



Immigration and  
Refugee Board of Canada

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

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2020

# Second Annual Report on Complaints

Status of complaints received and finalized  
in 2019 under the IRB's *Procedures for  
Making a Complaint About a Member*

Canada 

This publication is the Second annual report on the status of complaints made under the Immigration and Refugee Board of Canada's (IRB) [Procedures for Making a Complaint About a Member](#) (Complaint Procedures), covering the period between January 1, 2019, to December 31, 2019.

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## Executive Summary

This is the Second Annual Report on the status of complaints made under the Immigration and Refugee Board's (IRB) *Procedures for Making a Complaint About a Member (Complaint Procedures)* ([https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member\\_complaint-plainte\\_commissaire.aspx](https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member_complaint-plainte_commissaire.aspx)), covering the period between January 1, 2019 to December 31, 2019.

The IRB is Canada's largest independent administrative tribunal. It is responsible for making well-reasoned decisions on immigration and refugee matters, efficiently, fairly and in accordance with the law.

During the period of this Report, the IRB's Office of Integrity had jurisdiction to receive and investigate complaints with respect to approximately 400 IRB decision-makers (members) who issued over 72,500 decisions across the four Divisions of the Board, namely, the Refugee Protection Division, the Refugee Appeal Division, the Immigration Division and the Immigration Appeal Division. Of this caseload, the Office of Integrity received 23 complaints throughout the year.

Information about complaints received and finalized in 2019 is contained in this Report, along with detailed case summaries of the complaints finalized, which can be found in the Appendix.

Decision-making in refugee and immigration cases is recognized as one of the most difficult and consequential areas of adjudication, often involving complicated questions of law and fact, regularly requiring the assessment of sensitive matters of credibility, and often resulting in life-altering decisions. The vast majority of IRB members regularly carry out their work in compliance with the highest standards of conduct as required by the *Code of Conduct for Members of the IRB (Code of Conduct)* (<https://irb-cisr.gc.ca/en/members/Pages/MemComCode.aspx>). The standards of conduct identified in the *Code of Conduct* recognize the importance of maintaining public confidence and trust in the integrity, objectivity, and impartiality of IRB members.

The IRB complaints process provides a formal mechanism which allows those who appear before the IRB and others to voice their concerns about the conduct of IRB members. It promotes the integrity of the decision-making process and helps to identify systemic issues or trends that require attention.

Over the past two years, important changes to the IRB complaints process have been implemented in an effort to strengthen both accountability and transparency. In 2017, the IRB undertook national stakeholder consultations regarding the manner in which complaints were being addressed. Concerns raised included a lack of understanding regarding the process for filing complaints; questions around the appearance of fairness in the investigation and management of complaints; and issues around lack of transparency, including limited reporting.

On December 21, 2017, following national stakeholder consultations, new IRB *Complaint Procedures* came into effect. The *Complaint Procedures* outline the process for making a complaint about the conduct of a member of the IRB which is alleged to be contrary to the *Code of Conduct*. The *Complaint Procedures* are grounded in principles of procedural fairness for all parties, and respect the adjudicative independence of IRB members, ensuring that complaints are based on member conduct and not adjudicative matters.

With the introduction of the new *Complaint Procedures*, significant changes were introduced in response to issues raised by stakeholders. Most notably, to address questions around the appearance of impartiality in the investigation of a complaint, and to help the IRB identify any systemic member conduct issues requiring attention, the IRB centralized the responsibility for the receipt, management and investigation of all complaints with the IRB Office of Integrity, an office that reports directly to the Chairperson and is separate from the four adjudicative tribunals (Divisions) whose members are the subject of complaints. As well, the new *Complaint Procedures* were written to both raise awareness and clarify the manner in which complaints were to be submitted and processed.

In 2019, during the reporting period, the IRB introduced additional measures to strengthen accountability and transparency. The IRB amended its *Code of Conduct* by expressly identifying possible corrective or disciplinary measures that could be imposed on a member upon breach of the Code's standards of conduct. It also increased the prominence of, and made more accessible, complaint related materials on its website, and introduced an Annual Report on member complaints to provide more information on the nature of the complaints received and their disposition.

The IRB recognizes the importance of an effective complaint mechanism and is committed to continuous improvement. In 2020, the IRB will be pursuing a number of measures to build on results from the reporting period, and further strengthen its complaints process.

First, while not representative of IRB member conduct generally, a number of complaints received by the IRB in late 2019, coupled with other cases brought to the Board's attention by the media, identified member conduct in respect of gender-based claims as requiring attention. As a result, the IRB announced immediate measures to be undertaken, including focused mandatory training in relation to sensitive and trauma informed questioning and credibility assessments for gender based claims; establishing a dedicated team with specialized training relating to gender related claims, and reviewing and updating the IRB's *Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (Gender Guidelines)* and the IRB's *Chairperson's Guideline on Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression (SOGIE Guideline)*, in order to provide the latest guidance available to members adjudicating such claims.

In addition, the IRB will conduct a review of the Office of Integrity to ensure it is appropriately structured, and has the necessary resources to promote the *Code of Conduct* and the *Complaint Procedures*, as well as the timely investigation and resolution of complaints. Finally, the IRB will undertake a formal third-party review of its complaints process to assess the effectiveness of the changes recently introduced, and to assess whether further measures are required.

The IRB looks forward to reporting on the results of these initiatives in next year's Annual Report.

## Introduction

This is the Second Annual Report on the status of complaints made under the Immigration and Refugee Board's (IRB) *Procedures for Making a Complaint About a Member (Complaint Procedures)* ([https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member\\_complaint-plainte\\_commissaire.aspx](https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member_complaint-plainte_commissaire.aspx)).

The period of time covered by this Annual Report is from January 1, 2019 to December 31, 2019.

During the reporting period, the IRB's Office of Integrity had jurisdiction to receive and investigate complaints with respect to approximately 400 IRB members who issued over 72,500 decisions across the four Divisions of the Board, namely the Refugee Protection Division, the Refugee Appeal Division, the Immigration Division and the Immigration Appeal Division. Of this caseload, the Office of Integrity received 23 complaints throughout the reporting period.

This Second Annual Report provides an overview of recent measures introduced to strengthen the IRB complaints process. The Report also includes information on the standards of conduct expected of IRB members as well as clarification on what type of allegations can properly form the basis of a complaint under the *Complaint Procedures*. Information is also provided regarding the complaints process and the Office of Integrity, the IRB Office responsible for receiving and investigating complaints. Lastly, the Report provides data on complaints received and finalized in 2019, detailed case summaries of complaints finalized, and information about how such complaints are informing the broader functioning of the Board.

# Code of Conduct and Complaint Procedures

## Code of Conduct

All IRB members, whether they are public service employees (Refugee Protection Division and Immigration Division) or are appointed by the Governor in Council (Refugee Appeal Division and Immigration Appeal Division), are subject to the *Code of Conduct for Members of the IRB (Code of Conduct)* (<https://irb-cisr.gc.ca/en/members/Pages/MemComCode.aspx>).

The *Code of Conduct* establishes the standards of conduct that govern the professional and ethical responsibilities of all decision-making members at the IRB. It further provides that the Chairperson is responsible for its administration, and that IRB members are accountable to the Chairperson for their compliance. These standards of conduct recognize the importance of maintaining public confidence and trust in the integrity and impartiality of the IRB, and address members' responsibilities to the parties who appear before them, and to the public.

While the *Code of Conduct* covers a range of obligations that govern the professional and ethical responsibilities of members, of particular relevance to the *Complaint Procedures* are certain sections of the *Code of Conduct* which outline the expectations around member conduct, as a complaint can only be about the conduct of a member.

In 2018, during the first full year under the new *Complaint Procedures*, questions arose regarding which sections of the *Code of Conduct* could be the subject of a member complaint. Some complainants understood that a breach of any section of the *Code of Conduct*, including those addressing decision-making responsibilities, could be the subject of a member complaint.

As a result, during the reporting period, the *Code of Conduct* was updated to group those sections relating to member conduct (i.e. those properly subject to a member complaint according to the *Complaint Procedures*) under a common heading titled "Conduct of Members" (Sections 9–15), in an effort to distinguish conduct from decision-making and to clarify the scope of matters that can properly form the basis of a complaint about a member.

Also, during the period under review, the *Code of Conduct* was updated, following feedback received during national stakeholder consultations, to better emphasize accountability for member misconduct. The *Code of Conduct* was revised to expressly identify possible corrective or disciplinary measures that may be imposed on a member found to have breached the *Code*<sup>1, 2</sup>.

## Complaint Procedures

The *Complaint Procedures* outline the process of making a complaint about the conduct of a member of the IRB which is alleged to be contrary to the *Code of Conduct*.

