



Guideline 6

Scheduling and Changing the Date or Time of a Proceeding

**GUIDELINES ISSUED BY THE CHAIRPERSON, PURSUANT TO
PARAGRAPH 159(1)(h) OF THE *IMMIGRATION AND REFUGEE PROTECTION ACT***

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1. Introduction

- 1.1 The Immigration and Refugee Board of Canada (IRB) is an administrative tribunal and operates less formally and more expeditiously than a traditional court of law. Accordingly, the *Immigration and Refugee Protection Act* (IRPA) requires that each division of the IRB deals with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.¹
- 1.2 This Guideline is an expansion to all three divisions of the Chairperson's Guideline 6 that was issued for the Refugee Protection Division (RPD) on December 1, 2003. For the Immigration Appeal Division (IAD), it reflects much of the content in the Commentaries to rule 22 of the *Immigration Appeal Division Rules* (Fixing a Date for a Proceeding) and rule 48 (Changing the Date or Time of a Proceeding). For the Immigration Division (ID), it reflects rule 21 of the *Immigration Division Rules* (Fixing a Date) and rule 43 (Changing the Date or Time of a Hearing). As for the RPD, it continues to reflect rules 21 and 48 of the *Refugee Protection Division Rules* and the Commentaries to rule 48 (Changing the Date or Time of a Proceeding – Postponements and Adjournments).

2. Purpose

- 2.1 The purpose of this Guideline is to explain the process the IRB follows before and during a hearing to ensure fair and efficient scheduling of its proceedings. This Guideline also sets out what the IRB expects of participants and what participants can expect from the IRB. While Chairperson's Guidelines are not mandatory, members are expected to apply them or provide a reasoned justification for not doing so.
- 2.2 This Guideline applies to all cases heard by the three divisions of the IRB – the RPD, the IAD and the ID – but is intended to be sufficiently flexible to take into account the various circumstances that arise in the three divisions. It is to be read within the context of the rules for each division. In this document, “counsel” refers both to counsel for the subject of a proceeding before the tribunal and Minister's counsel.
- 2.3 The IRB will be sensitive to the situation of unrepresented parties who are unfamiliar with its rules and processes. Persons identified as vulnerable under Guideline 8, *Guideline on Procedures with Respect to Vulnerable Persons Appearing before the IRB*, will see their special needs procedurally accommodated.
- 2.4 To fulfil its responsibility, the IRB must schedule its proceedings so that refugee protection claims, immigration appeals, admissibility hearings, detention reviews and other proceedings are finalized as quickly as possible and, where applicable, within their legislative timeframes.

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- 2.5 The IRB has the lawful authority to control its process and to set its own procedures, as long as the principles of natural justice and fairness are followed.² Detention reviews are a special situation, where compliance with statutory timeframes is the guiding principle.³
- 2.6 The IRB recognizes that parties have the right to be represented by counsel⁴ but this right is not absolute. It includes a reasonable time period to retain counsel and to not unduly delay the hearing process. However, the opportunity to retain counsel is not unlimited. The parties and any counsel they choose to retain must be ready and able to appear and proceed according to the scheduling requirements of the Division.⁵
- 2.7 The IRB also recognizes that the parties, their counsel and witnesses have the right to participate in the official language of their choice and have the right to simultaneous interpretation of either official language if it is requested by a party.⁶
- 2.8 The IRB also recognizes that any member of the public, including counsel, have the right to request to communicate with the IRB on scheduling matters in the official language of their choice. Therefore, a counsel may request that IRB personnel communicate with him or her on scheduling matters in either official language⁷ even if it is not the official language chosen by the person who is the subject of the proceeding.

3. Scheduling

- 3.1 The IRB consults counsel as to their availability before scheduling a proceeding in the course of assessing whether parties are ready to proceed to a hearing.
- 3.2 The IRB schedules proceedings based on operational and legislative⁸ requirements and principles of natural justice and fairness. All scheduling situations require a division to balance the goal of minimizing postponements and the mandate to schedule and conduct cases efficiently.
- 3.3 The IRB routinely provides priority processing to:
- unaccompanied minors;
 - persons who are being detained under the *Immigration and Refugee Protection Act*;
 - persons who are likely to be a danger to public health or to public safety, or would cause excessive demands on health or social services;
 - persons who are serving a sentence for a criminal offence;
 - persons whom the Division has identified as requiring priority processing;

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- persons who have had a proceeding adjourned or postponed and for which a resumption date is required; and
 - persons who have been identified as vulnerable for the purpose of procedural accommodations in accordance with the *Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB*.

