



## **GUIDELINE 8**

# **GUIDELINE ON PROCEDURES WITH RESPECT TO VULNERABLE PERSONS APPEARING BEFORE THE IRB**

**GUIDELINE ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 159(1)(h)  
OF THE *IMMIGRATION AND REFUGEE PROTECTION ACT***

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*Disponible en français*



# Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB<sup>1</sup>

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## 1. Introduction

- 1.1 The intention of this Guideline is to provide procedural accommodation(s) for individuals who are identified as vulnerable persons by the Immigration and Refugee Board of Canada (IRB). Chairperson's Guidelines are issued to assist members in carrying out their duties as decision-makers under the *Immigration and Refugee Protection Act (IRPA)*<sup>2</sup> and to promote consistency, coherence and fairness in the treatment of cases at the IRB.
- 1.2 Appearing before an IRB hearing is a process that can be difficult due to language and cultural barriers and due to the fact that the outcome of the hearing is so significant for those involved. The IRB makes decisions on immigration and refugee matters, including admissibility, detention, removal, refugee protection, permanent resident status and family reunification – all matters that affect the lives of individuals directly and profoundly.
- 1.3 The IRB's three divisions, the Immigration Division (ID), the Immigration Appeal Division (IAD) and the Refugee Protection Division (RPD), are committed to providing fair hearings to all persons appearing before them in a manner that is guided and informed by the objectives set out in section 3 of the IRPA. This Guideline is intended to apply to the three divisions of the IRB.
- 1.4 The IRB occasionally hears cases involving persons for whom a hearing or other case process is a particularly difficult experience because their ability to present their cases is severely impaired due to a physical or psychological frailty or for other reasons. The vulnerability of these persons has always required special consideration and the IRB has in the past adopted case by case procedures to deal with their cases. This Guideline articulates the IRB's commitment to making procedural accommodations for such persons so that they are not disadvantaged in presenting their cases.
- 1.5 A person's vulnerability may be due to having experienced or witnessed torture or genocide or other forms of severe mistreatment; however, it may also be due to innate or acquired personal characteristics such as a physical or mental illness, or age. What vulnerable persons appearing before the IRB have in common is their severe difficulty in going through the hearing process or other IRB processes

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<sup>1</sup> Short title: Guideline on Vulnerable Persons.

<sup>2</sup> S.C. 2001, c. 27.

without special consideration being given to their individual situations. Like all persons appearing before the IRB, vulnerable persons need to be treated with sensitivity and respect, but they also need to have their cases processed taking into account their specific vulnerabilities.

## **2. Definition of Vulnerable Persons**

- 2.1 For the purposes of this Guideline, vulnerable persons are individuals whose ability to present their cases before the IRB is severely impaired. Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, and women who have suffered gender-related persecution.
- 2.2 The definition of vulnerable persons may apply to persons presenting a case before the IRB, namely, to refugee protection claimants (in the RPD), appellants (in the IAD), and foreign nationals or permanent residents (in the ID). In certain circumstances, close family members of the vulnerable person who are also presenting their cases before the IRB may qualify as vulnerable persons because of the way in which they have been affected by their loved one's condition.
- 2.3 Persons who appear before the IRB frequently find the process difficult for various reasons, including language and cultural barriers and because they may have suffered traumatic experiences which resulted in some degree of vulnerability.<sup>3</sup> IRB proceedings have been designed to recognize the very nature of the IRB's mandate, which inherently involves persons who may have some vulnerabilities. In all cases, the IRB takes steps to ensure the fairness of the proceedings. This Guideline addresses difficulties which go beyond those that are common to most persons appearing before the IRB. It is intended to apply to individuals who face particular difficulty and who require special consideration in the procedural handling of their cases. It applies to the more severe cases of vulnerability.
- 2.4 Wherever it is reasonably possible, the vulnerability must be supported by independent credible evidence<sup>4</sup> filed with the IRB Registry.

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<sup>3</sup> For example, paragraph 209 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva, January 1992) states that "some degree of mental disturbance is frequently found in persons who have been exposed to severe persecution." Such persons regularly appear before the IRB, and the processes of the IRB have been designed to ensure that all persons are treated with sensitivity and respect. This Guideline will not necessarily apply to all such persons since it is intended to apply to those individuals whose ability to present their cases before the IRB is severely impaired.

<sup>4</sup> Such as a detailed report by an expert following an in-depth assessment of the person.