These procedures came into effect on December 21, 2017, replacing the former *Protocol Addressing Member Conduct Issues*, following national consultations. During the consultations, stakeholders raised concerns about the perceived lack of impartiality of the process, as complaints were generally received by the Assistant Deputy Chairpersons (ADCs) in the Divisions and IRB regions in question. In most cases,

1 Section 17 of the *Code of Conduct* was introduced, which states: "A breach of this Code may result in corrective or disciplinary measures. The nature of any corrective or disciplinary measures would depend on the circumstances and the gravity of the breach. Corrective or disciplinary measures could range from training, a note to the member's file or a reprimand for less serious breaches; to removal from the hearing room, suspension and up to termination for serious or repeated breaches of the Code."

2 In addition to the Chairperson's authority to impose corrective measures, sections 176 to 186 of the *Immigration and Refugee Protection Act* set out the procedures regarding remedial and disciplinary measures that may be imposed by the Minister on any member of the Immigration Appeal Division or the Refugee Appeal Division.



the ADCs would decide whether the complaints were founded. Stakeholders questioned the appearance of fairness, with the Divisions investigating “one of their own members” and concerns were also raised regarding the lack of a single office being able to monitor trends and identify any systemic member conduct issues of concern.

Under the new *Complaint Procedures*, the previously decentralized approach to receiving and investigating complaints about members was centralized with the Office of Integrity. This Office became responsible for managing the complaints process, reporting directly to the Chairperson, independent of the four tribunals (Divisions) whose members are the subject of complaints.

The new *Complaint Procedures* established a centralized, more rigorous and transparent approach to managing member complaints received by the IRB. They respect the adjudicative independence of IRB members while ensuring members are held accountable for their conduct and that all parties to a complaint are accorded procedural fairness.

When a party before the Board or any other individual has concerns with the conduct of a member, whether in or outside of the hearing room context, they may file a complaint to the Office of Integrity. Section 3.3 of the *Complaint Procedures* states that:

“a complaint must be about the conduct of a member which is believed to be contrary to the Code of Conduct. A complaint cannot be about a member’s decision.”

Complaints cannot be about what a member decides in a case. When there is a concern about the adjudicative aspect of a member’s decision (such as their reasons for decision on the merits or concerns about a denial of procedural fairness or natural justice), the proper approach is to file an appeal with the Refugee Appeal Division (RAD) or the Immigration Appeal Division (IAD), or seek leave and judicial review with the Federal Court, as appropriate. To allow otherwise would undermine the purpose and integrity of those recourse bodies, create duplication of effort, increase costs and be inconsistent with other judicial and administrative complaint mechanisms.

With the launch of the new *Complaint Procedures*, and during this reporting period, questions have been raised about whether an allegation of “bias” against a member could form the basis of a conduct complaint. Complaints based in bias may or may not be related to member conduct. When a complaint based in bias is related to adjudication (i.e. the complaint relates to a member’s decision or concerns allegations that the member was not impartial), it is not within the scope of the complaints process. Indeed, a number of complaints received by the Office of Integrity during the reporting period contained allegations of bias that were determined to be adjudicative in nature, and therefore were not appropriate for investigation under the Complaints Process.

On the other hand, a complaint that is framed in bias will be accepted for investigation under the complaints process if the allegations concern misconduct (for example, an inappropriate comment or action by a member related to discrimination based on gender, race, nationality, ethnicity, religion, sexual orientation, or age in the hearing room or in a written decision).

The IRB recognizes that this distinction is not always well understood, and the IRB will continue to bring increased clarity to this matter in the context of IRB complaint related communications, including in future case summaries.

## Overview of the Complaint Process

Any person may make a complaint to the Office of Integrity about the conduct of a member. A complaint must be made in writing and either sent through the mail or to the general email inbox for the Office of Integrity ([Integrity-Integrite@irb-cisr.gc.ca](mailto:Integrity-Integrite@irb-cisr.gc.ca)). A sample form is available on the website (<https://irb-cisr.gc.ca/en/forms/Pages/member-complaint-form.aspx>) but a complaint can be made without using that form.

Once a complaint is received, the Office of Integrity will send an acknowledgement that the complaint has been received and will outline the next steps in the process. If the case related to the complaint has not yet been decided by the member, the complaint will generally be held in abeyance until such time as the member is no longer seized by the case. This is meant to ensure that the member is not influenced in arriving at their decision because the complaint has been made about their conduct.

The diagram on the following page illustrates the high-level process that follows the receipt of a complaint, which upholds the principle of ensuring a fair process.

Additional details can be found in the “Complaint Review Process” section (Section 5) of the *Complaint Procedures* ([https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member\\_complaint-plainte\\_commissaire.aspx#s5](https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member_complaint-plainte_commissaire.aspx#s5)).

Once the investigation is completed, the final investigation report is provided to the Chairperson of the IRB for consideration and a decision. The Chairperson will ensure that the investigation process was fair to both parties. The Chairperson then decides whether to accept the conclusions in the investigation report. The Chairperson also decides whether there was a breach of the *Code of Conduct* on the part of the member. The Chairperson will inform the person who made the complaint and the member who is the subject of the complaint of the outcome of the investigation. The Chairperson will ensure that any follow-up actions which are appropriate in the circumstances are taken.

Different labor relations frameworks apply to public servant members (Refugee Protection Division and Immigration Division) and Governor in Council appointed members (Refugee Appeal Division and Immigration Appeal Division). Where the Chairperson finds that there was a breach of the *Code of Conduct*, the Chairperson will generally refer the matter to the Deputy Chairperson of the Division. The Deputy Chairperson in question will work with the manager of the member to implement and follow-up on any necessary corrective or disciplinary measures.

A summary of the complaint and its disposition is posted on the IRB website. In accordance with the *Privacy Act* (<https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-privacy-act/>), the names of the parties are not publicized.

# Complaint Review Process



**Principles that are applied in the process:**

When a complaint is referred for investigation, the process will ensure that:

- the complaint is dealt with as quickly as fairness and thoroughness permit.
- it is procedurally fair to the person who made the complaint and the member who is the subject of the complaint.
- the identity of parties' subject to the complaint will be protected, to the extent possible, and as outlined in the *Privacy Act* and the *Access to Information Act*.
- adjudicative independence of IRB members is respected while members are accountable for their conduct.

## Office of Integrity

The IRB Office of Integrity was established in 2015 as an impartial and confidential resource, responsible for providing advice and managing the following matters within the workplace:

- Values and Ethics Codes applicable to employees and members
- Conflicts of Interest
- Political Activities
- Disclosure of Wrongdoing
- Investigation of Workplace Harassment Complaints
- Informal Conflict Resolution Services

The Office of Integrity is led by a Director who reports directly to the IRB Chairperson and who is independent of the IRB's four adjudicative Divisions and management.

As part of a suite of measures to strengthen the IRB complaints mechanism and with the coming into force of the new *Complaint Procedures* in December, 2017, the Office of Integrity became responsible for managing the complaints process, increasing awareness of the process, identifying improvements to the process and ensuring that the process is fair, transparent and accessible.

To this end, the Office of Integrity:

### **Manages the complaints process**

The Office of Integrity acknowledges receipt of a complaint, provides screening recommendations to the Chairperson (as to whether the allegations fall within the scope of the *Complaint Procedures*), communicates regularly with the parties to the complaint, conducts investigations and prepares final investigation reports for the Chairperson's consideration in reaching a decision on the complaint. In addition, the Office of Integrity posts case summaries on the IRB's website and supports the production of an *Annual Report on the Complaints Process*.

### **Supports potential complainants in navigating the process**

The Office of Integrity publishes information on the IRB website on the member complaints process, which can be accessed from the homepage (<https://irb-cisr.gc.ca/en/Pages/index.aspx>). From there, users can find a simple and easy to complete complaint form (<https://irb-cisr.gc.ca/en/forms/Pages/member-complaint-form.aspx>), and can also easily access the *Code of Conduct* and the *Complaint Procedures*.

Throughout the complaints process, the Office of Integrity is available to respond to questions and provide procedural information to complainants and those considering filing a complaint. To this end, the Office of Integrity has a generic email address ([Integrity-Integrite@irb-cisr.gc.ca](mailto:Integrity-Integrite@irb-cisr.gc.ca)) where potential complainants can request information on how to proceed, clarification on the scope of the complaints process, and how to submit their complaint.

### **Increases awareness of the Complaint Procedures and Code of Conduct amongst members**

The Office of Integrity raises awareness with members through new member training, where the *Code of Conduct* and *Complaint Procedures* are reviewed; and the Office of Integrity makes presentations to members during learning and professional development days. Governor in Council appointees who join the Refugee Appeal Division or the Immigration Appeal Division attend a joint presentation given by the



Office of the Conflict of Interest and Ethics Commissioner, and the IRB Office of Integrity, at which time the latter outlines the requirements of the *Code of Conduct* and the *Complaint Procedures*.

Additionally, members who are the subject of a conduct complaint have access to the Office of Integrity in order to obtain procedural information to assist them in understanding the steps in the process.

The Office of Integrity ensures that all parties to a complaint are treated fairly.

