Citizenship and Immigration Canada
Citoyenneté et Immigration Canada

Chapter ENF 6

Review of Reports under A44(1)

Canada

1 What this chapter is about

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

2 Program objectives

The *Immigration and Refugee Protection Act* allows officers delegated to act for the Minister to exercise certain decision-making authorities. In the context of this chapter, key delegated decision-making authorities include:

- the authority to determine certain cases of admissibility and certain violations of the Immigration and Refugee Protection Act; and
- the authority to make administrative removal orders.

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

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

3 Act and Regulations

The Act provides for both delegated officers and members of the Immigration Division (ID) to have jurisdiction to issue removal orders depending on the circumstances.

The policy considerations for determining whether a delegated officer should have jurisdiction to issue a removal order are the complexity of the decision to be made and the latitude to decide the consequences of the order. The more a decision requires analysis and a greater use of discretion in assessing the situation, the more likely the jurisdiction should rest with a member of the Immigration Division.

In order to streamline the enforcement process in cases involving straightforward decisions, and to maintain the principle that delegated officers make determinations in cases where there is little weighing of evidence, the *Immigration and Refugee Protection Act* empowers delegated officers to issue removal orders in circumstances prescribed in the Regulations.

See Table 1: Sections of the Act applying to Administrative Removal Orders and Table 2: Regulations.

Table 1: Sections of the Act applying to Administrative Removal Orders

Provision	Section of the Act:
Humanitarian and compassionate considerations	[A25(1)]
Inadmissible family member	[A42]
Preparation of report	[A44(1)]
Referral or removal order	[A44(2)]
Conditions	[A44(3)]
No return without prescribed authorization	[A52(1)]
Arrest and detention with warrant	[A55(1)]
Detention on entry	[A55(3)]
Notice	[A55(4)]
Release—officer	[A56]
Review of detention	[A57(1)]
Further review	[A57(2)]
Application for judicial review	[A72(1)]
Convention refugee	[A96]
Person in need of protection	[A97]

Table: Regulations

About	Regulation
Criminality (see section 3.2)	R228(1)(a)
Misrepresentation (see section 3.3)	R228(1)(b)
Failure to comply (see section 3.4)	R228(1)(c)
Inadmissible family members (see section 3.5)	R228(1)(d)
Permanent residents and their residency obligation (see section 3.6)	R228(2)
Eligible claims for refugee protection (see section 3.7)	R228(3)

3.1 Considerations

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

1) Departure order
2) Exclusion order
3) Deportation order

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

3.2 Regulation 228(1)(a) – Criminality

In order to streamline the enforcement process, the *Immigration and Refugee Protection Act* provides delegated officers with the authority to issue deportation orders to foreign nationals convicted of an offence in Canada.

Put simply, delegated officers shall make a deportation order where a foreign national is inadmissible on grounds of having been convicted in Canada of serious criminality, as defined in A36(1)(a), or for having been convicted in Canada of an indictable offence or convicted of two offences under any Act of Parliament not arising out of a single occurrence.

Note: Proof of a conviction in Canada may consist of a certified copy of the conviction certificate or the warrant of committal. A certified copy of the court information containing the accusations against the **person concerned, and indicating a conviction, can also be used.**

Note: Further, if a person is not contesting a criminality allegation, then the person's admission of such criminality, which may also take the form of a statutory declaration, can also constitute sufficient evidence. In Canada convictions may be confirmed through the Canadian Police Information Centre (CPIC) - see ENF 13, CPIC Access and Warrant Management.

See also ENF 1, Inadmissibility; and ENF 2, Evaluating Inadmissibility.

3.3 Regulation 228(1)(b) – Misrepresentation

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

Put simply, where a removal order is to be issued, delegated officers shall make a deportation order where a foreign national is inadmissible on grounds of misrepresentation where the misrepresentation is based on a final decision to vacate the refugee or protected person status.

3.4 Regulation 228(1)(c)– Failure to comply

The Minister shall make an exclusion order in those instances where a foreign national fails to comply with the following requirements of the *Immigration and Refugee Protection Act*:

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

In the case of a foreign national who is inadmissible for non-compliance with the requirement to obtain the authorization of an officer before returning to Canada, the Minister shall make a deportation order.