### **3. Objectives**

- 3.1 To recognize that certain individuals face particular difficulties when they appear for their hearings or other IRB processes because their ability to present their cases is severely impaired.
- 3.2 To ensure that such vulnerable persons are identified and appropriate procedural accommodations are made.
- 3.3 To the extent possible, to prevent vulnerable persons from becoming traumatized or re-traumatized by the hearing process or other IRB process.
- 3.4 To ensure the on-going sensitization of members and other hearing room participants to the impact of severe vulnerability.

### **4. Procedural Accommodations**

- 4.1 Depending upon the nature of a person's vulnerability, they may face particular difficulties in presenting or addressing evidence which should be taken into account in determining the procedural accommodations to be made. Such difficulties may include the following:
  - a) a person's vulnerability may affect memory and behaviour and their ability to recount relevant events;
  - b) the vulnerable person may be suffering from symptoms that have an impact on the consistency and coherence of their testimony;
  - c) vulnerable persons who fear persons in a position of authority may associate those involved in the hearing process with the authorities they fear;
  - d) a vulnerable person may be reluctant or unable to talk about their experiences.
- 4.2 The Division has a broad discretion to tailor procedures to meet the particular needs of a vulnerable person, and, where appropriate and permitted by law, the Division may accommodate a person's vulnerability by various means, including:
  - a) allowing the vulnerable person to provide evidence by videoconference or other means;
  - b) allowing a support person to participate in a hearing;
  - c) creating a more informal setting for a hearing;
  - d) varying the order of questioning;<sup>5</sup>
  - e) excluding non-parties from the hearing room;
  - f) providing a panel and interpreter of a particular gender;
  - g) explaining IRB processes to the vulnerable person;

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<sup>5</sup> See section 3.2 of IRB, *Guideline 7 – Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*, December 1, 2003 <[http://www.irb-cisr.gc.ca/en/references/policy/guidelines/preparation\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/guidelines/preparation_e.htm)>.

- h) allowing any other procedural accommodation that may be reasonable in the circumstances.

## **5. General Principles**

- 5.1 A person may be identified as vulnerable, and procedural accommodations made, so that the person is not disadvantaged in the presentation of their case. The identification of vulnerability will usually be made at an early stage, before the IRB has considered all the evidence in the case and before an assessment of the person's credibility has been made.
- 5.2 A person may be identified as vulnerable based, in part, on alleged underlying facts which are also central to the ultimate determination of their case before the IRB. An identification of vulnerability does not indicate the IRB's acceptance of the alleged underlying facts. It is made for the purpose of procedural accommodation only. Thus the identification of a person as vulnerable does not predispose a member to make a particular determination of the case on its merits. Rather, a determination of the merits of the case will be made on the basis of an assessment of all the evidence.
- 5.3 Similarly, evidence initially used to identify a vulnerable person and to make procedural accommodations may not have been tested through credibility assessments or other means. If such evidence is then used to adjudicate the merits of the case, the member should ensure that all hearing participants are given an opportunity to address this evidence as it relates to the merits of the case. This means that submissions may be made about the relevance of the evidence and the evidence may be tested through such means as questioning by the parties and the member, and other methods. The credibility and probative value of the evidence may then be assessed by the member, even though the IRB previously accepted the evidence for the purpose of identifying vulnerability and making procedural accommodations.

## **6. Proceedings with More than One Party**

- 6.1 Some IRB hearings are adversarial in nature, and the rules of natural justice apply equally to both parties. Identification of vulnerable persons and procedural accommodations for vulnerable persons cannot have the effect of denying any party a fair opportunity to present their case. Where the Minister<sup>6</sup> is a party, the Minister's views will be sought on whether a person should be identified as a vulnerable person and, if so, on the nature of any procedural accommodations to be made, except for accommodations of an administrative or minor nature.

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<sup>6</sup> The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness.

## **7. Early Identification**

- 7.1 A person can be identified as vulnerable at any stage of the proceedings. It is preferable to identify vulnerable persons at the earliest opportunity.
- 7.2 In the course of early review of the file, the IRB may find information which discloses that the ability of the person to present their case may be severely impaired. The IRB may initiate early contact with the person, the designated representative, counsel or any other person to gather evidence which is relevant to whether the individual should be identified as a vulnerable person and which is relevant to the types of procedural accommodations which might be made.
- 7.3 Counsel for a person who may be considered vulnerable is best placed to bring the vulnerability to the attention of the IRB, and is expected to do so as soon as possible. Others who are associated with the person or who have knowledge of facts indicating that the person may be vulnerable (counsel for the Minister or any other person) are encouraged to do the same. Wherever it is reasonably possible, independent credible evidence documenting the vulnerability must be filed with the IRB Registry.
- 7.4 Counsel for a person who wishes to be identified as a vulnerable person must make an application under the Rules of the Division.<sup>7</sup> The application must specify the nature of the vulnerability, the type of procedural accommodations sought and the rationale for the particular accommodations. The IRB will be sensitive to the barriers that may be created by the formal requirements related to making applications in the case of unrepresented persons and other situations and will waive or modify the requirements or time limits set out in the Rules, as appropriate. The IRB may also act on its own initiative.
- 7.5 A Coordinating Member, Assistant Deputy Chairperson or ID Director may identify an individual as a vulnerable person and may take appropriate measures to accommodate the person at an early stage and before a member has been assigned to conduct a proceeding. The assigned member is not bound by the IRB's early identification. The assigned member will consider this Guideline and whether the identification and any procedural accommodations made will be maintained, amended or discontinued.
- 7.6 To the extent practicable, the same Tribunal Officer will have administrative responsibility for the vulnerable person's file from the beginning of the IRB process to the end.
- 7.7 The Division may hold conferences prior to and during hearings to assist in identifying vulnerable persons and to establish the nature of the procedural accommodations required.

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<sup>7</sup> RPD rule 44 (SOR/2002-228), ID rule 38 (SOR/2002-229) and IAD rule 43 (SOR/2002-230).

## **8. Expert Evidence**

- 8.1 A medical, psychiatric, psychological, or other expert report regarding the vulnerable person is an important piece of evidence that must be considered. Expert evidence can be of great assistance to the IRB in applying this Guideline if it addresses the person's particular difficulty in coping with the hearing process, including the person's ability to give coherent testimony.
- 8.2 The IRB may suggest that an expert report be submitted but will not order or pay for it.
- 8.3 Generally, experts' reports should contain the following information:
- a) the particular qualifications and experience of the professional that demonstrate an expertise which pertains to the person's particular condition;
  - b) the questions that were posed to the expert by the person who requested the expert report;
  - c) the factual foundation underlying the expert's opinion;
  - d) the methodology used by the expert in assessing the person, including whether an interview was conducted, the number and length of interviews, whether tests were administered, and, if so, what those tests were and the significance of the results;
  - e) whether the person is receiving treatment and, if so, the nature of the treatment and whether the treatment is controlling the condition;
  - f) whether the assessing expert was also treating the person at the time of producing the report; and
  - g) the expert's opinion about the person's condition and ability to participate in the hearing process, including any suggested procedural accommodations and why particular procedural accommodations are recommended.
- 8.4 Experts should not offer opinions on issues within the exclusive jurisdiction of the decision-maker, such as the merits of the person's case.
- 8.5 An expert's opinion is not in itself proof of the truthfulness of the information upon which it is based. The weight given to the report will depend, among other things, on the credibility of the underlying facts in support of the allegation of vulnerability.
- 8.6 The absence of expert evidence does not necessarily lead to a negative inference about whether the person is in fact vulnerable. The IRB will consider whether it was reasonably possible to obtain such evidence.

## **9. Scheduling**

- 9.1 The IRB has a duty to determine all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.<sup>8</sup> Moreover, the uncertainty and anxiety caused by delay can be particularly detrimental to vulnerable persons. As a general rule, proceedings involving vulnerable persons will be given scheduling priority; however, some cases may be reasonably delayed if doing so facilitates meeting the objectives of this Guideline.<sup>9</sup>

## **10. Questioning the Vulnerable Person**

- 10.1 The IRB ensures that all those who appear at its hearings or other proceedings are questioned with sensitivity and respect. This obligation is all the more important in the case of vulnerable persons. In probing the information provided by the person, the IRB will attempt to avoid traumatizing or re-traumatizing the vulnerable person.<sup>10</sup>

## **11. Decisions and Reasons**

- 11.1 The uncertainty and anxiety generated by waiting for a decision and reasons for decision may be particularly stressful for vulnerable persons. Generally, decisions and reasons for decisions involving vulnerable persons will be delivered as soon as possible, and orally wherever appropriate. In individual cases, members may determine that written reasons are preferable.

## **12. Designated Representative**

- 12.1 In some cases, vulnerable persons may be under 18 years of age or unable, in the opinion of the Division, to appreciate the nature of the proceedings. In such cases, the Division shall designate a person to represent the person, as required by section 167(2) of IRPA.<sup>11</sup>

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<sup>8</sup> IRPA, section 162(2).

