submissions to the member of the Immigration Division.

- Any party may ask to see the notes that witnesses use to assist them in their testimony, and may even demand that these notes be introduced as an exhibit in the record.

If the cross-examination raised new information, it may be useful and/or necessary to ask additional questions to the witness after the cross-examination has been closed,.Throughout the admissibility hearing, the parties may raise objections and respond to the objections raised by the other party.

### 10.8. Submissions on the allegations

After the Minister's counsel and the person concerned have finished introducing all evidence, the member of the Immigration Division will give both parties an opportunity to make submissions about the allegations. The hearings officer should summarize the evidence introduced at the admissibility hearing. The presentation should be clear, concise and delivered in logical order. The submission stage is not the time to introduce new facts. The hearings officer should also ensure that any statements and conclusions they make in their submission can be supported by the evidence entered in the record.

In the case of a person seeking admission or seeking to come into Canada, for example, the hearings officer may indicate in his submissions that the person concerned:

- has no right to enter Canada since they are neither a Canadian citizen nor a permanent resident of Canada,

- has not discharged the burden of proof and has therefore failed to establish admissibility.

The hearings officer might want to mention that considerations under A25(1) have been examined, but that special consideration was not warranted in this case.

In the case of a foreign national in Canada, the hearings officer must indicate that the person concerned has no right to remain in Canada since they are neither a Canadian citizen nor a permanent resident of Canada. The hearings officer could then summarize the evidence that would lead a reasonable and cautious person to conclude that there is a factual basis to the allegation.

### 10.9. The member of the Immigration Division's decision

Following the submissions, the member of the Immigration Division will give a decision as to whether or not the person is inadmissible to Canada. The decision will determine whether the allegations contained in the report are well founded and whether the evidence introduced into the record revealed any other grounds of inadmissibility. The Immigration Division shall then render one of the decisions listed in A45, which could be:

1. If the Immigration Division finds that the person concerned is in fact a Canadian citizen, a permanent resident, or a registered Indian under the *Indian Act*, the Division will recognize that person's right to enter Canada [A45(a)].

2. If the Immigration Division finds that the person concerned is not inadmissible, and is satisfied that the person meets the requirements of the Act, the Division will grant the person concerned temporary or permanent resident status [A45(b)].

3. If the Immigration Division finds that the person concerned is not inadmissible, but the evidence does not show that the person concerned meets all the requirements of the

Act, then the Division shall authorize the person concerned to enter Canada for further examination, with or without condition [A45(c)].

4. If the Immigration Division finds that the allegation is well founded, the Division shall make the applicable removal order, which may require additional evidence [A45(d)].

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

### 10.10. Submissions on a removal order

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

Each ground of inadmissibility leads to a specific removal order.

Section R229(1) provides that, in certain cases, the removal order will be automatically and invariably determined by the sole finding of the inadmissibility. In such cases, the Immigration Division will make the removal order forthwith, without receiving any additional evidence or argument.

In other cases, the removal order applicable to a specific inadmissibility varies with the person's situation.

R229(2) lists grounds of inadmissibility for which the Immigration Division shall make a departure order when the person concerned is a refugee protection claimant [R229(1)(f), (g), (j),(m) and (n)]. To ensure that the correct removal order is issued, the hearings officer should state whether the eligibility of the claim has been determined, and produce copies of relevant forms when the claim has been determined to be ineligible. Where an application for refugee protection is presented before or during the proceedings, the hearings officer must act as if the eligibility determination has already been made.

R229(3) lists aggravating circumstances in which the Immigration Division shall make a deportation order against a person instead of the prescribed removal order indicated under R229(1). The circumstances contemplated in R229(3) are:

(a) the person was previously subject to a removal order and they are inadmissible on the same grounds as in that order;

(b) the person has failed to comply with any condition or obligation imposed under the Act or the *Immigration Act*, R.S.C. 1985, c. I-2, unless the failure is the basis for the removal order; or

(c) the person has been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment or of two offences under any Act of Parliament not arising out of a single occurrence, unless the conviction or convictions are the grounds for the removal order.

In such admissibility hearings, the Immigration Division will ask the hearings officer to make their recommendation on the removal order and, where applicable, ask that additional evidence be introduced to support this recommendation. If there is no particular evidence relating to the criteria provided for in R229(3), or if the evidence is insufficient, the member shall make an exclusion order (against a foreign national or permanent resident) or a departure order (against the refugee protection claimant). Proof of the existence of the facts contemplated in R229(3) may be made by producing documentary evidence, see R223 – R229, or through testimony.

**Note:** For more information on specified removal orders, see ENF 10, Removals.

### 10.11. Cases involving refugee protection claimant.

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

The person concerned will be issued a Determination of Eligibility form (IMM 1442B), which will state the reason in the case of an unfavourable decision.

Where an application for refugee protection is presented before or during the proceedings, the hearings officer must act as if the eligibility determination has already been made. This means that the admissibility hearing must be held in private from the moment when the application is presented. If it is later determined that the claim for refugee protection was not eligible, any other subsequent hearing, and even the continuation of an adjourned admissibility hearing, shall be held in public.

### 10.12. Claim to Canadian citizenship

The consequences of a statement from the person concerned to the effect that they have Canadian citizenship is not contemplated in the Act. However, Canadian citizen status has a major impact on the outcome of the admissibility hearing, since inadmissibility may only apply to a permanent resident or foreign national.

The admissibility hearing is not adjourned automatically by the declaration of the person concerned, and a simple oral statement by the person concerned shall not in itself be sufficient to prove Canadian citizenship.

It is up to the member to determine whether the evidence that the person concerned has produced regarding their alleged Canadian citizenship is sufficient.

The hearings officer may decide to immediately challenge the claim of the person concerned, where the evidence required to do so is immediately available. The officer may then ask the member to render a decision on the allegation of Canadian citizenship, and afterwards continue with the admissibility hearing in accordance with the usual process.

The hearings officer must not hesitate to request an adjournment in order to carry out the necessary verifications and to obtain the evidence required to refute the allegation of the person concerned, where the required evidence is not immediately available.