### **Identifies improvements through monitoring of trends and any systemic issues related to member conduct**

Fundamental to the revised complaints process, is the centralized and consistent management of complaints received. This allows the Office of Integrity to identify emerging trends in complaints, potential shortcomings in member training and procedural changes that might improve the overall complaints process.

During the reporting period, the Office of Integrity recommended a revision to the *Code of Conduct* to regroup those sections directly related to member conduct under one heading. The purpose of this recommendation was to help potential complainants better understand the sections of the *Code of Conduct* that could form the basis of a complaint.

### **Ensures that the complaints process is fair, transparent and accessible**

In an effort to promote impartiality and fairness in the investigation and management of complaints, the Office of Integrity is independent of the four adjudicative Divisions of the Board, and the Director of the Office of Integrity reports directly to the Chairperson.

When a complaint is filed about IRB members, the Office of Integrity is mindful of the need to respect their adjudicative independence by ensuring that complaints relate to conduct and not decision making, and by ensuring that all parties are afforded procedural fairness as provided for in the *Complaint Procedures*.

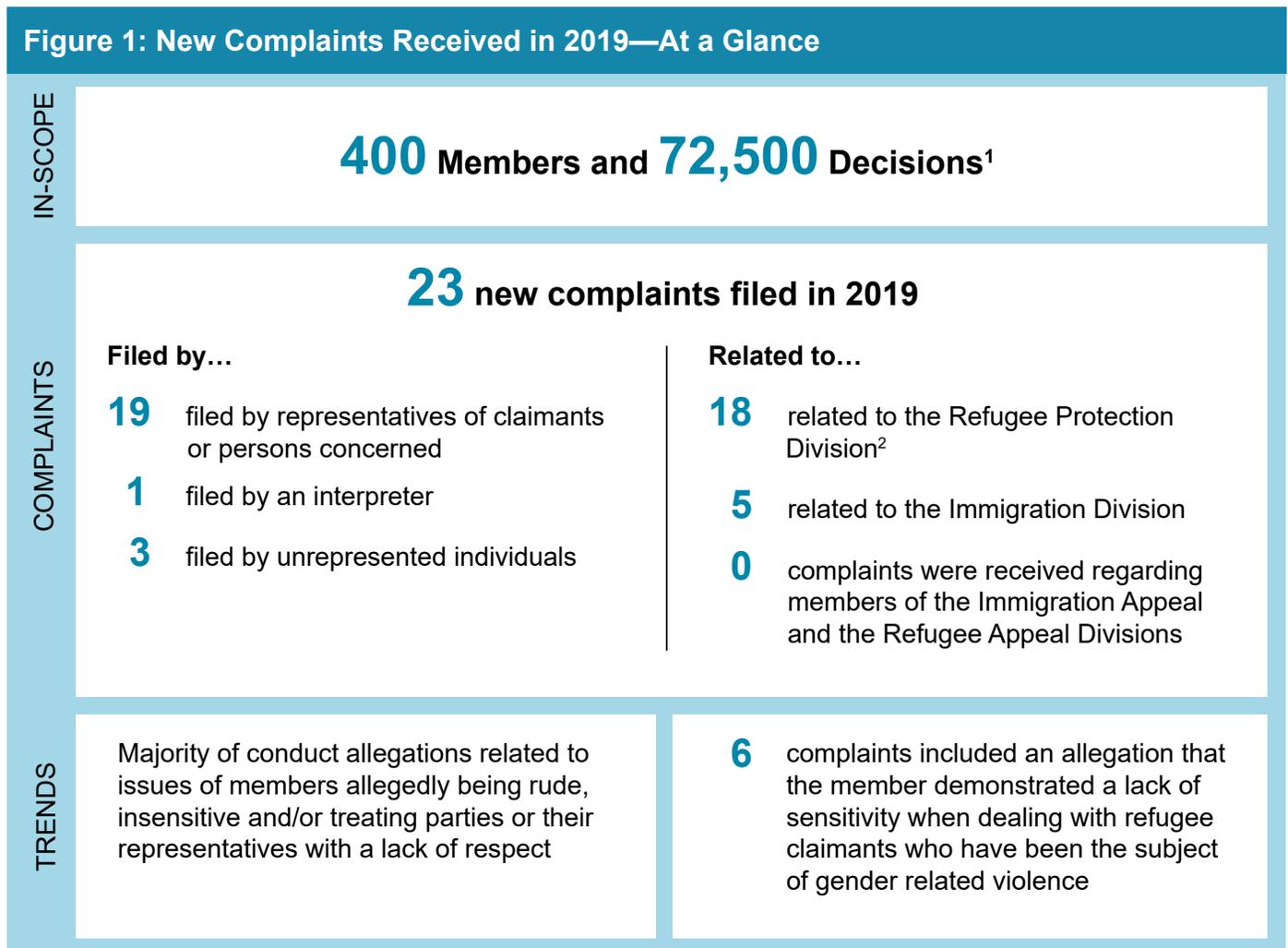
The Office of Integrity ensures that the complaints process is explained, as much as possible, in plain language; steps in the handling of a complaint are clearly laid out; parties are kept informed of progress throughout the process; summaries of the facts and disposition of finalized complaints are published on the IRB's website; and annual reports about the complaints process are published and available on the IRB's website.

During the reporting period, and given the recent investments in the Board to increase decision-making capacity through additional member recruitment, the Chairperson requested that the IRB review the scope of responsibilities, volume of work, and organizational design of the Office of Integrity, to ensure that the complaints process remains effective and efficient. Pending completion of this work, the IRB identified in late 2019 additional resources to support the Office of Integrity.

# Summary of Complaints Received and Finalized in 2019

## Overview

The Office of Integrity carried forward ten (10) complaint files in 2019 from the previous year. During the reporting period, 23 new complaint files were received by the Office of Integrity. Figure 1 provides a breakdown of new complaints received in 2019.



Notes:

1. Actual number of members in 2019 fluctuated between 326 and 441; there were 72,508 decisions rendered by the IRB in 2019.
2. While a majority of the 23 complaints received in 2019 were directed to the conduct of members from the Refugee Protection Division this can be attributable to the number of members, the number of hearings held and decisions rendered by the Refugee Protection Division being significantly greater than the number of members and cases before the other Divisions.



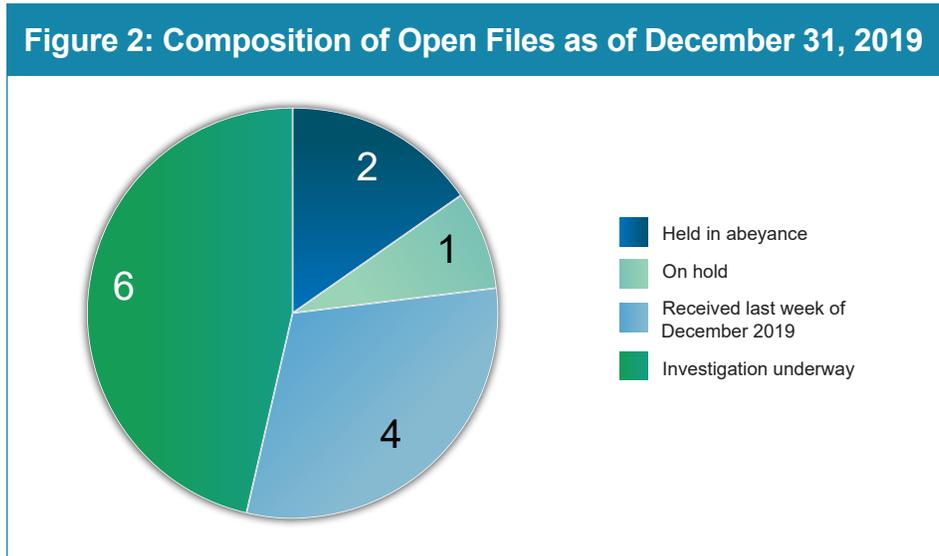
Including the 10 files carried into 2019 from the previous year, the total number of open files during 2019 was 33. Of these, 20 files were finalized before December 31, 2019, of which ten (10) were carried over from 2018. Figure 2 provides a breakdown of files received and finalized since 2018.

**Table 1: Caseload in Calendar Years**

	2018	2019
Continued From Previous Years	0	10
New Files Opened During the Year	20	23
Total Files Open During the Year	20	33
Closed During the Year	10	20
Continued into Next Year	10	13

On average, for these files:

- Complaints were acknowledged within 4 working days;
- The Office of Integrity obtained member responses to the allegations, conducted the investigation, prepared and forwarded draft investigation reports to the parties for comment and submissions, within 4.6 months; and
- The Office of Integrity received comments and submissions from the parties, finalized the investigation report and issued formal letters of decision from the Chairperson within 1 month.



