



Immigration and  
Refugee Board of Canada

Commission de l'immigration  
et du statut de réfugié du Canada

# **Quality Performance in the Immigration Division 2019–2020**

## Results Report

Prepared by:

Elaine Doyle and the Corporate Planning and Accountability Directorate  
Immigration and Refugee Board of Canada

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For more information, contact:

Immigration and Refugee Board of Canada  
Minto Place, Canada Building  
344 Slater Street, 12th Floor  
Ottawa, ON Canada K1A 0K1  
[IRB.gc.ca/en/contact](https://irb.gc.ca/en/contact)

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## 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).

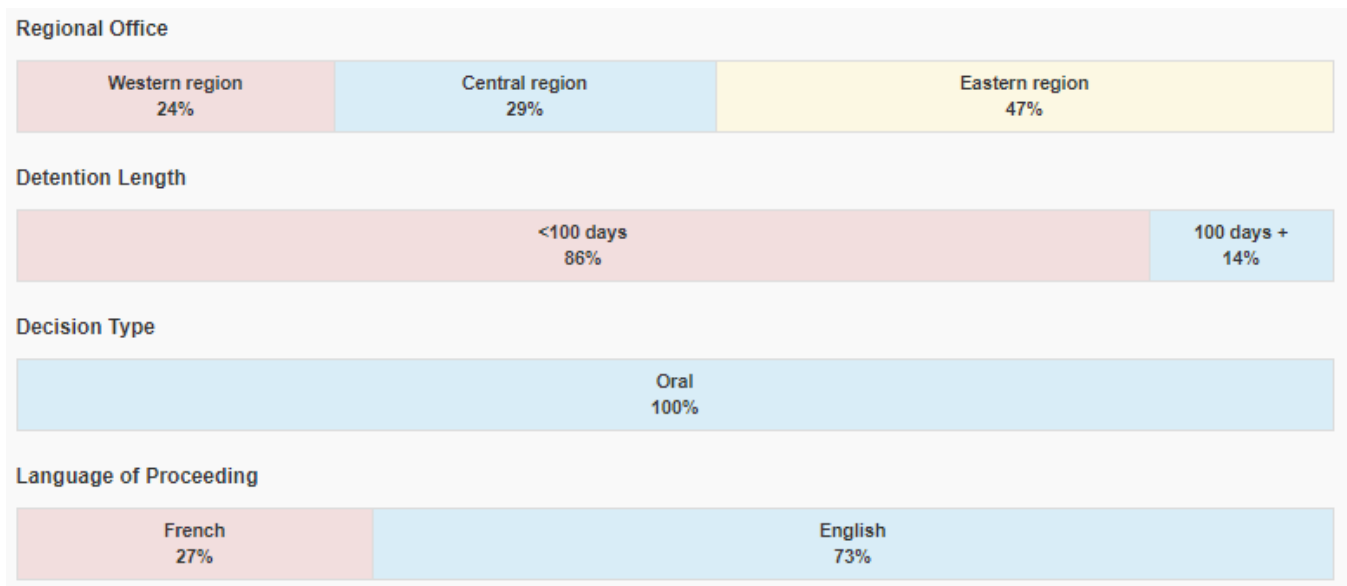
### Sample methodology

The study reviewed 75 hearings within 49 case files of detention reviews finalized between August 1, 2019 and October 31, 2019 (the assessment period), after an oral hearing. The case files were randomly selected in proportion to region, language of proceeding, and length of detention (more than 100 days or less than 100 days).

Admissibility hearings are excluded from this assessment. Only detention reviews were selected as they represent the majority of cases in the ID and provide a sample to assess improvements made based on the recommendations from the Report of the 2017-2018 External Audit (Detention Reviews), published in July 2018.

The following chart describes the demographics of the cases in the sample, which is proportionately representative of the population data :<sup>1</sup>

### Regional Office



Note:

1. A disproportionately larger sample was pulled from the Eastern Region in order to include a selection of cases with a detention length of 100+ days. Since the majority of hearings in the Eastern region are conducted in French, the proportion of French cases is also slightly higher in the sample than it is in the population.

The reviewer randomly selected hearings to assess from the case file in proportion to the number of hearings available. Where the case file included 1-3 hearings, the reviewer assessed 1 hearing; where the case file included 4-6 hearings, the reviewer assessed 2; where the case file included 7 hearings, the reviewer assessed 3; where the case file included 8-9 hearings the reviewer assessed 4; and where the case file included 10 or more hearings, the reviewer assessed 5 hearings.

