8. Procedure: Making a decision to write an A44(1) report

8.1. Considerations before writing an A44(1) report

The fact that officers have the discretionary power to decide whether or not to write an inadmissibility report does not mean that they can disregard the fact that someone is, or may be, inadmissible, or that they can grant status to that person under A21 and A22.

Rather, this discretion gives officers flexibility in managing cases where no removal order will be sought, or where the circumstances are such that the objectives of the Act may or will be achieved without the need to write a formal inadmissibility report under the provisions of A44(1).

However, note that the 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 report is to be referred to the Immigration Division.

For example, in the case of *Minister of Public Safety and Emergency Preparedness v. Cha* (2006 FCA 126), a case involving a foreign national inadmissible under s.36(2)(a), the Federal Court of Appeal 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 Minister's delegates. The court held that with respect to foreign nationals inadmissible for criminality or serious criminality, officers and Minister's delegates have limited discretion under s.44(1) and (2) of the Act. The court 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.

Officers should carefully consider the consequences of writing or not writing a report given that their decision may have an impact on possible future dealings with the person.

For more information, see sections 8.2 "Non-criminal inadmissibilities", 8.3 "Special considerations for criminal inadmissibilities", and 8.9 "Writing an A44(1) report on a permanent resident".

8.2. Non-criminal inadmissibilities

Although not considered exhaustive, the following are some factors that officers may choose to consider when deciding whether or not to write an A44(1) inadmissibility report for a non-criminal inadmissibility.

- Is the person concerned a permanent resident or a foreign national?
- What is the nature or category of the inadmissibility?
- Is the person already the subject of a removal order?
- Is the person already the subject of a separate inadmissibility report incorporating allegations that will likely result in a removal order?
- Is the officer satisfied that the person is, or soon will be, leaving Canada? And in such a case, is the imposition of a future requirement to obtain consent to return warranted?
- Is there a record of the person having previously contravened immigration legislation?
- In the case of non-compliance, was it unintentional or excusable for a valid reason?
- Has the person now been fully counselled on the topic of their inadmissibility? And is the officer satisfied that the person now understands what is required in future to overcome their inadmissibility?
- Is there any reason to believe that, after having previously been counselled on the topic of their inadmissibility, the person simply chose to ignore that counselling?
- Has the person been cooperative?
- Is there any evidence of misrepresentation?

- Has the person applied for restoration of status, and does the person appear to be eligible?
- Has a temporary resident permit been authorized?
- How long has the person been in Canada?
- Has the person been a permanent resident of Canada since childhood? Was the permanent resident an adult at the time of admission to Canada?
- How long has the permanent resident resided in Canada after the date of admission?
- Are family members in Canada emotionally or financially dependent on the permanent resident? Are all extended family members in Canada?
- Are there any special circumstances in the likely country of removal, such as civil war or a major natural disaster?
- Is the permanent resident financially self-supporting or employed? Does the person possess 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?
- 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?
- Is the permanent resident remorseful, or has the person supplied any necessary documentation requested by an officer?

8.3. Special considerations for criminal inadmissibilities

Cases involving inadmissibilities for criminality, security, war crimes and crimes against humanity (as described in A34, A35, A36 and A37) are to be treated with utmost seriousness. In *Cha*, Mr. Justice Décary explained that Parliament's intention in drafting IRPA was to make security a top priority for immigration law enforcement officials. Although the above factors are always to be considered when writing an A44(1) report, the officer must always be mindful of the various objectives of the IRPA, in particular A3(1)(h) and (i). In cases of criminal inadmissibility, the scope of discretion enjoyed by the officers making a decision regarding whether or not to write an A44(1) report will be narrower. The following factors are to be considered when making a decision on writing an A44(1) report in cases of criminal inadmissibilities.

- In minor criminality cases, is a decision on rehabilitation imminent and likely to be favourable?
- Has the permanent resident been convicted of any prior criminal offence? Based on reliable information, is the permanent resident involved in criminal or organized criminal activities?
- What is the maximum sentence that could have been imposed?
- What was the sentence imposed?
- What are the circumstances of the particular incident under consideration?
- Did the conviction involve violence or drugs?

Regardless of the above factors, in all cases where an officer is of the opinion that a person is inadmissible on grounds involving security, violating human or international rights, serious criminality or organized criminality, it is important to have a formal record of that inadmissibility. This is best accomplished by preparing an A44(1) inadmissibility report.

CIC has been designated the authority to write reports for inadmissibilities. except in circumstances where an inadmissibility on grounds involving A34 (security), A35 (human or international rights violations) and A37 (organized criminality) has been identified. Where these inadmissibilities have been identified, the case is to be referred to the CBSA office, which will make a decision on pursuing the allegation. For further instructions on this process, see ENF 7, section 7.

In essence, it is important for the officer to seriously consider whether the information might be important for future dealings with the person and to weigh the longer-term consequences of not doing so. These impacts include, but are not limited to the following: the person's eligibility to claim refugee status at a later date; access to the Pre-Removal Risk Assessment (PRRA) stream; future primary inspection line (PIL) referrals; and the safety and security of officers dealing with this individual in subsequent investigations.

In rare instances, officers may choose not to prepare a report regarding a person who, in their opinion, is inadmissible on grounds involving security (A34), violation of human or international rights (A35), serious criminality (A36(1)) or organized criminality (A37). In these cases, officers should notify their supervisor in writing, and enter a Type 01 non-computer-based (NCB) "Watch For" into the Field Operational Support System (FOSS). This will ensure a long-term historical record of the decision and will generate future hits should the person concerned return to Canada at a later date. The NCB entry should include full details of the inadmissibility, a brief account of what happened, the officer's rationale for not writing the A44(1) report, and the officer's initials or name.

In addition, the officer must write, sign and send a letter to the person (and their counsel if applicable) indicating that although they may be inadmissible to Canada, a report is not being prepared at this time (except for POE cases). The letter must explain the inadmissibility ground(s) being considered by the officer, and the officer's rationale and reasons for not writing a report. The letter must **not** imply that a report will never be prepared for that specific allegation (e.g., A36, A37, etc.). It is important that the CBSA retains the option to pursue an allegation at a later time should new circumstances warrant it. The officer will include a copy of the signed letter in the person's file.

Where a decision is taken not to write a report for a "less serious inadmissibility," officers should still enter an NCB into FOSS with the inadmissibility details and an account of what transpired, as well as their initials or name. The following is an example of when the recording of such an inadmissibility might be useful:

Example: A foreign national or permanent resident already has a removal order, based on criminality, and is again convicted in Canada of another criminal offence. Although the officer may decide that a report is not necessary since an order has already been issued against the person, it would be useful to have a record of that inadmissibility in case that person is convicted again later, and the next officer dealing with the case wants to pursue a danger opinion.

8.4. Counselling persons who are allowed to leave Canada

Before writing an inadmissibility report under A44(1), officers should determine whether the objectives of the Act are better served by allowing the person to withdraw their application to enter Canada. In such circumstances, the same factors as outlined in section 8.1 above, "Considerations before writing an A44(1) report," are applicable.

If a person is allowed to leave Canada voluntarily, officers should counsel the person as follows:

- inform the person why they are believed to be inadmissible;
- inform the person that if they leave Canada voluntarily, they will be free to seek entry to Canada once the factor causing inadmissibility has been overcome;
- if the person appears to be eligible for a temporary resident permit, counsel them on this option, including cost recovery; and
- inform the person of the possible consequences of an A44(1) report, including the possibility of an admissibility hearing and/or a removal order being made against them.