



Immigration and Refugee Board of Canada
**Quality Performance in the
Immigration Division 2020 to 2021**

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Table of contents

1.0 Introduction.....	4
2.0 Performance results	6
Annex A – Immigration Division Performance Indicators	21
Footnotes	24

1.0 Introduction

Context

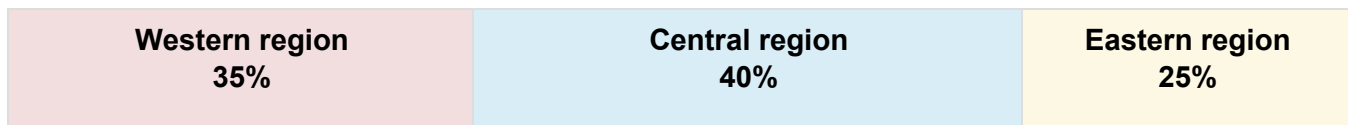
This report describes the results of the measurement of quality in decision-making in the Immigration Division (ID) of the Immigration and Refugee Board of Canada (IRB).

Sample methodology

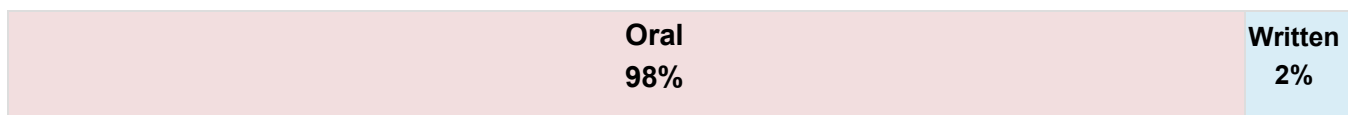
The study reviewed 80 out of a possible 915 case files finalized between January 1 and March 31, 2021 (the assessment period). This includes 40 Admissibility Hearings (AHs) and 40 Detention Reviews (DRs). The case files were randomly selected in proportion to regional office, decision type (oral or written), and language. Hearings were excluded if the hearing duration was less than 20 minutes or greater than 4 hours, to ensure that cases were complex enough to draw findings but respected the time and budgetary resources available for this review.

The following charts illustrate the sampling makeup, which is proportionately representative of the population data:

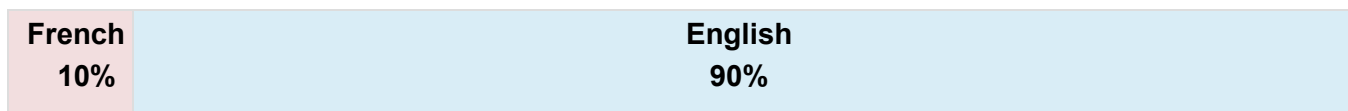
Regional Office



Decision Type



Language of Proceeding



The reviewer was instructed to review 40 DRs, that took place on a specific date within the assessment period, and 40 AHs, related to a specific case file number, that were finalized within the assessment period. Some AHs include multiple sittings across multiple dates and the reviewer was instructed to listen to all oral hearings associated with one AH file number.

Assessment methodology

This qualitative assessment was performed by an independent reviewer who is an associate professor of law and was selected based on her knowledge of the *Immigration and Refugee Protection Act* (IRPA) and experience related to migration, refugee protection, and human rights law. The reviewer examined all relevant evidentiary and administrative material on file, listened to the complete audio recordings¹ and assessed them against performance indicators provided in a checklist developed by the Strategic

Planning, Accountability and Reporting (SPAR) Directorate in consultation with the Deputy Chairperson of the ID (see [Annex A](#)). The checklist assesses 34 indicators across 6 performance categories:

1. Fair and Respectful Proceedings
2. Focused and Robust Proceedings
3. Decisions State Conclusions on All Determinative Issues
4. Decisions Provide Findings and Analysis Necessary to Justify Conclusions
5. Reasons Are Transparent and Intelligible
6. Supplementary Questions related to Virtual/Remote Hearings

Fourteen of the indicators were mandatory for assessment (one of these 14 indicators was mandatory for DRs only), and twenty were assessed only where applicable. Each performance indicator is assessed along a 1-3 rating scale, and for supplementary questions related to Sexual Orientation and Gender Identity Expression (SOGIE) ², a categorical yes-no scale is used if SOGIE related cases are available for assessment.

The 1-to-3 rating scale is as follows:

1. = Does not meet expectations: The quality requirement was not met. The evidence showed one or more key instances where the proceeding or reasons would have markedly benefited had this requirement been met. There may have been an effort to apply the requirement, but the level of achievement fell short of expectations.
2. = Meets expectations: This is a level of acceptable achievement. On balance, the member satisfied this quality requirement though there is margin for minor improvement.
3. = Exceeds expectations: This is a level of consistent, above-average achievement. The evidence shows a grasp of the quality requirement and an understanding of its importance to a high-quality proceeding or decision.

Results are also expressed as a percentage of hearings that meet expectations, by obtaining a score of 2.0 or higher.