At the end of the reporting period (December 31, 2019), as illustrated in Figure 2, 13 files that were received in 2019, were carried over into 2020. Two (2) complaints are being held in abeyance; one (1) complaint is on hold while the complainant decides whether or not they wish to proceed; four (4) complaints were received during the last week of December 2019; and the remaining six (6) complaints are currently at various stages of investigation.

## Case Summaries

Of the 20 complaints finalized in 2019, nine (9) were screened out, five (5) were withdrawn and abandoned, and six (6) were investigated.

**Table 2: Outcomes of Complaints Closed in 2019**

Screened out—not conduct	9
Withdrawn	2
Abandoned	3
Investigated—Chairperson’s decision—breach of code	3
Investigated—Chairperson’s decision—no breach of code	3
<b>Total closed in 2019</b>	<b>20</b>

The Appendix of this Report provides detailed case summaries for those files screened out and those files which were investigated and finalized during the year, while the following sections provide high-level descriptions for all cases which were finalized and closed in 2019.

### Screened out in 2019

Screened out complaints are those which fall outside the scope of the *Complaint Procedures*. During the reporting period, nine (9) complaints were screened out as they did not pertain to conduct but rather adjudicative matters (i.e. generally related to an allegation of bias or dissatisfaction with the decision, not related to member conduct) for which recourse is provided at the Refugee Appeal Division, the Immigration Appeal Division or with leave at the Federal Court.

During the reporting period, two (2) of the nine (9) complaints contained allegations which were fundamentally about the exercise of the member’s adjudicative discretion. However, given that these allegations pertained to matters actively under consideration at the Immigration Division and being addressed through the development of a revised *Chairperson’s Guideline on Detention* (subsequently published: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir02.aspx>), the Chairperson decided that the complaints should be examined. Accordingly, the complaints were referred to the Deputy Chairperson of the Immigration Division for follow-up and action as required.

### Complaints Withdrawn in 2019

A withdrawn complaint is one where the complainant, for whatever reason, decides not to pursue the matter. During the reporting year, two (2) complaints were withdrawn: one (1) was withdrawn by the complainant further to the unfortunate passing of the member in question, and the other one (1) was withdrawn by the complainant on the advice of their counsel.

### Complaints Abandoned in 2019

Abandoned complaints are those where a complaint is filed and acknowledged by the Office of Integrity, but at some stage of the process, the complainant stops responding to correspondence. They are advised that if they do not state their intentions by a certain date, the matter will be closed by the Office of Integrity. During the reporting period, three (3) complaints were deemed abandoned.



## Complaints Investigated and Decided on in 2019

During the reporting period, six (6) complaints were finalized after investigation.

In three (3) instances, the Chairperson found there to be a breach of the *Code of Conduct*:

- One (1) complaint concerned allegations of a lack of sensitivity by the member of a claimant who was the victim of gender related violence, and a lack of understanding of the *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*. Given it was the first complaint of this nature received, the Acting Chairperson referred the investigation to an external investigator with a background in human rights and a former Vice-Chair of the Human Rights Tribunal of Ontario. Please refer to case no. 18-009 in the Appendix for a detailed summary of the complaint.
- A second complaint involved allegations that a member's tone was disrespectful and unprofessional towards a CBSA Hearings Officer and that the member raised his voice at times. Please refer to case no. 18-018 in the Appendix for a detailed summary of the complaint.
- A third complaint involved an incident that took place outside the hearing room. It was alleged that the member was disrespectful towards a CBSA employee. It was also alleged that the member's behavior had a negative impact on representatives from an outside organization. Please refer to case no. 18-019 in the Appendix for a detailed summary of the complaint.

In the other three (3) instances, the Chairperson found there was no breach of the *Code of Conduct*:

- One (1) complainant alleged that in her decision, the member commented on the competency of counsel, finding his lack of an attempt to obtain a copy of his client's passport from U.S. authorities to fall short of an act of a competent or diligent lawyer. The complainant found this to be disrespectful. Please refer to case no. 18-016 in the Appendix for a detailed summary of the complaint.
- A second complaint involved allegations that the Minister's representative was directed to obtain certain documents and verify information. The Minister's representative felt that the member was treating him like his employee. The complainant also took exception to comments made about him by the member in his reasons for decision. He considered the comments to be unprofessional. Please refer to case no. 18-014 in the Appendix for a detailed summary of the complaint.
- A third complaint involved allegations that the member improperly criticized counsel for being late for the hearing. Please refer to case no. 19-009 in the Appendix for a detailed summary of the complaint.

## Conclusion

Decision-making in refugee and immigration cases is recognized as one of the most difficult areas of adjudication, often involving complex questions of both law and fact, regularly requiring the investigation and assessment of sensitive matters of credibility, and often resulting in life-altering decisions. The inquisitorial nature of many of the proceedings, where members are actively involved in questioning claimants, imposes greater challenges on members than would otherwise be the case.

In 2019, approximately 400 IRB members issued over 72,500 decisions. Twenty-three (23) complaints were received regarding member conduct, underscoring that the vast majority of IRB members across all four Divisions regularly carry out their work with professionalism, consistent with the high standards of conduct established in the *Code of Conduct*.

Across federal tribunals, the IRB is a leader in implementing a member complaints process, recognizing it is fundamental to maintaining public confidence in the professionalism of IRB members. Following extensive national stakeholder consultations, the IRB has, over the past two years, and again during the reporting period, taken concrete steps to strengthen its complaints process.

Going forward in 2020, the IRB is building on the results of this Report and undertaking additional measures to strengthen the accountability, transparency and effectiveness of its complaints process. In response to complaints received in 2019, the IRB will introduce a number of initiatives in relation to gender related claims in 2020, including mandatory training, the establishment of a dedicated team with specialized training in gender related matters, and updating the *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* and the *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression (SOGIE Guideline)*. Further, the IRB will undertake a third-party review to assess the effectiveness of recent changes to the complaints process, the results of which will inform continued improvements. Finally, the IRB will complete a review of the Office of Integrity to ensure it is optimally structured and resourced.

The IRB looks forward to reporting on these initiatives in the context of its Third Annual Report on Complaints in 2021.

# Appendix

## Case Summaries—Complaints Finalized in 2019

The case summaries below relate to complaints which were finalized in 2019. Complaints which were abandoned or withdrawn in 2019 are not included.

Identifying information has been removed in accordance with the requirements of the *Privacy Act*.

### CASE NO. 18-009

The complainant appeared as counsel for a claimant before the Refugee Protection Division (RPD).

The allegations in the complaint relate to the member's lack of sensitivity when presiding over a claim which was predicated on decades of physical and sexual abuse.

The complainant alleged that by way of her insensitive questions, the member had effectively traumatized the claimant who had a history of abuse both in her home country and also having arrived in Canada. It was alleged that the member failed to acknowledge the impact of gender violence on the claimant's actions, and that the member was judgmental because the claimant had not left the abusive relationships.

The complaint was submitted in October 12, 2017, under the former Protocol Addressing Member Conduct Issues. In accordance with paragraph 7.2 of the *Procedures for Making a Complaint About a Member (Complaints Procedures)* ([https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member\\_complaint-plainte\\_commissaire.aspx](https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member_complaint-plainte_commissaire.aspx)), the complaint was placed in abeyance while the member was seized with the claim. Counsel then re-submitted the complaint, with additional allegations, on May 22, 2018 and asked that it be treated under the Complaints Procedures. The then Acting Chairperson determined that the complaint would be addressed pursuant to the new Complaints Procedures.

The member subsequently retired from the IRB and the claimant's refugee claim was heard *de novo* and decided by a different decision-maker.

The then Acting Chairperson determined that this complaint would be referred to an external investigator pursuant to paragraph 5.5(d) of the Complaints Procedures which authorizes the Chairperson, in exceptional cases, to refer the complaint to an external investigator.

The external investigator in this case had expertise in human rights and labour law and was a former member of the Human Rights Tribunal of Ontario. The external investigator was appointed in December 2018.

The allegations related to member conduct, namely those relating to lack of sensitivity and traumatization of the claimant, were referred for investigation.

The allegations with respect to procedural fairness, bias and violations of the Charter were not referred for investigation as the Chairperson concluded that these allegations were not related to conduct and therefore fell outside the scope of the Complaints Procedures.

Although retired, the member chose to participate in the investigation.

The external investigator listened to the audio recordings of the sittings in question and reviewed the complaint and the member's response, as well as correspondence in the RPD file between the member and the complainant.

Both the member and the complainant had an opportunity to provide additional documents, to make submissions, and to review and comment on all information received and considered by the external investigator.

The investigation report outlined members' obligations under the *Code of Conduct for Members of the IRB (Code of Conduct)* (<https://irb-cisr.gc.ca/en/members/Pages/MemComCode.aspx>). The report also outlined how the *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* informs the interpretation and application of the Code of Conduct in such circumstances.

The external investigator concluded that the member's conduct was generally professional and courteous throughout the hearing and that the member demonstrated consideration towards the claimant's situation. However, despite indicia that abuse and rape trauma syndrome were likely factors in the claimant's behavior, some of the questions posed by the member during the hearing showed a lack of appreciation of rape trauma syndrome and its impact on the claimant.