Parties are reminded of the general application rule for each division, which allows them to bring a matter to the Division's attention that may require priority scheduling.⁹

- 3.4 A notice to appear sent by a division will advise parties that they are responsible for making sure that counsel is available and ready to proceed on the proceeding date that has been scheduled if they want to be represented at that proceeding. Parties must follow the Division's rules on providing documents to the Division and ensure that witnesses are available for the scheduled proceeding.
- 3.5 Counsel are required to submit their available dates for scheduling purposes to the IRB in accordance with the IRB's directions. Counsel who have submitted available dates and are no longer available on those dates must inform the IRB as soon as possible. The IRB will also contact counsel for available dates in the course of assessing whether parties are ready to proceed to a hearing, and attempts will be made to accommodate counsel's calendar. However, the IRB is not bound by counsel's availability, and these attempts cannot interfere with the IRB's ability to schedule its proceedings efficiently and fairly as it is the Division - and not the parties - that decides when cases will be scheduled.
- 3.6 If counsel is retained in so many proceedings before the IRB that the IRB cannot schedule cases efficiently taking counsel's availability into account, the IRB may schedule proceedings on dates when counsel is not available. In such a case, parties will be notified of the conflict in their counsel's schedule. This provides the parties with an opportunity to deal with their counsel or to retain new counsel so that the proceeding can take place on the date and time that it is scheduled to proceed.
- 3.7 The IRB may also require a party to participate in a scheduling conference to help the Division fix a date for a proceeding.¹⁰ If counsel is retained after a date has already been set for a proceeding, the party is responsible for making sure that counsel is available and ready to proceed on the scheduled date. The fact that counsel cannot attend is not sufficient reason, in itself, for the Division to change the date or time of a proceeding. Parties who decide to hire new counsel must therefore ensure that their counsel is available on the scheduled date or parties will be required to explain why they were not able to retain or have counsel who is ready for the proceeding.

4. Changing the Date or Time of a Proceeding

4.1. General Principles

- 4.1.1 The IRB allows applications to change the date or time of a proceeding only in exceptional circumstances and where such a change is justified. When considering an application, the member considers all of the factors set out in the applicable rule of the Division, including whether the party making the application has demonstrated good faith and whether the party has made reasonable efforts to proceed as scheduled.¹¹ The member also takes into consideration the response to the application provided by the other party, if applicable.
- 4.1.2 All applications to change the date or time of a proceeding are determined on the basis of the evidence and arguments that are presented in support of the change. All scheduling situations require a division to minimize the number of postponements and to schedule and conduct cases quickly with procedural fairness.
- 4.1.3 The IRB must take into account its obligation to deal with proceedings as quickly as possible. The sole reason that it may be the first time that the party has asked for a change is not in itself a sufficient reason to allow the application. The IRB considers if the parties have been given notice of the date and time of the proceeding and if the parties have had a reasonable amount of time in order to be available and to prepare for the proceeding.

4.2. Counsel and Unrepresented Parties

- 4.2.1 The IRB must provide the parties with reasonable notice of the date and time of a proceeding in every case; the length of notice will vary depending on the type of proceeding. The IRB therefore expects that counsel will be available and prepared to present the party's case at the time and date set by the IRB. Where, for any reason, counsel is unable to appear at a proceeding, counsel is expected to make the necessary arrangements to be replaced by another counsel who is prepared to proceed with the case at the scheduled date and time. If counsel does not appear, the IRB may decide to proceed without counsel or, if applicable, to start abandonment proceedings or to conclude that a case has been abandoned.
- 4.2.2 The IRB must inform unrepresented parties of its process sufficiently in advance of the proceeding to help ensure that they will be ready to proceed on the date scheduled. This includes informing them of the right to be represented by counsel. The IRB expects unrepresented parties to be prepared to present their cases on the date scheduled for the proceeding.