Considerations and limitations

Results are accurate to within $\pm 10\%$ percent, 19 times out of 20. This margin increases when data is broken down by region or hearing type. However, the goal of the study was not to achieve statistical certitude but to identify areas of strength, areas for improvement, and patterns in decision-making quality. This study acknowledges the inherent limitations of qualitative research. Qualitative measures do not generate precise data as do quantitative metrics. To ensure quality and consistency in the assessment, a reviewer was selected based on their in-depth knowledge of the IRPA and their significant experience with immigration and refugee law. Moreover, the assessor was provided with orientation by the division, and a detailed training guide.

Where sample sizes are too small, observations or recommendations may still have been provided but these are not based on representative findings. For example, indicator 15 assesses whether designated representatives provide quality assistance to the person concerned. Only 12 hearings involved a designated representative and was assessed against this criterion. As a result, any observations or recommendations made may not be representative of other hearings with a designated representative at the ID. Nonetheless, the findings provide insight and may suggest opportunities for improvement.

The findings in this report, including the strengths, areas for improvement, and recommendations found in sections 2.1-2.6 are solely those of the assessor. The evaluation unit of SPAR developed the tables and statistics for each section, as well as the information contained in section 1.1 “Context” and 2.0 “Performance Results”. The observations of the assessor do not lend themselves to firm conclusions on legal matters such as the correct application of the law, the weighing of the evidence, or the fairness of the proceedings from a natural justice perspective. Only a court reviewing the case can arrive at such conclusions. This report aims to provide a perspective to improve the Division’s performance overall.

2.0 Performance results

What was measured

Each performance result in sections 2.1-2.6 contains a table representing the number of hearings assessed for each indicator and the percentage of assessed hearings that scored a 2.0 or higher. The number of hearings assessed is provided for reference and context only.

The primary performance target for this assessment is for 75% of hearings to meet quality standards. The quality standard is that the hearing achieves a score of 2.0 or higher in at least 80% of all indicators assessed within that hearing. This target was achieved with 95% (76 out of 80) of hearings meeting the expectation. Although the scores are high and many hearings scored a 2.0 on most indicators, a score of 2.0 still allows room for improvement.

Where an indicator had many hearings that did not meet the target, it is addressed in the reviewer’s observations following the table (Areas for Improvement).

2.1 Fair and respectful proceedings

Why measure this

Individuals appearing before the IRB expect that they will be treated with sensitivity and respect.

Any shortcoming in this regard potentially undermines tribunal integrity and public confidence.

What was measured:	Number of hearings assessed	Percent of hearings scoring at least 2.0
1. The member treats participants with sensitivity and respect.	80	99%
2. The member ensures parties have an opportunity to present and respond to evidence and to make representations.	80	90%
3. The member explains clearly the allegation(s) / criteria against the person concerned and the possible consequences.	80	89%

4. The member identifies when the evidence has not adequately addressed an important issue as identified by the member and asks questions of clarification.	44	96%
5. Communications in the absence of a party is disclosed and summarized on the record.	5	100%
6. Problems with interpretation are identified and addressed.	8	100%

General observations

The implementation of Indicator 2, having an opportunity to present and respond to evidence and to make representations, is closely connected to the full and timely disclosure by the Minister. The lack of proper disclosure negatively impacts participants' ability to respond to evidence. This systemic issue was highlighted in the Quality Performance in the Immigration Division 2019-20:

“Legislated timelines mandate that a detention review be conducted within 48 hours of detention (Section 57 (1) of the Immigration and Refugee Protection Act (IRPA)). As a result of this short timeline, it is challenging to ensure all evidence is disclosed to the person detained or their counsel before the hearing, with enough time to review it. As the majority of the Minister’s evidence is produced for the 48-hour review, the full steps to proper disclosure are not always followed because the timeline does not often allow for the documents to be fully reviewed by the person detained or their counsel prior to the hearing, nor does it allow for translation when required.”

Proper disclosure problems were identified in a number of cases reviewed for this assessment. While the timelines for detention reviews are legislated and therefore must occur within 48 hours for the first hearing, this makes disclosure protocols difficult to manage, and is an ongoing issue which continues to impact the detained person’s ability to present their defense or be able to review evidence before the hearing.

Strengths

Indicator 1 - In 99% of the hearings assessed, the member treated participants with sensitivity and respect. The member was patient and showed empathy to the person concerned. Everyone involved in the proceedings, including interpreter, designated representative, and witness, were treated with respect. In cases where the person concerned was part of a vulnerable group or showed signs of distress and anxiety, the member was responsive to their situation and treated them with tact and sensitivity.

Indicators 2 - This target was met in the vast majority of the hearings assessed. In cases where persons concerned were not represented by counsel, members made an extra effort to ensure that persons concerned made representations and answered the clarification questions asked. In one case, the member was very careful in making sure that the person concerned understood the allegations, the proceedings, and the consequences. The member repeated their questions, answered in detail questions they received and asked for clarification when the statements of the person concerned were not clear enough. In another case, the member spent the first hour of the hearing to clarify the facts by ensuring the parties had an opportunity to present and respond to evidence. The member was patient, professional, and well-organized. It should be noted that the member was at the same time dealing with connection issues.