The investigator's report concluded that some of the member's questions had a negative impact on the claimant, were inappropriate, and were in breach of the member's obligations under the Code of Conduct. Other allegations of misconduct were deemed unfounded, or were adjudicative questions which were outside the mandate of the investigation.

The Chairperson reviewed the investigation report. He was satisfied that the investigation was thorough and fair. The Chairperson accepted the conclusions in the report and decided that there was a breach of the Code of Conduct.

Both parties were informed about the resolution of the complaint in the Chairperson's decision letters of May 10, 2019. The Chairperson informed them that member managers will be encouraged to consider lessons learned from this investigation to determine future training needs. In particular, the analysis done by the external investigator and the conclusions could help delineate the line between latitude for questioning by members in an inquisitorial system and members' obligations under the Code of Conduct related to respect, dignity and cultural sensitivity and the interpretation of the *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*.

Following the finalization of this complaint, the Director of Integrity met with IRB managers who have responsibility for member training and policy development. In addition, this matter was brought to the attention of the Deputy Chairperson of the RPD. Steps were subsequently taken to ensure that RPD members received supplemental training on the *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*. Lessons learned from this complaint were incorporated into the training program for RPD members.

The Chairperson concluded that no further actions were required as the member had retired.

The complaint was founded and the file was closed.

## **CASE NO. 18-014**

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The complainant appeared as Minister's counsel at two sittings before the Refugee Protection Division (RPD).

The allegations in the complaint relate to lack of respect and courtesy on the part of the member towards Minister's counsel during the hearing. The complainant alleged that Minister's counsel was directed to obtain certain documents and verify information. Minister's counsel felt that the member was treating him like his employee.

The claim involved, among other matters, allegations that the claimant should be excluded from refugee protection under Article 1F(a) of the Refugee Convention. The complainant made it clear during the

proceedings that he was only intervening on the issue of whether the claimant should be excluded from refugee protection. He alleged in his complaint that the member attempted to push him into participating in other aspects of the claim.

The complainant also took exception to comments made about him by the member in his reasons for decision. He considered the comments to be unsubstantiated personal attacks on his integrity. The impugned paragraphs in the member's decision were:

[13] The Minister's counsel's absolute refusal to even make an effort to follow reasonable directions from the panel in a hearing in which the Minister was a party is improper and, in the panel's view, a demonstration of contempt for the Board and these proceedings.

[27] . . . The Minister[']s counsel] has apparently failed to make any efforts to carry out its duty to protect the integrity of Canada's refugee determination system.

Following the hearing, the member sent two letters requesting the Minister's counsel to obtain or follow up regarding certain documents. Minister's counsel complied with the first request, but took the position that he would not obtain documents with respect to the second request. The member repeated the request, noting that the Minister's counsel "was expected to follow the panel's direction." The complainant repeated his position, suggesting that the panel should order the claimant to obtain the information.

The Chairperson referred the following issues to the Office of Integrity for investigation under paragraph 5.5 of the *Procedures for Making a Complaint About a Member (Complaint Procedures)* ([https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member\\_complaint-plainte\\_commissaire.aspx](https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member_complaint-plainte_commissaire.aspx)):

- the conduct of the member during the hearing; and
- comments made by the member in his written decision regarding the complainant.

The Director of Integrity listened to the audio recordings of the two sittings in question and reviewed the decision and the correspondence in the RPD file between the member and the complainant.

The Director of Integrity prepared draft findings of fact and analysis and provided both parties with an opportunity to make submissions.

The member submitted that the RPD makes requests of the Canada Border Services Agency (CBSA) regularly to obtain the information in question, that he had no intention of treating counsel as an employee, that he had never before encountered such a flat refusal to cooperate on the part of counsel before him, that counsel directing how he should proceed as a member demonstrated disrespect to the member, and finally that the comments in the written decision were reasonable given the circumstances and were directed at the CBSA and not counsel personally.

The Director of Integrity reviewed the submissions provided and he prepared a final investigation report. He concluded that:

- the member did not show any rudeness, impatience, lack of professionalism or disrespect during the proceedings;
- the member did not push or threaten Minister's counsel or treat him like an employee during the proceedings; and
- the allegations regarding the member's comments in the decision fell outside of the complaint process under paragraph 3.3 of the Procedures which states that "a complaint cannot be about a member's decision". Therefore, the Director of Integrity did not make any findings with respect to those allegations.

The Chairperson reviewed the investigation report. He was satisfied that the investigation was thorough and fair. The Chairperson accepted the conclusions in the report and decided that that the member did not breach the Code of Conduct.

Both parties were informed about the resolution of the complaint. In his decision letter of April 9, 2019, the Chairperson stated there was no merit to the allegations that the member's conduct during the hearing was inappropriate.

With respect to the complainant's allegations related to comments in the member's decision, the Chairperson decided that IRB management cannot fetter a member's discretion and independence and accepted the conclusion that the comments constituted a determination by a quasi-judicial decision-maker, which fell outside the scope of the Complaints Procedures.

The complaint was dismissed and the file was closed.

## **CASE NO. 18-016**

The complainant appeared as counsel for a claimant before the Refugee Protection Division (RPD).

The allegations in the complaint relate to a statement made by the member regarding counsel in the reasons for decision delivered orally at the hearing, and subsequently transcribed as written reasons. In the reasons, the member commented on the competency of counsel, finding his lack of an attempt to obtain a copy of his client's passport from U.S. authorities to fall short of an act of a competent or diligent lawyer.

The complainant alleged that:

- the member questioned counsel's competence as a lawyer on the record; and
- the member's comments in the reasons for decision were disrespectful towards him and were a personal attack against him.

The Chairperson referred the following issues to the Office of Integrity for investigation under paragraph 5.5 of the *Procedures for Making a Complaint About a Member (Complaint Procedures)* ([https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member\\_complaint-plainte\\_commissaire.aspx](https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member_complaint-plainte_commissaire.aspx)):

- the conduct of the member during the hearing; and
- comments made by the member in her reasons for decision regarding the complainant.

The Director of Integrity listened to the audio recording of the hearing, reviewed the reasons for decision, the complaint and the member's response.

The Director of Integrity prepared draft findings of fact and analysis and provided both parties with an opportunity to make submissions.

The investigation findings are summarized as follows. The claimant had lived for an extended period in the U.S. prior to arriving in and claiming asylum in Canada. She arrived without any documents to confirm her identity, in part because her passport had been seized and was never returned by U.S. authorities. After this was explained to the member at the hearing, the member asked counsel what steps he had undertaken to obtain the claimant's passport from the U.S. authorities. Counsel responded that he had not taken any new steps, since his client had recently told him she herself reached out to her U.S. lawyer at the time who confirmed that the U.S. authorities had never returned the passport. He noted his client had tried to obtain a new passport from her home country without success. The member then turned her attention back to questioning the claimant.



In the reasons for decision, the member stated:

Her Canadian lawyer confirmed on the record that he had taken no steps and made no effort to contact the U.S. authorities for a copy of her passport. While I find this to fall short of an act of a competent or diligent lawyer, which I find very disappointing, I am not prepared to count it against the claimant. Once the claimant had retained counsel in Canada it was reasonable for her to assume that he would take the necessary steps to advocate for her and a competent lawyer should have known that identity was an issue.

The Director of Integrity concluded in his report that apart from procedural matters at the outset of the hearing, the exchange regarding the passport was the only substantive interaction between the member and counsel during the hearing. The member did not probe why counsel hadn't taken any additional steps to obtain the passport, highlight the fact that identity is always an important issue or provide any indication of concern with counsel's response to her query.

The Director of Integrity concluded that the member was not discourteous nor disrespectful towards the complainant during the proceedings.

The Director of Integrity's investigation report concluded that the member issued her decision while carrying out her decision-making functions, and the allegations regarding comments in the decision fall outside the scope of the complaint process. Paragraph 3.3 of the Complaints Procedures states that "a complaint cannot be about a member's decision". However, the report also noted that to ask a single question of counsel during the entire hearing, make no comment in response and then to include the above passage in the reasons for decision was, on the face of it, disproportionate and that the matter could certainly have been handled with more tact.

The member admitted that the language she used in the decision was unnecessarily blunt, and that in hindsight she regretted her choice of words.

However, because the allegation related to the member's decision and not conduct, the Director of Integrity concluded that there was no breach of the Code of Conduct.

The Chairperson reviewed the investigation report. He was satisfied that the investigation was thorough and fair. The Chairperson accepted the conclusions in the report and decided there was no breach of the Code of Conduct.

Both parties were informed about the resolution of the complaint. In his decision letter of April 29, 2019, he advised the parties that the member did not breach the Code of Conduct. [However, while the Chairperson decided that the allegation regarding the comments in the decision were outside the scope of the Complaints Procedures and, therefore, there was no breach of the Code of Conduct, he informed the complainant that the member had admitted that the language she used in the decision was unnecessary and that she had expressed regret for her choice of words under the circumstances.