To adequately satisfy Treasury Board Secretariat (TBS) guidance on Gender Based Analysis Plus (GBA+), 11 hearings involving persons of diverse sexual orientation, gender identity and expression (SOGIE) were included for assessment. They represent all SOGIE cases between January 2017 and October 2019 where SOGIE guidelines were considered and/or applied, as few were found within the assessment period. Two of the 11 hearings fell within the assessment period and will be included in the overall analysis and findings. The remaining 9 hearings fell outside the assessment period and will be included for SOGIE observations only.

## Assessment methodology

This qualitative assessment was performed by an independent reviewer who is a former member of the ID and a former legal advisor within the IRB, and was selected based on her knowledge of the *Immigration and Refugee Protection Act* (IRPA) and experience related to the IRB hearing process. The reviewer examined all evidentiary and administrative material on file, listened to the complete audio recordings<sup>2</sup> 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 32 indicators across 5 performance categories:

1. Fair and Respectful proceedings
2. Focused and robust proceedings
3. Reasons state conclusions on all determinative issues
4. Decisions provide findings and analysis necessary to justify conclusions
5. Reasons are transparent and intelligible

Sixteen of the indicators were mandatory for assessment, and sixteen were assessed only where applicable. Note that not all mandatory indicators were assessed in every hearing, if a joint recommendation was made to the member by the Minister and the party concerned or their counsel, some indicators were no longer applicable. Each performance indicator is assessed along either a 1-3 rating scale or a categorical yes-no scale.

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.

Note:

2. In two hearings, where audio recordings were unavailable, the reviewer used transcripts to assess hearing quality.

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.

A second checklist was developed to assess the quality of decision making in cases related to Sexual Orientation and Gender Identity and Expression (SOGIE) (See Annex B).

## **Considerations and limitations**

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 based on their significant experience with the IRB hearing process as both a former member of the Immigration Division and former legal advisor with the IRB. Moreover, to mitigate the inherent limitations of qualitative research, detailed performance indicators were provided to the assessor to help focus the assessment.

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 one hearing involved a designated representative and was assessed against this criterion. As a result, any observations or recommendations made are not representative of other hearings with a designated representative at the ID.

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 are necessarily subjective in nature and 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, the average score, and the percentage of assessed hearings that scored a 2.0 or higher. The average score is a finding that helps determine which indicators had strong or weak results and helps to inform observations and recommendations. The number of hearings assessed is provided for reference and context only.

There are two performance targets for this assessment:

- The first target is for each indicator to achieve a score of 2.0 or higher in 75% of all hearings assessed. This was achieved for 30 out of 32 indicators and is evident in the tables provided (see “% of hearings scoring at least 2.0” column in the table below). Where an indicator does not meet this target, it is addressed in the reviewer’s observations following the table (Strengths; Areas for Improvement; Recommendations).
- The second target is to achieve an overall aggregate score between 2.0 and 3.0. This study calculated an aggregate score of 2.7 out of 3.0 for the Division, meeting the target established by the IRB.

## 2.1 Fair and respectful proceedings

### Why measure this:

The groundwork for quality is set before the hearing when the Registry prepares a timely, organized and complete file and the member understands the facts and key issues of the case

What was measured:	# of hearings assessed	Avg. Score out of 3 (target 2.0)	% of hearings scoring at least 2.0
1. The member treats participants with sensitivity and respect.	75	3.0	100%
2. The member ensures parties have an opportunity to present and respond to evidence and to make representations.	74	2.7	99%
3. The member explains clearly the allegation(s) / criteria against the person concerned and the possible consequences.	73	2.5	99%
4. The member identifies when the evidence has not adequately addressed an important issue as identified by the member and asks questions of clarification.	45	2.8	100%
5. Communications in the absence of a party is disclosed and summarized on the record.	5	2	60%
6. Problems with interpretation are identified and addressed.	16	2.2	94%

### Considerations

Indicator #1 applied to all hearings. Although indicators #2 and #3 are meant to apply to all hearings, as explained in the section on assessment methodology, the reviewer deemed them to be non-applicable in some hearings. Indicators #4, #5 and #6 are applied on an as-applicable basis. The target was achieved for all indicators except #5. Indicator #5 was assessed in only 5 hearings in the Eastern and Central regions and was not applicable in any Western region hearings.

### Strengths

#### Indicator #1 - ‘The member treats participants with sensitivity and respect’:

In almost all hearings, Board members treated all participants with great respect and demonstrated a high degree of sensitivity to the individual involved. In one hearing in the Central Region, which was particularly difficult to manage, the member showed exceptional sensitivity and respect for all participants. In the Eastern Region, after the parties have made their submissions, all members systematically ask the person detained if he or she has anything to add, demonstrating a high degree of sensitivity and respect for the person whose liberty is under review.

