Canada Border Services Agency | Agence des services frontaliers du Canada

ENF 6

Review of reports under subsection A44(2)

Canada

Contents

ENF 6 Review of reports under subsection 44(2)

Updates to chapter

Listing by date:

2020-02-12

Substantive and minor changes, as well as clarifications, have been provided throughout the chapter.
New content has been added to reflect legislative and regulatory amendments and to ensure consistent application of IRPA provisions as clarified through new court decisions.
Sections have been re-written for clarity and/or moved and re-organized for more logical flow of information.
Section 3.1: Amended to include several new or updated forms.
Section 9: New section added to provide guidance on Charter considerations.
Section 10.9: Content added to reflect amendments to IRPA provisions regarding inadmissible family members under section A42.
Section 10.10: Content added to reflect new inadmissibility section A40.1 Cessation of refugee protection: under R228(1)(b.1) the MD has the authority to issue removal orders to foreign nationals who are found inadmissible under A40.1(1) on a final determination by the RPD under A108(2) that the refugee protection of the foreign national has ceased.
Section 18: New section added to reflect changes to IRPA and IRPR requiring that decision-makers impose prescribed conditions on security (A34) inadmissibility cases.

Date: 2007-04-12

Section 5.1: Substantial changes were made throughout that section.
Section 5.7: Minor changes were made to the first paragraph. As well, two paragraphs were added.
Section 7: The entire section was re-written.
Section 9: Minor changes were made.
Section 19.2: The section on non-criminal cases involving permanent residents was re-written.
Section 20.1: The entire section was re-written.
2005-10-31

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

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

2004-08-11

ENF 6 - Review of Reports under A44(1) has been updated to reflect an amendment to paragraph R228. The amendment prescribes that inadmissibility reports with respect to unaccompanied minors and persons unable to appreciate the nature of proceedings who

are unaccompanied must be referred to the Immigration Division if the Minister's delegate determines that a removal order should be sought.

2004-01-26

The title for section 23 of chapter ENF 6 in French has been amended and now reads as follows:
Statut de citoyenneté/Citoyens canadiens qui présentent une demande d'asile
2003-09-02
A minor change was made to section 3.8 and section 24 of ENF 6.

2003-06-19

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

1 What this chapter is about

This chapter provides guidance to Canada Border Services Agency (CBSA) and Immigration, Refugees and Citizenship Canada (IRCC) officials performing the function of the Minister's Delegate (MD) and exercising their authority to review reports prepared under A44(1) of the *Immigration and Refugee Protection Act* (IRPA).

2 Program objectives

The objectives of Canadian immigration legislation with regard to the inadmissibility provisions are:

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

3 The Act and Regulations

Under A44(1), an officer may prepare and transmit a report if that officer is of the opinion that a permanent resident or foreign national in Canada is inadmissible. Under A44(2), all A44(1) reports must be referred to the MD to determine the accuracy and validity of the report and to decide whether to:

- issue a removal order, where the MD has jurisdiction to do so; or
- refer the matter to the Immigration Division (ID) of the Immigration and Refugee Board (IRB) for an admissibility hearing.

The IRPA provides authority both to members of the ID and to the MD to issue removal orders, depending on the type of allegation contained in the A44(1) report, and pursuant to the authority prescribed in the IRPA and the *Immigration and Refugee Protection Regulations* (IRPR) .

In order to streamline the enforcement process in cases involving straightforward allegations, and to maintain the principle that the MD may make determinations in cases where there is little need to weigh evidence, the scheme of the Act and Regulations empowers the MD to issue removal orders under the circumstances prescribed in R228. Generally speaking, the more discretion and analysis required in assessing the allegation, the more likely the jurisdiction rests with a member of the ID.

It is important to note that where the MD is authorized to make removal orders under R228, this authority applies at both ports of entry and at inland offices.

The following table includes some of the most relevant provisions that may apply during the A44(2) process. Some of the authorities listed below pertain specifically to CBSA Border Services Officers (BSOs) at the port of entry or IRCC officers assessing applications; others are more relevant to CBSA Inland Enforcement Officers (IOEs).

ENF 6 Review of reports under subsection 44(2)

Table 1: Sections of the IRPA and the IRPR applying to determinations under A44(2)

Provision	Act and Regulations
Delegation of powers	A6(2)
Permanent Resident	A21(1)
Temporary resident dual intent	A22
Entry to complete examination or hearing	A23
Residency obligation	A28
Security Human or international rights violations Serious criminality Criminality Organized criminality Health grounds Financial reasons Misrepresentation Cessation of refugee protection Non-compliance with the IRPA or IRPA— foreign national Non-compliance with IRPA or IRPR— permanent resident Inadmissible family member	A34 A35 A36(1) A36(2) A37 A38 A39 A40 A40.1 A41(a) A41(b) A42
Preparation of report	A44(1)
Referral or removal order	A44(2)
Imposition of Conditions	A44(3)
Mandatory imposition of conditions— inadmissibility on grounds of security	A44(4),(5)
Applicable removal order- Immigration Division	A45(d)
No return without prescribed authorization	A52(1)
Right of appeal to Immigration Appeal Division (IAD)	A63
Loss of appeal rights	A64
Application for judicial review	A72(1)
Protected person	A95
Referral to Refugee Protection Division	A100(1)
Suspension of consideration of eligibility of claim	A100(2)
Deemed referral to Refugee Protection Division	A100(3)
Ineligibility to refer refugee claim	A101
Cessation of refugee protection	A108
Vacation of refugee protection	A109

Non-refoulement— protected person	A115(1)
Ministerial Opinion for protected person	A115(2)
Rehabilitation	R18, R18.1
Direct back to the United States	R41(b)
Withdrawing application/Allow to leave	R42
Conditions A23	R43(1)
Applicable removal order— Minister Criminality (foreign nationals) Misrepresentation (vacation of refugee/protected person status) Misrepresentation (cessation of refugee protection) Failure to comply Inadmissible family members Permanent residents and their residency obligation Eligible claim for refugee protection Unaccompanied minors Persons unable to appreciate the nature of proceedings	R228 R228(1)(a) R228(1)(b) R228(1)(b.1) R228(1)(c) R228(1)(d)(e) R228(2) R228(3) R228(4)(a) R228(4)(b)
Applicable removal order— Immigration Division (ID)	R229

For further information regarding the division of jurisdiction to issue removal orders, see **Appendix B, 'Table: Immigration and Refugee Protection Act (IRPA) Inadmissible Classes'**

3.1 Forms

The following table includes some common forms used in the 44(2) process. This is a non-exhaustive list and some may only apply to officers carrying out the administration of IRPA at the port of entry.

Table 2: Forms

Form title	Form number
Referral under subsection 44(2) of the Immigration and Refugee Protection Act for an admissibility hearing	BSF506
Denial of Authorization to Return to Canada Pursuant to Subsection 52(1) of the *Immigration and Refugee Protection Act*	IMM 1202B
Authorization to Return to Canada Pursuant to Section 52(1) of the *Immigration and Refugee Protection Act*	IMM 1203B
Departure Order	IMM 5238B
Exclusion Order	IMM 1214B

Deportation Order	BSF581
Notice to Appear for a Proceeding under Subsection 44(2)	IMM 1234B BSF504
Notice to client – No Admissibility Hearing	BSF513
Subsection A44(1) Highlights – Port of Entry Cases	BSF516
Subsection 44(1) and A55 Highlights – Inland Cases	IMM 5084B
Request for Admissibility Hearing/Detention Review Pursuant to the Immigration Division Rules	BSF524
Entry for Further Examination or Admissibility Hearing	BSF536
Direction to Leave Canada	BSF503
Direction to return to the United States	BSF505
Notification to the Refugee Protection Division and the Refugee Appeal Division and the Person Concerned by an Immigration Officer Pursuant to Subsection 103(1) of the Immigration and Refugee Protection Act of the Suspension of Consideration of Claim	BSF528
Notification to the Refugee Protection Division and the Person Concerned by an Officer Pursuant to Paragraph 103(2) of the Immigration and Refugee Protection Act	BSF527
Notification to the Person Concerned by an Immigration Officer Pursuant to Paragraph 104(1)(A), (B), (C), OR (D) of the Immigration and Refugee Protection Act & Notification to the Refugee Protection Division pursuant to Paragraph 104(1) of the same Act	BSF529
Acknowledgement of Conditions	IMM1262* BSF 821**
Acknowledgement of Conditions for IRPA Section 34 Cases	BSF798
Notes to File	BSF788

*currently available in GCMS
** currently available only in CBSA Atlas

4 Instruments and delegations

A4 sets out which Minister is responsible for the administration of the IRPA. The Minister of Citizenship and Immigration [also known as Immigration, Refugees and Citizenship Canada (IRCC)] and the Minister of Public Safety and Emergency Preparedness (PS) are jointly responsible for the administration and enforcement of the IRPA, however there are some differences. The IRCC Minister is responsible for the overall administration of the IRPA, unless

otherwise specified. The Minister of PS has the primary responsibility for the administration of the IRPA as it relates to the following:

- port of entry examinations;
- policy lead relating to enforcement of the IRPA including arrest, detention and removal;
- establishment of policies respecting the enforcement of the IRPA and inadmissibility under A34/35/37; and
- declarations referred to under A42.1 (Ministerial Relief provision)

Pursuant to A6(1), the responsible Minister has the authority to designate specific persons or classes of persons to carry out any purpose of any provision of the IRPA with respect to their individual mandates as described in A4, and to specify the powers and duties of the officers so designated. In addition, A6(2) authorizes that anything that may be done by the Minister under the Act and Regulations may be done by a person that the Minister authorizes in writing. This is referred to as delegation of authority.

A designated authority refers to the position that has been given the legal authority by the Minister to carry out the delegated function.

Each Minister who has responsibilities under the IRPA has written an instrument of delegation and designation that is periodically updated. The Delegation of Authority and Designations of Officers (D & D) instruments stipulate who has the authority to perform specific immigration-related functions. CBSA and IRCC personnel are designated by position to perform all delegated or designated authorities, including those associated with A44(1)/A44(2) functions. It is to be noted that the IRPA D & D instruments have a hierarchical link which means only the lowest level of authority is included in the D & D instruments as every position above this one (with a direct hierarchical link) has the same authority to perform specific immigration-related functions.

CBSA and IRCC officials acting in the capacity of the MD in A44(2) proceedings should always review both the CBSA and the IRCC D & D instruments as they have authorities delegated and designated under both instruments, which can be found on the IL 3- Designation of Officers and Delegation of Authority.

The authority to review A44(1) reports has been designated to certain CBSA and IRCC officials. It is important to note that while IRCC officers have been designated the authority to review reports for most inadmissibility sections, A44(1) reports for inadmissibility under A34 (security grounds), A35 (grounds of violating human or international rights) and A37 (grounds of organized criminality) may only be prepared and reviewed by CBSA.

All reports written by CBSA or IRCC officers will be reviewed by the MD who has been delegated the authority under the D & D instruments. If the MD is of the opinion that the report is well-founded, the MD will make the appropriate decision based on the evidence and determine whether to:

- issue a removal order, if the allegation is within the MD's authority pursuant to R228; or
- refer the report to the ID pursuant to the R229.

For additional information, see Appendix B— 'Table: Immigration and Refugee Protection Act (IRPA) Inadmissible Classes'

Note: Policy requires that even where officers and officials acting in the capacity of the Minister's Delegate (including chiefs and directors) have the delegated authority under the D & D instruments, they should not perform Minister's Delegate functions and reviews until they have successfully completed the necessary training to perform the A44(2) function. This policy is consistent with the Federal Court's decision in Zhang v. Canada (Citizenship and Immigration), 2014 FC 362 where judicial review was granted based on a finding that there was an inadequate record before the court to conclude that the MD had received the required Minister's Delegate Review training and was therefore authorized to issue a removal order.

5 Definitions

Adult legally responsible
An adult legally responsible for a minor or suspected incompetent person may be their parent or legal guardian. If the accompanying adult is not a parent or guardian, reasonable efforts must be made to contact a parent or guardian. For more information on accompanying adults, please refer to ENF 21 Recovering Missing, Abducted and Exploited Children.

Foreign national
A person who is not a Canadian citizen or a permanent resident; includes a stateless person [A2(1)].

Indian
A person who is registered as an Indian under the Indian Act [R2].

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

Permanent resident
A person who has acquired permanent residence status and has not subsequently lost that status under A46 [A2(1)].

Persons unable to appreciate the nature of proceedings
This phrase refers to persons who are unable to understand the reason for the proceedings or why they are important, or cannot give meaningful instructions to counsel about their case. An opinion regarding competency may be based on the person's own admission, the person's observable behaviour at the proceeding, or an expert opinion on the person's mental health or intellectual or physical faculties. Pursuant to R228(4)(b) and R229(4)(b), the authority to issue any removal order for persons unable to appreciate the nature of the proceedings shall be the Immigration Division.

Protected person
A person on whom refugee protection is conferred in Canada and whose claim or application has not subsequently been deemed to be rejected because of cessation or vacation proceedings [A95(2)].