The complaint was dismissed and the file was closed.

## **CASE NO. 18-018**

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The complainant was an official of the Canada Border Services Agency (CBSA) who took exception to the manner in which one of his employees, a hearings officer, was treated by a member of the Immigration Division (ID).

The allegations in the complaint relate to conduct of the member during a detention review hearing. The complainant expressed concerns about the member's tone. The complainant alleged that the member was disrespectful, and raised his voice at times. The complainant also alleged that the Member did not "meet the standard of conduct as laid out in the members' responsibilities to the parties."

The complainant also alleged that the member did not approach this case with an open mind and was not impartial nor objective. Adjudicative matters of this nature fall outside the scope of the Complaints Procedures. Therefore, this aspect of the complaint was not referred for investigation.

The Chairperson referred the allegations related to the conduct of the member to the Office of Integrity for investigation under paragraph 5.5 of the *Procedures for Making a Complaint About a Member (Complaint Procedures)* ([https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member\\_complaint-plainte\\_commissaire.aspx](https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/member_complaint-plainte_commissaire.aspx)).

The Director of Integrity listened to the audio recording of the hearing and reviewed the written decision, the complaint, and the member's submissions.

The Director prepared draft findings of fact and analysis and provided both parties with an opportunity to make submissions.

In his response to the allegations, the member expressed his regret with the tone he used at the hearing and in not displaying the decorum expected of a member of the IRB. The member recognized that the circumstances of the case did not excuse his behaviour at the hearing.

In the investigation report, the Director of Integrity stated that the member noted that he had requested at the previous detention hearing that certain steps be completed before the hearing in question. He expected the Minister's representative to be prepared to address a particular identity form at this hearing, as he viewed it as resolving the very issue that the Minister's representative had relied on to continue to seek detention of the person concerned.

There was a protracted and heated exchange between the member and the hearings officer about the form in question. The hearings officer took the position that it could not and should not be submitted with incorrect information included. The member responded in an animated manner stating that the document should have been submitted.

In his response to the allegations in the complaint, the member indicated that the Minister's representative was "stalling" and was not proceeding in an expeditious manner to deal with new evidence presented that might lead to an alternative to detention. His frustration in this regard manifested itself in exasperated interruptions and comments directed at the hearings officer.

The Director of Integrity's investigation report concluded that there are objective and neutral ways of challenging the Minister's representative's position, making the very same points and holding the Minister's representative to task for certain perceived shortcomings in a normal tone of voice, without personalizing the exchange.

The investigation report concluded that the member's tone and attitude were inappropriate and not in keeping with members' obligations under the Code of Conduct. It was noted, however, that from the outset, the member recognized that his tone was not justified and he took responsibility for his actions.

The Chairperson reviewed the investigation report. He was satisfied that the investigation was thorough and fair. The Chairperson accepted the conclusions in the report and decided that there was a breach of the Code of Conduct.

Both parties were informed about the resolution of the complaint. In his decision letters of June 6, 2019, the Chairperson informed the parties that the member's tone at times was inappropriate and not in keeping with members' obligations under the Code of Conduct.

The complaints process is intended to be corrective in nature. The Chairperson was satisfied that the member took the complaint seriously and he recognized that his behaviour fell short of the expected

standards. Because of this acknowledgment on the part of the member, the Chairperson was satisfied that the member was fully aware of the expected behaviour going forward and that such an incident will not occur again.

The Deputy Chairperson of the ID was informed of the results of the investigation.

The Chairperson concluded that there was no need for any further follow-up action.

The complaint was founded and the file was closed.

## **CASE NO. 18-019**

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The complainant was an official of the Canada Border Services Agency (CBSA) who took exception to the manner in which one of his employees was treated by a member of the Immigration Division (ID).

The allegations in the complaint relate to the member's behavior. It is alleged that the member was rude and disrespectful towards the CBSA employee. The CBSA employee felt humiliated and belittled by the member. It is also alleged that the member's behaviour had a negative impact on representatives from an outside organization who witnessed the exchange.

The allegations relate to an incident which took place outside the hearing room. The CBSA had allocated two vacant hearing rooms normally used for ID hearings to the outside organization for the purpose of regular visits for interviews. The member noticed, from security monitors in the members' preparation room, that individuals unknown to him were in the hearing room and that the microphones used for audio recording of ID hearings had been disconnected. The member went to find out who the individuals were, and subsequently had a heated exchange with the CBSA employee.

The Director of Integrity pursued informal resolution of the complaint under paragraph 5.3 of the *Procedures for Making a Complaint About a Member* (Complaints Procedures). However, the complainant chose to proceed with the formal process.

The Chairperson referred the complaint to the Office of Integrity for investigation under paragraph 5.5 of the Complaints Procedures.

The member was invited to provide a written response to the allegations in the complaint.

Investigations typically involve incidents in the hearing room, for which audio recording of the proceedings are available. In this instance, the incident occurred outside the hearing context and those most directly involved were interviewed personally by the Director of Integrity.

The Director of Integrity prepared draft findings of fact and analysis and provided both parties with an opportunity to make submissions.

In the investigation report, the Director of Integrity indicated that different views were expressed regarding what was said, and regarding the tone, volume and underlying intent of the member's actions. The Director of Integrity found that it was a regrettable incident that should have been avoided altogether. By his own admission, the member should have shared his concerns with his manager and not intervened personally. While not accepting the way all of his behaviour was characterized in the complaint, the member recognized that he could and should have handled himself more appropriately.

The Director of Integrity concluded that the conduct of the member on that day fell short of what is expected of IRB members in their interactions with others. The demonstrated behaviours were found not to be in keeping with members' obligations under the Code of Conduct.

The Chairperson reviewed the investigation report. He was satisfied that the investigation was thorough and fair. The Chairperson accepted the conclusions in the report and decided that there was a breach of the Code of Conduct.

Both parties were informed about the resolution of the complaint in the Chairperson's decision letters of October 31, 2019.

The Deputy Chairperson of the ID was informed of the results of the investigation.

The Chairperson discussed the matter with the member and confirmed his expectations of conduct going forward. In his decision letter to the member, the Chairperson noted that the member recognized that his behaviour fell short of expectations and that the member accepted responsibility for his actions.

The Chairperson was satisfied that the member was fully aware of the expected standard of conduct and that such an incident will not occur again.

The Chairperson concluded that there was no need for any further follow-up action.

The complaint was founded and the file was closed.

## **CASE NO. 19-002**

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The complainant appeared as Minister's counsel in two detention reviews before the Immigration Division.

The allegations in the complaint relate to the member's line of questioning, carriage of the hearings and correspondence with Minister's counsel. It is alleged that there was a reasonable apprehension of bias. The complainant also alleged that the member failed to consider the submissions made and evidence provided by the Minister's counsel and the member continued to question the Minister's counsel on matters that had previously been addressed and decided in earlier detention reviews by previous members.

Among other things, the complainant alleged that:

“the member continued this vein of obvious disagreement with the danger finding on December 28th. When the Minister's counsel attempted to address the previous decisions regarding danger, the member advised that she was aware of the decisions. However, she very quickly asked the Minister's counsel numerous questions that had clearly been addressed previously...”.

The complainant submitted that the member's failure to consider the submissions made and evidence provided by the Minister's counsel indicated a prejudgment and bias against the Minister's counsel. The complainant also alleged that the member did not approach the hearing with an open mind, and as such, was not impartial or objective.

The Office of Integrity forwarded the complaint to the Chairperson for a decision on whether the complaint was outside the scope of the complaints process under paragraph 5.5 of the *Procedures for Making a Complaint About a Member* (Complaints Procedures).

Both parties were informed about the resolution of the complaint. In his decision letter of February 19, 2019, the Chairperson explained that the complaint process is not meant to address a member's decision nor other related adjudicative matters.

The Chairperson concluded that the basis of the complaint and the allegations were about an apprehension of bias and a lack of impartiality on the part of the member and not about the member's conduct. Thus, the complaint fell outside the scope of the Complaints Procedures.

The complaint was screened out and the file was closed.

**Note - In this case, the complainant alleged that the member failed to consider the evidence and had prejudged the case. These types of allegations relate to the exercise of the member's discretion and are not accepted for investigation. The proper remedy to address such allegations is through the appeals process or judicial review at the Federal Court, as the case may be. This approach is based in the legal requirement that members' adjudicative independence cannot be fettered.**

### **CASE NO. 19-003**

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The complainant acted as counsel for a detainee who at the time of the incident in question, was unrepresented in a detention review before the Immigration Division (ID).

The allegations in the complaint relate to comments made by the member. The complainant made serious allegations with respect to the fairness of the detention review process.

The complainant also alleged that in her decision the member:

- failed to treat the detainee's statement as evidence;
- made factually inaccurate statements;
- relied uncritically on numerous statements which the Canada Border Services Agency hearings officer made at the previous detention review, which were unsupported by evidence;
- failed to engage in even the most minimal "active adjudication" although the detainee was unrepresented and had minimal education, and made problematic comments about persons with mental health issues.

The Office of Integrity forwarded the complaint to the Chairperson for a decision on whether some or all of the allegations in the complaint would be investigated or if the complaint should be dismissed because it was outside the scope of the complaints process under paragraph 5.5 of the *Procedures for Making a Complaint About a Member* (Complaints Procedures).

The Chairperson found that although the member ultimately concluded that she did not have jurisdiction to rule on a particular issue for which she sought submissions, this was an adjudicative matter which related to the member's functions and authority as an independent member of the Board.

However, in his letter of March 19, 2019, the Chairperson informed the parties that given the seriousness of the allegations in the context of the *Report of the 2017/2018 External Audit (Detention Review)*, the Chairperson decided that the complaint would be investigated by way of a process which offers a broader scope of review and he referred it to the Deputy Chairperson of the ID for investigation.

More specifically, the Chairperson asked the Deputy Chairperson to investigate whether there were ongoing systemic issues remaining with the detention review process following the Division's acceptance of the findings of the Detention Review, particularly with respect to unrepresented detained individuals and as regards persons suffering from mental health issues.

As a follow-up to this matter, the Deputy Chairperson met with the member. The member recognized that there was a need for improvement. More broadly, the Deputy Chairperson instituted mandatory training for the Division shortly thereafter with respect to mental health and unconscious bias.

The file was then closed.

## CASE NO. 19-004

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**Note that this complaint was filed by the same complainant as in case no. 19-003 and the allegations in the two complaints are similar.**

The complainant acted as counsel for a detainee who at the time was unrepresented in a detention review before the Immigration Division (ID).

The allegations in the complaint relate to comments made by the member. The complainant made serious allegations with respect to the fairness of the detention review hearing.

The complainant also alleged that the conduct of the member at the hearing was problematic in the following ways:

- she failed to treat the detainee's statement as evidence;
- she created barriers to the detainee's ability to present evidence;
- she failed to engage in "active adjudication" although the detainee was unrepresented, and had minimal education;
- she relied uncritically on numerous statements from the Canada Border Services Agency hearings officer, which were not supported by evidence; and
- she made problematic comments about persons with mental health issues.

The Office of Integrity forwarded the complaint to the Chairperson for a decision on whether some or all of the allegations in the complaint would be investigated or if the complaint should be dismissed because it was outside the scope of the complaints process under paragraph 5.5 of the *Procedures for Making a Complaint About a Member* (Complaints Procedures).

The Chairperson found that although the member ultimately concluded that she did not have jurisdiction to rule on a particular issue for which she sought submissions, this was an adjudicative matter which related to the member's functions and authority as an independent member of the Board.

However, in his letter of March 19, 2019, the Chairperson informed the parties that given the seriousness of the allegations in the context of the *Report of the 2017/2018 External Audit (Detention Review)*, the Chairperson decided that the complaint would be investigated by way of a process which offers a broader scope of review and he referred it to the Deputy Chairperson of the ID for investigation.

More specifically, he asked the Deputy Chairperson to investigate whether there were ongoing systemic issues remaining with the detention review process, following the Division's acceptance of the findings of the *Detention Review*, particularly with respect to unrepresented detained individuals and as regards persons suffering from mental health issues.

As a follow-up to this matter, the Deputy Chairperson met with the member. The member recognized that there was a need for improvement. More broadly, the Deputy Chairperson instituted mandatory training for the Division shortly thereafter with respect to mental health and unconscious bias.

The file was then closed.



## CASE NO. 19-005

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The complainant appeared as Minister's counsel in a detention review before the member in the Immigration Division.

The complainant alleged that:

- (1) the member directed the complainant to create a new disclosure package for the application and, after submissions and arguments were already made by the parties, explained that she did not have jurisdiction to assess the initial arrest, rendering the application moot. The complainant stated this was a needless exercise of authority and could have been avoided.

The complainant alleged that the member "began the review by conducting a *Voir Dire* application to quash the detention on the grounds that the initial arrest was unlawful...".

- (2) the complainant further alleged that the member counselled the detainee on a potential avenue to frustrate removal and asked questions which were irrelevant to the proceedings in an attempt to cast the Minister's counsel in a negative light, thus failing to maintain impartiality.

The complainant alleged that the member speculated about proceedings that the detained person was not eligible for and suggested proceedings that would benefit the detainee. The complainant alleged that these speculations and suggestions needlessly complicated the detention review process and gave the appearance that the member was advocating for the detainee and working against the Minister's counsel.

The Office of Integrity forwarded the complaint to the Chairperson for a decision on whether the complaint was outside the scope of the complaints process under paragraph 5.5 of the *Procedures for Making a Complaint about a Member* (Complaints Procedures).

Both parties were informed about the resolution of the complaint. The Chairperson stated in his decision letter of April 10, 2019, that the complaint process is intended to address a member's conduct and not their decisions. Adjudicative matters are to be addressed and decided by the Immigration Appeal Division or the Federal Court, as applicable.

The Chairperson concluded that the first allegation related to the conduct of the hearing and noted that members have broad powers to conduct hearings in the manner they see fit. The Chairperson found that although the member concluded that she did not have jurisdiction to rule on a particular issue this does not mean that time spent looking into the issue was inefficient. This was a legal question which related to the member's judicial functions and authority.

With respect to the second allegation, the Chairperson concluded that it related to a question of perceived bias on the part of the member which also fell outside the scope of the Complaints Procedures.

The complaint was screened out and the file was closed.

**Note - This complaint related to alleged misconduct in respect of the member's directions on disclosure, complication of the proceedings, asking irrelevant questions and a perception that the member advocated for the detained person and failed to maintain impartiality. These types of allegations relate to the exercise of the member's discretion and are not accepted for investigation. The proper remedy to address such allegations is through the appeals process or judicial review at the Federal Court, as the case may be. This approach is based in the legal requirement that members' adjudicative independence cannot be fettered.**

## CASE NO. 19-006

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The complainant appeared as Minister's counsel in a detention review before the Immigration Division.

The complainant alleged that the member gave the impression that she was an advocate for the detainee rather than an impartial decision-maker.

The complainant submitted that in her decision the member stated: "Perhaps you know or perhaps you don't know but once the Minister sets a date for removal you can apply to the Federal Court for stay of that removal but it's up to you to get those legal processes going as without any of those legal processes the Minister has to remove you." And, further in the decision, "for you ma'am, I would recommend that you speak to Legal Aid about whether you will proceed with a Federal Court case, either for a stay of removal or pursuing an appeal on humanitarian and compassionate grounds." The complainant was of the view that these statements were unsolicited and that it is not the member's function to counsel detainees on various methods to delay the removal process.

The Office of Integrity forwarded the complaint to the Chairperson for a decision on whether the complaint was outside the scope of the complaints process under paragraph 5.5 of the *Procedures for Making a Complaint About a Member* (Complaints Procedures).

Both parties were informed about the resolution of the complaint. In his decision letter of April 10, 2019, the Chairperson noted that the complaint process is not meant to address a member's decision nor related adjudicative matters.

The Chairperson concluded that the allegation related to a perceived apprehension of bias and was not related to the conduct of the member and therefore fell outside the scope of the Complaints Procedures.

The complaint was screened out and the file was closed.

**Note - In this case, the complainant alleged that the member was not an impartial decision-maker. The appropriate recourse to address this type of allegation is through the appeals process or judicial review at the Federal Court, as the case may be. This approach is based in the legal requirement that members' adjudicative independence cannot be fettered.**

## CASE NO. 19-009

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The complainant appeared as counsel for a claimant before the Refugee Protection Division (RPD).

The allegations in the complaint relate to a three-minute exchange between the member and the complainant that occurred at the outset of the hearing. The member asked the complainant why he was late for the hearing. The complainant explained that he was not late for the hearing but the delay was caused by clearing security and getting to the hearing room.

The complainant stated in his complaint: "Upon arrival, I observed the member was extremely furious. He could not say a single word. My client and I could read his face as extremely unhappy. I could also observe that his tone was intimidating and condescending. There were angry outbursts. After starting the hearing, he lambasted me for coming late."

The complainant made a number of allegations related to:

- intimidation and condescending demeanour of the member;
- angry outbursts at the beginning of the hearing;
- unprofessional conduct of the member;
- lack of respect towards counsel; and
- apprehension of bias.

The complainant requested that the Member be prevented from hearing any matters where the complainant is counsel.

As regards the allegation related to bias, the complainant claimed that the member had already decided the outcome of the refugee claim because the member was upset with counsel for being late for the hearing.