**Indicators #2 - ‘The member ensures parties have an opportunity to present and respond to evidence and to make representations’; and #3 - ‘The member explains clearly the allegation(s) / criteria against the person concerned and the possible consequences’:**

In almost all hearings, members met the target for these indicators. For Indicator #2, this is a significant improvement over the findings of the Report of the 2017-2018 External Audit (Detention Reviews) (see Strengths for Indicators #7, 8 and 9).

**Indicator #4 - ‘The member identifies when the evidence has not adequately addressed an important issue as identified by the member and asks questions of clarification’:**

The target was met in 100% of hearings where this indicator was applicable.

**Indicator #6 - Problems with interpretation are identified and addressed:**

In general, problems of interpretation rarely arose. Members always ensured that the person detained and the interpreter understood each other and swore the interpreter in or reminded the interpreter of his or her general oath as an official interpreter at the IRB. In addition, when necessary, they intervened in the proceeding to allow the interpreter to translate.

## Areas for improvement

**Indicator #3 - ‘The member explains clearly the allegation(s) / criteria against the person concerned and the possible consequences’:**

Some members seem to have a standard explanation that they use regularly. Although acceptable, it was observed that members sometimes do not appropriately adapt the standard explanation to the circumstances of the case, (i.e., designated representative and/or counsel present, vulnerable person, sequence of examinations, etc.).

**Indicator # 5 – ‘Communications in the absence of a party is disclosed and summarized on the record’:** Despite the data showing that the target for this indicator is only met in 60% of hearings (3 out of 5 hearings), it should be noted that the exchanges did not necessarily take place in the absence of one of the parties. There was no explanation and/or summary in the recording and therefore no indication in this regard. However, these cases were noted because in all hearings where there is a change after a break (for example a change in the language of the proceeding), or where arrangements were made before the hearing (e.g., designated representative is present in the room), it would be important to summarize any communication with the parties for the purposes of the record in the event of a judicial review or appeal.

## Recommendation

**Indicator #3 - ‘The member clearly explains the allegation(s) / criteria against the person concerned and the possible consequences’:**

A professional training session or a communiqué addressed to all members could make them aware of the importance of adapting the explanations according to whether the person is vulnerable, whether a designated representative and/or counsel is present, or according to the sequence of detention reviews.

**Indicator # 5 – ‘Communications in the absence of a party is disclosed and summarized on the record’:**

A communiqué could remind all members of the importance of summarizing for the record, any discussions or changes that may have occurred during a break or an adjournment.



## 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	# of hearings assessed	Avg. Score out of 3 (target 2.0)	% of hearings scoring at least 2.0
7. The member ensures the parties focus testimony and documentation on the issues that the member has identified as the relevant issues	71	2.8	100%
8. The member's questioning is relevant in relation to the issues identified in the hearing agenda or issues identified in the course of the hearing	54	2.8	100%
9. The member's questioning is focused and organized	34	2.7	100%
10. The member manages challenging situations as they arise	10	2.3	90%
11. The member accommodates needs of vulnerable participants, including unaccompanied minors, to facilitate their presentation of evidence	5	2.2	80%
12. The Member deals with oral applications made by parties	6	2.7	100%
13. The Member identifies applicable legislation, regulations, rules or Guidelines	73	3.0	100%
14. The member ensures that a designated representative is appointed, when appropriate	5	1.8	60%
15. The member ensures that the designated representative is taking the necessary steps to assist the person concerned	1	3.0	100%
16. The member considers the evidence presented by the parties	75	2.7	99%
17. The member ensures that the Minister discloses all relevant evidence	66	2.4	94%
18. The member undertakes a fresh assessment of the issues at each hearing and gives due consideration to new circumstances	43	2.7	100%
19. The member ensures that Charter issues are considered	1	2.0	100%
20. The member considers the factors set out in section 248 of the Immigration and Refugee Protection Regulations before ordering continued detention	73	2.7	99%
21. The member hears evidence from potential bondspersons and other witnesses when assessing alternatives to detention	10	2.7	100%

### Considerations

Indicators #7, 16, 17, and 20 are meant to apply to all hearings, while the rest apply on an as-applicable basis. As explained in the section on assessment methodology, the reviewer deemed the assessment of some mandatory indicators to be non-applicable in some hearings. The target was achieved for all indicators, except for #14.

### Strengths

**Indicator #7 – ‘The member ensures the parties focus testimony and documentation on the issues that the member has identified as the relevant issues’; #8 – ‘The member's questioning is relevant in relation to the issues identified in the hearing agenda or issues identified in the course of the hearing’; and #9 – ‘The member's questioning is focused and organized’:** 100% of hearings assessed met the target for these indicators. In most cases, members are actively involved in ensuring that the evidence and submissions presented by the parties are relevant, and to

level the playing field (for example if the detained person is not represented by counsel). Omissions to swear in the detained person are rare. The person, especially if he or she is unrepresented, is directed to aspects where his or her testimony could be useful, or directly questioned by the member. It should also be noted that generally speaking, members do not hesitate to simplify their language, particularly with respect to alternatives to detention. There appears to be a clear improvement in this regard compared to the findings in the Report of the 2017-2018 External Audit (Detention Reviews).