6 Departmental policy

6.1 Procedural fairness

Actions and decisions made under the IRPA must be made in accordance with the principles of procedural fairness and natural justice. These principles apply to the exercise of the powers of the Minister's delegate. In general terms, this means the MD must:

- Allow the person concerned the opportunity to know the case to be met and present all relevant facts of the case;
- Inform the person concerned about the purpose and possible outcomes of the MD proceedings;
- Provide the person concerned with a reasonable opportunity to respond;
- Allow the person to respond to facts or new information that will be considered by the decision-maker;
- Fully and fairly consider the evidence;
- Render decisions that are impartial and free from bias;
- Provide the notice of decision and reasons for the decision to the person concerned;
- Inform the person concerned of a right to counsel if an A44(2) MD proceeding is caused where the person is detained and the Minister has the authority to issue a removal order;
- Ensure that an interpreter is provided where necessary

It is important to differentiate those cases where the MD may issue a removal order and those cases where the jurisdiction to issue a removal order lies with the ID, as different procedural requirements and considerations will apply in order to ensure that procedural fairness and natural justice are met.

The content of procedural fairness will also depend on the status of the person concerned and additional considerations will apply for permanent residents and protected persons.

For additional information, see ENF 5 Writing 44(1) reports: section 6.1, 'Procedural fairness'; section 8, 'Considerations before reviewing an A44(1) report- Scope of officer discretion'; section 9.2, 'Special considerations for protected persons'; section 10, 'A44(1) reports concerning permanent residents of Canada'.

In reaching a decision, the MD must take into account representations made by persons or by their counsel, and make particular note of the nature and content of these representations. All decisions of the MD are subject to judicial review, with leave, by the Federal Court of Canada. Certain decisions that the MD makes may be subject to appeal before the Immigration Appeal Division (IAD), where a statutory right of appeal exists under the IRPA.

Individuals subject to A44 proceedings have the right to know the case against them, which generally includes understanding what information the MD would rely on in making a decision. Each case, however, must turn on its facts and the level of disclosure required at the A44 stage may vary depending on the circumstances of the case. If an MD relies on new information [i.e., information that was not already provided at the A44(1) stage] that is material and that the person concerned would not otherwise be aware of or have access to, the MD should ensure that it is provided to the person concerned [for further details, see Durkin v. Canada (Public

Safety and Emergency Preparedness), 2019 FC 174]. This is particularly important where the MD has jurisdiction to issue the removal order, as a higher level of procedural fairness will apply. Conversely, in cases where the ID has the jurisdiction to issue the removal order, there is no duty to disclose other than information which is "material and otherwise unknown or unavailable" at A44(1) or A44(2) since the person will be entitled to receive disclosure in the context of an admissibility hearing [Jeffrey v. Canada (Public Safety and Emergency Preparedness), 2019 FC 1180]. With respect to all requests for disclosure, MDs should always be cognizant of the legal rules and restrictions on the general disclosure of documents (e.g., *Privacy Act*, information sharing agreements, etc.). For further details, MDs should refer to ENF 5 Writing 44(1) reports, section 12.5, 'Disclosure of documents'.

6.2 Procedures for persons less than 18 years old or persons unable to appreciate the nature of the proceedings

R228(4) provides for specific safeguards for certain vulnerable persons by requiring that where the person:

- is under 18 years of age and not accompanied by a parent or an adult legally responsible for them; or
- is unable, in the opinion of the Minister, to appreciate the nature of the proceedings and is not accompanied by a parent or an adult legally responsible for them;

the matter must be referred to the ID for an admissibility hearing**. In these cases, the MD does not have jurisdiction to issue a removal order.**

Such cases will call for a higher degree of procedural fairness at the A44 stage and officers and MDs must take extra care to ensure that the person's interests are represented and that the evidence has been fully and fairly considered.

During the ID proceedings, a designated representative will be appointed pursuant to A167(2) to represent the person's interests and ensure that procedural fairness requirements are met with respect to presenting evidence relevant to the case and providing a response to facts or new information that will be considered by the decision-maker. In these hearings, parties will also be governed by the Immigration and Refugee Board of Canada Chairperson Guideline 8: 'Procedures With Respect to Vulnerable Persons Appearing Before the IRB'

Where a person appears to be unable to appreciate the nature of the proceedings, it is important for the MD to identify this as soon as possible during the A44(2) proceedings. Where the MD, in the course of their interactions with a person, has identified that a person has a suspected or known mental illness and does not appreciate the nature of the proceedings, this should be clearly documented in the MD's decision so that in cases where the case is being referred for an admissibility hearing, the need for a designated representative is flagged for the ID.

In such cases, the MD should also ensure that other departmental and agency guidelines with respect to dealing with vulnerable persons are followed. See ENF 7 Investigations and arrests; ENF 20 Detention; and ENF 34 Alternatives to Detention.

For additional guidance on how to identify a vulnerable person, see IRCC Program delivery instructions on Processing in-Canada claims for refugee protection of minors and vulnerable persons.

6.3 Official languages

Both the *Official Languages Act* and the *Canadian Charter of Rights and Freedoms* establish the right of individuals who are subject to administrative proceedings in Canada to communicate with employees of IRCC and CBSA in the official language of their choice, either French or English. Officials carrying out the administration of the IRPA must respect the right of the individual to proceed in French or English. In order to ensure that procedural fairness is maintained, MDs should ensure that all the Minister's documents are provided in the language of the proceedings and, where necessary, obtain translations (e.g., a certificate of conviction from another country that is not in French or English that the Minister is relying on as evidence).

6.4 Interpreters

The MD 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 necessary, an interpreter is to be provided to enable the persons to understand and communicate fully.

Note: Travellers arriving at a port of entry into Canada do not have an automatic right to an interpreter upon request during routine port of entry examinations, however there are situations where officers at the port of entry are required to suspend the proceedings until a qualified interpreter is available. This may include circumstances where the officer is considering denying entry to the traveller. For further information, see Nere v. Canada (Citizenship and Immigration), 2018 FC 672.

CBSA officers should consult guidelines on the use of interpreters contained in ENF 4 Port of entry examinations (section 8.5 'Use of interpreters').

For further information see IRCC Program delivery instructions (PDI) on interpreters.

6.5 Counsel

Persons do not have a right to counsel at MD review proceedings, **unless they are detained**. In all detained cases, persons must be given the opportunity to obtain and instruct counsel at their own expense. Counsel includes a barrister, solicitor, family member, consultant or friend.

In detained cases: The MD must inform persons of their right to counsel prior to commencing the MD review. This right applies in all cases (port of entry and inland) where a person is detained under an Act of Parliament and includes situations where the person is detained by the criminal courts while facing charges or serving a sentence and subject to IRPA proceedings.

Port of entry: Generally, CBSA's policy is not to permit counsel at MD review proceedings unless arrest/detention has occurred. However if the MD is dealing with an individual who does have counsel present, the officer should allow the counsel to remain present as long as counsel does not interfere with the examination process.

Note: In Dehghani v. Canada (Minister of Employment and Immigration), [1993] 1 S.C.R. 1053], the Supreme Court of Canada (SCC) determined that the principles of fundamental justice do not include the right to counsel for routine information-gathering, such as that gathered at port of entry examination interviews. The SCC further held that an Immigration Secondary examination at a port of entry does not constitute a detention within the meaning of paragraph 10(b) of the Canadian Charter of Rights and Freedoms.

For further information regarding right to counsel at POE examinations, officers should refer to ENF 4 Port of entry examinations.

In non-detained inland cases (CBSA/IRCC): A non-detained person does not have the right to have counsel present during the MD review, however in the spirit of procedural fairness, the MD shall inform the person of the possibility of obtaining counsel for the MD review prior to commencing the proceeding. Call-in notices for MD reviews should advise the person that they may have counsel present for the MD review. MDs are not obligated to postpone MD review proceedings in non-detained cases due to counsel unavailability, however, may consider such requests on case-by-case basis.

Where counsel is representing the person concerned at the proceeding, the MD should ensure that counsel's identity, the fact of counsel's presence at the proceeding and statements made by counsel on behalf of the person concerned are documented in the their notes, and that counsel's representations have been considered in their decision. The MD may also need the person's representative to complete a Use of a Representative form (IMM 5476). For further information, see IRCC Program delivery instructions on Use of Representatives.

Participation by counsel involves speaking on the client's behalf, presenting evidence and making submissions on the issues. Allowing counsel to participate does not mean that the MD is required to tolerate disruptive or discourteous behaviour by counsel. Where such conduct is encountered, the MD may require counsel to leave and/or the proceeding may be adjourned to another time. In such cases, the MD should ensure to document their reasons for taking such action.

7 Procedure: Review of the A44(1) report by the Minister's Delegate

7.1 Transmission of an A44(1) report to the Minister's Delegate

Under A44(1), an officer may prepare a report if that officer is of the opinion that a permanent resident or foreign national in Canada is inadmissible.

All A44(1) reports concerning permanent residents and foreign nationals must be referred to the MD making the final decision about whether or not to issue a removal order or refer the matter to the Immigration Division.

Where the officer transmitting the report to the MD has also prepared an A44(1) case highlights form (IMM 5084B for inland cases or BSF516 for port of entry cases), a detailed memorandum or an A44(1) narrative report, this must also accompany the A44(1) report.

The officer transmitting the report must also forward to the MD, all documentation and evidence relied on by the officer in forming their opinion, including but not limited to:

- for permanent residents, proof of a search of citizenship records;
- copies of all relevant immigration documents and other certificates and affidavits that can be obtained from IRCC, if applicable;
- originals or copies of other documents relevant to the case, such as a birth certificate, marriage certificate, a certificate of conviction or other evidence of a previous conviction that is acceptable in a court of law;
- police occurrence reports;
- probation, parole and psychiatric assessments;
- police records and information on other convictions not reportable under A44(1);

- other documentary evidence that supports the allegation(s), including statutory declarations;
- evidence filed by the person concerned, including any documentation describing the person's attachment to Canada and potential for successful establishment or rehabilitation.

See also, ENF 1 Inadmissibility; ENF 2 Evaluating inadmissibility; and ENF 23 Loss of permanent resident status.

The importance of forwarding the officer's recommendation to the MD at the same time as the A44(1) report is transmitted was highlighted in Wong v Canada (Citizenship and Immigration) 2011 FC 971. In that case, the Federal Court dealt with the legality of two removal orders issued by the MD prior to the A44(1) case highlights form being signed and dated. In finding that this sequence of events rendered the orders improperly issued and therefore null and void, the Court affirmed that the officer's recommendation needed to be reviewed by the MD as part of the A44 process **before** a removal order was issued.

7.2 Reviewing the A44(1) report

Once the A44(1) report is transmitted by the officer to the MD, the MD will then review the report to determine its **accuracy** and **validity**.

Accuracy refers to the determination of the correctness of details contained in the report.

Prior to any substantive review by the MD, it is important for the MD to conduct an initial review of the A44(1) report to ensure that:

- the biographical data is correctly cited [name(s), date of birth];
- the status of person concerned is correctly identified in the A44(1) report;
- the inadmissibility section has been properly cited; and
- the A44(1) report has been signed and dated.

Any report containing such errors should be sent back to the officer who wrote the A44(1) report so that it can be corrected accordingly.

Validity refers to the determination of whether the report is well-founded, based on the MD's review of all of the evidence.

If the report is found to be valid, then the MD upholds the report and decides on the disposition of the case.

The disposition of the MD review under A44(2) will depend on the allegations and circumstances of each case and may include:

- referring the case to an admissibility hearing;
- issuing a removal order;
- allowing the person to leave Canada (POE cases only);
- issuing a Temporary resident permit (TRP); or
- issuing a warning letter (permanent residents/protected persons).

If the MD finds that the report is not valid, the MD may authorize the person to enter or remain in Canada; in certain circumstances, the MD may also decide to send the report back to an officer to for consideration of preparing a new report with the accurate allegation.

7.3 Procedure: Evidentiary requirements

To form the opinion that an A44(1) report is well-founded, the MD must have knowledge of the evidentiary rules and requirements for immigration matters. Knowledge of what may be required to substantiate an allegation of inadmissibility is an important consideration in all cases.

Each allegation has specific requirements for evidence and officers are to be guided by the content of ENF 1 Inadmissibility; ENF 2 Evaluating Inadmissibility; and ENF 18 War crimes and crimes against humanity.

In order to make a decision on the validity of an A44(1) report, the MD must be satisfied that the applicable burden and standard of proof may be met and that sufficient evidence has been or may be gathered to ensure that each element of an inadmissibility allegation may be satisfied.

7.4 Burden of proof

The burden of proof, in the context of immigration legislation, refers to who is responsible for establishing admissibility under the IRPA.

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

In cases of foreign nationals who are seeking entry (primarily applicable to port of entry cases) or those who entered Canada illegally, the onus is on the individual to establish that they are not inadmissible. Where the person has been authorized to enter Canada the burden to establish inadmissibility is on the Minister.

Table 3: Burden of proof

Persons authorized/not authorized to enter	Details	Burden of proof
Permanent residents and foreign nationals authorized to enter	A45(d) requires the Immigration Division to make a removal order against a permanent resident or a foreign national who has been authorized to enter Canada, if it is satisfied that they are inadmissible. Consequently, in cases involving persons who were granted entry into Canada, including permanent residents, the onus rests on the Minister to establish that the person is inadmissible.	Minister

Foreign nationals not authorized to enter	A45(d) requires the Immigration Division to make a removal order if it is not satisfied that a foreign national who has not been authorized to enter Canada is not inadmissible. A21(1) states that a foreign national becomes a permanent resident and A22(1) states that a foreign national becomes a temporary resident if an officer is satisfied that, inter alia, the foreign national is not inadmissible. This applies to persons seeking entry into Canada or those persons who have entered illegally. Consequently, the onus is on these persons to establish that they are not inadmissible.	Foreign national

7.5 Standard of Proof

The term “standard of proof” refers to the degree to which the decision maker must be satisfied. Immigration proceedings are civil in nature and therefore the general standard of proof is the one applicable to civil matters: balance of probabilities. However A33 provides that, unless otherwise provided, the standard of proof for allegations listed under sections A34 to A37, is a lower standard of proof: reasonable grounds to believe that the facts have occurred, are occurring or may occur, applies.