The Office of Integrity forwarded the complaint to the Chairperson for a decision on whether some of the allegations of the complaint were outside the scope of the complaints process under paragraph 5.5 of the *Procedures for Making a Complaint About a Member* (Complaints Procedures).

The Chairperson decided that those allegations relating to reasonable apprehension of bias would be screened out because allegations not related to conduct fall outside of the scope of the *Procedures for Making a Complaint About a Member* (Complaints Procedures).

The Chairperson referred the remaining allegations to the Office of Integrity for investigation under paragraph 5.5 of the Complaints Procedures.

The Director of Integrity listened to the audio recording of the proceeding and reviewed the member's written response to the allegations in the complaint.

The Director of Integrity prepared draft findings of fact and analysis and provided both parties with an opportunity to make submissions.

The hearing involved an RPD claim which was streamed for a short hearing pursuant to the *Instructions Governing the Streaming of Less Complex Claims at the Refugee Protection Division*. A number of these files are scheduled in succession in a day. A delay in the start time of one of these hearings affects all those following that day.

The Director of Integrity stated in the investigation report that during the three-minute exchange the member was clear that counsel was late for the hearing. It was scheduled for 8:30 a.m. and due to his tardiness only began shortly before 9 a.m.

In the investigation report, the Director of Integrity indicated that at the hearing, the complainant provided a confusing account to the member when questioned as to why he was late. The complainant maintained that he had not been late for the hearing. He stated that he presented himself to the security desk on the ground floor at 8:32 a.m. "by my watch", and was only late getting to the hearing room due to a delay in being escorted up by security personnel.

The Director of Integrity's investigation report stated that the complainant hadn't presented himself to the security desk by the scheduled start time for the hearing. In addition, the Notice of Hearing indicated that parties should be present 30 minutes in advance of the hearing. The Director of Integrity's investigation report concluded that the complainant was clearly late for the hearing.

The audio recording revealed that the member showed respect towards counsel throughout the exchange. The member was frustrated with the complainant for being late and asked him directly, but professionally, to explain his lateness. Once he had heard the complainant's position and explained the importance of hearings being on time, he proceeded.

In the investigation report, the Director of Integrity stated that the audio recording was completely at odds with the allegations made in the complaint. Any reasonable review of the audio recording would confirm that:

- there was neither intimidation nor condescension by the member;
- there were no angry outbursts at the beginning of the hearing;

- the member conducted himself in a professional manner throughout; and
- there was no evidence of lack of respect towards the complainant.

Counsel have an obligation to present themselves on time for IRB hearings, as outlined in the Notice of Hearing. The Director of Integrity concluded that the complainant was late for the hearing and did not take responsibility for his lateness. There was no evidence whatsoever that the conduct of the member was inappropriate.

The Director of Integrity concluded that the allegations were unfounded and that there was no breach of the Code of Conduct.

The Director of Integrity also concluded that, in any event, there were no grounds to grant the complainant's request that he be placed on a list of individuals who cannot appear before the member. The purpose of the complaints process is to ensure an open and transparent mechanism to investigate complaints about member conduct. However, the process cannot be used as a mechanism to determine or influence which members hear cases before particular counsel.

The Chairperson reviewed the investigation report. He was satisfied that the investigation was thorough and fair. The Chairperson accepted the conclusions in the report and decided there was no breach of the Code of Conduct.

Both parties were informed about the resolution of the complaint. In his decision letters of November 7, 2019, the Chairperson decided that the allegations about misconduct were unfounded and that the member met his obligations under the Code of Conduct.

The complaint was dismissed and the file was closed.

## CASE NO. 19-010

The complainant was an unrepresented refugee claimant who appeared before the member at the Refugee Protection Division.

The complainant alleged that the member was biased and rejected her claim. This led to her removal from Canada.

The complainant alleged that the member knew immediately that she would reject the claim but continued to question her for three and a half hours. The complainant submitted she had no criminal record, worked in Canada and was undeservingly removed. She further submitted that she was 60 years old with no place to go in her county of origin and would face discrimination.

The Office of Integrity forwarded the complaint to the Chairperson for a decision on whether the complaint was outside the scope of the complaints process under paragraph 5.5 of the *Procedures for Making a Complaint About a Member* (Complaints Procedures).

Both parties were informed about the resolution of the complaint. In his decision letter of May 3, 2019, the Chairperson stated that the complaint related to decision-making. Allegations related to members' decisions and other adjudicative matters fall outside the scope of the Complaints Procedures. The Chairperson explained in his letter to the complainant that the complaint process is intended to address a member's conduct and not their decision-making.

The complaint was screened out and the file was closed.

**Note - In this case, the complainant alleged that the member was not an impartial decision-maker. The appropriate recourse is through the appeals process or judicial review at the Federal Court, as the case may be. This approach is based in the legal requirement that members' adjudicative independence cannot be fettered.**



## CASE NO. 19-012

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The complainant was a refugee claimant who appeared before the member at the Refugee Protection Division (RPD).

The complaint contained two allegations as follows:

- (1) the complainant alleged that the member, in his decision, addressed and commented on issues that were not included in the Basis of Claim (BOC) form; and
- (2) The complainant alleged that the audio recordings of the hearings had been manipulated such that statements made by the member during the hearings are missing. The complainant alleged that certain remarks and comments made by the member do not appear in the recording, that the audio recording was manipulated during the hearings by starting and stopping the recording so that the member's remarks and interventions were excluded.

The Office of Integrity forwarded the complaint to the Chairperson for a decision on whether the complaint was outside the scope of the complaints process under paragraph 5.5 of the *Procedures for Making a Complaint About a Member* (Complaints Procedure).

Both parties were informed about the resolution of the complaint in the Chairperson's decision letter of May 21, 2019

The Chairperson decided that the first allegation was adjudicative in nature. Allegations related to a member's decision fall outside the scope of the Complaints Procedures. The Chairperson explained in his letter to the complainant that the complaint process is intended to address a member's conduct and not their decision-making. Complaints cannot be about what a member decides in a case.

With respect to the second allegation, the Chairperson noted that the Director of Integrity listened to the audio recordings and found no evidence to support the allegation that the recordings were manipulated. The Chairperson found this allegation to be without merit.

The complaint was screened out and the file was closed.

**Note – The first allegation related to the member's decision. The proper remedy to address this allegation is through the appeals process or judicial review at the Federal Court, as the case may be. This approach is based in the legal requirement that members' adjudicative independence cannot be fettered.**

## CASE NO. 19-013

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The complainant appeared as counsel for a claimant before the Refugee Protection Division.

The main allegations were as follows:

- the member was biased or at least appeared to be biased in that it seemed that the member had already decided the claim;
- the member "went to another document to attach the credibility of that document leaving the room to obtain a foreign law which he then introduced into evidence";
- it was obvious that the member had already decided the case.

The complainant stated that he had determined that it was not a fair hearing. He made a bias motion explaining why he had come to that conclusion. He stated that the member rudely denied the motion.

The complainant asked not to be assigned any cases with the member in the future.

The Office of Integrity forwarded the complaint to the Chairperson for a decision on whether the complaint was outside the scope of the complaints process under paragraph 5.5 of the *Procedures for Making a Complaint About a Member* (Complaints Procedures).

Both parties were informed about the resolution of the complaint. The Chairperson stated in his decision letter of July 3, 2019, that the complaint process is intended to address a member's conduct and not their decisions. The Chairperson concluded that the allegations were not related to the conduct of the member and therefore fell outside the scope of the Complaints Procedures.

The complaint was screened out and the file was closed.

**Note - This complaint related to a perceived lack of impartiality and to the member's exercise of adjudicative discretion in respect of the documentary evidence. The appropriate recourse to address these types of allegation is through the appeals process or judicial review at the Federal Court, as the case may be. This approach is based in the legal requirement that members' adjudicative independence cannot be fettered.**

## **CASE NO. 19-018**

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The complainant was a refugee claimant who appeared before the member at the Refugee Protection Division (RPD).

The complainant was represented by counsel at the RPD hearing.

The complainant alleged that the member's decision was based on miscommunication between the member and the interpreter and a misunderstanding of the complainant's testimony during the hearing. The complainant alleged that the member misunderstood the basis of the claim.

The Office of Integrity forwarded the complaint to the Chairperson for a decision on whether the complaint was outside the scope of the complaints process under paragraph 5.5 of the *Procedures for Making a Complaint About a Member* (Complaints Procedures).

Both parties were informed about the resolution of the complaint. In his decision letter of August 9, 2019, the Chairperson concluded that the allegations were not related to the conduct of the member and therefore fell outside the scope of the Complaints Procedures.

The Chairperson explained in his letter to the complainant that the complaint process is intended to address a member's conduct and not their decision-making. Complaints cannot be about what a member decides in a case.

The complaint was screened out and the file was closed.

**Note – This complaint related to the member's decision. The proper remedy to address this matter is through the appeals process or judicial review at the Federal Court, as the case may be. This approach is based in the legal requirement that members' adjudicative independence cannot be fettered.**