Indicator 4 - 96% of admissibility hearings assessed met the target for this indicator. In most cases, members were thorough in asking questions of clarification in relation to facts and applicable law to parties present. In a number of instances, this helped untangle complex criminal and immigration history of persons concerned. In some detention hearings, members' clarification questions about prospective alternatives to detention enhanced their decision to order release on conditions.

Indicator 5 - In all applicable cases, members ensured communications in the absence of a party was disclosed and summarized on the record.

Indicator 6 - In one case, the person concerned was duly provided with the opportunity to respond to allegations. However, the way the member interacted with the person concerned was intimidating. The member seemed to understand the language of interpretation. Without giving the interpreter the opportunity to translate what the person concerned had said, the member intervened and interrupted them to render their decision. In so doing, not only did the member silence the person concerned, but they also did not allow the other participants to understand what the person concerned had said.

Areas for improvement

Indicator 1 - In one case, the person concerned was duly provided with the opportunity to respond to allegations. However, the way the member interacted with the person concerned was intimidating. The member seemed to understand the language of interpretation. Without giving the interpreter the opportunity to translate what the person concerned had said, the member intervened and interrupted them to render their decision. In so doing, not only did the member silence the person concerned, but they also did not allow the other participants to understand what the person concerned had said.

Indicator 2 – In a small number of cases, members did not provide the persons concerned with the opportunity to testify and to respond to allegations. For instance, in a detention review where the facts of the case were complex, the member did not ask any clarification from the person concerned or give him any opportunity to speak although there were some submissions made by the Minister that needed to be further substantiated.

As stated under general observations, proper disclosure by the Minister remains a systemic issue that impacts participants' right to respond to evidence. For example, in a 7-day detention review hearing, the counsel who was retained on the same day as the hearing, repeatedly said that they did not receive the transcript of the previous hearing to understand the evidence against their client. The first time the counsel raised the issue the member said "we have to proceed on the basis of the material available" before asking the Minister to give a brief synopsis of the previous detention review. The Minister's synopsis was far from being a complete account as he himself acknowledged it, making it challenging for the counsel to respond to evidence.

Indicator 3 - In the cases where the target for this indicator was not met, the member omitted to explain or rushed the explanation of the criteria against the person concerned and/or the possible consequences, including right of appeal.

Recommendation

The ID should consider discussing best practices related to indicators 2 and 3 as part of the training provided to its members. Members should consider Indicator 2 in conjunction with their responsibility to ensure that the Minister discloses all relevant evidence.

These considerations / best practices should include:

- Remind members of the importance of providing the person concerned with the opportunity to respond to evidence and to make comments, even when the person concerned is represented by counsel, in particular when counsel was not present in the previous hearing and/or new to the case, e.g., appointed the same day as the hearing.
- In case of late disclosure of evidence by the Minister, members should consider allowing a recess to enable the parties to review and understand evidence and ultimately, to be able to have an opportunity to present and respond to evidence and to make representations.

2.2 Focused and robust proceedings

Why measure this

Proceedings that are efficient and well managed create conditions for quality outcomes to emerge and support the IRB's efforts to make the most effective use of its resources.

What was measured	Number of hearings assessed	Percent of hearings scoring at least 2.0
7. The member ensures the parties present testimony and documentation that are relevant to the issues.	80	96%
8. The member's questioning is relevant in relation to the issues.	64	97%
9. The member's questioning is focused and organized.	64	92%
10. The member manages challenging situations as they arise.	11	82%
11. The member accommodates needs of vulnerable participants, including unaccompanied minors, to facilitate their presentation of evidence.	14	93%
12. The Member deals with oral applications made by parties.	9	100%
13. The Member identifies applicable legislation, regulations, rules, or Guidelines.	75	97%
14. The member ensures that a designated representative is appointed, when appropriate.	12	92%

What was measured	Number of hearings assessed	Percent of hearings scoring at least 2.0
15. The member ensures that the designated representative is taking the necessary steps to assist the person concerned.	12	100%
16. The member ensures that the Minister discloses all relevant evidence.	40	90%
17. The member undertakes a fresh assessment of the issues at each hearing and gives due consideration to new circumstances.	37	89%
18. The member ensures that Charter issues are considered.	2	100%
19. The member considers the factors set out in section 248 of the Immigration and Refugee Protection Regulations before ordering continued detention.	32	59%
20. The member hears evidence from potential bondspersons and other witnesses when assessing alternatives to detention.	6	100%

General observations

None identified.

Strengths

Indicator 7 – In one hearing the Minister's questioning was at times irrelevant. In this hearing, the member interjected on a matter of law and referred to the rules that protect the person concerned from self-incrimination. The member warned the person concerned that if they admitted to any criminal wrongdoing in these proceedings, that admission can be used as evidence in other proceedings.

Indicator 9 - Members' questioning was generally highly focused and well-organized. The way they asked questions and followed up on the responses they received from the parties was effective and helped clarify important issues, in particular, in cases where material facts and applicable case-law were unclear or complex.

Indicator 11 – The target was met in 93% of the cases where this indicator was applicable. Of all the hearings assessed, 5 involved 6 unaccompanied minors, all in the Central region. Other vulnerable persons included those with mental health and/or addiction issues. In one case, the member was particularly patient with the vulnerable person concerned who had difficulty in understanding the nature of proceedings and what an alternative to detention meant. On two occasions, the member offered lengthy and detailed clarification to the person concerned to facilitate their presentation of evidence.

Indicator 14 - In nearly all cases analyzed where this indicator is applicable, the member ensured that the designated representative is taking the necessary steps to assist the person concerned. Members assessed the ability of the person concerned to understand the nature of the proceedings. They evaluated the need to appoint a designated representative as well as the reason for which a designated representative was present. This is a significant improvement compared to the findings of the Quality Performance Report: Immigration Division 2019-2020 (see: p. 10 and 11 of the report).

Indicator 15 - In some cases, members went above and beyond the requirement. To give an example, at the end of one hearing, the member ensured that the designated person remained in touch with the person concerned once they will be released from detention. The person concerned did not have a mobile phone or a fixed address. The member dealt with this issue in addition to offering guidance to the designated representative in terms of assisting the person concerned with the appeal process.

The ID should continue its efforts to ensure a designated representative is appointed when needed. These efforts are important to pursue since a number of persons concerned are unrepresented and/or vulnerable. The COVID-19 pandemic has further exacerbated the level of vulnerability of those who are in detention.

Indicator 18 - There were very few cases directly involving the Charter. The target was met in 100% of hearings where this indicator was applicable.

Areas for improvement

Indicator 7 – Although in the vast majority of the cases observed this indicator was respected, there were cases where the member did not ensure the Minister's questioning was relevant to the issues. In one hearing the questioning went beyond and above the alleged facts and issues of the case at hand, and in another, the Minister's questioning was unnecessarily aggressive and at times, irrelevant. In one of those hearings, the member did not inform the person concerned -who was not represented by counsel- against the risk of self-incrimination.

Indicator 9 - In a small number of cases, the member's questioning was disorganized making it hard for the parties to follow the proceedings. This is particularly true for persons who are not represented by counsel or counsels who are new to the case and/or who might not be familiar with the proceedings before the ID.

Indicator 10 - Challenging situations rarely arose in the hearings analyzed. They are often related to another indicator, such as acknowledging and addressing the specific needs of vulnerable persons in the hearing.

In two cases, a challenging issue was the discussion about the removal of the persons concerned.

In one case, the member asked the Minister to clarify the reasons for which the person concerned will be transiting by a third country on their way to their country of origin and whether the electronic card to be issued to the person concerned will be accepted by these countries. It became clear that the Minister's removal plan involved a stopover in a third country in order to get around the Government of Canada's COVID-19 pandemic-related advisory against travel to the country of origin. While it is CBSA's responsibility to make travel arrangements, at no point in the discussion did the member question this arrangement or raise any concerns about the potential risk it would represent for the health and safety of the person concerned. Although this challenging situation is somewhat outside of the ID members' responsibility, it was disturbing to hear travel arrangements discussed in the hearing which did not take into consideration the safety of the person concerned.

Indicator 11 - In one case, the person concerned suffered from mental health issues and tried to commit suicide while in detention. The person's counsel was new to the case and did not have access to all relevant information and some of the documents were submitted by the Minister's counsel just before the hearing. The member did not provide the person concerned with an opportunity to speak during the hearing. Before the decision was rendered, the person concerned who was not disruptive- wanted to interject, however the member ignored them. The member had a heightened obligation to ensure they accommodated the needs of the vulnerable participant, to facilitate their presentation of evidence and failed to do so.

Indicator 14 - In almost all cases, members ensured a designated representative was appointed, when appropriate. However, in one case, the member did not ask the reasons for which a designated representative is needed and did not appoint the designated representative until they were reminded to do so by the counsel. In another case, the member's questioning showed that the person concerned was unable to appreciate the nature of the proceedings and had a history of noncompliance. When the person concerned was asked about non-compliance, they said that they lost track of the time and they didn't know how to do paperwork. The person concerned also said they did not appear for examination because they were too afraid they would be arrested. The member acknowledged in their reasons that the person concerned did not seem to understand the proceedings and what is required from them. The member could have acted upon this finding and, given how distressed the person concerned was throughout the hearing, the member could have considered the appointment of a designated representative.

Indicator 15 - In one case, the designated representative was the brother of the minor person concerned and was 18 years of age. The designated representative's response to some questions made it clear that he wasn't himself fully understanding the proceedings, including the legal language used. Before appointing the designated representative, the member should have ensured that the designated representative was able to understand the nature of the proceedings in addition to fully understand the [Designated Representative Guide](#), to duly protect and advance the interests of the persons concerned.

Indicator 16 - Late submission of evidence by the Minister is a recurrent problem in the hearings analyzed. The COVID-19-related restrictions in immigration holding centres and provincial correctional facilities seem to have exacerbated the issue of timely evidence disclosure. In one case, the person concerned who was unrepresented, did not have with them the documents (some 140 pages) submitted by the Minister. The member said some of the documents came late from the Minister. Although he was unhappy with the late submission, the member did not suggest a recess to allow the person concerned to review the evidence submitted by the Minister.

In another case, the person concerned was unrepresented and detained in a provincial correctional facility. The two documents submitted by the Minister before the hearing were not in possession of the person concerned who said they were not given any documents by the facility authorities. Yet, in another case, the person concerned said they received the evidence disclosed by the Minister late the night before the hearing. That person was unrepresented by counsel and needed the assistance of an interpreter to understand the proceedings.

In several cases, members made efforts to enter the late disclosed evidence in fairness in order not to delay the proceedings unnecessarily. In one case, the minister disclosed a package of 8 documents the day before the hearing. When the member asked the person concerned if they received and had the opportunity to read them, the person concerned said they did receive them, but they could not understand the content. The member replied that they can enter the evidence in fairness and asked the minister if there was any part of the disclosure they would like to rely on in the hearing. The member then explained the content of the two documents disclosed to the person concerned. The efforts of the

Member to balance fairness and efficiency are commendable. These efforts are acknowledged and work well in certain circumstances. But in this particular case, the counsel was not present at the hearing and the person concerned clearly wasn't given enough time to understand and appreciate the importance of the documents disclosed. The member relied on these documents in their reasons. Later in the hearing, when the member asked the person concerned if he has anything to add, the person said that too many things have been presented during the hearing and he did not understand everything.

Indicator 17 – In 11% of the hearings in which this indicator was applicable, the member did not meet the target. Though this is a small percentage which did not meet the target, it is important to note that in these hearings the members heavily relied on the findings of the previous hearings and did not take a fresh assessment of the issues raised at the hearing nor did they give due consideration to new circumstances. In a detention review hearing, significant new circumstances were outlined by the counsel and the Minister, including a permanent residence application made under a new immigration program and the fact that the person concerned was deemed, by a medical professional, to be unfit to fly. The member characterized these facts as attempts on the part of the person concerned to passively resist removal order. In another case, the member overly relied on past decisions despite the efforts by the person concerned -who was unrepresented- to challenge some of the evidence against them and to present suitable alternatives to detention. Two potential bondspersons who were each ready to pose a considerable amount of bond and to ensure the person concerned complied with conditions were refused by the member who also dismissed new evidence presented to substantiate that the person concerned was not a flight risk.

Indicator 19 - With a few exceptions, in all hearings assessed where this indicator is applicable, members duly mentioned section 248 of the IRPR (R248) before giving their decision. However, in several applicable cases, members did not systematically go over the R248 factors and omitted to consider or insufficiently considered some of them. For instance, in relation to the best interests of a directly affected child who is under 18 years of age (IRPR, s. 248(f)), in one case the member considered the best interest of the youngest child of the person concerned but they did not inquire about the impact of the person's continued detention on their other children. The member only said that information had not been provided about them. The member had the opportunity to ask questions to the person concerned and could have raised this issue with them.

All the hearings assessed took place during the third wave of the COVID-19 pandemic, between January and March 2021. As a result, the conditions of detention were among the factors systematically considered by members in applicable hearings. Typically, the Minister's submission included information about the COVID-19 situation in the detention centre concerned, e.g., the number of actual and presumptive cases, the number of detainees at a given time, and the capacity of the detention facility. However, the depth of the information provided by the Minister varied from one hearing to another. Against this background, members' consideration of the COVID-19 situation lacked consistency.

Although in many cases, the member inquired about the COVID-19 situation in the detention facility, this was not done in all cases. In one case, the member did not consider the conditions of detention at the provincial correctional facility where the person concerned had been detained for several months; the member did not raise the issue with the counsel or the designated representative, did not discuss the implications of the continued detention on the safety of the person concerned during the pandemic and did not ask any questions to the Minister about the COVID-19 situation in the correctional facility before ordering the continued detention of the person concerned. In another case, there was no mention of the COVID-19 situation in the provincial facility where the person concerned was detained. Although the health issues experienced by the person concerned should normally be considered an aggravating factor in congregate living settings during the pandemic, the member did not mention them in their reasons.

Similarly, there were notable variations in members' reasoning on whether and how the COVID-19 situation weighs in when considering R248 factors. In comparable cases, some members found that COVID-19 alone was a concern in congregate living settings and a factor that weighed in favour of release. For others, this factor was neutral. Yet some other members considered the COVID-related detention conditions not a factor important enough to order release. This indicator involves a case-by-case analysis and considerable member discretion. The case law does not require the ID member to consider the conditions of detention at every detention review. However, recent case law states that "as a tribunal of competent jurisdiction capable of providing Charter remedies, the ID can order release of a detainee on the grounds that the conditions of detention, on their own or in conjunction with other factors, are disproportionate" (Brown, 2020 FCA 130, para 107). Therefore, it is highly recommended that the ID ensures consistency in decision-making in relation to the consideration and weight of the COVID-19-related concerns, in particular, and the conditions of detention that negatively impact a person's safety, in general.

Recommendation

Indicator 16 - The ID should organize training and/or develop a communiqué to remind members to follow the below-mentioned recommendations outlined in the Quality Performance Report: Immigration Division 2019-2020.

1. All relevant evidence is disclosed by the Minister in advance and with enough time to allow the detained person or their counsel to review it and respond.
2. All evidence is translated for the person detained where appropriate, and routinely asking the person detained on the record if the evidence has been translated for them.
3. Objections to evidence raised by the person detained are dealt with appropriately, particularly when they are unrepresented by counsel." (See: p. 11 of the report).

Indicator 19 - The ID should consider offering guidance and training to members in order to inform a more principled approach to the consideration of the factors set out in section 248 of the Immigration and Refugee Protection Regulations before ordering continued detention. The guidance can touch on the process of weighing all the R248 factors together and the interpretation of COVID19-related detention conditions in this process.

2.3 Reasons state conclusions on all determinative issues

Why measure this

The Supreme Court of Canada set the requirement for justifiability, intelligibility, and transparency in a decision of an administrative tribunal. Through indicators 21 to 31, this study applies the Court's requirement in the context of IRB decision-making.

What was measured	Number of hearings assessed	Percent of hearings scoring at least 2.0
21. Conclusions are based on the issues and evidence adduced during the proceedings.	80	98%
22. All allegations and/or criteria are dealt with in the reasons.	80	98%

General observations

None identified.

Strengths

Indicators 21 and 22 - The criteria measured were duly and consistently implemented. The target was met in 98% of the cases analyzed.

Areas for improvement

Indicators 21 and 22 – Some determinative issues were overlooked in the reasons in a small number of cases where the facts were complex and the proceedings lengthy. In one case, the member did not consider the mental health issues of the person concerned when they assessed the person's non-compliance with a reporting order. In another case, it was alleged that the person concerned was inadmissible to Canada under IRPA s. 20(1)(a) and s. 41(a). The questioning of the person concerned, and the submission of the counsel revealed that the person concerned, a minor person, came to Canada with a valid documentation and made a refugee claim. At the time of the hearing the documentation was still valid. The counsel argued that IRPA s. 41(a) is not applicable since there was no act or omission from the person concerned which contravenes a provision of the Act. In their reasons, which were very brief, the member did not address the comments by the counsel. The member should have expanded on them and dealt with the allegations of the counsel.

Recommendation

When a case is complex and proceedings are long, members can consider taking a short recess before rendering their decision and reasons. A short recess would allow members to ensure that all determinative issues are addressed in their reasons.

2.4 Decisions provide findings and analysis necessary to justify conclusions

Why measure this

The Supreme Court of Canada set the requirement for justifiability, intelligibility, and transparency in a decision of an administrative tribunal. Through indicators 21 to 31, this study applies the Court's requirement in the context of IRB decision-making.

What was measured	Number of hearings assessed	Percent of hearings scoring at least 2.0
23. The member makes clear, unambiguous findings of fact.	80	94%
24. The member supports findings of fact with clear examples of evidence shown to be probative of these findings.	80	94%
25. The member bases findings on evidence established as credible and trustworthy.	80	99%
26. The member addresses parties' evidence that runs contrary to the member's decision and why certain evidence was preferred.	46	85%
27. The member identifies legislation, rules, regulations, Jurisprudential Guides, Chairperson's Guidelines, or persuasive decisions where appropriate.	70	97%

General observations

None identified.

Strengths

Indicator 24 – 94% of the cases analyzed met the targets for this indicator. In one case, when the member explained the conditions of release, they supported findings of fact with clear examples. The member took into consideration the mental health issues experienced by the person concerned and the difficulty for them to comply with the conditions. The member said that's why they preferred keeping the release conditions simple and straightforward.

Areas for improvement

Indicator 23 – In a small number of cases, there were some contradictions or gaps in findings of fact. In one case, the member admitted early in the reasons that they don't have enough information to render a decision on the IRPA 36(2)b equivalency of the offence committed abroad by the person concerned. Later, the member concluded that there is an equivalency. The reasoning is confusing. In another case, the way the findings were explained was disorganized with the member backtracking a couple of times and reexplaining findings of fact, making it challenging to follow the examples of evidence provided. In another admissibility hearing, the member rushed the analysis of equivalency and the comparison between the US and Canadian statutes concerned without elaborating on evidence shown to be probative of these findings. It was important for the member to expand on the analysis since the counsel had objected to the equivalency.

I acknowledge that small inconsistency and gaps are likely to occur occasionally since the decision and reasons are delivered immediately at the end of the hearing. Nevertheless, some of them are of a nature to impede the justifiability and intelligibility of the decision.

Indicator 26 – In some cases, the member failed to address some of the counsel's arguments that run contrary to their decision and why certain evidence was preferred. In one case, the member did not duly address the counsel's submission that the Minister had not been diligent in moving the case forward. The counsel was, in particular, referring to the lack of progress since it had taken the Minister several months to make the removal arrangements for the person concerned. The Minister's replies were vague. The member dismissed the counsel's arguments without explaining why the Minister's evidence was preferred. In another case, the person concerned, and their counsel challenged the alleged association of the person concerned with organized criminality. The member found the evidence presented by the Minister was weak. Nevertheless, the member did not address why that evidence was preferred in their decision.

Indicator 27 – In most detention hearings, Members referred to legislation, rules, regulations or persuasive decisions but only minimally.

Recommendation

Remind members of the rules and best practices to ensure they address parties' evidence that runs contrary to the member's decision and why certain evidence was preferred.

2.5 Reasons are transparent and intelligible

Why measure this

The Supreme Court of Canada set the requirement for justifiability, intelligibility, and transparency in a decision of an administrative tribunal. Through indicators 21 to 31, this study applies the Court's requirement in the context of IRB decision-making.

What was measured	Number of hearings assessed	Percent of hearings scoring at least 2.0
28. The member uses plain language.	80	100%
29. The member gives appropriately clear and concise reasons.	80	95%
30. Reasons are easily understood and logically sequenced.	80	95%

<p>31. AH: Reasons, if reserved, are finalized within 60 days from either the date of the last sitting or once final submissions are received from all parties.</p> <p>DR: Reasons are provided within the statutory time-limits, in accordance with the Chairperson’s Guideline on Detention.</p>	44	100%
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General observations

None identified.

Strengths

Only 2 decisions and reasons in the cases reviewed were written. All the other decisions and reasons were delivered orally at the end of the hearing. In almost all hearings assessed, members used plain language and gave clear and concise reasons that were coherent and accessible. In all cases, reasons were provided within the statutory time-limits.

Areas for improvement

Indicators 28, 29, and 30 – Members should take into consideration the special needs of vulnerable persons, such as unrepresented minors, to ensure the accessibility of their decision and reasons. In one case, the member tried to use plain language which, still appeared too convoluted and legalistic, thus not accessible to the persons concerned who were unaccompanied minors. In this case, the designated representative wasn’t very likely to assist the persons concerned in clearly understanding the decision since he was himself a young foreign national not familiar with the system and the persons concerned were not represented by counsel.

Indicator 29 – Members should avoid repeating information when the information doesn’t contribute to the reasoning. In one case, the reasons were too lengthy and far from being concise. After they explained the grounds for detention, the member unnecessarily expanded on them, emphasizing and repeating the non-compliance and addiction history of the person concerned. The member spent a considerable amount of time on these issues, which took away time from considering alternatives to detention and the release terms and conditions, areas to which the member should have dedicated more time.

Recommendation

Ensure that vulnerable persons, such as minors or persons with mental health issues understand well the reasons and their implications. To this end, members should be reminded of this objective. In addition, the ID should continue its efforts to appoint a designated representative, when needed.

2.6 Supplementary questions related to remote hearings

Why measure this

During a time of transition to predominantly remote hearings, and specifically to new tools for virtual hearings such as MS Teams, it is important to ensure that members adhere to guidelines prescribed for this new approach to adjudication. This includes ensuring that claimants are afforded accommodations when required, that the technology provides adequate quality for the hearing, that witnesses are

participating with the same level of adherence to protocols as an in-person hearings, and that members follow practices in line with regional protocols.

What was measured	Number of hearings assessed	Percent of hearings scoring at least 2.0
32. The member ensures that participants in need of accommodation are appropriately accommodated throughout the virtual proceeding.	6	100%
33. If any participant identifies sound, video or technical issues that impact the quality of testimony or the hearing, the member takes appropriate steps to resolve them.	27	100%
34. In the event of a private hearing conducted via MS Teams, the member advises the participant about the privacy risks of virtual hearings and obtains consent/agreement to having the hearing conducted this way.	9	100%

General observations

In almost all hearings in the sample there were sound, image or other technical issues which ranged from background noise– (for instance, in the case of a person detained in a provincial correctional facility) to frozen screens, choppy sound, calls dropping and members trying to reconnect a participant sometimes for several minutes. Some of these issues were minor, others were more disruptive.

Strengths

Indicator 32 – In all applicable cases, members ensured that participants in need of accommodation are appropriately accommodated throughout the virtual proceeding. In one case, the person concerned was agitated and distressed. The member treated them with sensitivity, briefly paused the proceedings a few times to acknowledge their stress and tried to calm them down by explaining what is ahead. In another example, where the person concerned tested positive for COVID-19, the member ensured that they were feeling well enough to participate in the hearing.

Indicator 33 – Members were remarkably resourceful and patient in dealing with technical issues faced during virtual hearings. They took appropriate steps to resolve the problems as quickly as possible to minimize their impact on the quality of the testimony or the hearing. In one case, the member spent the first half hour of the hearing to fix the connection issues.

Areas for improvement

Indicator 34 – This target was not met in the applicable hearings. In some cases, members did not indicate whether the hearing was public or private. In other cases, the member mentioned that the hearing was private and held by videoconference through MS Teams, but they omitted to advise participants about the privacy risks or to obtain their consent. In one case, at the beginning of the hearing, the member indicated that the hearing is public. The designated representative and the counsel later informed the member that the person concerned made a refugee claim. The member did not ensure

the hearing became private. They did not advise participants about privacy risks and did not obtain their consent or agreement.

Recommendation

Indicator 33 – The ID should consider changing or upgrading the online technology used for virtual hearings. All hearing types were impacted equally, although in provincial detention facilities, it was more likely to have background noise problems than in immigration holding centres and other locations. Technical issues have negative impacts on the quality of the proceedings when the hearings are frequently paused or interrupted. Although it is hard to establish causal connection, one can reasonably hypothesize that technical issues are likely to result in feelings of anxiety for participants, in particular, vulnerable persons concerned and members who are responsible for resolving the technical issues while at the same time presiding over hearings. Members can't reasonably be expected to have technical skills and expertise needed to resolve the issues. A more stable connection, better quality technology, and more technical support would alleviate the burden on members.

Indicator 34 – There was clearly a lack of awareness and training for the requirements of Indicator #34. One should acknowledge the degree of complexity in relation to ID hearings, including the various methods that the ID must use to conduct its hearings remotely during the pandemic. Some of these methods entail more potential privacy risk than others. Nonetheless, the ID should consider a communiqué and training to members in order to ensure they advise participants about the privacy risks of virtual hearings and to obtain consent/agreement to having a private hearing conducted via MS Teams.

Annex A – Immigration Division Performance Indicators

A			
Fair and respectful proceedings			
1	All cases	AH and DR	The member treats participants with sensitivity and respect.
2	All cases	AH and DR	The member ensures parties have an opportunity to present and respond to evidence and to make representations.
3	All cases	AH and DR	The member explains clearly the allegation(s) and/or criteria against the person concerned and the possible consequences.
4	If applicable	DR only	The member identifies when the evidence has not adequately addressed an important issue as identified by the member and asks questions of clarification.
5	If applicable	AH and DR	Communications in the absence of a party are disclosed and summarized on the record.
6	If applicable	AH and DR	Problems with interpretation are identified and addressed.
B			
Focused and robust proceedings			
7	All cases	AH and DR	The member ensures the parties present testimony and documentation that are relevant to the issues.
8	If applicable	AH and DR	The member's questioning is relevant in relation to the issues.
9	If applicable	AH and DR	The member's questioning is focused and organized.
10	If applicable	AH and DR	The member manages challenging situations as they arise.
10	If applicable	AH and DR	The member manages challenging situations as they arise.
11	If applicable	AH and DR	The member accommodates needs of vulnerable participants, including unaccompanied minors, to facilitate their presentation of evidence.

12	If applicable	AH and DR	The Member deals with oral applications made by parties.
13	If applicable	AH and DR	The Member identifies applicable legislation, regulations, rules or Guidelines.
14	If applicable	AH and DR	The member ensures that a designated representative is appointed, when appropriate.
15	If applicable	AH and DR	The member ensures that the designated representative is taking the necessary steps to assist the person concerned.
16	All cases	DR only	The member ensures that the Minister discloses all relevant evidence.
17	If applicable	DR only	The member undertakes a fresh assessment of the issues at each hearing and gives due consideration to new circumstances.
18	If applicable	DR only	The member ensures that Charter issues are considered.
19	If applicable	DR only	The member considers the factors set out in section 248 of the Immigration and Refugee Protection Regulations before ordering continued detention.
20	If applicable	DR only	The member hears evidence from potential bondspersons and other witnesses when assessing alternatives to detention.
C	Reasons state conclusions on all determinative issues		
21	All cases	AH and DR	Conclusions are based on the issues and evidence adduced during the proceedings.
22	All cases	AH and DR	All allegations and/or criteria are dealt with in the reasons.
D	Decisions provide findings and analysis necessary to justify conclusions		
23	All cases	AH and DR	The member makes clear, unambiguous findings of fact.
24	All cases	AH and DR	The member supports findings of fact with clear examples of evidence shown to be probative of these findings.

25	All cases	AH and DR	The member bases findings on evidence established as credible and trustworthy.
26	If applicable	AH and DR	The member addresses parties' evidence that runs contrary to the member's decision and why certain evidence was preferred.
27	If applicable	AH and DR	The member identifies legislation, rules, regulations, Jurisprudential Guides, Chairperson's Guidelines or persuasive decisions where appropriate.
E	Reasons are transparent and intelligible		
28	All cases	AH and DR	The member uses plain language.
29	All cases	AH and DR	The member gives appropriately clear and concise reasons.
30	All cases	AH and DR	Reasons are easily understood and logically sequenced.
31	If applicable	AH and DR	<p>AH: Reasons, if reserved, are finalized within 60 days from either the date of the last sitting or once final submissions are received from all parties.</p> <p>DR: Reasons are provided within the statutory time-limits, in accordance with the Chairperson's Guideline on Detention.</p>
F	Supplementary questions on virtual hearings		
32	If applicable	AH and DR	The member ensures that participants in need of accommodation are appropriately accommodated throughout the virtual proceeding.
33	If applicable	AH and DR	If any participant identifies sound, video or technical issues that impact the quality of testimony or the hearing, the member takes appropriate steps to resolve them.
34	If applicable	AH and DR	In the event of a private hearing conducted via MS Teams, the member advises the participant about the privacy risks of virtual hearings and obtains consent/agreement to having the hearing conducted this way.

Footnotes

- 1 One case did not have an audio recording and a transcript was used in its place.

- 2 Chairperson's Guideline 9 - *Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression* was revised on December 17, 2021, to include Sex Characteristics and other important changes. This assessment and report were written prior to the publication of the update, however no SOGIE related hearings were identified in this year's assessment.