“Balance of Probabilities” is a civil standard of proof used in administrative tribunals. It means that the evidence presented must show that the facts as alleged are more probable than not. The party having the burden of proof must demonstrate that the evidence presented outweighs any opposing evidence or arguments. It is a higher standard of proof than “reasonable grounds to believe”, but is lower than the criminal standard of “beyond a reasonable doubt” used in criminal proceedings.

“Reasonable grounds to believe” is a bona fide belief in a serious possibility that fact has been established based on credible evidence. Reasonable grounds to believe is more than suspicion. Some objective basis for the belief has to exist. Put another way, the fact itself need not be proven; it is enough to show reasonable grounds for believing the allegation true. Information used to establish reasonable grounds should be specific, compelling, credible and be received from a reliable source.

The following table summarizes the standard of proof for sections A34 to A42:

Table 4: Standard of proof

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

7.6 Duty to provide information

A person who seeks to enter Canada at a port of entry or who makes an application at an inland office that they should be authorized to enter or remain in Canada, as the case may be, must truthfully provide such information as an officer may require for the purpose of the examination. As such persons are subject to examination, there is a legal obligation under A16(1) to answer truthfully all questions put to them by an officer for the purpose of the examination, and produce all documents or other evidence reasonably required.

R37 specifies the point at which the examination of a person who seeks to enter Canada, or makes an application to transit through Canada, ends. Generally, examinations will end when an officer makes a decision on the application before them or, in cases referred to the MD, when a determination has been made. For refugee claimants, however, R37(2) provides designated officers the authority to examine a refugee claimant until the refugee claim has been determined by the Refugee Protection Division (RPD) of the IRB. The same obligation to answer truthfully applies to persons claiming to be refugees who are referred for a determination of eligibility pursuant to A100(1.1).

While there is no way of compelling persons to comply with the legal obligation to provide truthful information, under the IRPA it is an offence to knowingly provide false or misleading information under A127 (Misrepresentation).

It should be noted by officers at the port of entry that while permanent residents are subject to examination when seeking entry, the IRPA gives permanent residents of Canada the right to

enter Canada at a port of entry pursuant to A19(2) once the officer is satisfied that the person holds permanent resident status. The obligation to answer truthfully under A16(1) for permanent residents is linked to A18(1) and must be related to examination for the purpose of establishing that the person holds permanent resident status in Canada.

While an officer who is satisfied at examination that a person holds permanent resident status must admit that person, the officer may also form an opinion during examination that the permanent resident is inadmissible for other reasons under the IRPA. In such cases, the officer should advise the person that while it has been established that they have a right to enter Canada, there are reasons to believe that they could become the subject of a report under the IRPA which could lead to the issuance of a removal order. If the person wishes to continue answering questions or providing information/submissions pertaining to the allegation, they should be given an opportunity but are not required to do so. Even if a permanent resident becomes the subject of an A44(1) report, they continue to have a right to enter until a final determination has been made regarding their loss of status.

For further details on examination, see ENF 5 Writing 44(1) reports and ENF 4 Port of entry examinations.

8 Scope of Discretion of the Minister's Delegate

8.1 Minister's Delegate Options— Limited discretion of the MD at A44(2)

Where the MD reviews the A44(1) report and finds that it is well-founded, there are circumstances in which the objectives of the IRPA may be achieved without the issuance of a removal order. The MD has the discretion to take other action within the exercise of their delegated authority as set out in the IRPA and the IRPR. However, as will be seen in this section, the scope of discretion of the MD is limited.

The use of the word "may" in the IRPA suggests that Parliament intended to provide the officer and the MD with some discretion on decisions made under A44(1) and A44(2). While the body of case law respecting this scope of discretion varies, Canadian jurisprudence does affirm that an MD's discretion under A44 is limited (see **Appendix E: Case Law on the Scope of Officer Discretion under A44**).

The discretion under A44(1) and A44(2) does not mean that officers and MDs can disregard the fact that someone is, or may be, inadmissible. The discretion under A44 is meant to give officers and MDs some flexibility in managing cases where circumstances warrant that no removal order will be sought and where the objectives of the IRPA may or will be achieved without the need to write a formal inadmissibility report under A44(1) or issue a removal order/refer the case to the ID under A44(2).

The courts have also found that this scope of discretion varies depending on the inadmissibility grounds alleged, whether the person concerned is a permanent resident or a foreign national, and whether the MD or the ID has the authority to issue a removal order. In other words, the scope of discretion has been viewed as "variable and flexible".[1]

[1] Sharma v. Canada (Public Safety and Emergency Preparedness), 2016 FCA 319

For example, in the case of Canada (Minister of Public Safety and Emergency Preparedness) v. Cha, 2006 FCA 126, a case involving a foreign national inadmissible under paragraph 36(2)(a) of the IRPA, the FCA held that in spite of the use of the word "may" in the wording of subsection A44(2), there are limits to the discretion afforded to officers and MDs. The FCA held that with respect to foreign nationals inadmissible for criminality or serious criminality, officers and MDs have limited discretion under A44(1) and A44(2). The Court further outlined that the particular circumstances of the foreign national, the nature of the offence, the conviction, and the sentence are beyond the scope of the discretionary power of the officer when considering whether or not to write an A44(1) report for criminality or serious criminality against a foreign national. The FCA also concluded that permanent residents have more rights and therefore benefit from more discretion by decision-makers than foreign nationals do.

In Faci v. Canada (Public Safety and Emergency Preparedness), 2011 FC 693), the Federal Court clarified that when deciding whether to make a referral for an admissibility hearing, the MD has the discretion, rather than the obligation, to consider the factors set out in policy manuals, such as length of residence in Canada, age at the time of arrival, country conditions in the country the person would be removed to, and prospects of rehabilitation. It is noteworthy that the Court also stated that it is not the function of officers or the MD to deal with matters described in section 25 of the IRPA (Humanitarian and Compassionate grounds) and section 112 of the IRPA (Pre-Removal Risk Assessment).

In general, discretion under A44 means that officers and MDs have some flexibility in managing cases where the person is inadmissible, however the objectives of the IRPA may or will be achieved without the need to write a formal report under A44(1) or, at the MD level, issue a removal order or A44(2) referral, for example:

- where an MD allows a withdrawal of an application to enter Canada (Allowed to Leave) option at a port of entry after an A44(1) report has been written;
- where a person is already subject to an enforceable removal order and the MD determines that the objectives of the IRPA would not be served by the issuance of an additional removal order and determines that a disposition of "no further action" on the A44(2) report would be appropriate;
- where an MD decides to issue a Temporary Resident Permit (TRP) to a foreign national taking into account the relevant assessment risk factors set out in agency and departmental guidance (e.g., foreign national who is seeking entry to work in Canada and who was convicted of a non-violent offence many years ago);
- where the MD holds the A44(2) review in abeyance pending the decision on an application to IRCC for restoration of status by a foreign national who has remained in Canada beyond the period authorized; or
- where the MD decides that the issuance of a warning letter for a permanent resident or protected person reported under A36(1) is warranted, in consideration of all of the circumstances of the case, including the objectives under paragraphs A3(1)(h) and (i) of the IRPA.

8.2 Priority Cases: Inadmissibility under A34, A35, A36 and A37 of the IRPA

It was affirmed by the FCA in Sharma v. Canada (Public Safety and Emergency Preparedness), 2016 FCA 319, that within the context of A44, officers and the MD must always be mindful of Parliament's intention in drafting the IRPA to make security of Canadians a top priority. In Sharma, the FCA also concluded that the FCA's rationale in Cha in support of a limited discretion under A44 would appear to apply equally to both foreign nationals and permanent residents.

Although the factors contained in these guidelines may be considered at the A44(2) stage, officers and MDs must always be mindful of the various objectives of the IRPA, in particular A3(1)(h) and (i). As suggested by Federal Court jurisprudence, in cases of inadmissibility under A34, A35, A36(1) and A37, the scope of discretion enjoyed by officers and MDs making a decision under A44 will be very narrow and generally it is reasonably open to officers and MDs to prioritize public safety and security.

8.3 Personal circumstances

Officials making an administrative decision under the IRPA should demonstrate on the record that they have considered any relevant arguments and evidence presented by the person concerned, including any relevant information pertaining to their personal circumstances and, if relevant, the interests of the children directly affected by the decision. While the best interests of children must always be taken into account as an important factor, this does not mean that these considerations will outweigh other factors of the case. In cases where a child is directly affected by a decision, the officer or MD should indicate in their reasoning that they actively considered the best interests of the child. This consideration, however, must be weighed within the scope of the limited discretion of officers and MDs under the A44 and the objectives of the IRPA as outlined in previous sections: it is not the function of the officer at the A44(1) stage or an MD during A44(2) proceedings to engage in a humanitarian and compassionate analysis under A25(1) or a pre-removal risk assessment under A112.

8.4 Special considerations for protected persons

This section applies in both cases where the jurisdiction to issue a removal order rests with the ID and in cases where the MD has the jurisdiction to issue a removal order. In other words, this section applies to both foreign nationals and permanent residents who were granted protected person status.

Under the IRPA, protected persons are provided with certain protections, including the right of non-refoulement under A115(1) and, subject to A64, the right under A63(3) to appeal to the IAD against a decision to make a removal order against them. This was recognized by Justice Décary in Cha, who noted that the Act and the Regulations treat permanent residents differently than Convention Refugees who are, in turn, treated differently than other foreign nationals.

A wider consideration of the protected person's circumstances may therefore be warranted and the MD should refer to the factors for consideration for permanent residents contained in section 15 below. As in the case of permanent residents, the MD should ensure that there has been an opportunity for the protected person to provide submissions on their personal circumstances. It should be noted, however that the Federal Court jurisprudence would support that protected persons are not entitled to a higher degree of procedural fairness or participatory rights with

respect to the operation of A44 than other foreign nationals or permanent residents [see Awed v. Canada (Citizenship and Immigration) 2006 FC 469]. Officers and MDs should also keep in mind that the Federal Court has made findings to support the principle that officials carrying out A44(1) and (2) assessments are not obliged to speculate about how and when future deportation might take place [Faci v. Canada (Public Safety and Emergency Preparedness), 2011 FC 693].

In cases of protected persons, the MD may also consider as an additional factor in their assessment, whether the facts of the case would support a referral for a Ministerial opinion ('Danger Opinion') under A115(2). For further information, see ENF 5, section 14.5, 'Overview: Minister's opinions/interventions'.

9 Charter considerations

The purpose of this section is to provide guidance to officials performing MD functions under A44(2) in handling Charter and/or constitutional arguments made in the course of A44(2) proceedings.

The jurisprudence respecting the application of the Canadian Charter of Rights and Freedoms [2] (Charter) at the A44(2) stage is in a state of flux.[3] Therefore, current guidance to MDs is constrained by the evolving state of the law in this area.

Existing case law establishes that all administrative decision-making must be consistent with the Charter.[4] Under the IRPA, this requirement has been incorporated into the objectives of the Act under A3(3)(d).

Where a person specifically alleges that a provision of IRPA or its application (i.e., decision of the MD to issue a removal order or refer the report to the Immigration Division ID for an admissibility hearing) breaches one or more enumerated Charter right, the MD must address these Charter concerns in their written decision. This was affirmed by the Federal Court in its decision in Abdi v. Canada (Public Safety and Emergency Preparedness), 2018 FC 733. In other words, the MD cannot ignore Charter arguments. This does not mean, however, that MDs are expected to engage in a complex Charter analysis within the context of A44(2) decisions.

In most cases, the courts have found that the specific Charter rights being raised do not apply at the A44(2) admissibility stage, that is, it is premature to say at the A44 stage that the MD's decision will impact these enumerated Charter rights. For example, in Brar v. Canada, 2016 FC 1214, the Federal Court expressed doubts that section 7 rights could be engaged by the A44(2) referral decision, and, in a related case, reiterated that section 7 rights are not engaged at the referral stage (Brar v. Canada, 2017 FC 820).

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[2] Constitution Act, 1982, Part I Canadian Charter of Rights and Freedoms

[3] For example, see Revell v. Canada (Citizenship and Immigration), 2019 FCA 262; Moretto v. Canada (Citizenship and Immigration), 2019 FCA 261; Surgeon v. Canada (Public Safety and Emergency Preparedness), 2019 FC 1314

[4] Doré v. Barreau du Québec, 2012 SCC 12

- MDs should keep in mind that the courts have found that the objectives of the IRPA indicate Parliament's intent to prioritize the security of Canadians. [5]
- MDs should note that the Federal Court has found that the MD is not obliged to speculate about how and when a future deportation might take place or engage in a section A25 (H&C considerations) or a section A112 (Pre-Removal Risk Assessment) analysis.[6]
- **Where a person specifically mentions a breach of their Charter rights in either verbal or written submissions**, the MD should record this in their notes and address it in their reasons, even if only to say that they do not find that specific Charter rights are engaged at this stage and provide supporting reasons.