Where the admissibility hearing has been adjourned, the person has to provide proof of the filing of the application for confirmation of citizenship as required within the specific period. If it has not been done in the period specified, or if the Minister’s counsel is informed by the Registrar of Canadian Citizenship that a certificate will not be issued, the Minister's counsel will request the Immigration Division to resume the admissibility hearing.

If the Registrar confirms that the person has Canadian citizenship or issues a certificate of citizenship, the Minister’s counsel will file a copy of the relevant documents with the Immigration Division and the admissibility hearing will be terminated immediately under the Act.

### 10.13. Cases involving detainees

The admissibility hearing concerning a person  who is detained may coincide with the date scheduled for their detention review. Although the admissibility hearing may be adjourned, the detention review must necessarily take place within the time frame prescribed by the Act.

For more information, see section 12, Detention reviews.

# 11. Non-disclosure hearings

## 11.1. General

A86(1) provides that the Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, make an application for non-disclosure of information.

A78 identifies the judicial considerations to the determination.

A86(2) provides that A78 applies to non-disclosure hearings, with any modifications that the circumstances require, including that a reference to "judge" be read as a reference to the applicable Division of the Immigration and Refugee Board.

As the Minister's counsel, hearings officers will represent the PSEP Minister in these non-disclosure hearings.

## 11.2. Non-disclosure hearing presented prior to an admissibility hearing or a detention review

Information will be provided to the CBSA National Security Division by an agency, that a person is suspected of being inadmissible, and that, in the opinion of the agency, the information on the person should not be disclosed.

After reviewing the file and in consultation with the agency providing the information, a decision will be taken as to whether the CBSA will go forward with an application for the non-disclosure of information.

If the decision is to go forward with the application, the PSEP Minister makes the application under the format prescribed by rule 38 of the *Immigration Division Rules*. Copy of the application must be sent to the person concerned and their counsel, and then forwarded to the Immigration Division, with proof of transmission. The application may only include minimal details which will allow the person concerned and their counsel to know that an application for non-disclosure is presented by the Minister. This should occur as soon as possible to ensure minimal delay in the hearing or review. (IRPA allows for possible arrest and detention of the individual [see A55 and the *Immigration Division Rules*, rule 41(1)].

The Immigration Division registrar will schedule a date for the *ex parte,* in-private hearing as expeditiously as possible. The scheduling will be done in consultation with the CBSA to ensure that all participants have the required security clearances.

The Minister's counsel and the agency providing the information shall have an *ex parte,* in-private meeting with the Immigration Division member and present the non-disclosure information to the member for examination.

Once the examination of the evidence is done, the member must then determine which elements of information or evidence may be considered in their decision as outlined in the following table.

**Information or evidence which may be considered**

| Types of information or evidence | Applicability to decision |
|---|---|
| Relevant facts that may not be disclosed | The member takes them into account in their decision (at the conclusion of the admissibility hearing or detention review), but does not include them in the summary prepared for the person concerned. |
| Relevant facts that may be disclosed | The member may take these facts into account in their decision, and summarize them in the summary, if the Minister's counsel agrees that |

| | |
|---|---|
| | the facts may be disclosed in the summary. If the Minister's counsel does not agree to the contents of the summary, the Minister's counsel can withdraw the information under dispute, or the application altogether, and a decision on the case will be rendered without the withdrawn information. |
| Irrelevant evidence | Such evidence is not considered in the decision. |

### 11.3. Non-disclosure hearing presented during an admissibility hearing or a detention review

An application for non-disclosure may be presented at the time of the admissibility hearing or detention review. Regardless of when the application is submitted, it must be made, in all cases, in writing and in the form prescribed by rule 38 of the *Immigration Division Rules*. Irrelevant evidence is not considered in the decision.

When an application is made during an admissibility hearing or detention review, the member who is presiding at the hearing must exclude the person concerned and the person's counsel from the hearing room.

The member may also decide to adjourn the admissibility hearing or detention review at the Minister's request or on the member's own initiative. The member shall then schedule a date for the hearing of the Minister's application.

The application will then follow the same course as if it had been presented before the hearing.

### 11.4. Conduct of the admissibility hearing or detention review following an application for non-disclosure

After an application for non-disclosure is submitted, the Immigration Division must proceed with the detention review or admissibility hearing, or continue with the hearing that has already begun.

The hearings officer, in preparing their file, shall determine which piece(s) of evidence will have to be produced as evidence at the admissibility hearing or at the detention review. Some pieces of the evidence presented before the member when the non-disclosure application was made will not have to be introduced, while others will have to be.

During the hearing, the hearings officer must not mention any information that is subject to the non-disclosure order. At the very most, the officer must mention, in the arguments and submissions, that the member must take this protected information into account in rendering their decision.

The facts that will be part of the summary may be disclosed by producing the summary in evidence.

## 12. Detention reviews

### 12.1. General

Detention reviews usually involve the presentation of facts and arguments by each of the parties. Generally speaking, the parties do not have to prove the facts and arguments, unless the information is challenged. In that case, it may be necessary to introduce evidence to support the presentation of facts and arguments. This may be done by producing documents or other material evidence, through the testimony of the person concerned or by introducing the affidavit of an officer. In this situation, the evidence is governed by the same rules that apply to admissibility hearings.

The member who presides over the detention review is supposed to have prior knowledge of the alleged reasons for detention from the information contained in form IMM 5245B (Request for admissibility hearing / detention review pursuant to the *Immigration Division Rules* ). The member may, however, require that the hearings officer present their reasons for detention and the hearings officer should be prepared to do so. The hearings officer's opening statement may be the following:

- Mr./Ms. Member of the Immigration Division, in accordance with Section A57 of the *Immigration and Refugee Protection Act*, I have brought before you Mr./Ms. _____ in order that the reasons for his/her detention be reviewed.

The member should normally continue with their own explanations concerning the purpose of the detention review and the jurisdiction conferred upon the member by the Act and Regulations. The member will then ask the Minister's counsel to submit the facts and arguments, and also their recommendation regarding the continuation of the detention or the release, as the case may be.