**Indicator #10 – ‘The member manages challenging situations as they arise’:**

Problematic situations are not common and are generally well managed by members. Challenging situations are most often related to another indicator, therefore, if necessary, comments are provided later in the report under more specific indicators.

**Indicator #11 – ‘The member accommodates needs of vulnerable participants, including unaccompanied minors, to facilitate their presentation of evidence’:**

None of the hearings reviewed involved the detention of a minor. In 4 out of the 5 cases assessed on this indicator, the members managed the hearings very well by applying Guidelines #2 on detention, #8 concerning vulnerable persons, and #9 on SOGIE cases.

**Indicator #12 - The Member deals with oral applications made by parties:**

These applications are not very frequent, but Board members correctly applied the Rules of the ID in all applicable hearings.

**Indicator #13 - The Member identifies applicable legislation, regulations, rules or Guidelines’:**

While not necessarily always citing the applicable provisions, it is clear that members are familiar with and apply the IRPA, the *Immigration and Refugee Protection Regulations* (IRPR), the ID Rules, and the Detention Guideline, in all hearings.

**Indicator #18 – ‘The member undertakes a fresh assessment of the issues at each hearing and gives due consideration to new circumstances’:**

100% of hearings assessed met the target for this indicator. Based on my observation, where justified and in the absence of new evidence or new claims, the member considers the previous decisions of colleagues as per the Guideline on Detention. In none of the hearings assessed was it clear that the member should have departed from previous decisions.

**Indicator #20 - The member considers the factors set out in section 248 of the Immigration and Refugee Protection Regulations before ordering continued detention’:**

The applicable criteria of R248 are generally considered in all regions.

**Indicator #21 - The member hears evidence from potential bondspersons and other witnesses when assessing alternatives to detention:**

100% of hearings assessed met the target for this indicator, which is a significant improvement over the findings of the Report of the 2017-2018 External Audit (Detention Reviews).

## Areas for improvement

**Indicators #14 – ‘The member ensures that a designated representative is appointed, when appropriate’:**

Indicator 14 was assessed in 5 hearings, 1 in the Western Region, 1 in the Eastern Region and 3 in the Central Region. Only 1 in the Western Region was treated appropriately.

Although 2 of Central Region's assessed hearings met the target, the fact remains that none of the 3 hearings reflect an attempt by the member to assess the detained person's ability to understand the

nature of the proceedings. In the 3 Central Region cases, when arrangements have been made for a designated representative to be present at the outset of the hearing, the member simply appoints him or her, without mentioning on the record the reason for which a designated representative is present and without assessing the situation. As a result, sometimes the designation appears inappropriate because the detained person's behaviour indicates that they understand the procedure very well. In one particular hearing, the designated representative emphasized that the person detained understood all the proceedings that concerned him or her, and even though the member agreed, the designated representative remained present at all subsequent hearings until the detained person's removal was completed.

Furthermore, in these 3 Central Region cases, a certain incongruity was noted in that the members addressed their explanations of the purpose, consequences, and procedures to the persons detained and asked them whether they understood. Without denying that some persons requiring a designated representative may partially understand the situation, the fact remains that the member has not made any assessment of the persons capacity, and asking a person who supposedly does not understand the nature of the procedures whether he or she has understood the explanations seems somewhat incongruous. This is not a criticism of member approach, but an observation about the practice itself.

**Indicator #17 – ‘The member ensures that the Minister discloses all relevant evidence’:**

The target was met in 62 hearings out of the 66 assessed against this indicator, since at a minimum, in the majority of hearings, a copy of the documents was provided to the person detained or counsel before the hearing. Nevertheless, the following observations were made regarding the steps to disclosure:

Before supporting documents can be used in a hearing, the member must ensure that the following steps to proper disclosure have been met:

1. the other party has a copy of the documents – as per Rule 26 of the Immigration Division Rules - this was the case in most assessed hearings;
2. the other party has had reasonable notice of the evidence or information that will be relied upon at the detention review – as per 7.3.3 of the Guideline on Detention (such as having had the time to read them) - this was not often the case; and
3. the documents are translated for the person detained – as per the Canadian Charter of Rights s.14 - this was rarely the case

**Proper disclosure:** 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. This is not a criticism of actions by the member, but an observation of a legal timeline requirement that hinders strict adherence to the steps to proper disclosure.

When counsel was present for the person detained, and they did not raise an objection to the omission of steps 2 and 3, the hearing was nonetheless scored a “2”, as meeting expectations, since the member can assume a lack of objection means counsel is satisfied with the disclosure.