<sup>9</sup> Scheduling in the RPD will continue to be subject to the Chairperson's *Instructions Governing the Management of Refugee Protection Claims Awaiting Front-end Security Screening* (2006) <[http://www.irb-cisr.gc.ca/en/references/policy/instructions/securit\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/instructions/securit_e.htm)>.

<sup>10</sup> For a useful guide on questioning, see the *Training Manual on Victims of Torture* developed by the Professional Development Branch of the IRB in April 2004. The principles suggested in the manual with respect to torture victims can be adopted, with necessary modifications, to the questioning of other vulnerable persons.

<sup>11</sup> See also RPD rule 15 (SOR/2002-228), ID rules 18 and 19 (SOR/2002-229) and IAD rule 19 (SOR/2002-230).

## **13. Unrepresented Persons**

- 13.1 Unrepresented persons are entitled to the same procedural safeguards as those who are represented, and the IRB will endeavour to ensure that the process outlined in this Guideline is both accessible and understandable to these persons. The IRB will take extra care to ensure that unrepresented vulnerable persons can participate as meaningfully as possible in their own hearings.

## **14. Gender Issues**

- 14.1 The RPD will consider the IRB *Guideline on Women Refugee Claimants Fearing Gender-Related Persecution* in all cases involving refugee cases based on gender.<sup>12</sup> This Guideline comprehensively sets out the relevant considerations and explicitly recognizes the special problems faced by women who fear gender-related persecution.

## **15. Minors**

- 15.1 In all cases involving minors, the RPD will continue to consider and apply the IRB *Guideline on Child Refugee Claimants: Procedural and Evidentiary Issues*.<sup>13</sup>
- 15.2 In all cases involving minors appearing before the Immigration Division or the Immigration Appeal Division, the ID or the IAD will consider and apply the IRB *Guideline on Child Refugee Claimants: Procedural and Evidentiary Issues*, making necessary modifications in respect of any provisions in the Guideline which are not relevant to the ID or the IAD.

## **16. References**

- ❖ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 <<http://laws.justice.gc.ca/en/I-2.5/index.html>>.
- ❖ *Refugee Protection Division Rules*, SOR/2002-228 <[http://www.irb-cisr.gc.ca/en/references/policy/rules/rpdrules\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/rules/rpdrules_e.htm)>.
- ❖ *Immigration Appeal Division Rules*, SOR/2002-230 <[http://www.irb-cisr.gc.ca/en/references/policy/rules/iadrules\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/rules/iadrules_e.htm)>.
- ❖ *Immigration Division Rules*, SOR/2002-229 <[http://www.irb-cisr.gc.ca/en/references/policy/rules/idrules\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/rules/idrules_e.htm)>.
- ❖ Immigration and Refugee Board of Canada. *Instructions Governing the Management of Refugee Protection Claims Awaiting Front-end Security Screening*. February 2006 <[http://www.irb-cisr.gc.ca/en/references/policy/instructions/secureit\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/instructions/secureit_e.htm)>.

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<sup>12</sup> Update, November 25, 1996 <[http://www.irb-cisr.gc.ca/en/references/policy/guidelines/women\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/guidelines/women_e.htm)>.

<sup>13</sup> September 30, 1996. <[http://www.irb-cisr.gc.ca/en/references/policy/guidelines/child\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/guidelines/child_e.htm)>.

- ❖ Immigration and Refugee Board of Canada. Professional Development Branch. *Training Manual on Victims of Torture*. 2004. (available upon request).
- ❖ Immigration and Refugee Board of Canada. *Guideline 3 – Child Refugee Claimants: Procedural and Evidentiary Issues* 1996. <[http://www.irb-cisr.gc.ca/en/references/policy/guidelines/child\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/guidelines/child_e.htm)>.
- ❖ Immigration and Refugee Board of Canada. *Guideline 4 – Women Refugee Claimants Fearing Gender-Related Persecution*. 1996. Update. <[http://www.irb-cisr.gc.ca/en/references/policy/guidelines/women\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/guidelines/women_e.htm)>.
- ❖ Immigration and Refugee Board of Canada. *Guideline 7 – Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*. 2003. <[http://www.irb-cisr.gc.ca/en/references/policy/guidelines/preparation\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/guidelines/preparation_e.htm)>.

## **17. Inquiries**

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