### 12.2. Mechanism of detention reviews

The decision-making mechanism for detention reviews is a two-stage process:

1. The member of the Immigration Division must first determine whether there are valid reasons for detention, in other words, if the person is being detained for one or more reasons listed in R244:

- the person is unlikely to appear according to the factors set out in R245;
- the person is a danger to the public according to the factors set out in R246;
- the identity of the person has not been established according to the factors set out in R247.

If the member finds that there are no valid reasons for detention, the member must release the person concerned, with or without conditions.

2. If the member finds that there are grounds for detention, regardless of which grounds, the member must examine each of the mandatory factors listed in R245 to R247, to determine whether detention must be maintained or the person concerned must instead be released, with or without conditions.

### 12.3. Grounds for detention – Regulatory factors

A58 provides that the Immigration Division may order continued detention when satisfied that the person concerned is a danger to the public, is unlikely to appear or his/her identity has not been established. To determine whether one or more of these grounds exist, the member of the Immigration Division must consider the factors listed in the Regulations.

The intent of the Regulations relating to detention is:

- to assist decision-makers in assessing issues related to detention;
- to increase transparency and consistency in decision making; and
- to provide specific guidelines for decision-makers that are consistent with the principle that detention of a minor child shall be used as a measure of last resort and that the best interests of the child are to be taken into account when determining whether to detain a minor.

For information on the assessment of grounds for detention, see chapter ENF 20, Detention.

The hearings officer has the responsibility to convince the Immigration Division that there are grounds for detention. The hearings officer has to keep in mind that the Immigration Division has

the duty to verify and consider each of the factors set out for each of the grounds for detention listed in the Regulations. If, for example, detention is required because the person is alleged to be a danger to the public, then the Division will have to take a look at each of six factors listed in R246. The hearings officer will have to explain and demonstrate to the Division how the facts of the case fall within the factors listed in R246.

When the specific facts of a case reveal equally favourable as unfavourable factors to the person concerned, the hearings officer must consider the case as a whole and asses the weight and seriousness of each factor to make the proper recommendation.

None of the factors set out in R245 to R247 is conclusive in itself. However, in certain circumstances, the existence of a single important or serious fact that constitutes a factor under the Regulations could be sufficient for a finding that there is a ground for detention.

Furthermore, certain facts, for example, the existence of a link with the community in Canada, may be an unfavourable factor for the person concerned in certain circumstances but may prove to be favourable to the person concerned in other circumstances. In such cases, it would be desirable for the hearings officer to indicate how the existence of such a fact is favourable or unfavourable to the person concerned.

It should also be noted that the list of factors set out in each of R245, R246 and R247 is not complete and that other factors may be considered by the member of the Immigration Division when rendering a decision. Thus, the credibility of the person concerned and their statements to the effect that they will or will not comply with the laws governing immigration and refugee protection or any directive issued by the CBSA can be considered in the assessment of the grounds of detention.

**1. Danger to the public**

In the majority of the cases, the sole evidence of a fact will lead to the conclusion that R245 factors exist. However, other factors may require that additional argumentation be made to demonstrate that a specific fact disclosed before the Immigration Division has to be considered as a detention factor. This is the case, for example, with R246(f)(i), which describes the factor of a foreign conviction for a sexual offence. In such a case, the details of the commission of the offence must be looked at carefully, and the circumstances of the foreign offence must be disclosed in order that the Immigration Division is satisfied that the offence is one described in R246(f)(i).

The circumstances of the commission of the offence can also help in determining the weight or the gravity of a factor compared to another. For instance, the fact that the victim of the offence is a minor may be considered as more serious. An offence committed with the use of a prohibited weapon may also be considered to have more weight than an offence committed with any other weapon, depending on the specific circumstances of each case.

To assess whether the person is a danger, it can be useful to refer to and consider the following documents:

- the criminal record of the person concerned, and any documents establishing a criminal conviction in or outside Canada;
- the indictment;
- the medical condition of the person concerned;
- police reports regarding association of the person with known criminals;
- any classified reports about the person concerned relating to security or criminal activity, and the record of physical violence of the person concerned;

- correctional services report on the person's behaviour in detention.

**Note:** See ENF 28, Ministerial Opinions on Danger to the Public and to the Security of Canada, for more details on assessing public danger.

**2. Unlikely to appear**

For a submission on the ground that the person concerned is not likely to appear for the admissibility hearing or its continuation or for removal from Canada, these factors may apply:

- the past conduct in Canada of the person concerned;
- whether the person concerned has used a pseudonym/alias to avoid detection or to evade complying with the Act and its Regulations;
- frequent changes of address in Canada by the person concerned;
- whether the person concerned previously eluded examination or did not appear as requested;
- whether the person concerned has not satisfied the conditions attached to a bond;
- whether the person concerned attempted to escape or to hide;
- the conduct of the person concerned at the admissibility hearing.

In cases where the hearings officer perceives a risk that the person concerned will not appear unless security is imposed, the officer should consider a guarantee or a cash deposit with conditions of release [A44(3)].

### 12.4. Other mandatory factors to be considered

R248 lists five factors that must be considered by the member once they have found that there exists one or more grounds for detention. R248 is a codification of the factors suggested by the Federal Court in S*ahin.* Thus, the factors listed in R248 should be interpreted and applied in light of the decision in *Sahin*.

In *Sahin*, the Federal Court determined that, in certain cases, indefinite detention violated Section 7 of the Charter. In the specific case of *Sahin*, the person in question had been detained for more than 14 months when the Federal Court rendered its decision. The Court prescribed certain tests to be considered by the adjudicator, which were then included in R248. In this context, the Federal Court indicated that the relevance and relative weight of each of these tests depended on the circumstances of each case. One of the significant tests was the period of time that had passed before a decision was rendered as to whether the person in question was authorized to remain in Canada.

However, R248 does not limit the requirement for the member of the Immigration Division to look at alternatives solely where the duration of the detention is or will be substantial. The hearings officer should present his arguments in such a way that the relative importance of the "alternative to detention" factor will be assessed in a manner that is inversely proportional to the relative importance or seriousness of the other tests.