**Detained persons who are unrepresented:**

Step 1 to proper disclosure was followed in most of the assessed cases. However, ensuring that steps 2 and 3 are followed is particularly important for detained persons who are unrepresented.

With regards to step 2, it was noted that, before introducing documentary evidence into the record as exhibit, members do not often verify with the unrepresented persons if they have had time to read the Minister's disclosures, which generally consists of CBSA interview accounts and, where applicable, contents of their criminal record. This omission does not seriously impact the conduct and the outcome of the hearing because the member generally explains that the Minister will present the contents of this evidence in his or her submissions and the evidence is rarely contested by the person concerned, which explains why these hearings scored a "2". Nonetheless, it is questionable whether this approach constitutes an obstacle to the detained persons' participation in the detention review.

As for step 3, in 4 hearings where the person detained was unrepresented, the documentary evidence was either not translated for the person detained in their language, or there was no indication on the record that it was translated. The failure to have the documentary evidence translated constituted a barrier to the detainees' participation in the detention review since they cannot prepare adequately and they can only react to the submissions of the Minister's counsel in the hearing room as it is being presented.

**Indicator #20 – 'The member considers the factors set out in section 248 of the Immigration and Refugee Protection Regulations before ordering continued detention':**

Although, the applicable criteria of R248 are generally considered in all regions, there is regional variance among the approaches. The following observation was made related to consistency of approaches across regions: In the Central Region, a number of Minister's counsel argue that the fact that the person detained destroyed his or her travel document upon arrival or failed to report previously and, as a result, the travel document has now expired, should be considered a lack of diligence on the part of the person detained. Several members in the Central Region accept this argument, which is reflected in their assessment of R248(d). This approach does not seem to be in line with the approach of the other two regions. Consideration should be given to achieving greater consistency of approach across regions.

**Recommendation****Indicators #14 – 'The member ensures that a designated representative is appointed, when appropriate' and #15 – 'The member ensures that the designated representative is taking the necessary steps to assist the person concerned':**

With respect to the appointment of designated representatives, the procedure leading to the presence of a designated representative in the hearing room may require a review, and training at the regional level on the responsibilities of members in the appointment of designated representatives may be appropriate.

**Indicator #17 – 'The member ensures that the Minister discloses all relevant evidence':**

Although the ID scored well on this indicator (despite the limitations of the legislated timelines for disclosure of information), the impact of improper disclosure could be significant for the person detained. To reduce the likelihood of this occurring it is recommended that the ID develop a communiqué to members to ensure that:

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.

**Indicator #20 – ‘The member considers the factors set out in section 248 of the Immigration and Refugee Protection Regulations before ordering continued detention’:**

Given the regional differences observed, it is recommended that the ID ask legal services to highlight relevant Federal Court jurisprudence for member training and attention on the subject of the interpretation of paragraph 248 (d) of the Regulation (whether facts prior to detention can be taken into account by the decision maker in determining whether there have been unexplained delays or an unexplained lack of due diligence on the part of the parties), to improve consistency of application and approach across the regions.

## 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 #22 to #23, this study applies the Court’s requirement in the context of IRB decision-making.

What was measured	# of hearings assessed	Avg. Score out of 3 (target 2.0)	% of hearings scoring at least 2.0
22. Conclusions are based on the issues and evidence adduced during the proceedings.	75	2.7	100%
23. All allegations or criteria are dealt with in the reasons.	75	2.8	100%

### Considerations

Indicators #22 and #23 are applied to all cases. The target was achieved for both indicators.

### Strengths

**Indicators # 22 – ‘Conclusions are based on the issues and evidence adduced during the proceedings’ and 23 – ‘All allegations or criteria are dealt with in the reasons’:**

100% of hearings assessed met the target for these two indicators, which is exceptional given that decisions are always rendered orally at the end of the hearing. Some evidence may occasionally be ignored or some conclusions may, among other things, be based on more or less relevant and important elements, but the conclusions always take into account the evidence, and are always based on the issues to be decided. Relevant allegations and criteria are always addressed in the reasons.

## Areas for improvement

None identified

## Recommendation

None identified

## 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 #24 to #28, this study applies the Court's requirement in the context of IRB decision-making.

What was measured	# of hearings assessed	Avg. Score out of 3 (target 2.0)	% of hearings scoring at least 2.0
24. The member makes clear, unambiguous findings of fact.	74	2.6	97%
25. The member supports findings of fact with clear examples of evidence shown to be probative of these findings.	74	2.5	97%
26. The member bases findings on evidence established as credible and trustworthy.	74	2.6	97%
27. The member addresses parties' evidence that runs contrary to the member's decision and why certain evidence was preferred.	47	2.5	92%
28. The member identifies legislation, rules, regulations, Jurisprudential Guides, Chairperson's Guidelines or persuasive decisions where appropriate.	72	3.0	99%

## Considerations

Indicators # 24 to 26 are meant to apply to all hearings, while #27 and #28 assessed on an as applicable basis. As explained in the section on assessment methodology, the reviewer deemed the assessment of some mandatory indicators to be non-applicable in some hearings. The target was achieved for all indicators.