3.5 Regulation 228(1)(d)– Inadmissible family members

Where a removal order is to be issued, the Minister shall make the following orders:

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

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

Note: Where a report relates to a family member, alleging the family member to be inadmissible because a family member was deemed inadmissible and made the subject of a removal order by the Immigration Division, delegated officers must first determine if the subject of the A44(1) report was included in the removal order issued by the Immigration Division. This is necessary as the Act provides that in certain circumstances, family members in Canada may be deemed by the Immigration Division to be included in a family members A44(1) report and any resultant removal order issued by the Immigration Division [R227(2)]. Put simply, the first thing delegated officers should satisfy themselves of, with respect to a report alleging inadmissibility and involving the family member inadmissibility provision [A42], is that the subject of the report is not already included in a removal order issued by the Immigration Division.

3.6 Regulation 228(2) – Permanent residents and their residency obligation

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

3.7 Regulation 228(3)– Eligible claims for refugee protection

Note: A removal order made with respect to a refugee protection claimant is conditional and will only come into force in prescribed circumstances – see A49(2).

3.8 Administrative removal orders and their effects

The *Immigration and Refugee Protection Act* contains provisions regarding the issuance of removal orders in cases of persons who are found to be inadmissible on one of the grounds listed in the Act. There are three types of removal orders that may be issued:

1) Departure Orders
2) Exclusion Orders
3) Deportation Orders

Subsection A44(2) provides that the Minister may issue a removal order in the circumstances prescribed by the Regulations. Subsection A49(2) provides that removal orders made with respect to a refugee protection claimant are conditional and specifies the circumstances where the order becomes enforceable.

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

Officers delegated to act for the Minister are authorized to make removal orders at ports of entry and at inland offices. See A44(2), R228(1), R228(2), R228(3); these provisions allow delegated officers to resolve uncomplicated cases of inadmissibility at ports of entry; and uncomplicated infractions of the *Immigration and Refugee Protection Act* at inland offices.

Departure orders

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

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

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

- a foreign national is inadmissible because of the inadmissibility of a family member and a departure order has been made against that family member; or
- the Minister finds a permanent resident inadmissible for having failed to comply with the residency obligations of section A28.

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

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

- an enforced departure order does not oblige a foreign national to obtain the authorization of an officer in order to return to Canada;
- a foreign national who is issued a departure order must satisfy the requirement related to departure from Canada within 30 days of the order becoming enforceable, failing which the order becomes a deportation order; and
- if the foreign national is detained within the 30-day period or the removal order is stayed, the 30-day period is suspended.

Exclusion orders

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

- for failing to appear for further examination or an admissibility hearing;
- for failing to establish they hold the visa or other document required by the Act; or

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

An exclusion order may also be made where:

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

A52(1) respecting exclusion orders specifies that:

- an exclusion order obliges the foreign national to obtain the written authorization of an officer in order to return to Canada for a period of one year after the order has been enforced; and
- a foreign national, who is issued an exclusion order as a result of being found inadmissible for misrepresentation, must obtain the written authorization of an officer to return to Canada for a period of two years after the order has been enforced.

Deportation orders

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

Persons who are deemed inadmissible under the Act for misrepresentation, based on a decision by the Immigration and Refugee Board to vacate refugee status, will also be issued a deportation order by the Minister's delegate without the need to re-establish the grounds of misrepresentation at an admissibility hearing.

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

Consequently, delegated officers may make a deportation order against a foreign national if they are inadmissible:

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

The provisions respecting deportation orders specify that:

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

3.9 Required forms

The following table lists required forms.

Form title	Form number
Release Hearing	[IMM1439]
Denial of Authorization to Return to Canada Pursuant to Subsection 52(1) of the Immigration and Refugee Protection Act	[IMM1202]
Authorization to Return to Canada Pursuant to Subsection A52(1) of the Immigration and Refugee Protection Act	[IMM1203]
Subsection A44(1) Highlights- Port of Entry Cases	[IMM5051]
Subsection 44(1) and 55 Highlights Inland Cases	[IMM5084]

4 Instruments and delegations

The *Immigration and Refugee Protection* Act provides that when the Minister is of the view that a report made under subsection A44(1) is well-founded, the Minister may make a removal order against the person concerned.

Although the Regulations prescribe that the Minister may make removal orders in certain circumstances, this authority has been delegated to officers pursuant to subsection A6(2). Consequently, all references to the power of the Minister to issue removal orders in prescribed circumstances may be read to impute the same power to delegated officers.

5 Departmental policy

5.1 Procedural Fairness

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

Decisions officers make about admissibility may be subject to judicial review, with leave, by the Federal Court of Canada. Certain decisions officers make may be subject to appeal to the Immigration Appeal Division (IAD).