Thus, the "alternative to detention" factor should not be conclusive with respect to release unless the person in question has been detained for a long time or when it is likely that the detention will be maintained for a long or indefinite period.

Moreover, the longer the person is detained, the more likely it is that the person concerned will be successful in convincing the member of the Immigration Division of the need to make use of an alternative to detention.

The weight attributed to the length of detention will also be less when one of the grounds for detention is danger to the public. A person's risk does not decrease or disappear simply because of the potential of a long stay in detention - for example, before removal can be effected. This argument must be advanced to members of the Immigration Division at detention reviews. A person who has served their sentence for a violent crime could still be considered dangerous and likely to pose a danger to the public. For the purposes of the *Immigration and Refugee Protection Act,* completion of incarceration does not necessarily equate to attenuation of any risk to the public.

### 12.5. Making a recommendation on continued detention

Where the hearings officer is of the opinion that continued detention should be maintained after considering the factors set out in R248, they should recommend continued detention.

On the other hand, when the hearings officer considers that evaluation of the factors set in R248 leads to a conclusion that the person should be released with conditions, they should recommend the particular conditions which they feel would constitute a sufficient alternative to detention. The hearings officer should consider whether cash bonds, performance bonds or a combination thereof is appropriate in the circumstances, and, where applicable, the necessary amounts. In addition, hearings officers should make alternative submissions concerning appropriate terms and conditions of release. When assessing the amount of the bond, the Minister's counsel should evaluate the financial capacity of the person concerned, when this information is available. It may be necessary to question the person concerned about their financial means or those of prospective guarantors during the detention review hearing.

Officers should remember that inappropriate release decisions by members of the Immigration Division may be subject to judicial review and advise NHQ Litigation Management (BCL), of any cases where judicial review may be appropriate.

Where the hearings officer feels that continued detention is unnecessary, or that the information on file is inadequate to justify continued detention, the hearings officer should indicate in their submission that there is no objection to release subject to guarantee or cash deposit and subject to certain terms and conditions. The hearings officer may comment on the nature and size of the bond that they consider would be appropriate.

When recommending release, the hearings officer should be satisfied that the guarantor is able to exercise such control over the movements of the person released, and that the person will report for continuation of immigration proceedings, as required. The hearings officer should also assess the reliability of the guarantor; for example, if a proposed guarantor had defaulted on a previous bond, then the hearings officer would be less inclined to recommend release without requiring a cash deposit.

### 12.6. Detention after an admissibility hearing has been held

In a case where the member of the Immigration Division makes a removal order against the person concerned, the hearings officer should - when the hearings officer believes that detention or continued detention is justified - ask the member of the Immigration Division to order the detention of the person concerned [A58].

## 13. Applications applicable to admissibility hearings and to detention reviews

### 13.1. General guidelines

At any time in the process of an admissibility hearing or detention review, the person concerned and/or the Minister's counsel may present any application. This would be like a hearing within a hearing. All applications must be made under the format prescribed by the *Immigration Division Rules,* beginning with rule 38.

### 13.2. Application for postponement

If the hearings officer receives a request for postponement of an admissibility hearing from the person concerned or counsel, they must advise the person concerned or counsel that such a request must be made to the Immigration Division [*Immigration Division Rules*, rule 43(1)].

### 13.3. Request for adjournment

**Note: Case law on adjournments may be found in detail in** Appendix B.

When a request for adjournment is made during an admissibility hearing, the hearings officers should use their personal judgment, experience and knowledge when arguing for or against the adjournment.

The hearings officers should base their position on the same factors to which the member of the Immigration Division must refer, such as whether the adjournment will impede or assist the progress of the admissibility hearing, and whether the reason the person concerned gives for the adjournment request justifies an interruption of the proceedings [*Immigration Division Rules*, rule 43].

The hearings officers could check their file to see whether the person concerned asked for a previous adjournment for a similar reason (to obtain counsel, for example). The hearings officers should also take into account the point at which the admissibility hearing has reached and the anticipated length of the adjournment, before arguing for or against the proposed adjournment.

In cases where the allegation is that the subject is described in A34, A35(1)(b) and A35(1)(c) or A37(1)(a), the subject may make a request for ministerial relief pursuant to A34(2), A35(2) or A37(2)(a). In those cases, should counsel for the person concerned request an adjournment pending the Minister's decision, the hearings officer should object to that request. See IP10, section 9 for further details at

http://www.ci.gc.ca/Manuals/immigration/ip/ip10/ip109_e.asp

### 13.4. Change of venue

Before an admissibility hearing has started, the person concerned may ask for a change of venue. Such requests must be made to the Immigration Division [*Immigration Division Rules*, rule 42].

When deciding if the application should be allowed, the Immigration Division must consider the following factors:

(a) whether a change of location would allow the hearing to be full and proper;

(b) whether a change of location would likely delay or slow the hearing;

(c) how a change of location would affect the operation of the Division;

(d) how a change of location would affect the parties; and

(e) whether a change of location would endanger public safety.

If the person concerned makes a request for a change of venue during the admissibility hearing, the member of the Immigration Division will hear the submissions of both parties before making a decision [*Immigration Division Rules*, rule 42].

### 13.5. Application for proceeding in private

If the member of the Immigration Division is satisfied that there is a serious possibility that the life, liberty or security of the person concerned will be endangered if the proceeding is held in public or that there is a real and substantial risk to the fairness of the proceeding such that the need to prevent disclosure outweighs the social interest that the proceeding be conducted in public or that matters involving public security will be disclosed, they may, on application or on their own

initiative, conduct a proceeding in private or take any other measure to ensure the confidentiality of the proceedings [A166(b)(i,ii,iii); *Immigration Division Rules*, rule 45; *Pacific Press Ltd*., Appendix A, case 2]..