## Strengths

**Indicators #24 – ‘The member makes clear, unambiguous findings of fact.’; #25 – ‘The member supports findings of fact with clear examples of evidence shown to be probative of these findings’; and #26 – ‘The member bases findings on evidence established as credible and trustworthy’:**

It is important to note the exceptional quality of decisions in general given that all decisions in the sample are rendered orally at the end of the hearing, often without even a short break. The vast majority of decisions met the targets for all 3 indicators.

**Indicator #28 – ‘The member identifies legislation, rules, regulations, Jurisprudential Guides, Chairperson’s Guidelines or persuasive decisions where appropriate’:**

Members consistently apply the relevant legislation and Guidelines in their decisions.

## Areas for improvement

**Indicators #24 – ‘The member makes clear, unambiguous findings of fact.’; #25 – ‘The member supports findings of fact with clear examples of evidence shown to be probative of these findings’; and #26 – ‘The member bases findings on evidence established as credible and trustworthy’:**

Only 2 decisions from the same case (one 48-hour review and one 30-day review) did not meet the target. The first review because some important factual conclusions were ambiguous and others unjustified in that they were based on speculation. In short, the analysis and assessment of the evidence lacked precision and rigour. In the first 30-day review, the member, in addition to relying heavily on previous decisions without specific details, also considered documentary evidence without having dealt with the challenge to that evidence.

**Indicator #27 – ‘The member addresses parties’ evidence that runs contrary to the member’s decision and why certain evidence was preferred’:**

It is obviously more difficult to set out the analysis and assessment of a disputed piece of evidence, especially when the decision is rendered immediately or after a short break. In 4 hearings, evidence to the contrary was not dealt with. However, in these 4 hearings, the other evidence presented during the hearing justified the decision taken. No specific recommendations are made to improve the handling of evidence contrary to the decision. It is my view that members generally set out their rationale for preferring one piece of evidence over another. The shortcomings in a few hearings are likely due to the fact that decisions are rendered orally at the end of the hearing and, as mentioned earlier, decisions are nonetheless justified by other evidence.

## Recommendation

None identified.

## 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 #29 to #32, this study applies the Court’s requirement in the context of IRB decision-making.

What was measured	# of hearings assessed	Avg. Score out of 3 (target 2.0)	% of hearings scoring at least 2.0
29. The member uses plain language.	75	2.9	100%
30. The member gives appropriately clear and concise reasons.	75	2.7	100%
31. Reasons are easily understood and logically sequenced.	75	2.7	100%
32. Reasons are provided within the statutory time-limits, in accordance with the Chairperson’s Guideline on Detention	75	3.0	100%

## Considerations

Indicators #29 to #32 are applicable to all hearings. The target was achieved for all indicators.

## Strengths

### Indicators #29, #30, #31, and #32:

100% of hearings assessed met the target for these indicators. Given that decisions are rendered orally at the end of the hearing or after a short break, the quality is generally exceptional.

## Areas for improvement

It can be noted that sometimes clarity, conciseness, and structure could be improved.

## Recommendation

None identified.

## 2.6 Consideration for Sexual Orientation and Gender Identity and Expression

Performance Indicator	% of hearings that are compliant
1 <b>Accommodation:</b> Did the decision-maker consider any accommodations under the <a href="#">Chairperson's Guideline 8: Procedures with Respect to Vulnerable Persons</a> , if appropriate, whether requested by a party or on the decision-maker's own initiative?	n/a
2 <b>Separation of files:</b> If an individual asserted an independent claim or appeal based on sexual orientation or gender identity or expression, did the decision-maker consider separation of joined claims or appeals, if appropriate?	n/a
3 <b>Name choice:</b> Did the member address and refer to the individual by their chosen name, terminology, and pronouns?	100%
4 <b>Tone and demeanour:</b> If there were any issues about a participant's conduct in a proceeding, including tone and demeanour, or any misunderstandings about the use of appropriate language, did the decision-maker address those issues as soon as they arose?	n/a
5 <b>Protection of sensitive information:</b> Whenever possible, did the decision-maker avoid the use of personal identifiers or sensitive information that is not necessary to explain the reasoning in the decision?	100%
6 <b>Stereotypes:</b> Did the decision-maker rely on stereotypes or inappropriate assumptions?	100%
7 <b>Questioning an individual:</b> Was questioning done in a sensitive, non-confrontational manner?	100%
8 <b>Inconsistencies, vagueness / material omissions:</b> If there were inconsistencies or omissions in the individual's evidence, did the decision-maker examine whether there were cultural, psychological or other barriers that may reasonably explain them?	100%
9 <b>Intersectionality:</b> Did the decision-maker consider intersectional factors such as race, ethnicity, religion, faith or belief system, age, disability, health status, social class and education when determining whether an individual has established a well-founded fear of persecution?	n/a