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- 4.2.3 When parties are given reasonable notice of the date and time of a proceeding, there is normally no basis for allowing an application to change the date or time of the proceeding if parties have not arranged to have counsel, or if counsel is not prepared to proceed with the case on the date set by the IRB.¹²
- 4.2.4 Counsel's workload or failure to manage their schedule appropriately is not a valid reason for allowing an application to change the date or time of a proceeding where reasonable notice was given of the date and time of the proceeding.¹³ The IRB recognizes that there can be unforeseen conflicts that arise in counsel's schedule, such as where the Federal Court sets a date for a proceeding and counsel is also expected to appear before the IRB on that same date. In such a case, it is expected that counsel will advise the IRB as soon as possible about this conflict. Failure to advise the IRB as soon as possible may mean that an application to change the date or time of a proceeding will be denied.
- 4.2.5 The fact that counsel wants to take time off, fulfil other professional duties or attend to personal matters that are neither urgent nor unforeseen are not sufficient reasons to allow an application to change the date or time of a proceeding.

4.3. Specific Cases

- 4.3.1 The fact that all parties to a proceeding agree to an application to change the date or time of a proceeding does not, in itself, mean that the IRB will allow the application. A party must not expect an application to be allowed simply because the other party also agrees with the application.
- 4.3.2 The argument that parties have not had enough time to prepare or have not been able to prepare adequately will need to be fully substantiated before an application to change the date or time of a proceeding may be allowed. Parties will need to explain to the member the efforts they have made to prepare and be ready for that proceeding and why the delay could not have been foreseen earlier.
- 4.3.3 The fact that a party is waiting for an application for legal aid to be approved is not normally a sufficient reason to allow an application to change the date or time of a proceeding if the IRB gave reasonable notice of the time and date of the proceeding.¹⁴ However, members may consider delays in the processing of legal aid applications that may have been beyond the control of the party.
- 4.3.4 The fact that immigration or other proceedings involving the party are in progress is not a sufficient reason to allow an application to change the date or time of a proceeding if the IRB gave the party and their counsel reasonable notice of the date and time of the proceeding.¹⁵
- 4.3.5 If a party asks for a change of time or date of a proceeding because of illness, the party must provide a detailed medical certificate whenever possible; otherwise the IRB may, where it deems appropriate, start abandonment proceedings.¹⁶

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- 4.3.6 In accordance with the *Instructions Governing the Management of Refugee Protection Claims Awaiting Front-end Security Screening*, and acting on its own initiative, the RPD may administratively postpone certain proceedings, when confirmation from the Canada Border Services Agency on front-end security screening of a claimant has not been received.

4.4. Procedure

- 4.4.1 A party who makes an application to change the date or time of a proceeding must do so according to the rules of the Division.¹⁷ When the application is denied prior to the proceeding or the IRB was not able to communicate its decision to the party before the proceeding, the party and their counsel, if represented, must still appear at the IRB and be prepared to proceed; otherwise, if applicable, the IRB may start abandonment proceedings.¹⁸
- 4.4.2 In cases where a written application is denied before the proceeding, and the party and their counsel, if represented, subsequently reapply to change the date or time of the proceeding orally at the proceeding, the IRB will have careful regard for the decision and reasons for the denial of the earlier written application and will only allow the new oral application in exceptional circumstances and where such a change is justified (for example, based on new evidence).
- 4.4.3 If the IRB believes that a party is trying, without valid reason, to delay the proceeding, the IRB may take the following measures:
- continue with the proceeding as scheduled;
 - set a peremptory proceeding date¹⁹ or;
 - where applicable, the Division may start abandonment proceedings in all cases where the parties do not appear for a proceeding or otherwise fail to proceed with the case.²⁰

5. References

- *Immigration and Refugee Protection Act*
- *Refugee Protection Division Rules*, rules 21 and 48 and Commentaries
- *Immigration Appeal Division Rules*, rules 22 and 48 and Commentaries
- *Immigration Division Rules*, rules 21 and 43
- Immigration and Refugee Board of Canada. *Instructions Governing the Management of Refugee Protection Claims Awaiting Front-end Security Screening*. February 2006.
- Immigration and Refugee Board of Canada. *Guideline 7 – Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*. October 2003.