It is important officers make notes detailing the process followed in exercising their decision-making powers. Officers have "case highlight forms" for both port-of-entry (form IMM 5051) and inland (form IMM 5084) processes; these forms should be completed in as much detail as possible.

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

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

Officers should place on the file any additional notes detailing, for example, the identity and presence of counsel, circumstances relating to detention or release, and the basis for any decision that an officer might take.

In reaching decisions, officers must take into account any representations made by persons or by their counsel and make particular note of the nature and content of any representations made.

Officers will usually conduct examinations, interviews and/or reviews in the presence of the person concerned (and counsel, where applicable); however, in certain circumstances, it will also be in order and considered appropriate to conduct such a proceeding by telephone or by other means of live telecommunication with the person who is the subject of such a proceeding.

5.2 Burden of Proof

The "burden of proof" is the obligation to demonstrate that a fact in issue is proved or disproved. "Burden of proof," in the context of immigration legislation, refers to who has the responsibility of establishing admissibility to Canada.

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

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

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

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

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

For more details, see Table 3: Burden of proof for authorization for persons to enter.

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

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

5.3 Duty to provide information

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

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

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

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

Neither the Minister nor a person concerned may access the Federal Court if a statutory appeal, as may be provided for by the *Immigration and Refugee Protection Act*, has not been exhausted.

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

Notice of right to appeal to the Immigration Appeal Division (IAD)

When a delegated officer makes a removal order against a person who may have a right to appeal that decision to the IAD, officers must advise the person of that right.

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

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

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

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

I acknowledge being informed that I have a right to appeal the removal order issued against me to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB); and that I have 30 days from the date of the removal order to file such notice of appeal with the Immigration Appeal Division (IAD).

I also acknowledge having received a notice of appeal form, which I understand is the form to be used to file an appeal with the Immigration Appeal Division (IAD).

Signature:

Date:

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

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

When a delegated officer makes a removal order against a person who does not have the right to appeal to the Immigration Appeal Division, they are to advise the person of their right to file an "application for leave and judicial review" with the Federal Court – Trial Division (FCTD).

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

Officers should obtain a written acknowledgement from the person that they have been advised of their right to file an "application for leave and judicial review" and place it in the case file.

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

See also, ENF 19, IAD Appeal Hearings, ENF 9, Judicial Review; and ENF 10, Removals.

5.5 Official Languages Act

Members of the public have a right to communicate with employees of Citizenship and Immigration Canada (CIC) in the official language of their choice, either French or English. An officer will be provided who speaks the official language requested by a person.

5.6 Interpreters

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

5.7 Counsel

The position of the Department is that a person does not have a right to counsel at removal order determinations and eligibility determinations, unless the individual is detained.

Notwithstanding the lack of a right to counsel, it is departmental policy to permit counsel to attend at an administrative removal order determination or eligibility determination, as long as counsel is ready, willing and able to proceed immediately.

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

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

6 Definitions

Nil.

7 Procedure: Handling unaccompanied minors and suspected incompetent persons

Departmental policy is such that certain procedural safeguards be exercised for persons who may not be capable of understanding the legal process in which they are involved.

Generally, in any case involving an A44(1) inadmissibility report and a minor or a suspected incompetent person, the Department expects officers to exhaust all reasonable efforts to arrange for a representative either “in-person” or by way of speaker telephone or by other means of live telecommunication.

In this context, a representative and proper representation, as defined by the Department, is a capable/responsible adult, willing to represent the interests of the minor or incompetent person.

To be more precise, a representative will generally be:

- over 18 years of age;
- able to appreciate the nature of the proceedings;
- willing to represent the person concerned;
- readily able to do so; and
- without an interest that is adverse to that of the person concerned.

Some questioning of both the minor/suspected incompetent person and the proposed representative may well be necessary in order to ascertain whether the representative meets the above requirements. Where the minor/suspected incompetent person has a representative that, in an officer’s opinion, meets with the Department’s “representative requirements,” decisions may be made on the case, up to and including issuance of a removal order. Officers should document particulars concerning the identity, relationship (if any) and contact information for the representative should the Department subsequently have need to contact the representative. Officers are also to carefully document in the case file notes that a representative was involved and why they believe the representative met the Department’s requirements with regard to being a suitable representative.

The preferred option for a representative is an adult relative (a parent, grand-parent, aunt, uncle or adult sibling) who may be travelling with the minor/suspected incompetent person or providing reception. Where no such representative is available, efforts to contact such a person, by telephone or other means of live telecommunication, should be made.

Where a representative cannot be contacted or is otherwise not immediately available, or where there are indications of a custodial dispute, child welfare authorities should be contacted for the purpose of securing a representative for the person.

If all reasonable efforts have been made and a representative still cannot be contacted or secured for a minor/suspected incompetent person, decisions may still be made to issue removal orders where the person has legal counsel or in cases where the person has made a claim to refugee protection. In such cases, officers are to carefully document in the case file notes what efforts were made to secure a representative.

Where a minor/suspected incompetent person does not have a representative or legal counsel, or does not make a claim to refugee protection, the examination/interview should be adjourned with instructions for the person to return at a later date with an adult who is willing to represent them

unless detention is warranted. A list of community resources, including local youth and social services, should be provided.

The Department's position with regard to responsibility for the welfare of a minor/suspected incompetent person is such that:

- reasonable efforts be made to secure representation for the minor/suspected incompetent person; and
- if an officer believes a minor / suspected incompetent person to be at risk, notifying child welfare authorities and/or the appropriate local policing authority of the perceived risk.

8 Procedure: Handling possible claims for refugee protection

Although there is no requirement in the *Immigration and Refugee Protection Act* for officers to ask whether the subject of a determination wishes to make a claim for refugee protection, officers should be aware of Canada's obligation under the United Nations Convention Relating to the Status of Refugees and the Convention Against Torture.

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

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

To handle a possible claim for refugee protection:

- Where the subject of a determination for an administrative removal order has not made a claim, officers should ask the person how long they intended to remain in Canada.
- If the person indicates that their intention is or was to remain temporarily, officers should proceed with the removal order decision and issue the removal order, if appropriate.
- If the person indicates that their intention is or was to remain in Canada indefinitely, officers are to inquire about the motives for leaving their country of nationality and the consequences of returning there before making a decision on the issuance of a removal order.
- Where the responses indicate a fear of returning to the country of nationality, that may relate to refugee protection, officers are to inform the subject of the definition of a "Convention refugee" or "Person in need of protection" [A96 / A97] and ask whether they wish to make a claim.
- Where the subject indicates an intention not to make a claim, the officer should proceed with the decision and issue a removal order, if appropriate.
- Where the subject is uncertain, officers are to inform the person that they will not be able to make a claim for refugee protection after a removal order has been issued [A99(3)] and provide the person with an opportunity to make the claim before proceeding with a removal order decision.
- If the person does not express an intent to either make a claim or not, despite the explanation that this is the person's last opportunity, officers should proceed with the decision and issue the removal order, if appropriate.
- Whenever the subject indicates a fear of returning to their country of nationality, officers are to refrain from evaluating whether the fear is well-founded. As well, officers must not speculate on the subject's eligibility before they have made a refugee claim, nor speculate about the processing time or eventual outcome of a claim.

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

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

9 Procedure: Adjournment

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

Officers may have to initiate adjournment for operational reasons, such as the lack of an interpreter. Do not use adjournment as a tool of administrative convenience.

Officers should not consider a request for adjournment to furnish additional information unless all of the following conditions are met:

- there are strong indications that the person can easily produce additional documents relevant to the inadmissibility report determination;
- officers believe the person's indications to be credible; and
- the person has not yet been given a reasonable chance to present such documents.

Officers should keep in mind the provisions of A44(3), A55(3) and A56 which provide authority to detain, release and impose conditions - including the imposition of a security deposit or the posting of guarantees - on the adjournment of an examination of a person who is the subject of a report made under A44(1).

See also ENF 8, Security Deposits and Guarantees.

10 Procedure: Completing orders

Officers must remember that any removal order made may ultimately be subject to a judicial review proceeding. It is important that officers complete these documents fully and accurately.

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

- complete a hardcopy IMM Departure Order, Exclusion Order or Deportation Order form – as appropriate - by clear, legible bold print or typewriter (if available);
- ensure that the subject's name is spelled correctly;
- complete the subject's date of birth in the format indicated on the form;
- insert the applicable country name in the country of birth and country of citizenship fields– country codes are not to be used;
- use the allegation wording found in Immigration FOSS - Removal Cause code manual to complete the allegation section on the order;
- check off the box on the Departure order indicating whether it is an enforceable order;
- sign and date the document;
- ensure that the order is interpreted and that the interpreter declaration is completed and signed, if appropriate
- ask the subject of the order, if present, to sign and date the order indicating receipt of a copy. If the subject refuses to sign; officers should make the notation "refused to sign" in the space reserved for the subject's signature;
- complete the "date delivered" and "delivered by (mail or in person)" fields in all cases.
- If the subject of the order is present and receives a copy of the order, the date delivered is the effective date of the Departure, Exclusion or Deportation order. If the subject of the order is not present, the date delivered is the date the order is mailed and will always be the same as or later than the date signed. It must be remember that the subject of the order is deemed to have been notified of the order seven days after the decision is mailed.
- distribute the form as follows:
    - for departure orders, give copy 2 to the client; send copy 3 to National Headquarters for microfilming; and send copy 5 to counsel, if available. Retain the other copies on file.
    - for unenforceable departure orders, give copy 2 to the client; and copy 5 to counsel, if available. Retain the other copies on file.
    - when the departure order becomes enforceable, complete the bottom portion of copy 3 and send it to National Headquarters for microfilming.
    - for exclusion orders, distribute as indicated on the form; and send copy 3 to National Headquarters immediately for microfilming
    - for deportation orders, distribute as indicated on the form; and send copy 3 to National Headquarters immediately for microfilming

11 Procedure: Obligations under the Immigration Division Rules

Under Rule 26(1) of the *Immigration Division Rules*, any document to be used in a proceeding must be typewritten or a clear and readable photocopy on one side of 21.5 cm by 28 cm (8 ½" by 11") paper. Immigration Division Rule 26(2) provides for an exception covering original documents such as photographs, hand-written notes, letters or birth certificates, or documents that cannot be made to conform with the requirements set out in Immigration Division Rule 26(1).

Put simply, what this means is that with the exception of those items described above (see also ID Rule 26(2)), all documentation destined to the Immigration Division (for example, an officer's statutory declaration), must be in compliance with the Immigration Division's designated size requirements.

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

12 Procedure: Obligations under the Immigration Appeal Division Rules

Delegated officers will encounter three circumstances where a person against whom they have made a removal order may have a right of appeal to the Immigration Appeal Division (IAD):

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

When a delegated officer makes a removal order against a person who may have a right to appeal that decision to the IAD, officers must advise the person of that right.

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

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

Officers should obtain a written acknowledgment from the person that they have been advised of their right to appeal to the Immigration Appeal Division (IAD) and place it in the case file. See also section 5.4, under heading “Notification to persons of their right to appeal / file an application for judicial review.”

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

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

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

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

Note: The IAD Rules require that a written statement indicating how and when the appellant was provided with the record be included with their copy of the record. A sample statement of service can be found at Appendix E of chapter ENF 19, IAD Appeal Hearings.

See also ENF 19, IAD Appeal Hearings and ENF 10, Removals.

13 Procedure: Handling persons who are detained

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

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

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

13.1 Taping proceedings

Courts have not imposed an obligation to record proceedings or to allow proceedings to be recorded. There is, therefore, no obligation to allow a request to tape or digitally record an administrative removal order determination proceeding or an eligibility proceeding [A100].

13.2 Providing counsel

For more information, see Counsel, section 5.7.

14 Procedure: Detention and release authority

14.1 Detention

An officer's authority to detain after making a removal order can be found in clause [A55].

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

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

See also ENF 8, Security Deposits and Guarantees.

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

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

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

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

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

See also section 13, "Handling persons who are detained;" and ENF 20, Detention.

14.2 Release

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

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

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

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

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

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

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

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

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

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

With respect to all manner of documentation that a Minister's delegate might issue, including a removal order, it will be in order for an officer to issue such documents on behalf of the Minister's delegate, only after having received the express verbal authorization from the Minister's delegate to issue such a document; and then only on condition that the officer signs such document on behalf of the Minister's delegate.

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

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

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

In the context of the *Immigration and Refugee Protection Act*, the practical application of *an "in absentia* proceeding" will be in those occasional instances where a person, who is subject to a Minister's proceeding, has a removal order made against them without the person being present at the time of the removal order's issuance.

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

In addressing the issue of procedural fairness, the Department considers the following "in absentia" procedures to meet the principles of procedural fairness so long as the Department has made reasonable efforts to give the person concerned an opportunity to be cooperative. Procedural fairness requires that the person concerned be given an opportunity to be heard. Where a person is not cooperative, if the Department has made reasonable efforts to give that opportunity, it is the Department's view that to proceed "in absentia" is not contrary to the principles of procedural fairness.

It is also to be noted that the following guidelines require a minimum of two notices be made to a person before an order may be issued.

Officers should note that "*in absentia*" proceedings are not without precedence. For instance, in criminal trials in some jurisdictions, when a person walks out or escapes after a trial has begun, the accused is viewed as having waived their constitutional right to face their accusers. *In absentia* proceedings are also quite common in other civil proceedings, such as minor traffic violations.

16.1 Handling in absentia proceedings

There are three stages for in absentia proceedings.

Stage one

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

In such cases, unless the person is detained, officers will give, or otherwise mail, to the person an "IMM 1234 – Notice to Appear for A44(2) Proceeding," notifying them - after writing the report - of the location, date and time for a Minister's determination proceeding.

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

The aforementioned constitutes a stage-one notification relating to an "*in absentia*" proceeding.

Stage two

If the person does not appear for the scheduled A44(2) Minister's determination proceeding, and has not contacted the responsible officer or office where the A44(1) report originated (informing on the reasons why they were unable to attend at the scheduled Minister's determination proceeding), and the person is not detained, then an officer will either hand deliver or mail to the person (to their last known address as it appears on Departmental records) a second "IMM 1234 – Notice to Appear for A44(2) Proceeding," indicating a location, date and time for a Minister's determination proceeding.

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

In the case of mailing a second notification, officers are to ensure that all reasonable efforts have been exhausted to verify the correctness of the address for the person concerned; this includes checking the Field Operational Support System (FOSS) for specific client address information.

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

The aforementioned will constitute a stage-two notification relating to an "*in absentia*" proceeding.

Final stage

If after a second scheduled Minister's determination proceeding, the person concerned has still not appeared, and the responsible officer and/or office where the A44(1) report originated has received no notice, notification or other indication from the person concerned providing reasons why the person concerned was unable to attend the second scheduled Minister's proceeding, then it will be in order for an A44(2) proceeding to be conducted by a Minister's delegate in the absence of the person concerned.

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

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

See also ENF 7, Investigations and Arrests.

17 Procedure: Included family members and persons accompanying family members

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

Officers should always consider including family members as it will avoid separating families and negate the possibility of family members being abandoned when one member of the family must be removed from Canada.

Regulation R1(3) provides that:

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

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

It is to be noted that R227(2) provides that in the case of a report and a removal order made by the Immigration Division against a foreign national in respect of whom there are family members in Canada, the removal order may be made effective against the family member(s) provided:

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

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

Synopsis:

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

Delegated officers can only make removal orders against persons about whom a report has been written – delegated officers cannot include family members in an administrative removal order relating to another member of the family.

18 Procedure: Charter arguments

Officers may occasionally be asked, in the course of an administrative removal order proceeding, to rule on the constitutionality of certain provisions of the Act. Officers may also be asked to delay eligibility or admission procedures so that the person concerned may make an application to the Court on the constitutionality of a provision of the *Immigration and Refugee Protection Act*.

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

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

As a result of the legal analysis received, the Department suggests that all officers use the following phrase if they are asked to rule on the constitutionality of a provision under the *Immigration and Refugee Protection Act*:

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

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

For further information relating to the *Canadian Charter of Rights and Freedoms*, see website, Department of Justice Canada, http://laws.justice.gc.ca/en/charter/index.html

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

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

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

19.1 A44 reports concerning foreign nationals

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

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

19.2 A44 reports concerning permanent residents of Canada

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

- **Age at time of landing—**Has the person been a permanent resident of Canada since childhood? Was the permanent resident an adult at the time of admission toCanada?
- **Length of residence—**How long has the permanent resident resided in Canada after the date of admission?
- **Location of Family support and responsiblities—**Are family members in Canada emotionally or financially dependent on the permanent resident? Are all extended family members in Canada?
- **Conditions in home country—**Are there any special circumstances in the likely country of removal, such as civil war or a major natural disaster?
- **Degree of establishment—**Is the permanent resident financially self-supporting? Are they employed? Do they have a marketable trade or skill? Has the permanent resident made efforts to establish through language training or skills upgrading? Any evidence of community involvement? Has the permanent resident been in receipt of social assistance?

- **Criminality—**Has the permanent resident been convicted for any prior criminal offence? Based on reliable information, is the permanent resident involved in criminal or organized crime activities?
- **History of non-compliance and current attitude—**Has the permanent resident been cooperative and forthcoming with information? Has a warning letter been previously issued? Does the permanent resident accept responsibility for actions, is remorseful, supplied any necessary documentation requested by an officer.

Criminal Cases

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

Three principal factors indicate the seriousness of an offence: (1) The circumstances of the particular incident under consideration; (2) the sentence imposed; and (3) the maximum sentence that could have been imposed.

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

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

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

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

Seriousness of Offence

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

Criminal history –

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

Length of Sentence –

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

Potential for rehabilitation –

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

Non-criminal cases involving permanent residents

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

Additional factors to consider in non-criminal cases

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

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

Simple knowledge of the terms and conditions would be sufficient. The fact that the sponsor may have refused to go through with the marriage does not necessarily mean that referral is not warranted as the foundation upon which the person was landed no longer exists.

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

19.3 Limited delegation for long-term permanent residents

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

Reports concerning long term permanent residents who:

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

- would not have a right to appeal a decision of the Immigration Division to the Immigration Appeal Division by virtue of A64 of the *Immigration and Refugee Protection Act*

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

19.4 Preparation of referral or warning letter

Referral

- The referral (IMM 5245 - Request for Admissibility Hearing) must reflect the complete name as it appears on the Record of Landing/Confirmation of Permanent Residence, in the case of permanent residents. It is preferable that officers do not list aliases on the referral. It is not incorrect to do so but it is not a required piece of information. If aliases are recorded on the referral, they must appear exactly as they do on the A44 inadmissibility report.
- The allegation(s) cited must reflect exactly what appears on the A44 inadmissibility report. It is necessary to list the sub paragraph(s) if applicable.
- The referral must be signed by the Minister's delegate with authority to make a decision in the particular case.
- Minister's delegates should record in their file notes what factors they considered in arriving at their decision. It is important that the discretion be exercised in a way that is reasonable and fair.

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

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

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

- The warning letter should always be an original, as opposed to a form letter. The letter can be stored on computer for easy access and completion. The 'blanks' should never be filled in by hand. The letter should be tailored to the individual circumstances of the person concerned and, if possible, on original letterhead.
- Every effort should be made to hand-deliver the warning letter. The person concerned should be asked to sign the file copy acknowledging receipt of the original. This is especially important in criminal cases in the event of a subsequent violation.
- It may happen that the letter cannot be hand delivered because the inmate has been transferred to an institution outside of the Canada Immigration Centre's (CIC) jurisdiction. In this event, officers should forward the letter to the responsible CIC with a request to hand deliver the letter on their next visit to the facility. If this is not feasible/practical or the inmate has already been released, then officers should obtain a current address and forward the letter by registered mail.

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

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

20 Procedure: Judicial Review

Delegated officer's decisions are subject to judicial review, with leave, by the Federal Court - Trial Division (FCTD). A review is commenced when an application for leave is filed with the Court.

Neither the Minister nor a person concerned may access the Federal Court if a statutory appeal, as may be provided for by the *Immigration and Refugee Protection Act*, has not been exhausted.

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

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

Officers should obtain a written acknowledgement from the person that they have been advised of their right to file an "application for leave and judicial review" and place it in the case file. See also section 5.4, under heading "Notification to persons of their right to appeal/file an application for judicial review."

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

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

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

Under the *Federal Court Immigration Rules, 1993*, "tribunal" is defined as the person or body whose decision, order, act or omission is the subject of an application. This means that delegated officers are considered to be a tribunal by the Federal Court; consequently, delegated officers are placed under certain obligations to provide information to the Court.

When applications for leave are filed, the Court may ask delegated officers to provide certain documents to the Court registry and to the parties under Rules 9, 14 and 17 of the *Federal Court Immigration Rules, 1993*.

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

Delegated officers are likely to encounter three kinds of requests from the Federal Court.

For more information, see:

- Judicial review, Requests under Rule 9, section 20.1.
- Judicial review, Requests under Rule 14, section 20.2.
- Judicial review, Requests under Rule 17, section 20.3.

20.1 Judicial review, Requests under Rule 9

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

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

If a delegated officer did not give reasons for the decision or order, or reasons were given but they were not recorded, delegated officers must send an appropriate written notice to all the parties and to the registry.

20.2 Judicial review, Requests under Rule 14

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

20.3 Judicial review, Requests under Rule 17

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

A record consists of the following:

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

Delegated officers must prepare a record in accordance with these guidelines. Since delegated officers' proceedings are not a matter of record, there is no need to enclose a transcript in the record.

Delegated officers, or the officer designated to fulfil this function, will send a certified true copy of the record to each of the parties and two copies to the Federal Court registry *[Federal Court Immigration Rules, 1993*, Rule 17]. Any questions concerning the materials to be sent to the court should be directed to the designated CIC regional Justice Liaison Officer responsible for litigation.

See also, ENF 9, Judicial Review.

21 Procedure : A52(1) - Written authorization to return to Canada

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

See prescribed circumstances in clauses [R224, R225, R226].

What this means is that under the provisions of A52(1), a foreign national who is obliged to obtain the written authorization of an officer in order to return to Canada, as a consequence of having been the subject of a previously enforced removal order, may do so (that is, return to and seek entry to Canada) only after securing an authorization from an officer or in other prescribed circumstances.

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

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

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

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

1) inadmissible for having been convicted in Canada; and

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

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

For more information, see:

- Requests for authorization to return, section 21.1.
- Refusal of authorization to return to Canada [IMM 1202], section 21.2.
- Approval of authorization to return to Canada (IMM 1203), section 21.3.

21.1 Requests for authorization to return

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

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

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

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

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

21.2 Refusal of authorization to return to Canada [IMM 1202]

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

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

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

21.3 Approval of authorization to return to Canada [IMM 1203]

For both permanent resident and temporary resident applicants, officers are to record approval of an authorization to return to Canada on an IMM 1203. In the case of an overseas office, only **an officer in charge of a visa office can sign an IMM 1203 and make the required entry in CAIPS notes.**

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

When completing the IMM 1203, officers must be sure to check the appropriate box pertaining to either permanent or temporary residents. Make two copies of the original; give the original to the applicant. Send one copy to the office that removed the applicant from Canada. Send the second copy to Quality Assurance, Operations (BIO), Information Management and Technologies Branch (BID), NHQ, with an IMM 1118 to confirm receipt.

22 Procedure: Admissibility on humanitarian and compassionate grounds

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

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

The *Immigration and Refugee Protection Act* gives the Minister discretion to grant an exemption of any applicable criteria or obligation of the Act or grant permanent residence, when it is justified by humanitarian and compassionate or public policy considerations [A25(1)].

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

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

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

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

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

Should a person claiming to be a Canadian citizen make a refugee claim to an officer, the officer should ascertain if the person is indeed a Canadian citizen. If such is the case, officers should advise the person that the *Immigration and Refugee Protection Act* does not allow for a determination of refugee status of Canadian citizens who are in Canada.

ENF 6 Review of reports under A44(1) version 2

Appendix A - Countries prescribed under A102(1) (reserved)

Countries prescribed under a102(1) (reserved)

Appendix B - Overview - Minister's opinions/interventions

Requesting the Minister's opinion

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

For example:

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

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

- A protected person who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada [A115(2)(a)].
- In such a case, if a Minister's opinion is issued, then that protected person, or person who is recognized as a Convention refugee by another country to which the person may be returned, will no longer be protected from the non-refoulement provisions [A115(1)].

Intervention, cessation and vacation

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

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

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

- conduct an interview with supporting notes (See ENF 7 - Investigations and Arrests - General rules for note-taking) and prepare a statutory declaration (see ENF 7 - Investigations and Arrests – Statutory Declarations) recording information or identifying documents received;
- seize any relevant documents under A140(1) that could be used as evidence;
- create a general information NCB in FOSS and update the National Case Management System (NCMS) to indicate that the case is under investigation and the reason(s) for investigation (for example, "under investigation - grounds to support intervention, cessation or vacation, as appropriate, may exist");
- contact the officer to discuss case details;
- at the request of the officer, conduct further investigation to collect additional evidence;
- when the investigation is complete, the file and all supporting documentation should be transferred to the officer with a memorandum outlining the case details.

See ENF 7, Investigations and Arrests; also, ENF 24, Interventions.

Appendix C - Noteworthy provisions of the Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appendix D - Warning letter samples

Warning letter for criminal cases - sample

Citizenship and Immigration Canada

Citoyonneté et Immigration Canada

Your file

Votre reference

Our File

Notre reference

Date

M.

address

Dear:

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

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

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

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

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

Yours truly,

Minister’s delegate

address

Warning letter for non-criminal cases - sample

Citizenship and Immigration Canada

Citoyonneté et Immigration Canada

Your file

Votre reference

Our File

Notre reference

Date

M.

address

Dear :

This is with reference to your interview on (date of interview] concerning your (describe violation, i.e., failure to comply with the terms and conditions of your admission to Canada or misrepresentation of a fact material to your landing in Canada).

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

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

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

Yours truly,

Minister’s delegate

address