On application or on its own initiative, the Immigration Division may conduct a proceeding in public, or take any other measure that it considers necessary to ensure appropriate access to the proceedings if, after having considered all available alternate measures and the factors set out previously, the Division is satisfied that it is appropriate to do so. [A166(c)and (d)] unless the member of the Immigration Division is satisfied that there is a serious possibility that the life, liberty or security of the person concerned would be endangered by a public hearing [Appendix A, case 2].

## 13.6. Applications applicable only to admissibility hearings

### Withdrawing notices

After reviewing the file,the hearings officer may decide that the report is unfounded, or that additional facts indicate that the person concerned is clearly admissible. In circumstances in which it is clearly evident that an admissibility hearing is unwarranted, it would be pointless to subject the person concerned to a hearing.

The hearings officer must discuss the matter with the Minister's delegate who signed the report and will make the final decision on whether or not to proceed with the admissibility hearing. The hearings officer should note in the file the reasons that led them to consult the Minister's delegate, and the final decision.

If the Immigration Division has already received the notice for a hearing:

- where no evidence has been presented in the proceedings, the Minister's counsel must notify the Division orally at a hearing, or in writing. If notified in writing, the Division will notify the other party of the withdrawal;

- where evidence has been presented in the proceedings, the Minister's counsel must make an application to withdraw the request for an admissibility hearing in accordance with rule 38 of the *Immigration Division Rules*.

The member of the Immigration Division can consider a withdrawal of a request for an admissibility hearing as an abuse of process that justifies the refusal of an application to withdraw, if they feel it will have a negative effect on the integrity of the process of the Division. There is no abuse of process if no substantive evidence has been accepted in the proceedings, when the request for withdrawal is made [*Immigration Division Rules*, rule 5].

## 13.7. Applications applicable only to detention reviews

### Application for an early hearing

Rule 9 of the *Immigration Division Rules* provides that the person concerned and/or the PSEP Minister may make an application for an early detention review. This provision only applies to a 7-day or 30-day detention review. The application for early review must be made in writing, and the party initiating the application must justify new facts. When determining if the application of the person concerned should be contested or not, the hearings officer should consider whether the new facts alleged by the person concerned were available to them at the time of the previous detention review. If the information was available or could have been reasonably obtained at the time of the previous detention review, the hearings officer could have solid grounds to contest the application. On the other hand, if the facts alleged are new and may influence the release or detention of the person, the application may lead the Immigration Division to grant the application for early review.

## 14. Post-admissibility hearing procedures

### 14.1. Carrying out a decision of the Immigration Division

After the admissibility hearing has ended, the hearings officer has three specific areas of responsibility with regards to ensuring that the member's decision is carried out:

- if the member of the Immigration Division issued a removal order against the person concerned, the hearings officer must give the case file to the removal unit for action;
- if the member of the Immigration Division ordered the detention of the person concerned, the hearings officer must take the appropriate action and annotate the file accordingly;
- if the member of the Immigration Division ordered the release of the person concerned on a performance bond, the hearings officer may have to assess the financial capacity and ability to comply of the person who assumes the responsibility for the bond.

### 14.2. Applications for judicial review

Where the Minister's counsel before the Immigration Division believes that there are or may be grounds to seek judicial review, the hearings officer will consult with their supervising officer and, within five business days of the decision, order, act or omission by the member, send a report to the Director, Litigation Management (BCL) at National Headquarters. The report is to be transmitted by facsimile or by electronic means. It is imperative that a copy of the written reasons, when received, is forwarded as expeditiously as possible to BCL. This will allow sufficient time for review and any needed consultations. This will also allow BCL to give appropriate instructions to the Department of Justice (DOJ) and to give the DOJ time to prepare applications for leave and judicial review.

See ENF 9, Judicial Review, for more information.

### 14.3. Prosecutions

It is the CBSA's policy to refer cases involving serious violations of the Act to the Royal Canadian Mounted Police (RCMP) for further investigation and prosecution. The manager decides whether or not a case should be referred following a debriefing from an officer on the reasons why this case should be brought to the attention of the RCMP in accordance with the guidelines set out in IRPA (for example, an offence under A117).

## 15. Reporting

Enter all relevant information in the Field Operations Support System (FOSS) and NCMS for an update of the case.

## 16. Feedback

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

The Minister's counsel should ensure to provide feedback on these cases for training purposes but also for confirmation of effectiveness of their work in successful cases and for guidelines for future cases.

# Appendix A List of Cases / Rules of Evidence

**References**

List of Cases

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

1. *Dan-Ash v. Minister of Employment and Immigration*, FCA, Doc. No. A-655-86, June 21, 1988.
2. *Pacific Press Ltd. v. Minister of Employment and Immigration*, FCA, Doc. No. A-1026-90, April 22, 1991.
3. *Chana v. Minister of Manpower and Immigration*, FCTD, Doc. No. T-641-77, March 2, 1977.
4. *Dhesi v. Minister of Employment and Immigration*, FCA, Doc. No. A-503-78, December 8, 1978.
5. *Brannson v. Minister of Employment and Immigration*, FCA, Doc. No. A-213-80, April 12, 1980.
6. *Dayan v. Minister of Employment and Immigration*, FCA, Doc. No. A-456-86, March 5, 1987.
7. *Anderson v. Minister of Employment and Immigration*, FCA, Doc. No. A-267-80, June 5, 1980.
8. *Burgon v. Minister of Employment and Immigration*, FCA, Doc. No. A-17-90, February 22, 1991.
9. *Prassad v. Minister of Employment and Immigration*, SCC, File No. 19608, March 23, [1989] 1 S.C.R. 560 (1989-03-23).
10. *Pierre v. Minister of Manpower and Immigration*, FCA, Doc. No. A-936-77, April 21, 1978.
11. *Rosales v. Minister of Employment and Immigration*, FCTD, Doc. No. T-663-82, February 15, 1982.
12. *McCarthy v. Minister of Employment and Immigration*, FCA, Doc No. A-169-78, May 4, 1978.
13. *Louhisdon v. Minister of Employment and Immigration*, FCA, Doc. No. A-17-78, March 13, 1978.

14. *Murray v. Minister of Employment and Immigration*, FCA, Doc. No. A-253-78, September 15, 1978.

15. *Nelson v. Minister of Employment and Immigration*, FCTD, Doc. No. T-4924-78, November 17, 1978.

16. *Widmont v. Minister of Employment and Immigration*, FCA, Doc. No. A-899-84, December 3, 1984.

17. *Smart v. Minister of Employment and Immigration*, FCA, Doc No. A-389-89, April 4, 1991.

18. *Jiminez-Perez v. Minister of Employment and Immigration*, FCA, Doc. No. A-552-80, May 25, 1982.

19. *Green v. Minister of Employment and Immigration*, FCA, Doc. No. A-1140-82, August 19, 1983.

20. *Prassad v. Minister of Employment and Immigration*, SCC, File No. 19608, March 23, [1989] 1 S.C.R. 560 (1989-03-23).

21. *Koutsouveli v. Minister of Employment and Immigration*, FCTD, Doc. No. T-2545-87, October 5, 1988.

22. *Chhokar v. Minister of Employment and Immigration*, FCTD, Doc. No. T-1635-90, March 4, 1990.

23. *Jolly v. Minister of Manpower and Immigration*, FCA, Doc. No. A-249-74, February 13, 1975.

24. *Mercier v. Minister of Employment and Immigration*, FCTD, Doc. No. T-1512-85, November 17, 1986.

25. *Grewal v. Minister of Employment and Immigration*, FCA, Doc. No. A-42-80, May 7, 1980.

26. *Georgas v. Minister of Employment and Immigration*, FCA, Doc. No. A-424-78, September 28, 1978.

27. *Cembranos-Alvarez v. Minister of Employment and Immigration*, FCA, Doc. No. A-267-82, June 6, 1983.

28. *Rios v. Minister of Employment and Immigration*, FCA, Doc. No. A-5-90, July 4, 1990.

29. *Kalacharan v. Minister of Employment and Immigration*, FCTD, Doc. No. T-750-76, March 24, 1976.

30. *Wilson v. Minister of Employment and Immigration*, FCA, Doc. No. A-224-80, June 18, 1980.

31. *Clarke v. Minister of Employment and Immigration*, FCA, Doc. No. A-588-84, October 31, 1984.

32. *Steward v. Minister of Employment and Immigration* [Steward No. 3], FCA, Doc. No. A-962-87, April 15, 1988.

33. *Mohammad v. Minister of Employment and Immigration* [Mohammad No. 1], FCTD, Doc. No. T-150-88, March 11, 1988.

34. *Mohammad v. Minister of Employment and Immigration* [Mohammad No. 3], FCA, Doc. No. A- 362-88, December 8, 1988.

35. *Hill v. Minister of Employment and Immigration*, FCA, Doc. No. A-514-86, January 29, 1987.

36. *Mak v. Minister of Employment and Immigration*, FCA, Doc. No. A-149-83, September 19, 1983.

37. *Robertson v. Minister of Employment and Immigration*, FCA, Doc. No. A-235-78, September 11, 1978.

38. *Davis v. Minister of Employment and Immigration*, FCA, Doc. No. A-81-86, June 19, 1986.

39. *Arnow v. Minister of Employment and Immigration*, FCA, Doc. No. A-599-81, September 28, 1981.

40. *Kai Lee v. Minister of Employment and Immigration*, FCA, Doc. No. A-11-79, June 20, 1979.

41. *Potter v. Minister of Employment and Immigration*, FCA, Doc. No. A-560-79, December 5, 1979.

**Rules of evidence**

Administrative tribunals are not bound by the strict rules of evidence that are found in judicial proceedings. However, they must observe the principles of fundamental justice.

**1. The admissibility of evidence**

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

- the best evidence rule, which requires that the evidence presented be the best evidence available (this means that secondary evidence should not be introduced unless primary evidence is unavailable);

- the rule against hearsay evidence. Hearsay evidence is testimony given by a witness, offered as proof of the truth of the matters contained in the testimony, which is not the personal knowledge of the witness but rather the mere repetition of what the witness heard others say. Such evidence is very weak, since the real author of the statement put in evidence is not available for cross-examination and therefore the credibility of the statement and its author cannot be tested.

At an admissibility hearing, any evidence considered by the member of the Immigration Division to be relevant, credible, and trustworthy in the circumstances of the case is admissible. In the examination of the evidence presented, the member of the Immigration Division will determine its weight or value in all the circumstances of the case. Hearings officers are to follow the best evidence rule. Generally, members of the Immigration Division will accept hearsay evidence, but they will attach very little significance to it if contradictory evidence is offered by the other party.

**2. The relevance of evidence**

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

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

**3. The weight of evidence**

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

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

Secondary or hearsay evidence may not have the same weight when better evidence is available. For example, if the hearings officer used a statutory declaration made by an officer who is reasonably available to testify, the hearings officer would be depriving the subject of the admissibility hearing of the opportunity to cross-examine; thus the hearings officer would be detracting from the quality of the evidence.

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

In the hearings officer's decision to rely on primary or secondary evidence, the hearings officer should take into account factors such as the importance of other aspects of the case, and the need to avoid lengthy detention while awaiting the best evidence. The hearings officer should also keep in mind that the weaker the evidence in relation to evidence of the subject of the admissibility hearing, the greater the possibility that the member of the Immigration Division will admit the person concerned to Canada or allow the person concerned to remain here.

In other words, the main points to consider when assessing the available evidence are as follows:

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

**4. The different types of evidence**

**4.1 Direct evidence**

Direct evidence is a means of proof which tends to show the existence of a fact in question without the intervention of the proof of any other fact. Put another way, direct evidence is evidence of a precise fact in issue by witnesses who can testify that they saw the act done or heard the words spoken which constitute the precise fact to be proved.

Direct evidence may take the form of the oral testimony of witnesses or evidence which consists of documents or objects introduced through the oral testimony of witnesses.

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

For example, if the hearings officer wishes to introduce a passport or other documents purporting to belong to the subject of the admissibility hearing, the hearings officer should present the document to the person and ask that it be identified for the member of the Immigration Division. If the witness is unable or refuses to identify the document, the hearings officer may need to ask an officer to establish a link between the document and the subject of the admissibility hearing.

After establishing the link, the hearings officer may then ask questions to establish the relevance of the document to the issue the officer wishes to prove.

**4.2 Circumstantial evidence**

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

Circumstantial evidence may consist, for example, of evidence of motive, opportunity, intent, character or previous activities. Such circumstances, taken alone, may not carry enough weight to persuade the member of the Immigration Division of the allegation; however, when argued in combination, they may be sufficient to tip the balance of probabilities.

**4.3 Presumption**

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

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

- presumptions under the Act.

**4.4 Judicial notice**

Judicial notice is the recognition by a judicial tribunal that a fact is true, without its having to be proved, on the basis that this fact is known to the tribunal.

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

**5. Documentary evidence and testimony**

**5.1 Documentary evidence**

The hearings officer will often use documents in immigration cases to establish an allegation or allegations. If the hearings officer uses them appropriately, presenting documents in evidence can speed up the process. Generally speaking, a member of the Immigration Division may accept any documentary evidence if it is admissible (relevant, credible and trustworthy), subject to its probative value.

Official documents - such as passports and certified court documents - generally have more weight than unofficial documents.

Originals usually have more weight than copies, unless the copy is a duplicate copy (a signed copy of the original) or a certified true copy produced or issued by a competent authority. The best evidence rule dictates that the hearings officer should submit the original of a document. If this is impossible, secondary evidence becomes the best evidence. The hearings officer should verify

that the documents that they wish to introduce at an admissibility hearing refer to the person concerned.

### 5.2 Statutory declarations

The hearings officer may introduce statutory declarations into evidence. A member of the Immigration Division must accept statutory declarations at an admissibility hearing, because they are equivalent to testimony under oath [*Canada Evidence Act*, s. 14(2)]. However, a statutory declaration may be of less probative value than the oral testimony of the author, because the credibility of the author of the statutory declaration cannot be tested by cross-examination.

The hearings officer may use a statutory declaration when the declarant's testimony could not likely be tested on cross-examination (for example, the declaration of a person concerning a recorded fact such as the date of admission to Canada).

### 5.3 Testimony

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

# Appendix B Adjournments

### Introduction

A member of the Immigration Division has the power to grant adjournments and is responsible for controlling the admissibility hearing process. In some situations prescribed by the Act, the member of the Immigration Division is required to grant adjournments. The member generally has the discretion to accept or refuse other adjournment requests, subject to the duty to ensure a full and proper admissibility hearing. The member of the Immigration Division must exercise the discretion to grant an adjournment in accordance with the principles of procedural fairness and natural justice [*Prassad*, Appendix A, case 9].

The principles of natural justice and procedural fairness require that the member of the Immigration Division consider an adjournment request by hearing submissions from both the person concerned (or that person's counsel) and the Minister's counsel. Then the member of the Immigration Division must make a decision which balances the interests of the parties involved, the taxpayer and society as a whole to hold a fair hearing in as efficient and expeditious a manner as possible.

It is not sufficient for the hearings officer as the Minister's counsel simply to object to the request for adjournment. In the arguments to the member of the Immigration Division, the hearings officer is responsible for demonstrating the reasons why the request should or should not be granted by referring to the appropriate case law and by submitting valid reasons for the objection.

### 1. Factors In an adjournment request

In *Prassad* (Appendix A, case 9), the Supreme Court noted the factors which should be considered when entertaining a request for adjournment:

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

Submissions of the Minister's counsel on an adjournment should address all the factors listed above.

### 2. Mandatory adjournments

The member of the Immigration Division must grant a request for adjournment under four specific circumstances:

- to enable a minor or a person unable to understand the nature of the proceedings to be represented by a parent or a guardian, or, if the member of the Immigration Division is of the opinion that the person is not properly represented by a parent or guardian, to designate a representative [A167(2); *Immigration Division Rules*, rules 18 and 19)];
- where the services of an interpreter are required, to permit the presence of an interpreter at the admissibility hearing [*Immigration Division Rules*, rule 17];
- when the person concerned claims Canadian citizenship, and had it not been for such claim, a removal order would have been made; and
- when the hearings officer has informed the member of the Immigration Division that they will request that a dependent family member of the person concerned be included in an order issued against that person, and the member of the Immigration Division is not convinced that

the family member of the subject of the admissibility hearing has been properly notified of the allegation and their rights.

**3. Discretionary adjournments**

Except for the four circumstances noted above, all other adjournments of admissibility hearings are granted at the discretion of the member of the Immigration Division, or under the general powers conferred on the member as a commissioner under Part I of the *Inquiries Act.* Both parties may make arguments about the need for an adjournment. A member of the Immigration Division may grant an adjournment for the following reasons, among other grounds:

- to enable the person concerned to retain counsel A167;
- to obtain additional evidence or to summon witnesses;
- to allow relevant documents to be introduced (such as evidence of a conviction outside Canada);
- to have the person concerned medically examined or to secure additional medical evidence;
- to consult with the Registrar of Canadian Citizenship;
- to replace an incompetent interpreter or counsel;
- to determine a claim to Canadian citizenship;
- to allow time to study evidence before making a submission;
- to allow the preparation of arguments; and
- to allow a member of the Immigration Division to prepare the decision.

**4. Adjournments to obtain counsel**

Over the years it has often been argued before the courts that refusal to grant an adjournment for the purpose of obtaining counsel of choice was tantamount to depriving a person of the right to retain and instruct counsel. In reply to such an argument, the hearings officer may refer to the decisions in Appendix A, cases 10, 11, and 12. The hearings officer can argue that the right to counsel simply means that the person concerned must be given the opportunity to retain and instruct counsel of choice amongst those who are ready and available to proceed on the date fixed by the member of the Immigration Division.

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

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

Counsel who abuse the system by making repeated unjustified requests for adjournments or using other delaying tactics should be reported to the office manager, so that a formal complaint

can be made to the provincial bar association or law society. Inland Enforcement Branch, CBSA - National Headquarters should be informed of such formal complaints.

For more information, see A167 and A168(2).

**5. Adjournments to seek a temporary resident permit**

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

The courts have made several decisions on the issue:

- In *Louhisdon* (Appendix A, case 13), the Federal Court of Appeal held that the *Immigration Act*, 1952 "simply gives the Minister the power to grant a permit; it does not create any right in favour of those who might benefit from the exercise of this power. It is true that making the deportation order had the effect of depriving the person concerned of the option of obtaining a permit from the Minister. This does not, however, give the person concerned grounds for complaint; the deportation order has this effect under the Act regardless of when it is made. In my view, the decision of the Supreme Court in *Ramawad* cannot help the applicant."

- In *Murray* (Appendix A, case 14), the Federal Court of Appeal held that the adjudicator (now member of the Immigration Division) did not err in refusing to adjourn a hearing to enable the applicant to apply for a Minister's permit (now temporary resident permit). The judge distinguished the *Ramawad* decision by stating in his reasons:

  "I find nothing in the decision of the Supreme Court of Canada that lays it down that, whenever a person, being in Canada, is the subject of deportation proceedings, the presiding officer must interrupt the admissibility hearing proceedings to permit him to apply for a Minister's Permit if he has not already done so. Such a rule of law would, in my view, create such a fundamental and disruptive change in the processing of these matters that I am not prepared to infer it in the absence of an express statutory provision or a clear pronouncement in a decision that I feel bound to follow."

- In *Nelson* (Appendix A, case 15), the Federal Court Trial Division dismissed an application for a stay to prevent the adjudicator (now member of the Immigration Division) from continuing the inquiry (now admissibility hearing), in order to await a decision on the application for a Minister's permit made by the person concerned.

- In *Widmont* (Appendix A, case 16), the Federal Court of Appeal noted that the *Immigration Act* did not contain any express provision concerning the adjournment of a hearing to enable the Minister to render a decision on a request for a permit under A37(1) (now A25(1)). The Court noted that, according to the prevailing opinion, the fact that the Minister contemplated the possibility of issuing a permit under A37(1) (now A25(1)) did not prevent the holding of a hearing. Earlier decisions had considered the issue raised in the case and the Court accordingly had to follow them.

- In *Smart* (Appendix A, case 17), the Federal Court of Appeal recognized that an adjudicator (now member of the Immigration Division) has jurisdiction to proceed with an admissibility hearing even if there is an outstanding request for a temporary resident permit.

- In *Prassad* (Appendix A, case 9), the Supreme Court upheld the adjudicator's (now member of the Immigration Division's) refusal to adjourn, because the person concerned had from June 6, 1984 until November 21, 1984, the date when the hearing was scheduled to proceed,

to make the application, but a letter was not sent to the Minister's office until November 16, 1984. The judge notes in his reasons:

"The logic of the appellant's submission would thus require that the member of the Immigration Division adjourn the admissibility hearing whenever the result of that hearing has the potential to inhibit the subject of that hearing from pursuing an alternative remedy. This would amount to reading into the legislation an automatic stay.... It is untenable to hinder the Immigration Division process under the *Immigration Act*, 1976 by laying down such an inflexible rule for the conduct of an admissibility hearing."

**6. Adjournments for humanitarian considerations**

The person concerned or that person's counsel may request an adjournment to examine humanitarian considerations [Appendix A, cases 18, 19, 20, 21, 22]:

- In *Green* (Appendix A, case 19), the Federal Court of Appeal noted that the *Jiminez-Perez* case (Appendix A, case 18) did not require that the adjudicator (now member of the Immigration Division) who receives an application pursuant to Section A115(2) (now A25(1)) during an inquiry (now admissibility hearing) adjourn immediately until the Minister or his delegate renders a decision on the application. The member of the Immigration Division is required to proceed with the hearing as expeditiously as is possible under the circumstances of each individual case. Likewise the power of the member of the Immigration Division to adjourn is restricted to adjournments "for the purpose of ensuring a full and proper admissibility hearing."

- In *Koutsouveli* (Appendix A, case 21), the Federal Court, Trial Division, noted that an application for an exemption submitted under section A115(2) (now A25(1)) in no way permits the hearing under A27(now A44) to be stayed.

- In *Chhokar* (Appendix A, case 22), the Federal Court, Trial Division, noted an interesting excerpt from the *Green* decision (Appendix A, case 19): "On the facts of this case, if the position of the person concerned were to prevail, the result would be that in every admissibility hearing under the *Immigration Act*, the proceedings could be stopped for a considerable length of time pending a decision by the Minister, by the simple expedient of making an application under A115(2) (now A25(1)) during the course of the hearing. In my view, such a result would disrupt and paralyze the conduct of inquiries under the Act."

- Nevertheless, in *Green,* the Court did state that, where an admissibility hearing had been adjourned for the purpose of allowing an application under A115(2) (now A25(1)), the adjudicator should await the response of the Minister.

**7. Adjournments for additional evidence or arguments**

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

Under Section 57 of the *Federal Court Act*, clients or their counsel must give the Attorney General of Canada and each of the ten provinces ten days' notice of their intention to raise a constitutional question.

**8. Adjournments for a change of venue**

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

**9. Adjournments in an admissibility hearing pending a ministerial relief application**

The person concerned who is inadmissible under A34(1), A35(1) and A37(1), except a person who has committed or been complicit in human rights violations as described in A35(1), can submit a request for relief to the Minister explaining why their presence in Canada would not be detrimental to the national interest.

See IP 10, section 9, for further details on the procedure for processing requests for relief.

In *Poshteh v. MCI* (FCA no. A-207-04), dated April 8, 2005, the Federal Court of Appeal ruled that there is no temporal aspect to A34(2), and by implication, to A35(2), and to A37(2). Thus, the person concerned can apply for ministerial relief, at any time, even after a finding of inadmissibility.

Thus, in admissibility hearings, the hearings officer should oppose adjournment applications based on a pending ministerial relief application. Also see IP 10, section 10, Procedure – Cases under enforcement action.