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- Immigration and Refugee Board of Canada. Guideline 8 – *Guideline on Procedures with Respect to Vulnerable Persons Appearing before the IRB*. December 2006.

6. Enquiries

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¹ IRPA, subsection 162(2).

² *Gorodiskiy, Volodimir v. Minister of Citizenship and Immigration*, (F.C.T.D., no. IMM-3066-97), MacKay, July 7, 1998; See also *Siloch, Hancy v. Minister of Employment and Immigration*, (F.C.A., no. A-88-92), Stone, Desjardins, Décary, January 11, 1993; 151 N.R. 76 at 78; *Prasad v. Minister of Employment and Immigration*, [1989] 1 S.C.R. 560 at 569.

³ IRPA, section 57.

⁴ IRPA, section 167.

⁵ *Pierre v. Minister of Manpower and Immigration*, [1978] 2 F.C. 849 (F.C.A.); *Aseervatham, Vimalathas v. Minister of Citizenship and Immigration*, (F.C.T.D., no. IMM-1091-99), Dubé, June 1, 2000; *Kandasamy, Ratnanathan v. Minister of Citizenship and Immigration*, (F.C.T.D., no. IMM-4825-99), Hansen, September 13, 2000.

⁶ *Official Languages Act*, Part III – Administration of Justice, section 14 and subsections 15(1) and (2).

⁷ *Ibid.*, Part IV – Communications With and Services to the Public, section 21.

⁸ Section 83.(1) of the *Immigration and Refugee Protection Act*, Review of reasons for detention before the Immigration Division

⁹ Rule 43 of the *Refugee Protection Division Rules*, rule 42 of the *Immigration Appeal Division Rules* and rule 37 of the *Immigration Division Rules*.

¹⁰ Rule 21 of the *Refugee Protection Division Rules*; rule 22 of the *Immigration Appeal Division Rules*; and rule 21 of the *Immigration Division Rules*.

¹¹ *Calles, Ivan Michael v. Minister of Employment and Immigration*, (F.C.A., no. A-386-89), Pratte, Hugessen, Stone, October 4, 1990. In the context of the *Immigration Division Rules*, s.43(2), the ID is acting without jurisdiction or acting beyond jurisdiction if it adjourns in order to circumvent the will of Parliament. *M.C.I. v. Fox, Timothy Roshaun*, (F.C., no. IMM-1930-09), de Montigny, October 5, 2009; 2009 FC 987.

¹² *Aseervatham, supra*, note 6.

¹³ *Ibid.*

¹⁴ *Awogbade, Emeline Karibi v. Minister of Citizenship and Immigration*, (F.C.T.D., no. IMM-165-95), Muldoon, April 10, 1995.

¹⁵ *Minister of Employment and Immigration v. Lundgren, John Frederick*, (F.C.T.D., no. T-682-92), Dubé, September 25, 1992; *Prasad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560; 7 Imm. L.R. (2d) 253 (S.C.C.)

¹⁶ *Ching, Rafael Lim v. Minister of Citizenship and Immigration*, (F.C., no. IMM-1825-04), Pinard, February 1, 2005; 2005 FC 132.

¹⁷ Rules 43 and 48 of the *Immigration Appeal Division Rules*; rules 38 and 43 of the *Immigration Division Rules*; and rules 44 and 48 of the *Refugee Protection Division Rules*.

¹⁸ IRPA, subsection 168(1): Abandonment of proceeding – A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so.

¹⁹ “Peremptory hearing date”: A date assigned for a hearing on which the hearing should proceed whether or not the subject of the proceeding has counsel who is ready to proceed, i.e. no further adjournments or postponements will be granted

²⁰ *Fetni, Toufik, v. Minister of Citizenship and Immigration*, (F.C.T.D., no. IMM-1230-96), Pinard, March 27, 1997; *Ressam, Ahmed v. Minister of Citizenship and Immigration*, (F.C.T.D., no. IMM-1271-95), Pinard, February 9, 1996.