10	<b>Trans and intersex individuals:</b> Did the decision-maker exercise caution before drawing negative inferences from discrepancies in gender identification documents?	100%
11	<b>Minors:</b> If the case involves a minor with diverse SOGIE did the decision-maker consider the application of <a href="#">Chairperson's Guideline 3: Child Refugee Claimants—Procedural and Evidentiary Issues</a> , if appropriate?	n/a
12	<b>Laws of general application:</b> Did the decision-maker consider laws of general application that are used to target individuals with diverse SOGIE?	n/a
13	<b>Country documentation:</b> If in the country of reference there is a lack of documentation reporting on the treatment of individuals with diverse SOGIE, did the decision-maker consider the circumstances in the country that may inform the absence of such documentation?	n/a

## Considerations

Although 6 SOGIE related case files were available for assessment, in 4 case files the SOGIE guidelines were considered but not necessarily applied. Therefore, these indicators were assessed in only 4 hearings, 3 of which were from the same case file. As such, observations made on the implementation of the SOGIE Guidelines are not based on statistically significant findings.

## Strengths

### Indicator # 3

One case file involved a transgender person who was initially identified as male and who, at the third hearing, provided another name and requested to be identified as female. At all subsequent hearings, the members adjusted very easily by addressing the detained person by their chosen name and using the proper terminology and pronouns.

### Indicator # 6

At no time, was there any indication that the members relied on stereotypes or inappropriate assumptions.

### Indicator # 7

Questioning by members was appropriate at all times. All members demonstrated great respect.

### Indicator # 8

In one case, the detained person attempted to justify some of the facts supporting criminal convictions for assault. The member considered the health status of the person detained, made no moral judgement, and acknowledged that mental health and drug abuse were significant factors in the person's behaviour.

### Indicator # 10

No negative inferences related to gender identification were drawn by the members.

## Areas for improvement

No areas for improvement related to the SOGIE checklist are identified. While the intent of the review of SOGIE cases is to assess the application of Guideline 9, some areas for improvement and accompanying recommendations were found regarding interactions observed throughout hearings that fall outside of the SOGIE checklist.

Some difficulties were observed in managing hearings by teleconference or videoconference:

- In one hearing the member omitted all the steps that ensure accurate interpretation of the hearing by teleconference.
- In one hearing, the member did not realize that the person detained needed a designated representative. The person answered "yes" to the question as to whether he understood the explanations, but for all intents and purposes, he did not participate. The member acknowledged in his decision that he was not sure that the person understood and the record shows that a designated representative was appointed at the subsequent hearing held in person. The hearing that was assessed was held by videoconference, which seems to make it more difficult to detect interactions.

## **Recommendation**

Teleconferencing and videoconferencing remain valuable tools in some cases. However, hearings by teleconference or videoconference may make it more difficult to detect interactions, particularly when trying to determine if the person detained is a vulnerable person, or in need of a designated representative. A communiqué could make members aware of the fact that they should be especially vigilant in their dealings with the person detained when conducting hearings by video or teleconference in order to detect vulnerable persons status, or a possible incapacity to understand the nature of the proceedings.

## Annex A– Checklist

Fair and respectful proceedings		
1	All hearings	The member treats participants with sensitivity and respect.
2	All hearings	The member ensures parties have an opportunity to present and respond to evidence and to make representations.
3	All hearings	The member explains clearly the allegation(s) / criteria against the person concerned and the possible consequences.
4	If applicable	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	Communications in the absence of a party is disclosed and summarized on the record.
6	If applicable	Problems with interpretation are identified and addressed.
Focused and robust proceedings		
7	All hearings	The member ensures the parties focus testimony and documentation on the issues that the member has identified as the relevant issues.
8	If applicable	The member's questioning is relevant in relation to the issues identified in the hearing agenda or issues identified in the course of the hearing.
9	If applicable	The member's questioning is focused and organized.
10	If applicable	The member manages challenging situations as they arise.
11	If applicable	The member accommodates needs of vulnerable participants, including unaccompanied minors, to facilitate their presentation of evidence.
12	If applicable	The Member deals with oral applications made by parties.
13	If applicable	The Member identifies applicable legislation, regulations, rules or Guidelines.
14	If applicable	The member ensures that a designated representative is appointed, when appropriate.
15	If applicable	The member ensures that the designated representative is taking the necessary steps to assist the person concerned.
16	All hearings	The member considers the evidence presented by the parties.
17	All hearings	The member ensures that the Minister discloses all relevant evidence.
18	If applicable	The member undertakes a fresh assessment of the issues at each hearing and gives due consideration to new circumstances.
19	If applicable	The member ensures that Charter issues are considered.
20	All hearings	The member considers the factors set out in section 248 of the Immigration and Refugee Protection Regulations before ordering continued detention.
21	If applicable	The member hears evidence from potential bondspersons and other witnesses when assessing alternatives to detention.