Constitutional arguments about legislation:

In cases where the person concerned is challenging the constitutionality of a provision of the IRPA itself:

- CBSA and IRCC officials do not have jurisdiction to grant Charter remedies under section 52 of the *Constitution Act* or under section 24 of the Charter.[7]
- Where the MD is specifically asked to rule on the constitutionality of A44(2) or another provision under the IRPA, the MD should indicate in their decision that they do not have the authority to do so and such a remedy should be sought in a court of competent jurisdiction.
- If the MD is requested to delay A44(2) procedures so that the person concerned may make an application to the Federal Court on the constitutionality of a provision under the IRPA, the MD should, in deciding the request, consider that the legal process permits an application to the Federal Court to be made following the decision on eligibility or admissibility. Consequently, there is no reason, based on a constitutional argument, for the MD to permit a delay of procedures for the purpose of pursuing a Federal Court application.

[5] Medovarski v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 39

[6] Faci v. Canada (Public Safety and Emergency Preparedness), 2011 FC 693

[7] Under subsection 24. (1) of the Charter, a person whose rights or freedoms guaranteed by the Charter, "have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances". Pursuant to subsection 52(1) of the Constitution Act, a court may also strike down a legislated provision which is found to infringe a person's Charter rights as invalid. Subsection 24(1) of the Charter relates to personal remedies for a government action which breaches Charter rights, whereas subsection 52(1) would apply where legislation is found to be invalid. MDs are not considered a court of competent jurisdiction and therefore cannot grant a remedy under section 24 of the Charter.

10 Cases where the MD has jurisdiction to issue a removal order

10.1 Procedural fairness considerations

The purpose of A44(2) proceedings is for the MD to review the A44(1) report to determine whether the report is well-founded. In prescribed circumstances set out in the Regulations, where the MD determines that the A44(1) report is well-founded, the MD has the authority to issue a removal order.

In cases where the MD has the authority to issue a removal order, the MD will need to ensure that certain steps are completed to ensure that procedural fairness has been met.

During in-person proceedings before the MD, the person concerned must be informed of the purpose of the A44(2) interview/proceeding and the possible outcomes of it. Prior to a substantive review, the MD must also give the person concerned the opportunity to obtain the services of an interpreter where one is necessary and the MD must ensure that the person concerned understands the proceedings. In certain circumstances, such as where the person concerned is detained, the officer must also explain the right to counsel and ensure that an opportunity to be represented by counsel has been provided.

Persons must be informed of the nature of the allegations regarding their inadmissibility contained in the A44(1) report(s) at the earliest opportunity, and must be given a reasonable opportunity to respond to those allegations before a removal order is issued.

It is important for the MD to make notes detailing the process followed in exercising their decision-making powers. Where the MD is utilizing the case highlights form (BSF516 or IMM5084B) to record their decision, the form should be completed in as much detail as possible).

For further detail on procedures during in-person proceedings, see **Appendix D: Steps to be completed during in-person A44(2) proceedings where the MD has jurisdiction to issue a removal order.**

10.2 Types of administrative removal orders

The IRPA and IRPR contain provisions regarding the issuance of removal orders for persons who are found to be inadmissible on one of the grounds listed in the IRPA.

R223 provides for three types of removal orders that may be issued:

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

R228 specifies the type of removal order that the MD is authorized to make in prescribed circumstances for certain inadmissibility provisions. It is important to note that the Regulations do not distinguish between removal orders that are in force under the IRPA and those that are not (conditional) and it is A49 which specifies when removal orders come into force.

Table 5: Types of removal orders

Departure Order R224(2)	• Requires the person to leave Canada within 30 days after the order becomes enforceable. • Becomes a deportation order by operation of law when the person does not meet the requirements set out under R240(1)(a) to (c) within 30 days after the order becomes enforceable.
Exclusion Order R225	• A person who has been removed on an exclusion order cannot return to Canada for one (1) year* unless the person obtains the required written authorization to return *If the exclusion order issued as a result of the application of A40(2)(a) (misrepresentation), the exclusion period is five (5) years
Deportation Order R226	• Permanently bars the person from returning to Canada, unless the person obtains the required written authorization to return

10.3 Permanent residents and their residency obligation— R228(2)

Pursuant to the IRPR, the MD has the authority to issue removal orders against permanent residents only in cases where the inadmissibility is based on a failure to comply with the residency obligations under A28. The authority of the MD does not include the issuance of removal orders for permanent residents on other grounds of inadmissibility.

Before the MD issues a departure order against a permanent resident, paragraph A28(2)(c) specifically requires the MD to determine whether humanitarian and compassionate considerations, including the best interests of any child affected by the decision, overcome any breach of the residency obligation.
The MD is required to consider all information presented by the permanent resident on a case-by-case basis. The following are examples of considerations the MD may consider in determining whether humanitarian and compassionate grounds justify the retention of permanent resident status. The MD is to consider circumstances and events that occurred in the last five-year period which led to the permanent resident's non-compliance with the residency obligation.

Examples of factors to weigh under A28(2)(c)

i. Extent of non-compliance:

- What is the number of days of physical presence in Canada within the five-year period under examination?

- Was any period of time outside of Canada due to a medical condition or the medical condition of a close family member? Could alternative arrangements for the care of the family member have been made?

ii. Circumstances beyond the person's control:

- Are the circumstances for remaining outside of Canada compelling?
- Were there circumstances which prevented the permanent resident from returning to Canada?
- Has the permanent resident returned to Canada at the earliest opportunity?
- Did the permanent resident leave as a child accompanying a dependent? If so, is the permanent resident returning at the earliest possible opportunity? Did the permanent resident accompany a parent because of a mental or physical disability?

iii. Establishment in and outside Canada:

- Is the permanent resident a citizen or permanent resident of another country?
- Has the permanent resident taken steps to establish permanence in a country other than Canada?
- To what degree is the permanent resident established in Canada?
- What ties to Canada has the permanent resident maintained?

iv. Presence and degree of consequential hardship:

- What is the degree of hardship caused by the loss of permanent resident status in relation to the permanent resident's personal circumstances? What is the impact on family members, especially children?

10.4 Removal order for refugee claimants— R228(3)

R228(3) provides that where a removal order issued with respect to a person who has made a claim for refugee protection which has been determined to be eligible to be referred to the Refugee Protection Division (RPD) or no eligibility determination has been made, a departure order is the applicable in prescribed circumstances.

A49(2) provides that a removal order made against a refugee protection claimant is conditional and prescribes the circumstances under which the removal order will come into force.

Note: MDs should keep in mind that there are special procedures for vulnerable persons and refer to the IRCC Program delivery instructions on Processing in-Canada claims for refugee protection of minors and vulnerable persons.

10.5 Dual intent

A22(2) states that the intention of a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that the person will leave Canada by the end of the period authorized for their stay.

Dual intent is present when a foreign national who has applied for permanent residence in Canada (or is entitled to apply for permanent residence within Canada) also seeks to enter Canada for a temporary period as a visitor, worker or student. If an officer has concerns/doubts about the foreign national's bona fides, the foreign national must be made aware of these concerns and given an opportunity to respond to them.

Some examples of dual intent could include:

- a foreign national frequently visiting a Canadian spouse who has complied with previous conditions of entry and is otherwise not inadmissible, even if an application for permanent residence has not yet been submitted;
- a foreign national who has applied or intends to apply for permanent residence, but is visiting Canada to assess employment opportunities, setting up household, etc.

The Federal Court in Rebmann v. Canada (Solicitor General), 2005 FC 301 held that an officer is required to take into account the foreign national's dual intent in entering/remaining in Canada as a temporary resident and provide analysis of the relevant evidence with regards to the foreign national's intention to establish permanent residence in Canada to show that the foreign national will not leave Canada by the end of the period authorized for his/her stay as a temporary resident.

Officers and MDs should distinguish between a foreign national whose intentions are bona fide and a foreign national who has no intention of leaving Canada at the end of their authorized stay if the application for permanent residence is refused.

The possibility that a foreign national may, at some point in the future, be approved for permanent residence does not absolve the individual from meeting the requirements of a temporary resident, specifically, to leave Canada at the end of the period authorized for their stay, in accordance with section R179.

In assessing the foreign national's intentions, officers and MDs should weigh all the factors relevant to the case, including the length of time the applicant has spent in Canada, the means of support; obligations and ties in the home country, previous compliance with requirements of the IRPA and any compassionate circumstances of the person concerned. These factors should be considered before proceeding with administrative enforcement action under A44(1) or A44(2).

Officers are reminded to use their own judgment and the flexibility afforded to them by subsection A22(2) when making decisions on cases where the foreign national also has the intention to become a permanent resident.

For further guidance on assessing dual intent considerations, see IRCC Program delivery instructions on Dual intent. See also: ENF 4 Port of entry examinations.

10.6 Restoration of status

R182 describes a mechanism by which a visitor, worker or student who has lost temporary resident status for having failed to comply with any of the conditions imposed under R185(a), R185(b)(i) to (iii) or R185(c), may nevertheless submit an application within the 90-day period of the loss of their status, and if eligible have that status restored.

It is important to note that under the D & D instruments, only IRCC officials have the authority to consider an application for restoration of status.

The application submitted to IRCC shall be approved if the processing officer is satisfied that the foreign national continues to meet the initial requirements of their stay, and has not failed to comply with any other conditions imposed and is not the subject of a declaration made under A22.1. It is to be noted that an officer shall not restore the status of a student if the student is not in compliance with a condition set out in R220.1(1).

Note: If a temporary resident has applied for an extension of their authorized status before the status expires, they are considered to have **implied status** until a decision is made on their application. Implied status works by operation of law [R183(5)], and the temporary resident cannot be reported for non-compliance until a decision is made on their application for an extension, unless other IRPA inadmissibilities are present. For further details regarding procedures for persons with implied status, see IRCC Program delivery instructions on Temporary resident visa validity (expiry dates).

The following guidelines must be taken into account by Inland Enforcement Officers and MDs prior to taking enforcement action in such cases:

Scenario 1: Foreign national is out of status, but has applied for restoration of status within the 90-day period and is otherwise admissible – decision pending

Foreign nationals who have submitted an application to have their status restored within the 90-day period, and who are not inadmissible under any other section of the Act or Regulations, should not be subject to an A44(1) report. In such circumstances, officers and MDs must allow for a decision to be rendered by IRCC before taking enforcement action, an approach which is consistent with the Federal Court's findings in Sui v. Canada (Minister of Public Safety and Emergency Preparedness), 2006 FC 1314.

Scenario 2: Foreign national is out of status and has not applied for restoration of status but is still within 90-day eligibility period

While there is nothing in the IRPA or the Regulations that prohibits an officer from writing an A44(1) report or an MD from issuing an exclusion order during the 90-day restoration period where no application for restoration has yet been made, officers and MDs should consider whether or not to pursue enforcement action in such cases. After taking appropriate steps to ensure that a restoration application has not been made, should an officer decide to write an A44(1) report and refer it to the MD for review, the officer should articulate their reasoning in pursuing enforcement action in the decision, if such action is pursued prior to the expiration of the 90-day eligibility period.

Where the MD receives an A44(1) report for non-compliance within the 90-day restoration period where the foreign national has not filed an application but is otherwise admissible, the MD must then consider R182 and has the discretion to hold the report in abeyance until the 90-day eligibility period has lapsed. If the MD decides to proceed with the A44(2) review, the MD should verify whether a restoration application has been or will be filed, and must consider all the circumstances of the case, including the fact that the foreign national is within the 90-day restoration period.

This approach is consistent with the Federal Court's decision in Ouedraogo v. Canada (Public Safety and Emergency Preparedness), 2016 FC 810 where the Court noted that the discretion of a MD to issue an exclusion order and the ability of a foreign national to apply for restoration of status are not mutually exclusive – both can occur at the same time. The Court found that the simple existence of an application for restoration does not in and of itself shield a foreign national against enforcement action. In short, where an application for restoration is made, although the existence of the application should be taken into consideration by the MD when they are exercising their discretion, there is nothing prohibiting the MD from nonetheless making an inadmissibility finding where the foreign national is found to be non-compliant with the requirements set out in R185.

In order to adhere to the principles of procedural fairness and natural justice, officers and MDs must consider each case on its own merits and may consider the following:

- Does the foreign national state that he/she wishes to remain in Canada and for what purpose?
- Has the foreign national already made arrangements to depart Canada in the immediate future?
- Is the foreign national evasive about his/her departure plans or the intent to remain in Canada?
- Has the foreign national otherwise been in compliance with the terms and conditions of his/her temporary resident status?
- If the foreign national has not applied for a restoration of status, is the officer/MD satisfied that the foreign national will appear for future immigration interviews and/or depart Canada voluntarily?
- If the officer/MD is satisfied that the foreign national will seek to remedy lapsed status within the 90-day period, then the officer/MD may wish to allow the 90-day application period to lapse before reviewing the case again in consideration of enforcement action.

Scenario 3: Foreign national is out of status beyond the 90-day restoration of status eligibility period, or is otherwise inadmissible under the IRPA or Regulations

If an officer encounters a foreign national who has overstayed their authorized period of stay beyond the 90-day eligibility period for applying for restoration of status, or where the foreign national is otherwise inadmissible under the IRPA or Regulations, the officer may pursue appropriate enforcement action, which includes writing an A44(1) report and referring it to the MD for a review under A44(2).

10.7 Procedure: Reviewing A44(1) reports when a Minister's Delegate is not on site

Officers cannot prepare and then review their own A44(1) report under the IRPA. In those circumstances where a MD is not physically on-site and/or otherwise available to conduct a review under A44(2) in person and deferring the proceeding is not a viable option, officers must contact an off-site MD for the purpose of reviewing the A44(1) report and conducting a determination under A44(2) by telephone or videoconference.

In all A44(2) reviews not conducted in person, the MD will need to review the A44(1) report in GCMS as well as any case notes or accompanying documents that the officer has uploaded into GCMS. The officer who contacts the MD must also ensure that their recommendation and any supporting evidence has also been provided to the MD prior to the commencement of the A44(2) proceeding. The officer must also make notes during the MD review and fully document the procedural steps taken throughout all stages of the proceedings.

The MD is required to follow all steps for conducting the MD review and enter detailed examination or application notes into the GCMS that fully support the decision being made. MDs may refer to section 22 of this manual chapter, 'Entering MD decisions into GCMS'. Where the MD also makes handwritten notes during the proceedings, these should be forwarded to the officer holding the file and/or uploaded into GCMS.

In those cases where the MD has jurisdiction to issue a removal order, officers and MDs must be particularly diligent in ensuring that all matters relating to natural justice and procedural fairness are satisfied and documented in notes.

In cases where the MD has jurisdiction to issue a removal order and if, for any reason, the opportunity does not exist for the person concerned to communicate directly with the MD, or if the MD is of the opinion that the person concerned does not truly appreciate the nature of the proceedings, then the A44(2) proceeding must be postponed until a MD is physically on site to conduct the A44(2) review in person.

If the MD makes a decision to issue a removal order pursuant to R228, the MD will enter the decision into GCMS and the officer who has the person concerned before them can print the removal order and provide it to the person concerned.

Note: If, for any reason, the MD has made a decision not to proceed with or otherwise continue the MD review under A44(2), the officer is not to contact other MDs.

10.8 Procedure: Issuing removal orders to persons in absentia

In absentia is Latin for "in the absence of".

In the context of A44(2), the practical application of an in absentia proceeding will be in those exceptional circumstances when persons who are subject to an A44(2) Minister's proceeding have a removal order made against them without being present at the time the removal order is issued.

A55(1) allows for the issuance of a warrant for the arrest and detention of a foreign national or permanent resident where there are reasonable grounds to believe the person is inadmissible

and unlikely to appear "at a proceeding **that could lead to the making of a removal order by the Minister under subsection 44(2)**".

As officers have the authority to issue a warrant for a person unlikely to appear at A44(2) proceedings in cases where the MD has jurisdiction to issue the removal order, removal orders should not be issued in absentia, unless under **exceptional circumstances**. These cases will be rare, and each will need to be assessed on an individual basis taking into consideration all relevant information before proceeding with an in absentia proceeding.

The following scenario illustrates an example of exceptional circumstances where an in absentia proceeding may be reasonable.

Scenario:

> A foreign national entered Canada as a member of a crew and shortly after deserted their vessel. The crew member did not report to CBSA or IRCC within the specified time frames under the Regulations and was reported under A44(1). In an attempt to locate the person in Canada, all investigative leads were exhausted. The A44(2) proceeding was held in absentia and after reviewing all the evidence, the report was determined to be well-founded and the person was issued a removal order and a warrant for removal.

This approach is consistent with the FCA's findings in Canada (Citizenship and Immigration) v. Jayamaha Mudalige Don, 2014 FCA 4. While the FCA concluded that it was open to the MD to issue the removal order, the court's finding that procedural fairness was not breached was based on the specific facts of the case (i.e., immigration officials had NO contact information for the person, more than 72 hours had elapsed from the time when the person deserted his ship and subparagraph 228(1)(c)(v) of the Regulations expressly provided for the issuance of a removal order). It is important to note that the FCA placed great weight on the fact that the person concerned had an obligation to report to CBSA or IRCC and failed to do so and the coordinates of the person concerned in that case were NOT known to CBSA/IRCC and therefore the person was incapable of being notified.

Notification when scheduling A44(2) proceedings

Not all A44(2) proceedings will take place on the same day that the A44(1) report is written, for number of reasons. In some cases, a person may be reported pursuant to A44(1), and the review of that report by a MD will not take place until a MD is available. In these situations, reasonable efforts shall be made to notify the person to appear and provide an opportunity to be heard at the A44(2) proceeding. 'Reasonable efforts' will vary from case to case depending on the nature of the case, type of information available and the level of engagement with the person concerned.

- Where the person's address is known, officers shall provide written notice in-person or mail, depending on the circumstances, by completing a Notice to Appear for a Proceeding under A44(2) [IMM 1234B or BSF504]. This form will provide notice of the location, date and time of the A44(2) Minister's proceeding; legal authority to conduct the proceeding; and consequences of failing to appear at the proceeding. Other relevant information such as a copy of the A44(1) report which sets out the allegation(s) and contact information should also be provided.

- If the notice is being mailed, reasonable efforts shall be made to verify the accuracy of the person's address; this includes querying and updating databases. Reasonable time and opportunity shall be provided to the person to allow for attendance at the A44(2) proceeding.

Failure to Appear at 44(2) Proceedings

- If the person fails to attend on the date specified, the MD conducting the review shall adjourn the proceeding. Reasonable efforts shall be made to determine the reasons for the no-show (e.g. letter to the last known address, site visit and/or telephone call).
- In some circumstances, there will be valid excuses as to why the person failed to appear. The onus will be on the person to show cause for not appearing at the proceeding. Officers shall make a determination as to whether the explanation is reasonable and attempt to communicate the results of that determination to the person.
- If satisfied of the explanation for not attending the proceeding, a second written notice [IMM 1234B or BSF504] will be delivered in-person or by mail, depending on the circumstances. Officers must clearly write or otherwise indicate "second notice" on the form.
- If, following the second call-in notice there is no communication from the person concerned and/or their legal representative explaining their absence and if the inadmissibility allegation falls within the MD's jurisdiction to issue a removal order (R228), the MD may pursue the issuance of an arrest warrant for being unlikely to appear for an A44(2) proceeding that could lead to the making of a removal order.
- For allegations where the jurisdiction to issue a removal order rests with the ID, it is open to the MD to refer the A44(1) report to ID for an admissibility hearing and consider issuing a warrant for admissibility hearing (see ENF7 Investigation and Arrests for further details).
- Note: IRCC officers may refer cases for warrant issuance to CBSA for review. All such referrals must include all details of attempts made to contact the person concerned and copies of all call-in notices sent and case notes.
- In exceptional cases where there is detailed information on file that the person concerned was aware of the A44(2) proceeding (e.g., person was served with the call-in notice in-person and understood the consequences, the A44(2) proceeding was initiated by the MD but had to be postponed due to unavailability of the person's counsel and the person concerned was fully aware of the new date, etc.) the MD may proceed to conduct a review under A44(2) in absentia.
- In those **exceptional cases** where the MD proceeds with the A44(2) review in absentia, the MD will be required to conduct a paper review of the A44(1) report with all relevant evidence available at the time of the A44(2) review. If, after such review, the MD determines the A44(1) report to be well-founded, and if all grounds of inadmissibility are those for which the MD has jurisdiction, a removal order may be made against the person concerned even though the person is not present at the time the removal order is issued.

For further information on investigations, warrants and arrests, please refer to ENF7 Investigation and Arrests.

10.9 A44(1) reports for inadmissible family members

Under A42, accompanying and non-accompanying family members may be inadmissible to Canada under prescribed circumstances. This provision may only apply to family members who are foreign nationals, other than protected persons.

Where an officer writes an A44(1) report against a family member for inadmissibility under A42, the MD has jurisdiction under R228 to issue the applicable removal order. Officers and MDs should note, however, that for the purposes of A52(1), the making of a removal order against a foreign national on the basis of inadmissibility under A42 is a prescribed circumstance that does not oblige the foreign national to obtain the authorization of an officer in order to return to Canada.

It is important to note that A42 may only form the basis of an A44(1) report when the person is inadmissible under sections A34, A35 or A37.

R227 sets out the prescribed circumstances under which an A44(1) report against a foreign national is also considered a report against the foreign national's family members in Canada.

R227(2) provides that, in the case of a report and a removal order made by the ID against a foreign national who has family members in Canada, the removal order issued by the ID against a foreign national may also be made effective against the family members without the need for a separate inadmissibility report provided that an officer informed the family member(s):

- of the report;
- that they are the subject of an admissibility hearing and, consequently, have the right to make submissions and be represented, at their own expense, at the admissibility hearing; and
- that they are inadmissible under A42 on grounds of being an inadmissible family member.

While this procedural avenue may be available under the Regulations, it is generally recommended that where an officer decides to pursue enforcement action against inadmissible family members of a foreign national under A42, the officer should proceed by way of writing a separate A44(1) inadmissibility report for each family member after the removal order has been made against the foreign national. It is also to be noted that this avenue is not available in cases involving allegations within the jurisdiction of the MD.

Note: the MD only has the authority to issue removal orders against persons about whom an A44(1) report has been written. The MD cannot include family members in an administrative removal order relating to another member of the family.

10.10 Procedure: Removal orders following vacation or cessation of refugee/protected person status by RPD

R228(1)(b) allows the MD to issue removal orders to foreign nationals who are inadmissible for misrepresentation under A40(1)(c) on a final determination by the RPD to vacate a decision to allow the person's claim for refugee protection or application for protection pursuant to A109.

Under A109(1), the RPD may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

R228(1)(b.1) allows the MD to issue removal orders to foreign nationals who are inadmissible under A40.1(1) on a final determination by the RPD under A108(2) that the refugee protection of the foreign national has ceased (i.e., cessation of refugee protection).

Pursuant to A46 a person loses permanent resident status on a final determination by the RPD:

- to vacate a decision to allow a claim for refugee protection or application for protection [A46(1)(d)]; or
- that their refugee protection has ceased under A108(2) for any of the reasons described in paragraphs A108(1)(a) to (d).

The MD should only issue the applicable removal order once all court challenges to the decision by the RPD to vacate the refugee protection claim or cease refugee protection have been exhausted and are resolved.

Following a decision by the RPD to vacate a decision to allow a claim for refugee protection or cease refugee protection, the foreign national has 15 days to apply for leave to the Federal Court for a judicial review as stipulated in A72(2). Therefore, the MD shall wait a minimum of 22 days (seven days for receipt of a decision sent by mail and 15 days for the application under A72(2)) before issuing the removal order following the writing of an A44(1) report for inadmissibility under A40(1)(c) or A40.1(1).

Where an application for leave to the Federal Court has been filed, the MD shall wait until the final decision is rendered and all legal means of challenging the decision have been exhausted and resolved. Prior to issuing the removal order, the MD shall ensure that no litigation regarding the RPD decision remains outstanding and that the minimum period of time to file an extension of time has elapsed without an application. The MD should seek the assistance of the regional Justice Liaison officer with respect to the status of litigation and any issues regarding extensions of time.

11 Temporary resident permits (TRPs)

In some cases, a designated officer or MD may exercise their authority under A24(1) to issue a TRP to allow a foreign national who is inadmissible or does not meet the requirements of the IRPA to enter or remain in Canada where it is justified in the circumstances. TRPs are always issued at the discretion of the delegated authority and may be cancelled at any time.
The authority to issue a TRP is determined by the IRCC Designation and Delegation (D & D) Instrument and depends on the nature of the allegation.

Note: For CBSA, TRPs may only be issued by designated officials at the port of entry
There are instances where the person who has the delegated authority to review the A44 report (the MD) does not have the designated authority to issue a TRP. In such cases, the official with authority to review the report (i.e., the MD) may make a recommendation to the person with the designated authority to issue a TRP.

Officers and MDs may recommend or issue TRPs only in accordance with the Act and Regulations, and must follow the IRCC Program delivery instructions on Temporary resident permits. In all cases, officers and MDs must leave a record, which includes detailed notes entries in GCMS, of their decision or recommendation. For further information, see ENF 4 Port of entry examinations, section 15.5, 'GCMS remarks'.

TRPs should only be issued after careful consideration of **all assessment factors** as the document carries privileges greater than those accorded to other visitors, students and workers with temporary resident status. Before issuing a TRP, officials must consult the departmental and agency guidelines on risk assessment factors and procedures for issuing TRPs. This applies to both initial and subsequent TRPs.

Where an officer does not have the authority to issue a TRP but has reviewed the case and is recommending the issuance of a TRP, the officer must prepare a written a case summary that includes a recommendation for a final decision. The officer will refer the case file to the decision maker with the designated authority to issue a TRP for a final determination. If the decision is made to issue a TRP, the decision maker will determine the period of validity of the TRP.

For further instructions and procedures for TRPs, officers must refer to the IRCC Program delivery Instructions on Temporary resident permits and ENF 4 Port of entry examinations.

Additional considerations for TRP issuance:

- A person is **not eligible for a TRP if less than 12 months have passed since their claim for refugee protection was last rejected** [or determined to be withdrawn or abandoned as described under subsection A24(4)].

  Exception: The one-year ban on accessing a TRP under A24(4) does not bar an IRCC officer, on their own initiative, from considering a TRP for a victim of human trafficking.

- There are specific IRCC policy guidelines respecting certain **vulnerable persons including suspected or known victims of human trafficking and victims of family violence.** Only IRCC officials may issue TRPs to victims of human trafficking or victims of family violence, however CBSA officials should follow the procedures set out in the Program delivery instructions above for handling these cases.

- If a **student, worker or visitor with valid temporary resident status is reported under subsection A44(1)** but a decision is made not to hold an admissibility hearing or issue a removal order, that person remains a temporary resident, and a TRP is not required.

12 Allowing withdrawal of application to enter Canada/ Allowed to leave (Port of entry cases)

Under R42, the officer who examines a foreign national who is seeking to enter Canada and who has indicated that they want to withdraw their application to enter Canada shall allow the foreign national to withdraw their application, unless R42(2) applies.

R42(2) provides that a foreign national shall not be allowed to withdraw their application to enter Canada where a report under A44(1) is being prepared or has been prepared, **unless the MD does not make a removal order or refer the report to the ID for an admissibility hearing.** In other words, once an officer writes an A44(1) report, the allowed to leave option may only be exercised at the MD level.

In exercising their discretion, the MD should consider whether the objectives of the IRPA are better served by allowing the person to voluntarily withdraw their application to enter Canada pursuant to R42 in the circumstances of the case.

R42(3) provides that foreign nationals who are allowed to withdraw their application to enter Canada must appear without delay at a port of entry to verify their departure from Canada. If a person is allowed to leave Canada voluntarily, the officer or MD must give the person an Allowed to Leave Canada form (IMM 1282B).

For further details regarding allowing persons to leave/withdraw their application to enter Canada: see ENF 5, section 9. 4, 'Allowing withdrawal of application to enter Canada/ Allowed to leave (Port of entry cases)' and ENF 4 Port of entry examinations.

13 Procedure: Handling possible claims for refugee protection

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

A99(3) excludes persons under a removal order from making a claim for refugee protection. Therefore, the MD should be satisfied 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.
Handling a possible claim for refugee protection:

- Where the subject of a determination for an administrative removal order has not made a claim, the MD should ask them how long they intend to remain in Canada (port of entry cases) or when they intend to return to their home country (inland cases) or if there are any reasons why they are unable or unwilling to return to their home country.
- If the person indicates that their intention is or was to remain temporarily, the MD should proceed with the removal order decision and issue the removal order, if appropriate.

- If the person indicates that their intention is or was to remain in Canada indefinitely, the MD is to inquire about their motives for leaving their country of nationality/home country and the consequences of returning there before making a decision on issuing a removal order.
- Where the responses indicate a fear of returning to the country that may relate to refugee protection, the MD is to inform the person of the definition of a "Convention refugee" or "person in need of protection" as found in A96 and A97, and ask whether they wish to make a claim.
- Where the person indicates an intention not to make a claim, the MD should proceed with the decision and issue a removal order, if appropriate.
- Where the person is uncertain, the MD should inform them that they will not be able to make a claim for refugee protection after a removal order has been issued [A99(3)], and provide them with an opportunity to make the claim before proceeding with a removal order decision.
- If the person does not express an intent to make a claim, despite the explanation that this is their last opportunity, the MD should proceed with the decision and issue the removal order, if appropriate.
- Whenever the person indicates a fear of returning to their home country, the MD is to refrain from evaluating whether the fear is well-founded. As well, the MD must not speculate on eligibility before the claim is made or speculate on the processing time or eventual outcome of a claim.

These procedures do not preclude any person from making a claim for refugee protection 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 the information provided by the person during the A44 proceedings.

For further information on processing refugee claims, see ENF 4 Port of entry examinations.

See also: PPI In-Canada claims for refugee protection; IRCC Program delivery instructions on Processing in-Canada claims for refugee protection: Post-interview processing and final decision.

14 Persons claiming to be Canadian citizens or registered Indians under the *Indian Act*

Under the IRPA, Canadian citizens and persons registered as Indians under the *Indian Act* have an unqualified right to enter and remain in Canada and are not subject to the inadmissibility provisions of IRPA. Therefore, before writing an A44(1) report, an officer should have evidence to confirm that the person does not hold such status.

In cases of permanent residents, officers must confirm through the appropriate queries that the person has not obtained Canadian citizenship and ensure that due diligence has been exercised before proceeding with further enforcement action.

Should the MD detect the possibility of Canadian citizenship or registered Indian status during the A44(2) proceedings, the MD shall cause an investigation of the matter to be initiated before making any removal order or referring the case to the ID for an admissibility hearing.

15 Cases where the jurisdiction to issue a removal order rests with the Immigration Division

In cases where the MD does not have jurisdiction to issue a removal order, the MD must determine whether to refer the A44(1) report to the ID if satisfied that the report is well-founded. At the end of the admissibility hearing, if satisfied that the person is inadmissible, the member of the ID shall, pursuant to A45(d), make the applicable removal order against the foreign national or permanent resident pursuant to R229.

Before referring a report that is believed to be well-founded to the ID for an admissibility hearing, the MD 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 IRPA; it is not intended to restrict the MD in the lawful exercise of his or her discretion. What follows are guidelines only.

15.1 A44(1) reports concerning foreign nationals

Decisions to refer a report to the ID for an admissibility hearing should be guided by the factors set out in preceding sections of this chapter, including section 8: 'Scope of Discretion of the Minister's Delegate'.

(See also ENF 5 Writing 44(1) Reports; specifically, section 8, 'Considerations before writing an A44(1) report- Scope of officer discretion').

15.2 A44(1) reports concerning permanent residents of Canada

The relative weight of the factors involved in determining whether to recommend a referral of the A44(1) report to the ID will vary depending on the circumstances of the case.

However, as noted by the FCA in Sharma v. Canada (Public Safety and Emergency Preparedness), 2016 FCA 319, the relevant Federal Court jurisprudence stresses that an MD's discretion is limited and a relatively low degree of participatory rights is warranted in the context of A44(1) and A44(2).

At the time of the MD's assessment, the MD should have before them all submissions and documents filed by the person concerned as well as any evidence relied on by the reporting officer in their recommendation under A44(1).

While the courts have affirmed that an MD's discretion is limited, the courts have also stated that any assessment of a person's personal circumstances or compassionate factors should be reasonable in the circumstances of the case and where factors are rejected, an explanation should be provided, even if only very brief in nature.[8] An MD's decision must be "justifiable, transparent, and intelligible" (Dunsmuir v. New Brunswick, 2008 SCC 9). MDs should also provide reasons for giving more weight to certain documents over others where there is conflicting or inconsistent information before them. For example, where there are conflicting versions of events pertaining to a criminal offence, an explanation as to why one version is being relied on over the other should be provided.

[8] McAlpin v. Canada (Public Safety and Emergency Preparedness), 2018 FC 422

In most cases, a summary of the permanent resident's circumstances and other relevant factors will be contained in the reporting officer's A44(1) narrative report, detailed memorandum or A44(1) case highlights form. Depending on the circumstances of the case, the MD may also concur with the rationale set out in the reporting officer's recommendation in their decision, once all of the factors and evidence have been considered.

During the A44(2) process, the MD may consider the following non-exhaustive list of factors:

- Age at time of landing—Has the person been a permanent resident of Canada since childhood?
- Was the permanent resident an adult at the time of admission to Canada?
- Was the person granted protected person status in Canada?
- Length of residence—How long has the person resided in Canada after the date of admission?
- Location of family support and responsibilities—Are family members in Canada emotionally or financially dependent on the permanent resident? Are all extended family members in Canada?
- Degree of establishment—Is the permanent resident financially self-supporting? Are they employed? Do they have a marketable trade or skill? Has the permanent resident made efforts to establish themselves in Canada through language training or skills upgrading? Is there any evidence of community involvement? Has the permanent resident received social assistance (frequency/duration)?
- 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? What is the nature and frequency of the person's interactions with the law? (for further details please refer to ENF 5 Writing 44(1) reports, section 10.4, 'A44(1) reports for criminality cases').
- History of non-compliance and current attitude—Has the permanent resident been cooperative and forthcoming with information? Has a warning letter been previously issued? Does the permanent resident accept responsibility for their actions? Are they remorseful?,
- Additional factors for non-criminal cases: MDs may refer to the factors set out in ENF 5 Writing 44(1) reports, section 10.5, 'Additional factors for permanent residents'.

Regardless of the factors to be considered, the MD should be aware that there are limitations to the scope of their assessment. For example, the Federal Court has made findings to support the principle that officials carrying out A44(1) and (2) assessments are not obliged to speculate about how and when future deportation might take place, nor is the expectation that a person's rehabilitation be analyzed in considerable detail. While the MD may be required to consider relevant factors on a case-by-case basis, they should be mindful of their limited scope of discretion and the objectives of the IRPA.

15.3 Loss of appeal right cases

During the assessment under A44(2) for permanent residents and protected persons, the MD may consider as a relevant factor, whether or not the person will have a right of appeal to the IAD under A63 (see section 20.1 of this chapter, 'Appeals to the Immigration Appeal Division').

The MD should be mindful, however, that while this may be a factor for officers to consider, it does not necessarily outweigh other factors of the case.

For inadmissibility under A36(1)(a) for permanent residents, it is important for reporting officers to obtain the most accurate evidence of the sentence imposed during the A44(1) process in order to determine whether the person retains a right of appeal. Under A64, a loss of appeal rights for serious criminality under A36(1)(a) must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months. Where it is not clear from the evidence whether the sentence meets the six month threshold under A64(2), before making any assessment under A44(1), the officer should obtain evidence demonstrating how the judge calculated the total sentence imposed as reflected in the court documents, taking into account the imposition of further credits for time served. Regardless of what assessment is made by the reporting officer, and especially in cases where the right of appeal is in doubt, the officer and/or the MD should clearly articulate in the recommendation and/or decision that the determination as to whether the person concerned retains a right of appeal ultimately rests with the IAD.

15.4 Considerations for 'long-term permanent residents'

Within the context of A44(2) referrals, the term 'long-term permanent resident' is not present in the current Act or Regulations. Previous policy defined a long-term permanent resident as a person who:

- became a permanent resident before attaining the age of 18 years;
- was a permanent resident of Canada for 10 years before being convicted of a reportable offence or, in cases not involving a conviction, the preparation of the inadmissibility report, and
- would not have a right to appeal a decision of the ID to the IAD.

Although the D & D instruments do not make a distinction between permanent residents and long-term permanent residents for the purposes of A44(1) and A44(2), where such circumstances exist, the MD should take particular care to ensure that the full circumstances of the case are considered and there has been an opportunity for the person to provide submissions on their personal circumstances.

When considering the personal circumstances of the person concerned, the MD should balance these with the objectives of the IRPA to protect public health and safety, maintain the security of Canadian society by denying access to Canadian territory to persons who are criminals or security risks.

Regardless of whether the reporting officer has recommended referral to an admissibility hearing or the issuance of a warning letter, the MD should ensure that all relevant factors raised by the person have been addressed in their decision.

15.5 A44(1) reports for criminality cases

In Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration), 2005 SCC 51, the Supreme Court of Canada (SCC) stated that the objectives in the IRPA reflect an intent to prioritize security and that this objective is given effect by removing persons with criminal records from Canada. The SCC noted that in drafting the IRPA, Parliament demonstrated a strong desire to treat criminals less leniently than under the former Immigration Act. This was noted in Sharma, where the FCA affirmed that officers and MDs, when dealing with matters under A44(1) and A44(2), must always be mindful of the various objectives of the IRPA, in particular A3(1)(h) and (i). The FCA also concluded that the Court's rationale in *Cha* in support of a limited discretion under A44 would appear to apply equally to both foreign nationals and permanent residents.

With respect to serious criminality under A36(1), the seriousness of the offence will be an important consideration in assessing whether to refer a report to the ID. MDs can refer to the factors set out in ENF 5 Writing 44(1) reports, section 10.4, 'A44(1) reports for criminality cases'

The MD should also be cognizant of how evidence of pending or existing charges was relied on by the reporting officer during the A44(1) assessment; the MD should be careful about how such evidence is relied on in the A44(2) decision. The MD must also be careful not to rely on convictions for which an application for rehabilitation or a record suspension has been granted as evidence of a criminal record. For further information, see ENF 5 Writing 44(1) reports, section 12.2, 'Evidence of pending or withdrawn charges'.

15.6 Preparation of warning letter

Where the MD finds that the A44(1) report is well-founded, but that there are other compelling reasons, taking into account the objectives of the IRPA, not to refer the A44(1) report to the ID for an admissibility hearing, the MD may exercise their discretion to issue a warning letter. In such a case, the decision to issue a warning letter constitutes a disposition of the A44(2) proceedings on the existing A44(1) report.

Based on the limited scope of discretion of the MD, this option to the MD is intended only to be available in cases of permanent residents and, in some circumstances, protected persons who remain foreign nationals. Such discretion should not be exercised lightly by the MD and must take into account all of the circumstances of the case, the limited scope of discretion of the MD, the objectives of the IRPA and Agency priorities regarding inadmissibility under A34, A35, A36(1) and A37.

In addition to the list of factors provided in ENF 5, in cases involving inadmissibility under A36(1), MDs should closely examine the nature of the criminal offence when reviewing the A44(1) report. Given their severity and the harm that they inflict on people, crimes that involve violence, weapons, drug trafficking (including importing/exporting and manufacturing), sexual offences, physical or psychological harm, death, or significant property damage to name a number of examples, should carry a considerable weight in the MD's decision making process. For cases involving these types of offenses, it is recommended that MDs perform a balancing of the case before issuing a warning letter.

The inherent value of a warning letter should not be underestimated. Its purpose is twofold: it conveys the decision and it is intended to act as a deterrent.

A warning letter sometimes has a third critical role: if, at some point in the future, the person becomes reportable again (i.e., new circumstances of inadmissibility arise following the issuance of the warning letter), the record of the warning letter will be an important factor to consider in an officer's determination of whether to write a new A44(1) report and/or in the MD's decision to issue a removal order or refer the new report to the ID, should the person engage in further unlawful conduct. Officers also rely on the warning letter to demonstrate to the IAD that the person concerned was duly cautioned as to the negative repercussions if another violation occurred.

It should be noted, however, that following the issuance of a warning letter, any new A44(1) report must be based on new facts/circumstances. In other words, a new report for the same allegation must not arise solely based on the same facts underlying the allegation of the previous report on which the warning letter was issued and the MD cannot re-open the previous A44(2) proceedings. For example, if a permanent resident receives a warning letter based on an A44(1) report for A36(1)(a) (e.g., based on a robbery conviction), the permanent resident cannot be re-reported under A44(1) for A36(1)(a) and/or referred for admissibility hearing based on the

same conviction should the permanent resident be subsequently convicted of a non-reportable offence (e.g., theft under).

- The warning letter should always be printed on letterhead. The fields should never be handwritten. This cannot be a standard form letter, as it needs to be tailored to the individual circumstances of the person concerned.
- 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.
- If the letter cannot be hand-delivered because the person concerned is outside of the local office's jurisdiction, the letter should be forwarded to the responsible office with a request to hand-deliver the letter. If this is not feasible or practical, the letter should be sent by registered mail.
- Once the letter is completed and signed, it must be uploaded into GCMS and the MD disposition under the A44(2) examination process must be updated accordingly. The MD is also required to enter detailed examination or application notes into GCMS fully supporting the decision being made (see section 22, 'Entering MD decisions into GCMS'). The issuance of the warning letter must also be recorded in the National Case Management System (NCMS) in offices where NCMS is utilized.

For an example of the warning letter for criminal and non-criminal cases, see **Appendix C: Sample warning letter.**

16 Adjourning Proceedings

Circumstances may warrant the adjournment of a proceeding under A44(2). In some cases, the MD may have to consider a request for an adjournment to ensure that a person has a reasonable opportunity to provide more evidence or to obtain counsel.

The MD may also have to adjourn proceedings based on operational reasons, such as the lack of an interpreter, however adjournments should not be a tool of administrative convenience.

In all cases, the MD will need to ensure that any decision regarding a request to adjourn is reasonable and meets the procedural fairness requirements set out in previous sections.

17 Procedure: Entry for the purpose of further examination or an admissibility hearing (Port of entry officers)

Under A23, an officer may authorize a person to enter Canada for the purpose of further examination or an admissibility hearing. It is important to note that, pursuant to R43(2), a foreign national authorized to enter Canada under A23 does not, by reason of that authorization, become a temporary resident or a permanent resident. The MD may have to initiate entry under A23 following an adjournment of the A44(1) proceeding or for operational reasons, such as the lack of an interpreter, however this procedure should not be used as a tool of administrative convenience.

The MD should not consider a request for entry under A23 to provide additional information unless all of the following conditions have been met:

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

MDs should be cautious when considering entry for the purpose of an admissibility hearing since the ID may not schedule an admissibility hearing for weeks or months, which could lead to the foreign national remaining in Canada for a prolonged period without any legal status or a means of financial support. MDs may also consider other options such as directing persons back to the United States under R41 (see section 19, 'Procedure: Directing persons back to the United States under R41').

Note: Pursuant to **R43(1)** the imposition of conditions for persons authorized to enter Canada under A23 is **mandatory**.

The MD should also keep in mind the provisions of A44(3), A55(3) and A56, which provide authority to detain and release persons, and impose further conditions—including the payment of a deposit or the posting of a guarantee—following the furthering of an examination of a person who is the subject of an A44(1) report. For further guidance see ENF 8 Deposits and Guarantees. For further details regarding detention and release authorities, see ENF 20 Detention and ENF 34 Alternatives to detention.

18 Imposition of Conditions following the A44(1) report for A34: Mandatory circumstances

A44(3) authorizes officers to impose any conditions, including the posting of a deposit or the posting of a guarantee for compliance with conditions, that the officer considers necessary, on a permanent resident or foreign national who is the subject of a subsection A44(1) report, an admissibility hearing or, being in Canada, a removal order.

Whenever officers write an A44(1) report, consideration should be given to imposing conditions on the foreign national or permanent resident. The MD also has the authority to impose conditions during the A44(2) process (e.g., following an adjournment of the proceedings or following the decision to issue a removal order or refer the A44(1) report to the ID for an admissibility hearing). Officers and MDs should always consult the D & D instruments regarding the authority to impose conditions as this authority may vary depending on whether the person concerned is a foreign national or a permanent resident.

The MD must be aware that in cases of inadmissibility on security grounds under A34, the imposition of conditions is mandatory once the report has been referred to the ID. Under the IRPA, decision-makers specified in the relevant legislative authority are required to impose the baseline prescribed conditions in prescribed circumstances: CBSA officers are required in A44(4) and A56(3); ID is required in A58(5); Minister is required in A58.1(4) and A77.1(1); Federal Court is required in A82(6).

The prescribed conditions must be imposed in the following circumstances:

- when an inadmissibility report on grounds of security (A34) is referred to the ID and the subject of the report is not detained (designated CBSA officers);
- when the subject of either an inadmissibility report on grounds of security (A34) that has been referred to the ID or a removal order for inadmissibility on grounds of security is released from detention; [designated CBSA officers under A56(3); ID under A58(5) and the Minister under A58.1(4)].

For each of the circumstances outlined above, the prescribed conditions to be imposed are found in R250.1.

See Acknowledgement of Conditions for IRPA Section 34 Cases [BSF798].

19 Procedure: Directing persons back to the United States under R41

R41 authorizes an officer to direct a foreign national seeking to enter Canada from the United States (U.S.) to return to the U.S. if:

- no officer is able to complete an examination [R41(a)];
- the MD is not available to consider, under A44(2), a report made with respect to the person [R41(b)]; or
- an admissibility hearing cannot be held by the ID [R41(c)].

In such cases, the person concerned may be given a Direction to Return to the United States form (BSF505) in appropriate circumstances. Officers and MDs should be aware that there is a specific policy for refugee claimants at the land port of entry.

A person who has been directed to return to the U.S. pending an admissibility hearing by the ID and who seeks to come into Canada for reasons other than to appear at that hearing is considered to be seeking entry. If such a person remains inadmissible for the same reason(s), and if a member of the ID is not reasonably available, the person may be directed again to return to the U.S. to wait until a member of the ID is available. In these circumstances it is not necessary to write a new A44(1) report.

Note: Generally, persons directed back to the U.S. who choose not to return to Canada will not be subject to enforcement action, as they have no desire to continue with their application to enter Canada. Such persons will simply be deemed to have withdrawn their application. Officers should therefore not counsel the person that failure to return in these instances will automatically result in enforcement action while the person is not in Canada.

In exceptional cases, it may be appropriate to pursue enforcement action for persons seeking entry who have failed to comply with R44(3). Officers and MDs should consider all information and individual circumstances of each case before they elect to proceed with enforcement action under A44(1)/ A44(2), including the circumstances surrounding the failure to comply and the intent of the person concerned.

See also: ENF 4 Port of entry examinations.

20 Appeals and Judicial Review— Removal Order

There are two levels of review of decisions made under the IRPA. Sponsors, permanent resident visa holders, permanent residents and protected persons have a statutory right to appeal adverse decisions to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board. In all other cases, where no statutory right of appeal exists under the IRPA or those rights have been exhausted, there is a right to seek judicial review at the Federal Court of Canada.

20.1 Appeals to the Immigration Appeal Division

The MD will encounter three circumstances in which a person against whom they have made a removal order may have a right of appeal to the IAD. Those circumstances involve a person who is:

- a foreign national who holds a permanent resident visa;
- a permanent resident (inside or outside Canada); and
- a protected person.

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. Pursuant to A50(c), if the IAD grants a stay of removal, the removal order is stayed under A66(b) and A68 until the stay is no longer in force.

Table 6: Right to Appeal— Removal Order

Who has right to appeal	Legislation	Period in which appeal must be made	Who is excluded
Foreign national holding a permanent resident visa	A63(2)*	30 days after receiving the decision	A64(1), A64)(2)
Permanent resident (in Canada)	A63(3)*	30 days after receiving the decision	A64(1), A64(2)
Permanent resident (outside Canada)	A63(4)	60 days to appeal	
Protected person	A63(3)	30 days after receiving the decision	A64(1)

*A64(1)— No Right to Appeal

No appeal may be made to the IAD by a foreign national or their sponsor or by a permanent resident or protected person if they have been found to be inadmissible on grounds of:

- security, violating human or international rights (A34)
- violating human or international rights (A35)
- serious criminality (A36)*
- organized criminality (A37)

*must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c)

When the MD makes a removal order against a person who may have a right to appeal that decision to the IAD, officers must advise the persons of that right. This is easily accomplished by giving them a notification of appeal form and informing them of their right to appeal.

The MD is also to provide the persons with the address and telephone number of the IAD registry office so that the persons may file a notice of appeal with the Registrar if they so choose.

The MD should also obtain a written acknowledgement from the persons that they have been advised of their right to appeal to the IAD and place it in the case file.

See **Appendix I: Sample letter— IAD Appeal Acknowledgement Letter**

20.2 Right to file an application for leave and judicial review— Where no statutory right of appeal exists

When an MD makes a removal order against a person who does not have the right to appeal to the IAD, the MD is to advise the person of their right to file an application for leave and judicial review with the Federal Court pursuant to A72(1).

For example, foreign nationals who are not protected persons have no statutory right of appeal to the IAD against a removal order issued by the MD. However, they may challenge a removal order made by the MD at the Federal Court.

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

The MD should obtain a written acknowledgment from the persons concerned, stating that they have been advised of their right to file an application for leave and judicial review, and place it in the case file. Applications for leave and judicial review must be filed within 15 days of the date of the removal order.

See **Appendix J: Sample letter— Judicial Review Acknowledgement Letter**

For further information regarding Judicial reviews, see ENF 9 Judicial Reviews and ENF 10 Removals.

21 Reports with multiple allegations

Where the person is inadmissible under multiple provisions of the IRPA, it is generally recommended that the officer writes a separate report for each allegation. The MD can then make a determination on each report during the A44(2) process.

There may be instances where multiple allegations are contained within in the same report. This practice is generally discouraged, especially where the jurisdiction for each inadmissibility does not lie with the same decision-maker (i.e., MD or ID). It should be noted, however, that where a report contains one or more inadmissibility allegation, and if the MD has jurisdiction for all inadmissibility allegations contained within that report, the MD can determine the disposition of that report; conversely, where there are several inadmissibility allegations in a report and the MD has jurisdiction for only some of them, the MD is not authorized to determine a disposition for that report, and all allegations must be referred to the ID.

22 Entering MD decisions into GCMS

When processing or issuing an immigration document, completing an MD review, or conducting an examination, the MD is required to enter detailed examination or application notes into GCMS fully supporting the decision being made, regardless of whether the decision was positive or negative.

- Notes are to be factual and should not contain personal opinions which are not supported by elements collected during the examination or review. The notes may consist of such items as: questions and answers asked during the examination or review, admissibility concerns the officer or MD may have, a synopsis of any documentation reviewed or requested, and any other pertinent details related to the examination/application or MD review. The notes are to include the decision made and rationale supporting the decision. Notes should provide sufficient detail to allow another GCMS user to understand what transpired and why an action was taken. Notes entered on the Client screen should be general information on the client, and should not be used for Examination/Application Notes.
- Officers are to continue to record user remarks on facilitation documents and narratives in the inadmissibility sub-tab supporting the inadmissible allegations.
- MDs should be uploading examination notes that clearly show that procedural fairness has been met, and what factors were considered as part of the decision.

CBSA officers may consult the GCMS Support Wiki for additional information on how to enter notes and upload documents into GCMS.

24 Offences under the Youth Criminal Justice Act

The MD must ensure that they do not rely on or refer to youth offences in any determinations under A44(2), except where access is authorized under the Youth Criminal Justice Act (YCJA). Information that is not accessible under the provisions of the YCJA cannot be considered and must not be included or referenced at any point during A44(1) or (2) proceedings. Moreover, contravention of the provisions of the YCJA is a serious matter.

ENF 6 Review of reports under subsection 44(2)

The importance of verifying whether information is protected by YCJA provisions was highlighted in Abdi v. Canada (Public Safety and Emergency Preparedness) 2017 FC 950. In that case, the Federal Court held that while the MD did not commit an error in relying on youth crimes that the applicant was found guilty of where access to these records was not restricted by virtue of section 119(9) of the YCJA, the MD's reliance on youth offences that were withdrawn or dismissed was unreasonable since section 119(2)(c) of the YCJA allows access to these records for only a brief period after dismissal or withdrawal of the youth charges and the access period to such charges had expired.

Officials conducting A44(1) and A44(2) functions must ensure that they only rely on youth records to which access is not restricted under the provisions of the YCJA. It is therefore important for reporting officers and the MD to be aware of the provisions of the YCJA which relate to access to youth records.

It is also important for officers and MDs to note that A36(3)(e) exempts permanent residents and foreign nationals who were found guilty under the Young Offenders Act (YOA) or who received a youth sentence under the YCJA from the inadmissibility provisions in A36(1) and A36(2).

Appendix A: Noteworthy provisions of the IRPA

48 (1) A removal order is enforceable if it 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 the order must be enforced as soon as possible.

49 (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.

In force — claimants

(2) Despite subsection (1), a removal order made with respect to a refugee protection claimant is conditional and comes into force on the latest of the following dates:

(a) the day the claim is determined to be ineligible only under paragraph 101(1)(e);

(b) in a case other than that set out in paragraph (a), seven days after the claim is determined to be ineligible;

(c) if the claim is rejected by the Refugee Protection Division, on the expiry of the time limit referred to in subsection 110(2.1) or, if an appeal is made, 15 days after notification by the Refugee Appeal Division that the claim is rejected;

(d) 15 days after notification that the claim is declared withdrawn or abandoned; and

(e) 15 days after proceedings are terminated as a result of notice under paragraph 104(1)(c) or (d).

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

52 (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.

(2) If a removal order for which there is no right of appeal has been enforced and is subsequently set aside in a judicial review, the foreign national is entitled to return to Canada at the expense of the Minister.

63 (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

(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.

No appeal for inadmissibility

64 (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.

Serious 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 six months or that is described in paragraph 36(1)(b) or (c).

Appendix B: Table: *Immigration and Refugee Protection Act* (IRPA) Inadmissible Classes

A33: Reasonable grounds, past, present or future events
Unless otherwise specified e.g. A35(2) and A36(3)(d)

Section	Inadmissibility	Sub-section	IRPA text	Reference	Jurisdiction to Issue Removal Order	Applicable Removal Order
A34	Security PR and FN	1(a)	act of espionage against Canada or that is contrary to Canada's interests		ID	Deportation Order R229(1)(a)
		1(b) 1(b.1)	subversion by force of any government subversion against democratic government, institution or process			
		1(c)	terrorism	R14		
		1(d)	danger to security of Canada			
		1(e)	violence/endanger lives or safety of persons in Canada			
		1(f)	membership in an organization described in (a)(b)(b.1) or (c)			
A35	Human or International Rights Violations PR and FN (unless otherwise specified)	1(a)	*Crimes against Humanity and War Crimes Act*	R15	ID	Deportation Order R229(1)(b)
		1(b)	prescribed senior official	R16		
		1(c)	entry into or stay in Canada restricted due to international sanctions (FN only)			
		1(d)	subject of an order made under *Special Economic Measures Act* (FN only)		MD	Deportation Order R228(1)(f)
		1(e)	subject of an order made under *Justice for Victims of Corrupt Foreign Officials Act* (FN only)			
A36(1)	Serious Criminality PR and FN	1(a)	convicted in Canada- FN convicted in Canada- PR		MD ID	Deportation Order R228(1)(a) Deportation Order R229(1)(c)
		1(b)	convicted outside Canada	R17	ID	Deportation Order R229(1)(c)
		1(c)	committed an act outside Canada	R17	ID	Deportation Order R229(1)(c)
A36(2)	Criminality FN only	2(a)	convicted in Canada (=by way of indictment or 2 offences)	R18.1	MD	Deportation Order R228(1)(a)
		2(b)	convicted outside Canada (=indictment or 2 offences)	R17 R18	ID	Deportation Order R229(1)(d)
		2(c)	committed an act outside Canada (=indictment)	R17 R18	ID	Deportation Order R229(1)(d)
		2(d)	committed an offence on entering Canada	R19	ID	Deportation Order R229(1)(d)
A37	Organized Criminality PR and FN	1(a)	member of an organization engaged in criminal activity		ID	Deportation Order R229(1)(e)
		1(b)	engaged in transnational crime (people smuggling/trafficking, laundering money or other proceeds of crime)			

present events only	A38	Health Grounds FN only	1(a)	danger to public health	R20	ID	Exclusion Order* R229(1)(f)
			1(b)	health condition danger to public safety	R20		
			1(c)	excessive demand on health or social services	R24		
	A39	Financial Reasons FN only		unable or unwilling to support themselves or dependents	R21	ID	Exclusion Order* R229(1)(g)
	A40	Misrep-resentation PR and FN	1(a)	misrepresentation/ withholding material facts	R22	ID	Exclusion Order R229(1)(h)
			1(b)	being or having been sponsored by a person inadmissible for misrepresentation		ID	Exclusion Order R229(1)(h)
			1(c)	final determination to vacate refugee claim or application for protection		MD	Deportation Order R228(1)(b)
			1(d)	ceasing to be a Canadian citizen		ID	Deportation Order R229(1)(i)
	A40.1	Cessation of refugee protection PR and FN	(1)	cessation of refugee protection – Foreign National under A108(2)		MD	Departure Order R228(1)(b.1)
			(2)	cessation of refugee protection – Permanent Resident under A108(1)(a) to (d)	See A46(1)(c.1)		
Balance of probabilities	A41	Non-compliance with Act FN only	41(a)	Foreign national — non-compliance Examples: A41(a) + A52(1) Obligation to obtain the authorization to return to Canada A41(a) + R43(1)(a) Failure to appear for further examination or admissibility hearing A41(a) + A20(1)(a) Does not hold the PR visa or other document required under the Regulations and have come to Canada in order to establish permanent residence A41(a) + A29(2) Failure to leave Canada by the end of the period authorized for their stay	 R6 R183(1)(a)	 MD MD MD MD	 Deportation Order R228(1)(c)(ii) Exclusion Order** R228(c)(i) Exclusion Order** R228(1)(c)(iii) Exclusion Order** R228(1)(c)(iv)
		Residency obligation PR only	41(b)	Permanent resident & non-compliance with residency obligation		MD	Departure Order R228(2)

	A42	Inadmissible Family Member FN only	(a)	accompanying family member is inadmissible	R23	MD	Same removal order as inadmissible family member R228(1)(d)
			(b)	FN is accompanying family member of person inadmissible under A34, A35 or A37		MD	Deportation Order R228(1)(e)

MD may not issue a removal order where R228(4) applies (unaccompanied minors and persons unable to appreciate nature of Proceedings

*Departure order for refugee claimants R229(2); Deportation order where R229(3) exceptions apply

**Departure Order for refugee claimants R228(3); Subject to R228(4); Deportation order in some cases R229(3)

Note: Only s. 34 deals with future events. Sections 35-37 are limited to past or present events

Appendix C: Sample Warning letter

(Name and Address of person concerned) Client ID #:

(Date)

Dear Mr. / Ms. Xxxxxxx;

This letter is in reference to your criminal conviction(s) and status in Canada. Enclosed, you will find a report written under subsection 44(1) of the *Immigration and Refugee Protection Act.*

Permanent residents of Canada may be reported to the Minister when they have engaged in criminal activity of a serious nature. Your conviction for xxxxxxxxxxxxxxxxxxxx is reportable under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act.*

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 your case will not be referred to the Immigration Division for an admissibility hearing at this time.

You must understand however, that this decision may be reviewed in the future should new adverse information come to our attention or any further criminal convictions be registered against you. If such a review occurs, a decision to pursue enforcement action may result in referring you 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 that we will not be required to contact you again as the result of any further criminal activity.

Yours truly,

(signature)

Name of Minister's Delegate and title

Note: This is a sample letter with suggested wording. Preference as to final wording, or the use of pre-printed as opposed to micro-produced "originals" is left to the discretion of local managers provided the content remains consistent with the intent.

Appendix D: Steps for in-person A44(2) proceeding where MD has jurisdiction to issue a removal order

Prior to the A44(2) proceedings, MDs should review A44(1) report and accompanying evidence to ensure:

- person concerned is not a Canadian citizen
- person is not a Permanent Resident of Canada (except for residency obligation files)
- person concerned is not an Indian registered under the Indian Act
- person's biographical data is correctly cited (name(s), date of birth)
- status of person concerned is correctly identified in A44(1) report
- inadmissibility section has been properly cited
- A44(1) report has been signed and dated
- ensure MD has jurisdiction to issue the removal order under R228

During the A44(2) proceedings, MD should:

Step 1 Notate the date/time of proceedings
- Introduce themselves as the MD

Step 2 Confirm person before the MD is the subject of the A44(1) report

Step 3 Determine whether person concerned requires an accredited interpreter
- Where an interpreter is required, confirm person understands the interpreter and that MD may continue with the proceedings. Advise the person that they should advise MD at any time if they do not understand the interpreter.
- If necessary, adjourn proceedings to obtain interpreter.

Step 4 Confirm person concerned has a copy of the report and the evidence being used to support the allegation and has had the opportunity to review it.
- Read the allegations contained in the A44(1) to the person concerned.
- State the purpose of the proceedings and refer to the A44(1) report.
- Advise the person that they must answer questions completely and truthfully.

Step 5 Explain the process MD will be following, evidence to be considered and the consequences of finding the report well-founded. Ensure the person concerned understands that this process may result in a removal order being issued, the type of removal order, and the consequence of this order.

Step 6 In detained cases: Prior to commencing the proceeding, advise the person concerned of their right to have a counsel of their choosing present at their own expense. This right applies in all cases where a person is detained under an Act of Parliament and includes situations where the person is detained by the criminal courts while facing charges or serving a sentence and subject to IRPA proceedings. Should the person express an intention to communicate with counsel, the MD should adjourn the proceeding and allow a reasonable period of time for the person to retain counsel.

In released cases: The person does not have the right to have counsel present during the MD review, however the MD should consider permitting counsel's attendance should the person concerned have a counsel present, as long as counsel's presence will not interfere with the process. MDs are not obligated to postpone MD review proceedings due to counsel unavailability, however, may consider such requests on case-by-case basis.

Step 7 Verify each of the case elements of the allegation contained in the A44(1) report by questioning the person to confirm that each of these elements has been proven by the evidence, either verbally or in writing.

- Verify person concerned has no other evidence/information to provide and if so, determine whether an adjournment is warranted.
- Allow the person the opportunity to respond and acknowledge their evidence and document this either by notes or making copies of what is presented, particularly if there is any inconsistency between the allegation in the A44(1) report and the person's declaration. MD must ensure that all the evidence presented has been considered.
-

Step 8 The MD should ask the person how long they intend to remain in Canada and follow the steps in ENF 6, section 13, 'Procedure: Handling possible claims for refugee protection'.

- Where the person does not express a fear of returning to their country or indicate an intention to make a claim, the MD should proceed with the decision and issue a removal order, if appropriate.
- Where the person's statements indicate a fear of returning to the country that may relate to refugee protection, the MD is to inform the person of the definition of a "Convention refugee" or "person in need of protection" as found in A96 and A97, and ask whether they wish to make a claim before proceeding with the issuance of a removal order.

Step 9 Advise the person of the decision and the reasons for the decision.

Step 10 If issuing a removal order, provide the person concerned with a copy of the removal order and its legal effect.

- Where applicable, explain the Certificate of Departure process and that a Departure Order will turn into a Deportation Order should they fail to properly follow the process for verifying departure (for further information, see ENF 10 Removals).
- Advise person concerned of their right to appeal (as applicable) or right to seek judicial review and the relevant time limits and document this. Provide relevant appeal forms and have the person sign the relevant acknowledgement letter, where appropriate. For further information, see ENF 6, section 20 'Appeals and Judicial Review- Removal Order'.

Step 11 At the conclusion of the review, notate the time and sign the record of decision, including the completion of the MD portion of forms [e.g., BSF516, IMM5084 or A44(1) narrative report]. Complete appropriate system updates/data entry.

Appendix E: Case Law on the Scope of Discretion under A44

Canada (Minister of Public Safety and Emergency Preparedness) v. Cha, 2006 FCA 126

Sharma v. Canada (Public Safety and Emergency Preparedness), 2016 FCA 319

McAlpin v. Canada (Public Safety and Emergency Preparedness), 2018 FC 422

Hernandez v. Canada (Minister of Public Safety and Emergency Preparedness), 2007 FC 725

Virani v. Canada (Public Safety and Emergency Preparedness), 2017 FC 1083

Faci v. Canada (Public Safety and Emergency Preparedness), 2011 FC 693

Correia v. Canada (Minister of Citizenship and Immigration), 2004 FC 782

Awed v. Canada (Citizenship and Immigration) 2006 FC 469

Kidd v. Canada (Public Safety and Emergency Preparedness), 2016 FC 1044

Melendez v Canada (Public Safety and Emergency Preparedness), 2016 FC 1363

Balan v Canada (Public Safety and Emergency Preparedness), 2015 FC 691

Medovarski v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 39

Lin v. Canada (Public Safety and Emergency Preparedness), 2019 FC 862

Cheng v. Canada (Public Safety and Emergency Preparedness), 2019 FC 1318

Singh v. Canada (Public Safety and Emergency Preparedness), 2019 FC 1170

Revell v. Canada (Citizenship and Immigration), 2019 FCA 262

Moretto v. Canada (Citizenship and Immigration), 2019 FCA 261

Appendix I: Sample letter— IAD appeal acknowledgement letter

Office Address _____

Date: _____

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

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

_____

Signature Date

_____

Print name Client ID

_____

Minister's Delegate Name/Badge number

Interpreter Declaration:

I, _____, solemnly declare
(Name of interpreter)

that I have faithfully and accurately interpreted in the _____ language.

I make this solemn declaration conscientiously believing it to be true knowing that it is of the same force and effect as if made under oath.

_____

(Signature of interpreter)

Appendix J: Sample letter— Judicial Review Acknowledgement letter

Office Address _____

Date: _____

I acknowledge being informed on this date that I have a right to file an application for leave and judicial review with the Federal Court of Canada and that if I wish to file such an application, it must be filed within 15 days of the date of the issuance of the removal order.

I have been provided with the following link with instructions:

http://www.cic.gc.ca/english/refugees/inside/appeals-review.asp

_____

Signature Date

Print name Client ID

_____

Minister's Delegate Name/Badge number

Interpreter Declaration:

I, _____, solemnly declare
(Name of interpreter)

that I have faithfully and accurately interpreted in the _____ language.

I make this solemn declaration conscientiously believing it to be true knowing that it is of the same force and effect as if made under oath.

_____

(Signature of interpreter)