Reasons state conclusions on all determinative issues		
22	All hearings	Conclusions are based on the issues and evidence adduced during the proceedings.
23	All hearings	All allegations or criteria are dealt with in the reasons.
Decisions provide findings and analysis necessary to justify conclusions		
24	All hearings	The member makes clear, unambiguous findings of fact.
25	All hearings	The member supports findings of fact with clear examples of evidence shown to be probative of these findings.
26	All hearings	The member bases findings on evidence established as credible and trustworthy.
27	If applicable	The member addresses parties' evidence that runs contrary to the member's decision and why certain evidence was preferred.
28	If applicable	The member identifies legislation, rules, regulations, Jurisprudential Guides, Chairperson's Guidelines or persuasive decisions where appropriate.
Reasons are transparent and intelligible		
29	All hearings	The member uses plain language.
30	All hearings	The member gives appropriately clear and concise reasons.
31	All hearings	Reasons are easily understood and logically sequenced.
32	All hearings	Reasons are provided within the statutory time-limits, in accordance with the Chairperson's Guideline on Detention

## Annexe B- SOGIE quality review checklist:

### Performance indicator and rating guide

	Performance indicator <u>SOGIE</u>	For further background see Section of Guideline being referred to	Rating guide	
			Reviewer's Rating (Enter Y, N, or N/A)	Reviewer's Observations (free text)
1	<b>Accommodation:</b> Did the decision-maker consider any accommodations under the <a href="#">Chairperson's Guideline 8: Procedures with Respect to Vulnerable Persons</a> , if appropriate, whether requested by a party or on the decision-maker's own initiative?	3.7		
2	<b>Separation of files:</b> If an individual asserted an independent claim or appeal based on sexual orientation or gender identity or expression, did the decision-maker consider separation of joined claims or appeals, if appropriate?	3.9		
3	<b>Name choice:</b> Did the member address and refer to the individual by their chosen name, terminology, and pronouns?	4.1		
4	<b>Tone and demeanour:</b> If there were any issues about a participant's conduct in a proceeding, including tone and demeanour, or any misunderstandings about the use of appropriate language, did the decision-maker address those issues as soon as they arose?	4.1		
5	<b>Protection of sensitive information:</b> Whenever possible, did the decision-maker avoid the use of personal identifiers or sensitive information that is not necessary to explain the reasoning in the decision?	5.3		
6	<b>Stereotypes:</b> Did the decision-maker rely on stereotypes or inappropriate assumptions?	6.1		
7	<b>Questioning an individual:</b> Was questioning done in a sensitive, non-confrontational manner?	7.3.1		
8	<b>Inconsistencies, vagueness / material omissions:</b> If there were inconsistencies or omissions in the individual's evidence, did the decision-maker examine whether there were cultural, psychological or other barriers that may reasonably explain them?	7.4, 7.7		
9	<b>Intersectionality:</b> Did the decision-maker consider intersectional factors such as race, ethnicity, religion, faith or belief system, age, disability, health status, social class and education when determining whether an individual has established a well-founded fear of persecution?	8.5.2.3		
10	<b>Trans and intersex individuals:</b> Did the decision-maker exercise caution before drawing negative inferences from discrepancies in gender identification documents?	8.5.4.4		
11	<b>Minors:</b> If the case involves a minor with diverse SOGIE did the decision-maker consider the application of <a href="#">Chairperson's Guideline 3: Child Refugee Claimants—Procedural and Evidentiary Issues</a> , if appropriate?	8.5.5.2		
12	<b>Laws of general application:</b> Did the decision-maker consider laws of general application that are used to target individuals with diverse SOGIE?	8.5.6.3		
13	<b>Country documentation:</b> If in the country of reference there is a lack of documentation reporting on the treatment of individuals with diverse SOGIE, did the decision-maker consider the circumstances in the country that may inform the absence of such documentation?	8.5.10.2		
	Other observations			

#### Footnotes:

[SOGIE](https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx), <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx>

[Chairperson's Guideline 8: Procedures with Respect to Vulnerable Persons](https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx), <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx>