Assessment of Credibility

Prepared by : IRB Legal Services

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FOREWORD

The process of determining whether a claimant is a Convention refugee or a "person in need of protection" under the *Immigration and Refugee Protection Act* (IRPA)[1] is one that requires members of the Refugee Protection Division (RPD) to decide whether they believe the claimant's evidence and how much weight to give to that evidence.[2] In determining this, members must assess the credibility of the claimant, other witnesses and the documentary evidence.

The RPD's decision to allow or reject a person's claim for refugee protection may be appealed to the Refugee Appeal Division (RAD) by the Minister or the claimant, unless one of the exceptions to this right applies.[3] The RAD assesses whether the RPD decision, including credibility findings, is wrong in law, in fact or in mixed law and fact.[4] The enabling provisions for RAD appeals only came into force on December 15, 2012.

It is important to bear in mind that a negative credibility finding which may be determinative of a refugee claim under s. 96 of the IRPA is not necessarily determinative of a claim under s. 97(1) of the IRPA.[5] Whether the Board has properly considered a claim under both s. 96 and s. 97(1) is determined in the circumstances of each individual case, bearing in mind the different elements that must be credibly established for each ground.

When reading older case law, keep in mind that under the former *Immigration Act,*[6] the determination of whether a person was a Convention refugee was made by members of the Convention Refugee Determination Division (CRDD), often referred to as the Refugee Division (RD). The CRDD was replaced by the Refugee Protection Division (RPD). The CRDD panel of two members was assisted by a Refugee Hearing Officer (RHO), later known as a Refugee Claim Officer (RCO) or Refugee Protection Officer (RPO) but this role was eliminated. All references to "the Court" mean the Federal Court of Canada, unless stated otherwise. The paper includes the relevant jurisprudence up to December 31, 2020.

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1 S.C. 2001, c. 27. IRPA came into effect on June 28, 2002. "Convention refugee" is defined in section 96 and "person in need of protection" in s. 97 of that Act. The definition of "Convention refugee" in the *Immigration Act* was not changed in substance.

2 See also IRB Legal Services, *Weighing Evidence,* December 31, 2020.

3 IRPA, s. 110(1). The restrictions on appeals are enumerated in s. 110(2).

4 *Canada (Citizenship and Immigration) v. Huruglica,* 2016 FCA 93, [2016] 4 FCR 157, at para 78.

5 *Odetoyinbo v. Canada (Citizenship and Immigration)*, 2009 FC 501, at para 7.

6 R.S.C. 1985 (4th Supp.), c.28.

1. GENERAL PRINCIPLES AND OBSERVATIONS

1.1. Credible or trustworthy evidence

The assessment of credibility is guided by legislative provisions and principles found in the jurisprudence. The IRPA states in s. 170:

> 170. The Refugee Protection Division, in any proceeding before it,
> …
> (*g*) is not bound by any legal or technical rules of evidence;
> (*h*) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances.

Corresponding provisions for the Refugee Appeal Division (RAD) are s. 171 (a.2) and (a.3).

It would be an error for the RPD or the RAD to reject evidence simply because it is hearsay; although the weight that is given to hearsay evidence may be discounted or even given no weight if there are reasons to consider it unreliable.[7]

Members may draw reasonable inferences of fact from the evidence. Inferences are deductions made from the evidence.[8] Reasonable inferences have the validity of legal proof, as can be read in a frequently-cited passage from *Jones v. Great Western Railway Co.,* where Lord Macmillan explained the difference between conjecture and inference:

> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a

[7] In *Guthrie v. Canada (Citizenship and Immigration)*, 2018 FC 852, at para 12, Justice Favel wrote: "With respect to the hearsay, the PRRA Officer correctly noted that such evidence can be admissible and that the weight of that evidence is to be determined."

See also *Singh v. Canada (Citizenship and Immigration)*, 2014 FC 610, at para 16, where Justice Roy observed:

> […] the documentary evidence, which is nothing other than the version that was not believed told by people who do not have knowledge of the facts, could not save the direct evidence that was not believed. Hearsay evidence is only admissible and useful if it is reliable. It is not that the evidence was disregarded but that it was deemed to have little weight given the problems with the direct and primary evidence. [emphasis added]

[8] *K.K. v. Canada (Citizenship and Immigration)*, 2014 FC 78. At para 61, Mr Justice Annis summarizes a statement of principles on inferences set out by the late Justice Ducharme of the Ontario Superior Court.

> deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. …[9]

A finding of a lack of credibility based on inferences must be supported by evidence on record.[10] It is not open for Board members to base their decisions on assumptions and speculations for which there is no real evidentiary basis. For example, in *Cao*,[11] the Board erred when it found that it was "reasonable to assume" that there would be documentation concerning the claimant's alleged required sterilization. However, it made no reference to any documentary evidence that would establish a foundation for this assumption.

Another case where the Court found that the RPD made an unwarranted assumption is *Mohammed*.[12] The RPD considered the claimant's oral testimony concerning the date he went into hiding was inconsistent with his BOC, not because of what was actually written in the BOC, but based on the RPD's assumption that events in the BOC were set out in chronological order. Justice Zinn found it unreasonable for the RPD to conclude that there was a contradiction on the basis of an inferred date: "Inferences are not evidence. This Court has observed that discrepancies relied on by the RPD in making credibility determinations must be real and not speculative."

Deductions based on the evidence must be distinguished from conjecture or speculation. In *Jung*,[13] the Court considered that the Board erred by engaging in "pure speculation" about why it was not credible that someone who was underweight and sick would be excused from military service in North Korea. The Board had reasoned that in light of the high number of North Koreans with stunted growth, the military could not afford to exclude persons from mandatory military service on that basis.

In *Mahalingam*, where the CRDD used the words "we feel" in its finding that the applicant's fear that the police would again humiliate and harass her was highly speculative, Justice Gibson held:

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[9] *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39 at 45 (H.L.) See also *Re Jaballah*, 2016 FC 586, at paras 14-15 concerning reasonable inferences, speculation and the fact that reasonable inferences must be based on established facts in order to have the "validity of legal proof".

[10] *Richards v. Canada (Citizenship and Immigration)*, 2011 FC 1391, at paras 17-19. The negative inferences as to credibility were based on inconsistencies between the testimonies of one of the claimants and of the designated representative and documentary evidence including the Personal information form (PIF).

[11] *Cao v. Canada (Citizenship and Immigration)*, 2013 FC 173, at paras 20-21.

[12] *Mohammed v. Canada (Citizenship and Immigration)*, 2020 FC 437, at para 11.

[13] *Jung v. Canada (Citizenship and Immigration)*, 2014 FC 275, at para 71. See also *Ahmad v. Canada (Citizenship and Immigration)*, 2019 FC 11, at para 28 where Justice Gleeson ruled that the RPD engaged in improper speculation when it found, without reference to any objective evidence, that the Afghan officer issuing a passport would have checked the birth registry if there were doubts relating to the applicant's birth date.

> In the absence of some evidence, cited by the CRDD and weighed against the evidence to the contrary to support its "feeling", I conclude that the CRDD here resorted to a speculative and conjectural conclusion which was clearly central to its decision. In so doing, it committed a reviewable error.[14]

The starting point for assessing credibility comes from *Maldonado,* where the Federal Court of Appeal stated that when a claimant swears that certain facts are true, this creates a presumption that they are true unless there is valid reason to doubt their truthfulness.[15] The strength of the presumption varies according to the circumstances of each individual case.[16] In *Hernandez*, Justice Denault specified that the presumption of truthfulness that applies to facts alleged by refugee claimants does not apply to deductions they make based on those facts.[17] Along the same lines, Justice McHaffie wrote: "However, the *Maldonado* presumption is simply that a sworn witness is telling the truth. It is not a presumption that everything the witness believes to be true, but has no direct knowledge of, is actually true."[18]

An important indicator of credibility is the consistency with which a witness has told a particular story.[19] In assessing credibility, the Board may consider matters such as inconsistencies, contradictions and omissions from the evidence, specialized knowledge, inferences, implausibilities, documentary evidence and the claimant's demeanour at the hearing.

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[14] *Mahalingam v. Canada (Minister of Citizenship and Immigration),* 1998 CanLII 7285, at paras 9 and 11.

[15] *Maldonado v. Canada (Minister of Employment and Immigration),* [1979] F.C.J. No. 248 (FCA)(QL), [1980] 2 FC 302 (CA), at para 5.

[16] See for example *Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration)*, 2019 FC 1126, at para 15:

> [I]n cases where a claimant for refugee protection appears to have had opportunities to gather corroboration for his/her claim, either before or after arriving in Canada, the strength of the presumption of truthfulness varies directly with the extent to which such corroboration is provided. Where the claimant simply gives a bald, unsupported assertion that strains credulity when considered together with objective information in the Board's National Documentation Package [NDP] or RIR documentation, the strength of the presumption of truthfulness is relatively weak and may be displaced by that objective information. Indeed, it may also be displaced by a failure to reasonably explain an omission to provide corroboration for such assertions.

See also *Lunda v. Canada (Citizenship and Immigration),* 2020 FC 704, at paras 29-31 for numerous examples of situations in which the presumption may be rebuttable.

[17] See *Hernandez v. Minister of Employment and Immigration*, [1994] F.C.J. No. 657 (FCTD)(QL) at paras 5-6, where the Court observed that the deductions that the tribunal made from the facts did not coincide with those made by the applicant.

[18] *Olusola v. Canada (Citizenship and Immigration),* 2020 FC 799, at para 25.

[19] *Magonza v. Canada (Citizenship and Immigration),* 2019 FC 14, at para 19, where Justice Grammond lists factors frequently used to assess credibility, the third factor is "Internal consistency of the testimony and consistency with previous declarations."

Findings of fact, and consequently, the determination as to whether a claimant's evidence is credible, are made on a balance of probabilities.[20]

1.2. Relevance of country conditions evidence

As affirmed by the Federal Court in *Odetoyinbo*,[21] tribunals must assess the claimant's alleged fear of persecution or individualized risk in light of "what is generally known about conditions and the laws in the claimant's country of origin, as well as the experiences of similarly situated persons in that country." In other words, the Board must consider corroboration by objective documentary evidence of country conditions or the treatment of certain groups in the country that could reasonably be expected to give rise to a well-founded fear of persecution or to a risk under s. 97 (1) when assessing the credibility of a claimant being at risk of persecution or other harm.[22]

Even where some of a claimant's allegations, for example regarding past experiences of persecution may lack credibility, country conditions may nonetheless indicate a prospective risk for the claimant as a member of a particular social group[23] or, in the absence of a nexus to the Convention grounds, as a person among other similarly situated persons.

Although evidence of country conditions is a relevant consideration, in *Oduro*, Justice McKeown cautioned that for cases from the same country, "[t]here can be no consistency on findings of credibility."[24] In other words, the credibility of each claimant must be assessed

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[20] *Li v. Canada (Minister of Citizenship and Immigration),* 2005 FCA 1, [2005] F.C.J. No 1 (FCA)(QL) at para 29: "Proof on a balance of probabilities is the standard of proof the panel will apply in assessing the evidence adduced before it for purposes of making its factual findings."

[21] *Odetoyinbo v. Canada (Citizenship and Immigration),* 2009 FC 501, at para 8.

[22] *Yahaya v. Canada (Citizenship and Immigration)*, 2019 FC 1570, at para 14:

> While the applicant has the burden to show membership in the recognized 'sexual orientation' social group […], tribunals should be attentive to evidence related to the social and legal realities of sexual minorities. As this Court affirmed in *Odetoyinbo* […] immigration and refugee tribunals must assess the applicant's fear of persecution or individualized risk in light of 'what is generally known about conditions and the laws in the claimant's country of origin, as well as the experiences of similarly situated persons in that country.' As a result, tribunals should be attuned to the realities of those in the sexual orientation group before making credibility assessments with respect to the applicant's sexual orientation.

[23] *Odetoyinbo v. Canada (Citizenship and Immigration)*, 2009 FC 501, at para 8:

> […] In the case at bar the Board did not explicitly state in its reasons that it did not believe that the applicant was bisexual. Accordingly, it could not ignore compelling objective evidence on record demonstrating the abuses which gay men are subjected to in Nigeria. Therefore, even if the Board rejected the applicant's account of what happened to him in Nigeria, it still had a duty to consider whether the applicant's sexual orientation would put him personally at risk in his country.

[24] *Oduro, Ebenezer v. M.E.I.*, [1993] F.C.J. No. 1421 (FCTD)(QL) at para 17.

individually. Justice Simpson echoed the comments made by her colleague, adding that "credibility cannot be prejudged. It is an issue to be determined by the Board members in each case based on the circumstances of the individual claimant and the evidence."[25]

1.3. Benefit of the doubt

The *Handbook on Procedures and Criteria for Determining Refugee Status*[26] provides the following guidance:

> 196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. … Even such independent research may not, however, always be successful and there may be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

This principle was discussed in the Supreme Court of Canada decision of *Chan*.[27] The majority found that, where the claimant's allegations run contrary to the available evidence and generally known facts, it is not appropriate to apply the benefit of the doubt in order to establish the claim. In reaching this conclusion, the majority stated:

> My colleague, La Forest J. argues that no conclusions can be drawn from individual items of evidence and that on each item the appellant should be given the benefit of the doubt, often by considering hypotheticals which could support the appellant's claim. This approach handicaps a refugee determination Board from performing its task of drawing reasonable conclusions on the basis of the evidence which is presented. This approach is also fundamentally incompatible with the concept of "benefit of the doubt" as it is expounded in the UNHCR Handbook:

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[25] *Gyimah v. Canada (Minister of Employment and Immigration),* [1994] F.C.J. No. 1239 (FCTD)(QL) at para 14.

See, for example, *Lengyel v. Canada (Citizenship and Immigration)*, 2015 FC 873, where the applicants argued that rather than focusing on tangential credibility issues, the RPD should have focused on the "macro-issue" of whether, as Roma, they were at risk in Croatia. At para 17, Justice Zinn rejected their argument:

> In the absence of any credible evidence that they experienced persecution in Croatia on account of their Roma ethnicity, they were entitled to have the RPD consider the situation of similarly situated persons. The country condition evidence simply does not establish that all Roma in Croatia are persecuted even though some may be. Moreover, they admitted that whenever they sought the protection of the state, it was provided. On this basis alone, their claims cannot succeed.

[26] Issued by the United Nations Office of the High Commissioner for Refugees, Geneva, January 1988.

[27] *Chan v. Canada (Minister of Employment and Immigration),* 1995 CanLII 71 (SCC), [1995] 3 SCR 593, at para 142.

> 204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts. [emphasis in the original]

Major J., speaking for the majority went on to discuss the evidence, contrasting the appellant's testimony with the documentary evidence (at paragraph 145):

> Since the appellant's claim that he would be physically coerced into sterilization runs contrary to the available evidence and generally known facts it is not an appropriate instance in which to apply the benefit of the doubt in order to establish the appellant's case.

However, the dissenting justices found, at paragraph 56, that the appellant's account did not run contrary to the available evidence and generally known facts; consequently, in their view, it was appropriate to apply the benefit of the doubt:

> The appellant's account of events so closely mirrors the known facts concerning the implementation of China's population policy that, given the absence of any negative finding as to the credibility of the appellant or of his evidence, I think it clear that his quite plausible account is entitled to the benefit of any doubt that may exist. With respect, I see no merit in the approach taken by some members of the court and by my colleague Major J. to seize upon sections of the appellant's testimony in isolation. Indeed, I find such a technique antithetical to the guidelines of the UNHCR Handbook (see paragraph 201).

The benefit of the doubt does not apply to situations where, as in *Hidalgo Carranza*[28] the Board reasonably finds a claimant's story improbable.

1.4. Notice to the claimant

The Federal Court has stated that credibility is always an issue in refugee hearings and that no special notice needs to be provided to the claimant.[29] The Board can, however, identify credibility as an issue at any point during the course of the hearing. The RPD must do so in clear terms and provide the claimant with an opportunity to address the issue.[30]

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[28] *Hidalgo Carranza v. Canada (Citizenship and Immigration)*, 2010 FC 914, at para 22. Justice Shore found it was reasonable for the RPD to consider omissions and contradictions in the claimant's testimony and in the documentary evidence. It was therefore not appropriate to apply the principle of the benefit of the doubt.

[29] *Talukder v. Canada (Citizenship and Immigration)*, 2007 FC 668, at para 20.

[30] *Malala v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 94, at para 24.

Natural justice requires that claimants understand the case they have to meet, so if a decision-maker leads a claimant to believe that a certain issue such as credibility is not an issue, it is a denial of natural justice to subsequently reject the claim based primarily on that issue. This is what happened in *Velauthar*,[31] where the CRDD indicated that the only issue was whether the harm the claimants feared qualified as persecution on a Convention ground. It invited and received submissions on that issue, but then decided the claim on the basis of credibility. The Court of Appeal found "a gross denial of natural justice "and noted that "the Appellants were denied the opportunity to know and answer the case against them by a deliberate decision of the presiding member in which his colleague acquiesced."

The circumstances in *Butt*[32] serve as a warning against relying on the fact credibility is always an issue in any refugee claim. In this case, the CRDD identified credibility as an issue at the outset of a hearing but according to counsel, when she asked the panel to provide a list of outstanding issues to cover in her written submissions, credibility was not listed as an issue. When she provided her submissions, counsel clearly indicated her understanding that credibility was not an issue. She received no response until some three months later when the decision of the panel was rendered, and credibility was the issue on which the Board's decision turned. Justice MacKay held that the circumstances were clearly comparable to those in *Velauthar*:

> **10** In my opinion, the failure of the panel to indicate that credibility was an issue when, at the request of counsel, it listed issues on which submissions should be made, resulted in a denial of natural justice when by its decision the panel determined that the applicants' evidence was not credible. In the circumstances the applicants were denied an opportunity to address the matter of principal concern to the panel in its decision.

Perera[33] is another case that the Court found comparable to *Velauthar* although the Board did not explicitly specify which issues should be addressed in the submissions by counsel. However, the Board erred by giving the claimant a false impression during the hearing that his oral testimony had been accepted and then later impeaching his credibility on the basis of that testimony.

Similarly, in *Sivamoorthy* Justice Russell found both *Perera* and *Velauthar* directly applicable. He held that the effect of the Board's comments was misleading: "The Applicant

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[31] *Velauthar v. Canada (Minister of Employment and Immigration)* [1992] F.C.J. No. 425 (FCA)(QL).

[32] *Butt v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7523 (FC), at paras 9-10.

[33] *Perera v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1172 (TD)(QL), at para 6.

was denied natural justice by the Board misleading the Applicant into believing that the issue of identity was resolved and then refusing the claim based primarily on that issue."[34]

In *Okwagbe*, Justice Zinn succinctly expressed the principle to be derived from the case law: "When the claimant has not made submissions on an issue, including credibility, because the tribunal directly or indirectly indicates that no such submissions are required, then the claimant is denied natural justice if the Board makes its ruling based on that issue."[35] [emphasis added]

In *Zhang*,[36] Justice Kane found that the RAD failed to consider the jurisprudence which establishes that where the RPD indicates that an issue does not need to be addressed, it is a breach of procedural fairness for the RPD to rely on that issue as a basis for its decision. The RAD erred by not considering, in the circumstances of this case, whether the RPD gave the impression that only particular issues would need to be addressed and, by implication, that other issues would not need to be addressed.

Regarding the requirement for the RAD to give notice of credibility issues, members must provide the parties notice and an opportunity to respond to credibility issues that were not raised before the RPD or in the appeal record.[37] A failure to provide notice runs the risk of breaching the principles of procedural fairness. Where however, the credibility issues raised and considered by the RAD are linked to the parties' submissions or to the RPD's findings, the RAD is entitled to independently assess the evidence and make new credibility findings.[38]

1.5. Witnesses and examination of documents

A claimant must be provided a reasonable opportunity to present evidence and question witnesses.[39] When the Board rejects a claim because it doubts that certain allegations going to the heart of the claim were proven, the claimant must be given an opportunity to present evidence about those allegations.[40]

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[34] *Sivamoorthy v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 408, at para 44.

[35] *Okwagbe v. Canada (Citizenship and Immigration)*, 2012 FC 792, at para 7.

[36] *Zhang v. Canada (Citizenship and Immigration)*, 2015 FC 1031, at paras 30-38: "In this case, the RAD erred in not considering whether the RPD's identification of specific issues and silence on the issue of objective risk led the applicants to reasonably presume or expect that objective risk would not be addressed."

[37] *Kwakwa v. Canada (Citizenship and Immigration)*, 2016 FC 600, at paras 25-26.

[38] *Bebri v. Canada (Citizenship and Immigration)*, 2018 FC 726, at para 16.

[39] See s. 170(e) of the IRPA.

[40] *Malala v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 94, at para 24.

See also *Teweldebrhan v. Canada (Citizenship and Immigration)*, 2015 FC 418, at paras 22-24.

If a party wants to call a witness, the party must provide witness information as set out in Rule 44(1) of the RPD Rules in writing to the other party and to the Division. If a party does not provide the witness information, the witness must not testify at the hearing unless the Division allows them to testify.[41] The Board has discretion in deciding whether to allow a witness to testify when the request is late and not made in accordance with Rule 44.[42]

All four Divisions have a provision in their rules for requesting a summons if a party wants the Division to order a person to testify at a hearing. There is however, no duty on the Board to call witnesses on behalf of a party or to issue a summons upon request. In *Zaloshnja*, Justice Tremblay-Lamer disagreed that the Board had improperly exercised its discretion by refusing to require the immigration officer at the POE to be summoned for the purpose of cross-examination:

> There was no duty on the Refugee Division to call the immigration officer. If the applicant believed that cross-examining the officer would assist her claim, it was up to her to call him as a witness. Rule 25(1) of the *CRDD Rules* [now 45(1) of the RPD Rules] specifically direct [*sic*] claimants to make an application in writing if they wish to summon a witness. The burden of proof is on claimants to substantiate their claims and to call whatever evidence and witnesses they require.[43]

The right to call further evidence is not absolute.[44] Although it may be preferable to hear the evidence in some cases, the Board does not err when it refuses to hear a witness who could *not* have clarified concerns about critical aspects of the claimant's story (for example, the failure to provide certain information in the PIF, POE notes or the claimant's identity) or would have

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[41] Rule 44(4) of the RPD Rules.

[42] *Kusmez v. Canada (Citizenship and Immigration)*, 2015 FC 948, at para 23.

See also *Olaya Yauce v. Canada (Citizenship and Immigration)*, 2018 FC 784, where the applicant had not complied with the requirements of the RPD Rules and there was nothing in the record before the RPD regarding the substance of the proposed testimony. At para 27, Justice Roussel found "In the absence of any information regarding the relevance and the probative value of the proposed testimony, it was reasonably open to the RPD to refuse the testimony of the witness."

[43] *Zaloshnja v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 206, at para 8.

See also *Liu v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1062, where the unrepresented appellant before the IAD argued that the Board had a duty to assist him and that the Board should have called the two witnesses listed by previous counsel. The Court held, at para 19, that "The Board had no obligation to call witnesses for the applicant…."

[44] *Rrukaj v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 605. Justice Kelen wrote, at para 11: "The applicant had adequate notice of the hearing, and there is no breach of natural justice for the Board to deny the applicant an opportunity of obtaining and submitting further evidence after the hearing to rebut issues which arose at the hearing, and which should have been anticipated by the applicant."

testified about matters not in issue.[45] Moreover, the Board has no duty to inform a claimant that it finds the claimant's witness' evidence to be non-persuasive.[46]

The RPD should accommodate reasonable requests by the claimant to allow their own experts to examine documents whose authenticity is impugned by Canadian officials.[47]

1.6. Interlocutory decisions on credibility

The claimant bears the burden to establish his claim by credible evidence. Although the Board should give claimants an opportunity to clarify any apparent contradictions or inconsistencies in their testimony upon which the Board intends to rely, there is no obligation on the Board to signal its conclusions on the general credibility of the evidence, sufficiency of the evidence or the plausibility of the story in advance of its final decision on the claim.[48] The Federal Court has noted such a procedure is not recommended or acceptable.[49]

1.7. Proper evidentiary basis for findings on credibility

An adverse finding of credibility must have a proper foundation in the evidence. The Board errs if it misapprehends,[50] misconstrues or fails to account for the evidence before it[51]

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[45] *Wang v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8946 (FC), at paras 5-6.

[46] *Salim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 864, at para 21.

[47] *Mayela v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8257 (FC), at para 8 where the Court held: "The applicants, through their counsel, should have the opportunity of having the [national identity] certificate examined by responsible persons to assist them in assessing the R.C.M.P. report concerning the certificate's authenticity."

[48] *Yurteri v. Canada (Citizenship and Immigration)*, 2008 FC 478, at para 27-28, citing *Sarker v. Canada (Minister of Citizenship and Immigration)* 1998 CanLII 8221 (FC) where Justice MacKay held, at para 15:

> In my opinion there is no obligation on the panel to signal its conclusions on implausibility or on the general credibility of evidence, in advance of a decision. Rather, the onus remains on the applicant to establish by credible evidence his claim to be considered a Convention refugee. The panel did not err, or fail to ensure procedural fairness in concluding there were implausibilities in the applicant's evidence without first bringing those to the attention of the applicant and providing opportunity for him to respond.[emphasis added by Justice Beaudry]

[49] In *Rahmatizadeh v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 578 (TD)(QL), counsel for the applicant asked the Division if it had any doubts about the applicant's nationality or if it was inclined to render a negative decision, in which case the applicant was prepared to present additional witnesses. Justice Nadon held, at para 10: "[…] the Division need not render an interlocutory judgment before rendering its decision concerning the claim to refugee status. In my opinion, this procedure is not to be recommended nor is it acceptable." [emphasis added]

[50] *Hernandez v. Canada (Citizenship and Immigration)*, 2020 FC 1060, at para 29. A possible misinterpretation of the father's statement clearly tainted the RPD's assessment of the Applicant's credibility.

[51] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; 441 DLR (4th) 1, at para 126.

or if the Board bases its conclusions on speculation,[52] conjecture,[53] or on circular reasoning.[54]

> If a finding of fact which was material to a finding of lack of credibility was made without regard to the evidence, the RPD's decision will generally be overturned.[55] The Board must take care to respect the claimant's testimony; it cannot distort that testimony and then find it lacking in credibility.[56]

The Federal Court will not interfere with a decision if the evidence before the Board, taken as a whole would support its negative assessment of credibility, if its findings were reasonable in light of the evidence, and if reasonable inferences were drawn from that evidence.[57]

When the Board's impugned finding relates to the credibility of a witness, the Court will be reluctant to interfere with that finding, given the tribunal's opportunity and ability to assess the witness' demeanour, frankness, readiness to answer, coherence and consistency, in oral

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[52] Although the decision was ultimately upheld because of many other reasonable negative findings on credibility, the Court in *Ahmad v. Canada (Citizenship and Immigration)*, 2019 FC 11, at para 28 found that the RPD engaged in improper speculation when it concluded, without reference to any objective evidence, that the Afghan officer issuing a passport would have checked the birth registry if there were doubts relating to the applicant's birth date. [emphasis added]

[53] For example, the Court in *Henriquez de Umaña v. Canada (Citizenship and Immigration)*, 2012 FC 326 at para 22, held that the RPD's finding was speculative, amounting to conjecture, when it inferred from the applicant's failure to produce one of his expired passports that he was hiding something such as undisclosed travel during the period covered by the passport.

[54] In *Jiang v. Canada (Citizenship and Immigration)*, 2019 FC 57, at para 30, the Court found the RPD engaged in circular reasoning by determining that it was unlikely that the Applicant could have left China on her own passport if she was wanted by authorities, when its negative credibility finding on the Applicant's Falun Gong practice was based in part on the fact that she was able to leave China with her own passport.

[55] *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), at para 17:

> …[T]he more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence': [citation omitted] In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[56] See *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 317, at para 55, citing Justice Pelletier in *Maruthapillai v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15329 (FC), at para 13: "[…] when weighing the evidence, the Refugee Division must respect a claimant's testimony. The Refugee Division cannot distort a claimant's testimony and then find that the claimant lacks credibility."

[57] *Tsigehana v. Canada (Citizenship and Immigration)*, 2020 FC 426, at paras 33-35.

testimony before it.[58] With regard to the RAD, which generally does not hold oral hearings, a RAD decision cited in *Paye*[59] explains that the RAD is not in the same position as the RPD to assess demeanour. The Court found that while it was appropriate in *Paye* for the RAD to give deference to the RPD's findings, deference is not automatic in all cases where the appellant's credibility is in doubt. For implausibility findings, for example, the RPD in most cases has no real advantage over the RAD.

1.8. Assessing a witness's testimony

A decision-maker customarily considers the integrity, age, education and intelligence of a witness and the overall accuracy of the statements being made. The witness' powers of observation and capacity for remembering are important factors. An assessment is customarily made of whether the witness is honestly endeavouring to tell the truth, that is, whether the witness appears frank and sincere or biased, reticent and evasive. The Court has cautioned that a refugee claim is not a memory test.[60]

In *Magonza*,[61] Justice Grammond writes that there are two components to the credibility of a witness' testimony: honesty and accuracy. The factors frequently used to assess credibility may pertain either to one or the other, but more commonly to both. Those factors include:

- Ability of the witness to observe the facts;
- Ability of the witness to remember the facts;
- Internal consistency of the testimony and consistency with previous declarations;
- Corroboration, that is, consistency with other witnesses' testimony or with written evidence which is itself considered credible;
- Plausibility, that is, conformity of the testimony with common experience;
- Bias, interest and motivation to be untruthful;
- Demeanour of the witness at the hearing.

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[58] *Qazi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1204, at para 23 citing *Sommariva v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 410 (FCTD)(QL) at para 6: "[…]When […] a tribunal's impugned finding relates to the credibility of a witness, the Court will be reluctant to interfere with that finding, given the tribunal's opportunity and ability to assess the witness, her demeanour, frankness, readiness to answer, coherence and consistency, in oral testimony before it."

[59] *Paye v. Canada (Citizenship and Immigration)*, 2017 FC 685, at paras 15 and 17.

[60] *Sivaraja v. Canada (Citizenship and Immigration)*, 2015 FC 732, citing *Sheikh v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15200 (FC), at para 28.

[61] *Magonza v. Canada (Citizenship and Immigration)*, 2019 FC 14, at para 19.

The fact that a witness has an interest in the outcome of the proceedings is just one of the factors to take into account when assessing the credibility of a witness's testimony. Regard should be given to all relevant factors in assessing credibility.[62] The Board cannot disbelieve testimony solely because a witness is interested, on the grounds that the evidence is self-serving.[63] Courts have repeatedly criticized the outright rejection of the credibility of evidence provided by a family member or persons otherwise closely associated with the claimant. Such persons may be the best-positioned to provide first-hand evidence relating to the claim.[64]

1.9. Clear findings on credibility

The Federal Court has commented frequently that if the Board rejects a claim essentially because of a lack of credibility, clear reasons must be given. Those aspects of the testimony which are found not to be credible must be clearly identified and the reasons for such conclusions must be clearly articulated.[65]

When the Board makes no clear adverse finding as to a claimant's credibility, his or her testimony is deemed to constitute the Board's findings of fact.[66]

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[62] *R. v. Laboucan,* 2010 SCC 12, [2010] 1 SCR 397, at para 11.

[63] *Rahman v. Canada (Citizenship and Immigration)*, 2019 FC 941, at para 28, Justice Walker writes:

> Self-interest is not a binary concept. The importance of an author's potential self-interest or bias as against the credibility and weight to be afforded their evidence will vary with such considerations as: the role the author played in the events recounted - were they a witness or did the applicant merely recount the events in question to the author; the relationship of the author to the applicant - is the author a close family member but, as a witness, nonetheless able to speak independently to the events; the content of the witness statement - does it merely parrot the applicant's evidence or does it have a degree of independence based on the author's own vantage point, and what was that vantage point; any inconsistencies between their statements and other objective evidence in the case, etc.

[64] *Cruz Ugalde v. Canada (Public Safety and Emergency Preparedness),* 2011 FC 458, at para 28.

[65] In *Hilo v Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 228 (FCA)(QL), Justice Heald wrote: "In my view, the Board was under a duty to give its reasons for casting doubt upon the appellant's credibility in clear and unmistakable terms. The Board's credibility assessment […] is defective because it is couched in vague and general terms."

Also, in *Bains v. Canada* (*Minister of Employment and Immigration*), [1993] F.C.J. No. 497 (FCTD)(QL), Justice Cullen was critical of the Refugee Division's failure to specify what it found was, or was not, credible."

[66] In *Addo v Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 424 (FCA)(QL), the Court of Appeal considered that because the CRDD panel's decision set out the claimant's testimony without any adverse finding of credibility, the panel had clearly accepted the Appellant's allegations as true and intended them to be the Board's findings of the relevant facts.

1.10. Adequacy of reasons

The Board is required to justify credibility findings with reasons that are transparent, intelligible, internally coherent, grounded in the evidence and based on a logical chain of analysis.[67]

In *VIA Rail*, the Federal Court of Appeal provided a practical description of what constitute adequate reasons:

> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.[68]

If a decision turns on credibility, the tribunal must provide reasons for its assessment given the importance of the issues at stake in a refugee claim.[69]

Reasons do not have to be lengthy, but they do need to be comprehensible. Reasons must explain to the parties and to the Court why the decision was reached.[70]

The Board owes a duty to the claimant to give its reasons for rejecting the claim on the basis of credibility in "clear and unmistakable terms."[71] That usually includes the obligation to

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[67] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras 102-105; *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190, at para 47.

[68] *VIA Rail Canada Inc v. Canada (National Transportation Agency)*, 2000 CanLII 16275 (FCA); [2001] 2 FC 25 (FCA), at para 22.

[69] *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319, at para 46, citing *Hilo v Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 228 (FCA)(QL).

[70] *Basanti v. Canada (Citizenship and Immigration)*, 2019 FC 1068. At para 41, Justice Gascon wrote:

> […] adequacy and sufficiency of reasons are not measured by the pound. No matter the number of words used by a decision-maker or how concise a decision may be, the test is whether the reasons are justified, transparent and intelligible, and explain to the Court and the parties why the decision was reached. The reasons for a decision need not be comprehensive; they only need to be comprehensible. Reasons are sufficient if they "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland Nurses*, at para 16). In order to provide adequate reasons, "the decision maker must set out its findings of fact and the principal evidence upon which those findings were based", as well as "address the major point in issue" and "reflect consideration of the main relevant factors" (*VIA Rail Canada Inc v Canada (National Transportation Agency)*, at para 22).[citations omitted]

[71] *Gomez Florez v. Canada (Citizenship and Immigration)*, 2016 FC 659, at para 23.

provide explanations or examples. It is not enough just to say that the evidence is not believed, since this creates an appearance of arbitrariness.[72]

Failing to indicate what part of the evidence is accepted and what part is rejected makes it impossible to know the basis for the Board's decision.[73] The Board is required to make clear findings as to what evidence is believed or disbelieved and set out the principal evidence upon which those findings were based.[74] If the RPD believes only some of the claimant's story, it is obliged to say how much was accepted and how much rejected.[75] Moreover, when rejecting parts of a claim for lack of credibility, the Board must explain the impact of those findings.[76]

The assessment of a claim must take into account all the evidence. In other words, The Board must consider any evidence found to be credible, including documentary evidence. In *Joseph*, Justice O'Reilly held "Even if the Board finds some evidence not to be credible, it must

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[72] *Mojica Romo v. Canada (Minister of Citizenship and Immigration),* 2006 FC 543, at para 16.

[73] *Rahman v. Canada (Minister of Employment and Immigration*), [1989] F.C.J. No. 525 (FCA)(QL). In its first set of reasons the Board accepted at least part of what the applicant had told them as they did not specifically reject any of his testimony. They rejected the claim due to a change of circumstances. That decision was set aside. In their new reasons for judgment, the Board concluded that the applicant was not a credible witness and dismissed his application. Writing for the majority, Justice Hugessen held that the Board could not simply reject what they had previously accepted. "If, in their previous decision, they believed only a part of the applicant's story, they were obliged, on the second occasion, to say how much was accepted and how much rejected; their failure to do so makes it impossible to know on what basis they really did decide and constitutes an error in law."

[74] In *Hilo v Canada (Minister of Employment and Immigration),* [1991] F.C.J. No. 228 (FCA)(QL), where the Board found that the appellant's evidence lacked detail and was sometimes inconsistent, Justice Heald wrote: "Surely particulars of the lack of detail and of the inconsistencies should have been provided. Likewise particulars of his inability to answer questions should have been made available."

Similarly, in *Bains v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. No. 497(FCTD)(QL), Justice Cullen considered that the weakness in the Refugee Division's reasoning was that although they determined the applicant had not given "sufficient" evidence, the panel did not specify what was or was not credible to them. It was not clear where they considered the applicant to be untruthful or evasive.

[75] *Ramirez v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 7827 (FC), at para 3.

The Applicant in *Gutierrez v. Canada (Immigration, Refugees and Citizenship),* 2018 FC 4, at para 27 referred to this direction from the Court to argue that the RPD's decision was unreasonable because it did not set out all of its credibility concerns. The Respondent's position (at para 39) was that the Applicant was arguing about the adequacy of reasons and that the reasons were adequate since the decision allowed the Applicant to know why his claim failed. The Court agreed: "[…] the Applicant was fully aware of a significant range of concerns that required an explanation. He could have been in no doubt as to why his claim was refused." (at para 71)

[76] In *Salifu v. Canada (Citizenship and Immigration),* 2014 FC 186, at para 7, Justice Roy "It is one thing to conclude that one's credibility is put in jeopardy. It is another to decide what impact, if any, a lack of credibility has on the outcome of the case. The reviewing court should not be left guessing."

go on to consider whether there remains a residuum of reliable evidence to support a well-founded fear of persecution."[77]

Justice Dawson in *Manickan* stated "The jurisprudence of the Federal Court of Appeal establishes that a finding of incredibility does not prevent a person from being a refugee if other evidence establishes both the subjective and objective branches of the test for refugee status."[78] In that case, although the RPD did not believe Mr. Manickan's allegations about having suffered past persecution, it did believe the evidence of his age, nationality, ethnicity and place of usual residence which linked him to the documentary evidence. The judicial review was allowed because by failing to assess the documentary evidence that dealt with the risk to which a Tamil male such as Mr. Manickan might be subject, the RPD reached its decision without regard to all of the evidence before it.

The Board cannot ignore evidence that is contrary to its conclusion impeaching credibility.[79] Important pieces of evidence that are contrary to the Board's conclusion should be assessed in the decision. In *Ortiz*, for example, the Court held that in the face of evidence that corroborates essentially all of the main allegations in the claim, the RPD was required to make reference to it and to include it in its analysis.[80]

The grounds for rejecting or disbelieving evidence must be stated clearly with specific and clear reference to the evidence. This generally includes an obligation to provide examples of the basis for not accepting the claimant's testimony (such as contradictions, inconsistencies, implausibilities), and to explain how and why they impacted the claimant's credibility. The panel is not required to list each and every inconsistency so long as specific examples are given.[81] However, the Board's analysis should respond to the claimant's central arguments that are

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[77] *Joseph v. Canada (Citizenship and Immigration)*, 2011 FC 548, at para 11.

[78] *Manickan v Canada (Citizenship and Immigration)*, 2006 FC 1525 at paras 3 and 4.

[79] *Sow v. Canada (Citizenship and Immigration)*, 2011 FC 646, at para 22. Because the Board did not refer to important evidence contrary to its conclusion, the Court held it could therefore be concluded that the Board failed to consider this evidence.

[80] *Ortiz v. Canada (Citizenship and Immigration)*, 2014 FC 82, at para 19.

[81] In *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319, commenting on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), Justice Gleason wrote, at para 39:

> [*Cepeda-Gutierrez*] does not stand for the bald proposition, advanced by the Applicant in this case, that the mere fact that a tribunal does not refer to an important piece of evidence in its decision will necessarily result in the decision being overturned. In fact, *Cepeda-Gutierrez*, to the extent it makes categorical statements at all, actually says the opposite and holds that a tribunal need not refer to every piece of evidence; rather, it is only where the non-mentioned evidence is critical and contradicts the tribunal's conclusion that the reviewing court may decide that its omission means that the tribunal did not have regard to the material before it.

contrary to the Board's conclusion. Where a claimant provides explanations for inconsistencies in the evidence, the Board is required to explain why it rejects the explanations provided.[82]

Ambiguous statements that do not amount to an outright rejection of the claimant's evidence, but only "cast a nebulous cloud over its reliability," are not sufficient to discount the evidence.[83] The Federal Court has commented that reasons supporting a negative credibility finding are not adequate where the reasons are based on faulty or circular logic,[84] peripheral issues,[85] a microscopic analysis of the evidence[86] or speculation.[87] As noted by the Court of Appeal in *Hilo*, where the Board casts doubt on the appellant's credibility but one paragraph later, found his evidence credible enough to rely on it as the basis for dismissing one component of his claim to refugee status, the Board should be consistent in the treatment of various aspects of the claimant's testimony. For example, the panel should not use evidence

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[82] In *Pulido Ruiz v. Canada (Citizenship and Immigration)*, 2012 FC 258, Justice Scott wrote at para 63:

> "…Starting from the time when the applicant offers plausible evidence and explanations, it is up to the IRB, if it rejects those elements, to provide justification for its decision …. In C. Ruiz's case, the IRB's explanations are unreasonable because they disregard certain evidence and were silent on others that could contradict its reasoning…." [emphasis added]

[83] *Hilo v Canada (Minister of Employment and Immigration)* [1991] F.C.J. No. 228 (FCA)(QL), per Heald J.A.

[84] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para 104.
See for example *George v. Canada (Citizenship and Immigration), 2019 FC 1385*, at para 37 where the Court describes it as circular reasoning for the RPD to have found Mr. George's primary assertion implausible without consideration of the evidence that might affect that plausibility finding, and then to disregard that evidence on the basis of the credibility finding.

[85] *Lubana v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, at paras 11 and 14.
In *Joseph v. Canada (Citizenship and Immigration)*, 2011 FC 548, at para 11, Justice O'Reilly stated:

> The Board must be careful not to dismiss a refugee claim on the basis that it disbelieves parts of the claimant's testimony, or evidence that does not go to the core of the claim. Sometimes claimants embellish their stories, or they forget minor details. It is unreasonable for the Board to dismiss claims simply because they find evidence at the fringes not to be reliable or trustworthy. [emphasis added]

[86] In *Clermont v. Canada (Citizenship and Immigration)*, 2019 FC 112, at para 31, Justice Diner found that the RPD had made microscopic or peripheral findings based on distinctions without a difference, and therefore they constituted an unreasonable basis upon which to reject the claim.

[87] For example, in *Del Carmen Aguirre Perez v. Canada (Citizenship and Immigration)*, 2019 FC 1269, at para 25, Justice Ahmed was highly critical of the RPD's finding:

> Moreover, the RPD stated that the Applicant's mother "would have noticed that something was going on because her daughter would always lock the bathroom door when she was taking a shower". This finding defies logic, lacks transparency, and appears to rely solely on speculation. It is entirely unclear how the RPD arrived at a finding that the locking of a bathroom door is an indication that sexual abuse has occurred. [emphasis added]

which was disbelieved as a premise (factual basis) to undermine other aspects of the claimant's testimony.[88]

1.11. Considerations on appeal and judicial review

Generally, the RAD reviews RPD decisions by applying the correctness standard; the RAD carries out its own analysis of the record, as framed by the arguments on appeal, to determine whether the RPD erred.[89] If there is an error, the RAD can still confirm the decision of the RPD on another basis. The RAD can also set the decision aside, substituting its own determination of the claim, unless it is satisfied that it can neither confirm nor substitute without hearing the evidence that was presented to the RPD.[90]

The RAD may however defer to credibility findings made by the RPD where the RPD enjoyed a meaningful advantage.[91]

Findings of credibility by the Board are given considerable deference by the reviewing court.[92] The Court recognizes that Board members who have the benefit of observing witnesses directly are in the best position to determine credibility.[93] It is not the role of the Federal Court, on judicial review, to substitute its decision for that of the Board even if the Court might not have reached the same conclusion.[94]

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[88] *Hilo v Canada (Minister of Employment and Immigration)* [1991] F.C.J. No. 228 (FCA)(QL).
See for example *Lushnjani v. Canada (Citizenship and Immigration),* 2010 FC 945, at paras 8-10. The Board found that the Applicant's brothers, whose existence was critical to his claim, did not exist. At the same time, it relied on the existence of a brother in Italy when it rejected the Applicant's explanation for not having sought protection in Italy.

[89] *Canada (Citizenship and Immigration) v. Huruglica,* 2016 FCA 93; [2016] 4 FCR 157, at para 103.

[90] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93; [2016] 4 FCR 157, at para 78. Also, paragraph 111(2)(*b*) of the IRPA.

[91] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93; [2016] 4 FCR 157, at paras. 70-73.

[92] *Durojaye v. Canada (Citizenship and Immigration),* 2020 FC 700, at para 15; and also *Suleman v. Canada (Citizenship and Immigration),* 2020 FC 654, at para 24.

[93] *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319, at para 42.

[94] *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 199; [2008] 1 FCR 155, at para 29; and *Odedele v. Canada (Citizenship and Immigration),* 2019 FC 1602, at para 8, citing *Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12; [2009] 1 SCR 339, at para 59.

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2. SPECIFIC CONCERNS

A review of the Federal Court's case law shows that members face some significant difficulties in assessing the credibility of claimants or other witnesses.

2.1. Considering all the evidence

2.1.1. Considering the evidence in its entirety

The Federal Court has clearly established in numerous decisions that, in assessing the credibility of a claimant, it is important to remember that *all*, not just some, of the relevant evidence, oral and documentary, must be taken into consideration and assessed.[1]

The same is true with respect to determining the grounds of persecution or the relevant provisions of the IRPA, for which the RPD must take into account all of the available evidence in support of a claim, even if some grounds are not clearly identified by the claimant and even if another aspect of the claim was found not to be credible.

In *Duversin*,[2] the Federal Court of Appeal noted that, according to the Supreme Court in *Ward*, "it is not the duty of a claimant to identify the reasons for the persecution. It is for the examiner to decide whether the Convention definition is met". The claimants stated in their BOC forms that they feared being kidnapped, raped and killed by political adversaries and filed reliable documentary evidence showing that Haitian women regularly face sexual violence. The Court was of the view that the RPD had failed to conduct a full analysis to determine whether the risk of kidnapping and rape constituted a serious risk of gender-related persecution. This analysis, conducted under section 96 of the IRPA, should have been

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[1] In *Geneus v. Canada (Citizenship and Immigration)*, 2019 FC 264, at para 10, the Federal Court states that disregarding evidence that is clearly relevant, objective and untainted by any suggestion of fraud is illogical and unintelligible and that a lower tribunal or court cannot shield itself from review in declaring a party not to be credible unless it has considered all the evidence, particularly when there is evidence supporting the credibility of that party.

[2] *Duversin v. Canada (Citizenship and Immigration)*, 2018 FC 466, at para 34, citing *Canada (Attorney General) v. Ward,* [1993] 2 SCR 689, at p. 745.

In *Kamalendra v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 393, at para 23, the Court found as follows:

> . . . I am satisfied that the adult applicant was entirely consistent, if not entirely articulate, in relation to the fears that she held for herself and her child if they were required to return to Sri Lanka. . . . [T]he Board denied fairness to the Applicants in failing to analyse the documentary evidence of abuse of women without male partners . . . before reaching its conclusion to reject the Applicants' claims. . . . The issue is simply a denial of fairness to the Applicants by failing to fully analyze their claims against the totality of the evidence that was before the Board. [citations omitted]

separate from the analysis which led the RPD to reject, for lack of credibility, the refugee protection claim based on section 97 of the IRPA.

In *Bains*[3] the Court clearly indicated that a complete analysis of the evidence should include an analysis of the situation in the claimant's country of origin as well as the lived realities of the people who are in a similar situation in the same country.

Assessing all the relevant evidence means that this evidence must be considered *together*, not assessing some pieces of evidence in isolation from the rest. The evidence must therefore be dealt with in a coherent manner.[4]

The Federal Court has insisted on the importance of not focusing solely on exaggerations or of not disregarding evidence that is unfavourable to the claimant. This means that the panel must do more than simply search through the evidence looking for contradictions or elements that lack credibility to "build a case" against the claimant's credibility and ignore other aspects of the claim.[5]

The Court has also emphasized the importance of avoiding "circular reasoning" in assessing credibility, for example, by disregarding documentary evidence in support of the claim solely on the basis of a finding that the testimony lacks credibility, without otherwise taking that evidence into account in the analysis, especially when the documents are independent or reliable.

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[3] *Bains v. Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 497 (FCTD)(QL).

See, for example, *Gutierrez v. Canada (Immigration, Refugees and Citizenship)*, 2018 FC 4, at para 33, where the Court stated as follows: "Furthermore, even where a claimant's subjective fear of persecution is not found credible, if the claimant's identity is not in dispute the objective evidence of country conditions may establish that the claimant's particular circumstances make him or her a person in need of protection." [citations omitted]

[4] For example, in *George v. Canada (Citizenship and Immigration)*, 2019 FC 1385, at paras 44–45, the Court found that the RPD's reliance on Mr. George's failure to claim refugee status in Mexico was unreasonable given that the travel in 2004 was prior to the events in 2005 that gave rise to Mr. George's fears. The Court also found unreasonable the fact that the RPD concluded that Mr. George was in the United States in 2005, while at the same time relying on the allegation that he was actually in Mexico to hold the failure to claim refugee protection there against him. Finally, the RPD's conclusion that Mr. George was working in the United States in 2005 was unreasonable given the volume of evidence supporting the allegation that he had been deported to Ghana, including various documents, some of which had been issued by American authorities.

[5] In *Mahamoud v. Canada (Citizenship and Immigration)*, 2014 FC 1232, at para 33, the Court found as follows:

> The Board based its findings on inconsistencies such as dates, without regard to key evidence, and by drawing conclusions that were simply unreasonable in a global view of the claim. The Board erred by failing to consider the totality of the evidence, focusing instead on minor inconsistencies in the Applicant's testimony. In my view, it made its conclusions based on erroneous findings of fact made without regard to the material before it. [citations omitted]

See *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319, at para 43: ". . . [T]he contradictions which underpin a negative credibility finding must be real as opposed to illusory. Thus, the tribunal cannot seize on truly trivial or minute contradictions to reject a claim . . .".

For example, in *George*,[6] the Court remarked that the "RPD gave the remainder of the supporting document no probative value 'given the claimant's overall lack of credibility,' with no other discussion of them other than to identify them in a list" and that, in doing so, the RPD engaged in the sort of reasoning found unreasonable in *Chen* and *Momanyi*: making a credibility finding without full consideration of the evidence and then dismissing the evidence on the basis of that previous finding. Further, the RPD gave no indication why Mr. George's credibility tainted the credibility of the other witnesses, including his family, friends, and even third parties with no interest in the outcome (notably the owner and an employee of the daycare who described the attempted kidnapping of Mr. George's daughter). [emphasis added]

It is well established in law that the Board is not required to refer to every piece of evidence and every argument put forward.[7] However, not referring to evidence that is related

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[6] *George v. Canada (Citizenship and Immigration)*, 2019 FC 1385, at para 62, where the Court refers to the type of reasoning that was recognized as unreasonable in *Chen*, and which the RAD did not follow in *Momanyi*.

In *Chen v. Canada (Citizenship and Immigration)*, 2013 FC 311, at paras 19–21, the Court explains that circular reasoning may give rise to a reviewable error. The Board failed to fairly consider the prison visiting card, stating that "…on the basis of having found that the raid of the claimant's house did not occur, the panel finds that the Prison 'Visiting Card' in relation to the claimant's introducer is not a genuine document." The Court states that "[i]t is impermissible to reach a conclusion on the claim based on certain evidence and dismiss the remaining evidence as inconsistent with that conclusion. Before concluding that the raid did not occur the Board must consider whether the prison visiting card substantiated it. The reasoning has been inverted. … The Board identified no basis for concluding that the visiting card was fraudulent, other than its inconsistency with the conclusion already reached on credibility."

However, in *Momanyi v. Canada (Citizenship and Immigration*, 2018 FC 431, at paras 35–37, the Court found that ". . . the RAD did not engage in the sort of reasoning that is impugned in *Chen*. The RAD would have been in error if it had rejected the corroborative evidence on the basis that it had found Mr. Momanyi not to be credible . . . and therefore was not prepared to consider evidence that was inconsistent with that conclusion. However, this was not the RAD's analytical process. Rather, it rejected the corroborative evidence based upon concerns about the trustworthiness of the parents as the source of the evidence. I find no reviewable error in this analysis."

See also *Geneus v. Canada (Citizenship and Immigration)*, 2019 FC 264, at para 10, where the Federal Court states that the fact that the RPD disregarded clearly relevant evidence because it had already established that the claimant was not credible constitutes a reverse reasoning process. It is not reasonable to conclude that someone is not credible and subsequently reject any and all relevant and reliable evidence obtained from independent third parties. According to the Court, the lack of reasonableness becomes even more evident when one considers that the disregarded evidence could have confirmed the party's credibility.

[7] *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), 157 FTR 35, at paras 16–17:

> [16] On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court [Citations omitted.] . . . , nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it . . . . That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
>
> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence" . . . . In other words, the

to a crucial point or that contradicts the Board's findings on such a point, may constitute a reviewable error.[8]

Generally speaking, it is only necessary to explicitly refer to evidence that is directly related to the issue being considered. It is especially important to specifically refer to and take into consideration the evidence that, on its face, contradicts or seems to contradict the finding made.[9]

This means the Board must not refer to certain evidence that supports its conclusions, without referring to evidence that does not. For example, in *Haramicheal*, the Court states the following:

> While it does not have to mention or analyze all the evidence, it is reasonable to expect the RAD to examine the one piece of evidence corroborating the applicant's story. The record contains a receipt for bail to the amount of 2000 birrs, issued on January 13, 2015, a date which would be consistent with her return to Ethiopia. I am concerned that both the RPD and the RAD are silent on corroborative evidence of her detention. While on its own, and in light of the other credibility issues, this document may not be sufficient to overcome the credibility findings, it nevertheless should have been examined. As I stated in *Teklewariat* the absence of any mention of a key piece of evidence is suspicious. The Court cannot speculate on whether or not this evidence would have influenced the RAD's credibility findings.[10] [emphasis added; citation omitted.]

In *Calderon*, the Court points out that the claimant's explanations are part of the evidence:

> It is trite law that the RPD cannot make an adverse credibility finding while ignoring evidence by a claimant explaining apparent inconsistencies in their application . . . . Where such a situation arises, this Court will be inclined to infer that the RPD made an erroneous finding of fact…; however, it is important to

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> agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact. [emphasis added; citations omitted.]

8 *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319, at para 39. The Court specifies that ". . . [I]t is only where the non-mentioned evidence is critical and contradicts the tribunal's conclusion that the reviewing court may decide that its omission means that the tribunal did not have regard to the material before it."

9 In *Moïse v. Canada (Citizenship and Immigration)*, 2019 FC 93, at para 20, the Court states that the RPD has an "obligation to refer to evidence which, on its face, contradicts its conclusions and to explain why the evidence concerned did not have the effect of changing those conclusions." [citations omitted]

10 *Haramicheal v. Canada (Citizenship and Immigration)*, 2016 FC 1197, at para 17.

> note that the onus falls on an applicant to show that such evidence was ignored.[11] [citations omitted]

With respect to documentary evidence, depending on its nature and probative value, the Federal Court may sometimes decide, in cases where the panel finds the refugee protection claim not to be credible, including specific facts stated in certain personal documents, that the panel did not err in not explaining why it did not rely on documents that purport to substantiate allegations found not to be credible.[12]

It can be presumed that the panel took into account all of the relevant evidence, regardless of whether or not it refers to it in its reasons, unless there is evidence to the contrary,[13] for example, where it is clear from the decision that an essential element of the refugee protection claim was not dealt with, at least implicitly.

In the absence of clear evidence establishing that the RPD did not take relevant and important evidence into account, the credibility finding must be upheld. As the Court states in *Gomez Florez*:

> Moreover, the fact that a piece of evidence is not expressly dealt with in a decision does not render it unreasonable when there are sufficient grounds to assess the tribunal's reasoning . . . . The RPD is presumed to have weighed

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[11] *Calderon v. Canada (Citizenship and Immigration)*, 2014 FC 557, at para 22.

[12] See, for example, *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 471, at para 26:

> Where the panel, as here, concludes that an applicant's claim, including the specific facts to which some personal documents refer to, are clearly not credible, it is not an error on its part not to explain why it did not give probative value to documents which purport to substantiate allegations found not to be credible . . . . Further, the applicant's personal documents, while relevant with respect to the death of his son, are inconclusive as to the circumstances of his death and to the perpetrators of the crime. In my view, they do not affect the heart of the panel's assessment of the applicant's claim.

[13] In *Moïse v. Canada (Citizenship and Immigration)*, 2019 FC 93, at para 20, the Court states the following:

> Indeed, as noted by the respondent, there is a presumption that the RPD reviewed all of the evidence that was before it; in fact, that is what it is expected to do. It is also well established that the RPD's decisions do not need to refer to all the documents included as evidence (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (QL), at para 1).

In *Xie v. Canada (Citizenship and Immigration)*, 2019 FC 1458, the RPD rejected the refugee protection claims, finding that the claimants lacked credibility on the key elements of their account of being pursued by the police, and that the fears of forced sterilization and persecution based on religion were not supported in the evidence. At paragraphs 23–24, the Court found as follows:

> I agree that the RPD committed a fatal error when it failed to address the Applicants' claim that they feared they would face sterilization upon return to China . . . . This is a core element of their claim. It was stated in the Personal Information Form of both Applicants and repeated in their testimony. . . . The jurisprudence is consistent that a decision-maker's reasons do not need to be perfect, and that reasonableness review is not to be a 'line-by-line treasure hunt for error'. . . . However, the case-law of this Court is also consistent that a failure to address a core element of a refugee claim may be found to be unreasonable where the decision does not provide an indication that the matter was dealt with, at least implicitly . . . ." [citations omitted]

> and examined all the evidence submitted to it, unless it is demonstrated not to have done so . . . . It is only when a tribunal is silent on evidence clearly pointing to the opposite conclusion that the Court can intervene and infer that the tribunal overlooked the contradictory evidence when making its finding of fact . . . .[14] [citations omitted.]

Thus, even if the panel does not refer to all the evidence in its reasons for decision, this should not result in a finding that the panel did not take some of the evidence into account if a review of the reasons shows that the panel did indeed consider all of the evidence.

Should the panel conclude that there is no credible basis for the claim, it is preferable to specifically analyze each piece of evidence on the record to determine whether there is any credible and reliable evidence on which a favourable decision could be based. However, in some cases, such as *Moise*,[15] the finding of no credible basis was upheld by the Court as reasonable even though some pieces of evidence were not specifically analyzed.

In sum, the Board is generally not required to refer to each piece of evidence in its reasons for decision and to analyze them. However, the more relevant the evidence, the more likely the higher courts will conclude that an error was made if that evidence is not mentioned in the analysis.[16] Even though there is a presumption that the panel weighed each piece of evidence, there is still an obligation to refer to important evidence justifying the panel's decision.

2.1.2. Assessing the evidence found to be credible

Even if there are inconsistencies and exaggerations, the panel must assess the evidence that is credible and decide the claim based on all of that evidence.[17] For example,

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[14] *Gomez Florez v. Canada (Citizenship and Immigration)*, 2016 FC 659, at para 35.

[15] In *Moïse v. Canada (Citizenship and Immigration)*, 2019 FC 93, at para 23, the Court states the following:

> It would certainly have been preferable, if not desirable, for the RPD's decision to have addressed each piece of documentary evidence that the applicant submitted in support of his claim for refugee protection for the purpose of establishing whether there was a credible basis for the claim, pursuant to paragraph 107(2) of the Act. However . . . , the fact that the RPD failed to do so is not fatal in the circumstances of the case at bar, as a review of the record reveals the reasonableness of the conclusion reached by the RPD on this issue.

[16] In *Kusmez v. Canada (Citizenship and Immigration)*, 2015 FC 948, at para 24, the Court states the following:

> Where a particular piece of evidence is important and directly contradicts an essential element of a finding, the failure of the Board to address the evidence or to explain why it was disregarded may lead to an inference that the decision was made without regard for the evidence before it . . . [citations omitted]

[17] For example, in *Odetoyinbo v. Canada (Citizenship and Immigration)*, 2009 FC 501, at para 8, the Court concluded as follows:

> In the case at bar the Board did not explicitly state in its reasons that it did not believe that the applicant was bisexual. Accordingly, it could not ignore compelling objective evidence on record demonstrating the abuses which gay men are subjected to in Nigeria. Therefore, even if the Board

in *Lappen*,[18] Justice Mandamin was of the view that the Board erred when it ended its analysis after finding the claimant not to be credible. Instead, it should have considered the claimant's profile in conjunction with the country condition evidence. He states the following at paragraph 27:

> This Court has held previously that there may be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the "country conditions are such that the claimant's particular circumstances make him/her a person in need of protection. [emphasis added; citations omitted.]

In other words, rejecting all or part of the testimony considered not to be credible does not necessarily result in the rejection of the refugee claim. The claim must still be assessed on the basis of evidence considered trustworthy, including documents related to the claimant's situation and evidence related to people in similar circumstances.[19]

In a decision that dealt with an unusual situation where a claimant chose not to testify, the Court ruled that the claimant's failure to testify does not enable the RPD to reject the claim without first assessing the other evidence.[20]

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rejected the applicant's account of what happened to him in Nigeria, it still had a duty to consider whether the applicant's sexual orientation would put him personally at risk in his country.

[18] *Lappen v. Canada (Citizenship and Immigration)*, 2008 FC 434, at paras 25–27.

[19] See *Odetoyinbo v. Canada (Citizenship and Immigration)*, 2009 FC 501, at para 8 (bisexual claimant from Nigeria); *Duversin v. Canada (Citizenship and Immigration)*, 2018 FC 466, at para 34 (young single woman from Haiti) and *Kamalendra v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 393, at para 23 (Sri-Lankan Tamils – documentary evidence of abuse of Tamil women without male partners and of forcible recruitment of young Tamils).

In *Saalim v. Canada (Citizenship and Immigration)*, 2015 FC 841, at paras 25–26, the claimants argued that females from minority clans are at objective risk of persecution in Somalia and that the RAD erred in failing to take into account all of the evidence, specifically, the IRB's National Documentation Package. "Before this Court, they rely on *Dezameau* v *Canada (Citizenship and Immigration)*, 2010 FC 559 for the proposition that where the RPD finds that an applicant did not provide credible or trustworthy evidence, it must still give proper consideration to documentary evidence of gender-based violence . . . . In *Myle v Canada (Citizenship and Immigration)*, 2007 FC 1073, Justice Harrington held that the RPD has a duty to consider the information in its own documentary package." The Court found that this duty must also apply to the RAD: "The RAD is required to come to an independent assessment of whether a claimant is a Convention refugee or a person in need of protection. As observed by Justice Phelan at paragraph 38 of *Huruglica*, the RAD has expertise greater than or equal to the RPD in the interpretation of country condition evidence. The applicants' appeal should have had the benefit of an informed assessment by the RAD of the relevant country condition documents." [emphasis added]

[20] In *Ngoyi v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1099, at paras 3–6, following a *de novo* hearing ordered by the Court, the RD found that, by electing not to testify, the claimant failed to prove that his allegations were credible. The Court stated that, absent any unequivocal evidence that the claimant had waived full consideration of the merits of his refugee protection claim, the RD should have at least commented on the written evidence (PIF, documents, transcript of the claimant's testimony at the first hearing).

2.1.3. General finding of lack of credibility

It may be concluded that the claimant's testimony as a whole is not credible. For example, in *Kinfe*,[21] the Court found that the discrepancies in the claimant's testimony went to the heart of his identity and nationality and were sufficient to undermine his overall credibility.

However, even a finding of an overall lack of credibility is not sufficient to reject a refugee protection claim if "there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim."[22]

In some cases, the claimant's contradictory evidence may undermine his or her entire oral testimony.[23] This is not always the case, especially when the panel's finding of a lack of credibility is not clearly connected to the determinative issues (see sections *2.2.1. Relevance, 2.2.2. Materiality* and *2.2.3. Contradictions, inconsistencies, omissions*).

In *Lubana* the Court warns that not every kind of inconsistency or implausibility justifies a negative finding on overall credibility. The Board must not draw its conclusions after a "microscopic" examination of issues irrelevant or peripheral to the claimant's claim.

> In particular, where a claimant travels on false documents, destroys travel documents or lies about them upon arrival following an agent's instructions, it

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[21] *Kinfe v. Canada (Citizenship and Immigration)*, 2019 FC 286, at paras 20–21. The claimant submitted a Sudanese refugee card, in spite of his statement that he was not a refugee in Sudan, as well as a temporary residence permit listing his nationality as Ethiopian, even though the other documents on the record, including the aforementioned refugee card, list his nationality as Eritrean.

[22] *Canada (Citizenship and Immigration) v. Sellan*, 2008 FCA 381, at para 3. In this case, the Court of Appeal had to deal with a certified question regarding whether the IRB was required to assess the objective evidence under section 97 of the IRPA concerning country conditions, after finding the claimant's fear of persecution and evidence that he was personally in need of protection not to be credible.

[23] In *Occilus v. Canada (Citizenship and Immigration)*, 2020 FC 374, at paras 26 and 29–30, the Court states the following:

> It also appears that the documentary evidence filed by the applicant (report from a justice of the peace . . . and the two medical certificates . . .) did nothing to assuage the concerns of the RAD and of the RPD before it as to the general credibility of the claimant, quite the contrary in fact. . . .
>
> I find that it was reasonable for the RAD to find that this evidence, meant to corroborate certain significant portions of the applicant's account, had no probative value whatsoever and even undermined the account's credibility. I cannot accept the applicant's argument to the effect that the formulation of documents created by third parties cannot be held against him. As the burden is on him to prove the elements of his claim [citations omitted], it was up to the applicant not to present corroborating evidence that raised more questions than it answered about the credibility of his account as a whole. The omissions in the initial BOC form, the applicant's unconvincing justifications for these omissions and the deficiencies in his corroborating evidence are many, and in my view, they support the reasonableness of the RAD's decision.

See also *Chen v. Canada (Citizenship and Immigration)*, 2020 FC 605, at para 62.

> has been held to be peripheral and of very limited value to a determination of general credibility . . . .[24] [emphasis added; citations omitted.]

When it is impossible to find that a claimant completely lacks credibility, the remaining credible or trustworthy evidence must be examined to determine whether it can be used as a basis for a positive determination[25] (see section *2.1.2. Assessing evidence found to be credible*).

2.1.4. Joined and related claims

Where a claim has been *joined* to another claim, a finding of a lack of credibility in respect of one claimant's evidence and testimony could have a negative impact on another claimant where the claims are linked to the same event or when one claim is dependent on the other. For example, in *Botello*, the member rejected the claims of all five family members, namely, the father, the mother and their three minor children. The member found the principal refugee claimant, the father, not to be a credible witness. The children did not make independent claims. Each child's Personal Information Form (PIF) simply referred to their father's PIF: "See narrative in my father's PIF". The children did not attend the hearing, and their mother, designated to protect their interests, made no specific comments about them. The Court found that the member made no error in how the children's claims were dealt with:

> The circumstances here are quite different from those set out by Kelen J. in his reasons in *Gonsalves v. Canada (MCI)*, 2008 FC 844 at paragraphs 27 to 29, a case relied upon the Applicants' counsel. In that decision, Kelen J. was careful to state that there was extensive evidence as to the ill-treatment and harm experienced by the children including a threat of sexual assault.[26] [emphasis added]

When claims are joined, the evidence produced by the claimants applies to all of them. In *Akanniolu*, the refugee protection claims of three members of the same family from Nigeria were based on threats resulting from the principal claimant's work in an organization that promotes the protection of women and girls from sexual exploitation. The RPD was of the opinion that the documents filed in support of the claimants' claims (stating that they were

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[24] *Lubana v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, at para 11.

[25] See *Geneus v. Canada (Citizenship and Immigration)*, 2019 FC 264, at para 10; *Duversin v. Canada (Citizenship and Immigration)*, 2018 FC 466, at para 34; *Odetoyinbo v. Canada (Citizenship and Immigration)*, 2009 FC 501, at para 8; and *Kamalendra v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 393, at para 23.

[26] *Botello v. Canada (Citizenship and Immigration)*, 2008 FC 1245, at paras 4–7.

See *Lubeya v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16678 (FC), at para 9. The wife's claim was based on that of her husband, the principal claimant. The female claimant "fully supported" the statements by her husband, which were found not to be credible. The RD could reasonably conclude that she was not credible either, even though she had argued her own imputed political opinion as well as her membership in the social group of the family.

victims of persecution and faced threats because of the principal claimant's work) lacked credibility. In their appeal to the RAD, the claimants stated that they should not be affected by the RPD's and RAD's findings about the evidence submitted by the principal claimant. The claimants argued that this evidence could be considered extrinsic with respect to the male claimant and the minor claimant and that they should have been given the opportunity to respond to the RPD's concerns regarding the evidence in question. The Court addressed that argument as follows:

> I completely disagree. This argument is based on a misunderstanding of extrinsic evidence. This argument also ignores that the Male Applicant and the Minor Applicant rely on the same narrative and the same evidence of the Principal Applicant; their claims are joined. Moreover, the Male Applicant submitted an affidavit recounting the same alleged home invasion. The evidence submitted by the Applicants applies to all of them. It is not extrinsic evidence. The Applicants are expected to know the content of their own evidence and are not entitled to have the decision-maker point out concerns and provide an opportunity for the applicants to respond.[27] [emphasis added]

When joined refugee protection claims rely on the same facts, the finding that one claimant is credible normally has an impact on the other claimant.[28]

However, if one of the claimants puts forward his or her own allegations of persecution or if joined claims have distinctive elements, they must be analyzed separately. See, for example, *God,* in which the Court states the following:

> . . . [B]oth the RPD and the RAD failed to acknowledge that there were two independent claims. The RAD and RPD failed to separately consider the evidence of Mrs. Houssein, presumed to be credible in the absence of an express finding to the contrary. . . . In the present case, Mrs. Houssein made a separate claim. While her narrative may be similar in many respects to her husband's, it is not identical. Several of the events to which she testified she experienced personally. As submitted by the Applicants, if Mr. God were making the claim by himself, one could understand how his claim was rejected by the RPD and RAD once he was found not credible. However, it is unclear whether that adverse credibility determination would have necessarily been

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[27] *Akanniolu v. Canada (Citizenship and Immigration)*, 2019 FC 311, at para 49.

[28] In *Gomez Flores v. Canada (Citizenship and Immigration)*, 2016 FC 1402, at para 15, the Court found as follows:

> The Applicant is a close family member of the husband, as are the children. She is a "similarly situated person" with respect to a risk which the RPD has already found to exist. She is presumed to be exposed to the same risk as those in a similar situation unless there is some reason to distinguish between family members, and none is cited.

In *Radoslavov v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15899 (FC), at para 4, the Court found that it is not possible for the evidence that was accepted for three claimants who had obtained refugee status not to be accepted for a fourth claimant, who based his claim on the same factual situation, which was apparently accepted as true for all four claimants despite inconsistencies in the evidence.

> made had his wife's testimony been accepted as credible. Upon carefully reviewing the decisions of the RPD and RAD, I conclude that there is no negative finding expressed in clear and unmistakable terms about Mrs. Houssein's credibility. The decision is fatally flawed in this respect and must be set aside.[29] [emphasis added]

Generally speaking, for related refugee protection claims, the Board is neither required to refer to decisions rendered by other panels nor bound by them,[30] even if it is considering the claims of family members of a claimant decided by another member from the same division. *Gutierrez* is an example of a case where a refugee protection claimant wanted to rely on the fact that he had family members whose claims had previously been accepted. The Court found as follows:

> In my view, there is no substance to the Applicant's arguments that the Board was obliged to decide his claim in accordance with the positive decisions received by his parents and two siblings. Each refugee claim is decided on its own facts and merits. See *Gilles v Canada* (*Citizenship and Immigration*), 2010 FC 159 at para 43. Cases do arise – particularly in family situations – where the same facts are relied upon, so that it makes sense to decide them in the same way or, at least, to explain why they should not be decided in the same way. See *Mengesha v Canada* (*Citizenship and Immigration*), 2009 FC 431 at para 5. But this is not one of those cases. The facts of the Applicant's case were very different from those of his parents and siblings, even though the same agent of persecution is alleged.[31] [emphasis added]

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[29] *God v. Canada (Citizenship and Immigration)*, 2019 FC 1483, at paras 13 and 16–18.

See *Csonka v. Canada (Citizenship and Immigration)*, 2001 FCT 915, at para 28, where the Court ruled that the Refugee Division (RD) erred in tarnishing the testimony of the principal claimant's spouse and eldest son because they found the principal claimant not credible. The tribunal had made no adverse credibility findings against the associated claimants whose claims contained some distinctive elements which the tribunal did not analyze.

[30] For example, in *Massroua v. Canada (Citizenship and Immigration)*, 2019 FC 1542, at paras 39–41, the Court states that the RPD is not bound by the findings of fact of the Immigration Division (ID), for example, when analyzing a possibility of exclusion. The Court explains as follows:

> The Applicant's counsel submitted that the two different findings of fact made by the ID, and by the RPD and RAD create a conflict that brings into question the RAD's plausibility finding. […]. The Applicant's counsel wished to rely on *Johnson v Canada (Citizenship and Immigration)*, 2014 FC 868 (CanLII) [*Johnson*] for the proposition that some interplay exists between the ID and RPD in the use of factual findings. However, I find that this case is of no particular help for the Applicant. . . . The interplay between the ID and RPD discussed in *Johnson* is restricted to how the findings of the RPD affect the subsequent determination at the ID level, not the other way around. Furthermore, as the RAD correctly notes, the RPD hearing is a different process from the ID determination, and the RPD is required to perform its own assessment based on the evidence before it and form its own conclusions.

[31] *Gutierrez v. Canada (Immigration, Refugees and Citizenship)*, 2018 FC 4, at para 58.

See also *Londono v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 569, at para 8, where the Court reiterated the fact that the Board must consider each case independently and grant little weight to the results of previous refugee protection claims by members of the same family.

In *Uygur*, the Court provided another reason why the fact that one claimant was granted refugee status based on a similar experience should not bind the Board: "previous decisions, even regarding family members, may have been wrongly decided".[32]

Therefore, if the Board has before it relevant evidence with respect to a *related* claim (heard separately) that may support the claim or undermine the claimant's credibility, it must take it into account and should explain its decision to adopt or discard the conclusions reached by another member regarding similar facts.[33]

In *Yeboah*, the application for judicial review concerned a RAD decision confirming the RPD's determination rejecting the claim of Ms. Sarpong's spouse on the basis of a lack of credibility. He alleged that he was persecuted by Ms. Sarpong's family members, who accused him of pressuring his wife into declining the role of Queen Mother. The Court concluded that the RAD committed a reviewable error in failing to properly consider the RPD's decision granting Ms. Sarpong refugee status:

> The RPD decision granting Mrs Sarpong's refugee claim found Mrs Sarpong to be credible since she testified in a straightforward and spontaneous manner. The RPD therefore believed her testimony that she was chosen to be the Queen Mother following the passing of her grandmother . . . . It is correct to say, as the Respondent contends, that this Court has established in a large number of cases that the IRB is not bound by the result in another claim, even if the claim involves a relative. Refugee claims are determined on a case by case basis [citation omitted] However, in a case such as the present, where the Applicant's narrative is exactly the same as his wife's, as are the agents of persecution, the RAD was required to provide sufficient reasons, grounded in the evidence, to support its conclusion that Mrs Sarpong was never chosen to be Queen Mother, which is a marked departure from the RPD's previous positive decision.[34] [emphasis added]

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[32] In *Uygur v. Canada (Citizenship and Immigration)*, 2013 FC 752, at para 28, citing *Bakary v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1111, at paras 9–10.

[33] In *Ruszo v. Canada (Citizenship and Immigration)*, 2019 FC 296, at para 18, the Court stated the following:

> . . . [A]s four (4) different RPD members came to the conclusion that Ms. Ruszo's other children ought to be granted refugee protection, the Applicants were reasonably entitled to receive a more fulsome explanation of why the RPD member did not subscribe to the same conclusion as the other RPD members regarding similar treatment and incidents. In the absence of such an explanation, the decision of the RPD is unreasonable as it lacks justification, transparency and intelligibility . . . . [emphasis added]

In the same vein, see *Pardo Quitian v. Canada (Citizenship and Immigration)*, 2020 FC 846, at para 52:

> While each claim must be assessed on its own merits, and the acceptance of the claims of other family members does not automatically lead to success for a claimant, the decision-maker must give some explanation for treating the claims differently . . . . [emphasis added]

[34] *Yeboah v. Canada (Citizenship and Immigration)*, 2016 FC 780, at paras 23–26.

See also *Sellathurai v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1235, at para 22, in which the Court ruled that the RD did not make any error in considering the issue of Canada's previous granting of

A panel's reliance on the findings of another panel "must be limited, careful and justified."[35] In *Dinehroodi*, the Board did not believe the claimant's narrative after considering the unfavourable decision regarding her husband. The RD had rejected the husband's claim for lack of credibility three years earlier. Although it was clear from the Board's reasons that it did not base its credibility finding solely on the previous decision regarding the husband, the Board seemed to have used that decision in support of its conclusion that the claimant's story was not credible. The Board specified in its detailed reasons for decision why it did not believe the husband's story. On the issue of whether the Board was entitled to consider the unfavourable determination regarding the husband, the Court ruled as follows:

> In this case, we are dealing with the Board's use of a different panel's reasons for rejecting the claim of a different refugee claimant: the applicant's husband. The respondent contends that the Board was entitled to rely on those reasons because the applicant knew that they were being admitted into evidence and did not raise any objections at that time. In my view, and based on the case law cited above, while the Board was entitled to rely on the previous panel's decision to some extent, for example, with regard to any factual findings made about country conditions, . . . it was not entitled to rely on the Board's overall conclusions as proof that the applicant's husband and, in turn, the applicant's own claim was fabricated, a finding which is clearly determinative of the Board's conclusion with respect to the applicants' credibility and which is clearly an important part of the Board's decision. As such, having improperly relied on the previous panel's adverse credibility finding as support for its own adverse credibility finding, it is my opinion that the Board's credibility determination was patently unreasonable and that it based its decision on irrelevant evidence.[36] [emphasis added]

2.2. Basing a decision on the evidence and relevant and material aspects of the claim

2.2.1. Relevance

In *Magonza,* the Court explains the concept of relevance as follows:

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refugee status to three of the claimant's children, given that the claimant did not lead any evidence as to why his children were accepted as Convention refugees. [emphasis added]

In *Dudar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1277, at para 35, the Court stated that the Board was correct in giving little or no weight to the PIFs of other ethnic Russian claimants. There was no evidence presented that explained the context in which these refugee claims were granted. Nor was there any evidence that the Applicant in this case was personally connected with or aware of the persons named in those PIFs. [emphasis added]

[35] *Badal v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 311, at para 25.

[36] *Dinehroodi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 758, at paras 12 and 15.

> Thus, while probative value is a matter of degree, relevance is a binary concept. As long as a piece of evidence has some probative value, it is relevant. Relevance is often a component of tests for the admissibility of evidence.[37]

The Federal Court has held that a finding of lack of credibility must be based on relevant considerations.[38] In *Abdinur* for example, Mr. Abdinur's PRRA and H&C applications were rejected because of negative credibility findings that were used to conclude that he had family support available in Somalia. One of the adverse credibility findings was based on Mr. Abdinur's inability to provide the name of the person who accompanied him to Canada when he was five years old. The Court stated:

> It is also important to recall the relevant issue: whether Mr. Abdinur has family that he can rely on in Somalia. The relevance of the name of the cousin's aunt who accompanied him from Kenya to Canada in 1994 is not immediately apparent, and the Minister's delegate does not indicate why she considered it "basic information." As this Court has held, credibility determinations should not be based on a "memory test," nor on a granular analysis of issues irrelevant or peripheral to the claim: *Shabab v Canada (Citizenship and Immigration)*, 2016 FC 872 at para 39; *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 23.[39]

2.2.2. Materiality

There is a considerable body of case law which indicates that a finding of lack of credibility due to contradictions in the testimony of a claimant or witness must be based on actual contradictions or discrepancies which are material or serious in nature.[40] Minor or secondary inconsistencies in the claimant's evidence should not lead to a finding of general lack of credibility where the documentary evidence supports the credibility of the claimant's story.[41]

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[37] *Magonza v. Canada (Citizenship and Immigration)*, 2019 FC 14, at para 23.

[38] In *Nur v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1444, at para 40, the Court recalls that RPD decisions must "demonstrate justification, transparency and intelligibility" (*Khosa*, at para 59). As Justice Russel Zinn explains in *Jakutavicius v Canada (Attorney General)*, 2011 FC 311, at para 31: "Justification requires a decision maker to focus on relevant factors and evidence."

[39] *Abdinur v. Canada (Citizenship and Immigration)*, 2020 FC 880, at para 40.

[40] In *Lalegbin v. Canada (Citizenship and Immigration)*, 2015 FC 1399, at para 26, the Court concluded:

> It is clear that the contradictions identified by the RPD are not "details". They are significant contradictions that tend to demonstrate a lack a credibility on the part of the applicant. It was completely reasonable for the RAD, which owes deference to the RPD's credibility findings, to find that the applicant was not credible because the contradictions identified by the RPD were real as opposed to illusory.

[41] Paragraph 20 of *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429, [2003] 4 FC 772, is frequently cited:

> . . . It would not be proper for the Board to base its findings on an extensive "microscopic" examination of issues irrelevant or peripheral to the claim. Furthermore, the claimant's

Inconsistencies, misrepresentation and concealment should lead to the rejection of the claim only where they are material. Where the panel considers that the claimant is lying, and that the lie is material to the claim, it must nevertheless examine all the evidence and base its conclusion on all the evidence before it (see sections *2.1.2. Assessing evidence found to be credible* and *2.1.3. General finding of lack of credibility*).

A number of Federal Court decisions make the point that where the claimant's statement of fact is categorically rejected, the contradictions (or omissions or inconsistencies) must relate to essential elements or critical points, i.e., points going to the very basis of the claim. In *Irivbogbe*, for example, where the claim was based on the claimant's bisexuality, but the claimant did not mention his alleged same-sex partner on his BOC form, the Court states:

> I note that jurisprudence has established that omissions from a BOC narrative may ground adverse credibility findings where the omission is significant, material or central to the claim [citations omitted]. Although the Applicant is correct that minor inconsistencies are not grounds to undermine his credibility, the RAD clearly found this inconsistency to be significant. As the RAD noted, the Applicant's sexuality is the basis for his claim and, because he was represented by counsel when he prepared his BOC, he would have known the importance of proving this aspect of his claim. In my view, this conclusion and the RAD's finding that the credibility of the Applicant's allegation that he was involved in a same sex relationship in Canada was thereby undermined were reasonable.[42]

Omissions or a lack of detailed information are important when they relate to essential elements of a claim.[43] However, the panel must be careful to avoid dealing with issues that

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> credibility and the plausibility of her or his testimony should also be assessed in the context of her or his country's conditions and other documentary evidence available to the Board. Minor or peripheral inconsistencies in the claimant's evidence should not lead to a finding of general lack of credibility where documentary evidence supports the plausibility of the claimant's story.

See, for example, *Abbar v. Canada (Citizenship and Immigration)*, 2017 FC 1101, at para 1 (and 39), where the Court quotes *Mohacsi* and states that the RAD erred in concluding that the claimant was not a credible person on the ground that she was unable to give important details of her daily life under the Al-Shabaab regime from 2009 to 2012. Despite the evidence submitted to the RAD of the claimant's medical condition, which prevented her from giving clear and credible testimony, the RAD failed to give weight to the objective evidence on country conditions. The Court concluded (at para 47) that "the RAD failed to give a complete assessment of the Applicant's fear of persecution in Somalia, including her profile as an elderly woman with disabilities and as an unaccompanied woman with no family support in Somalia, by considering the country conditions and the risk factors associated with the possibility of returning to areas controlled by Al-Shabaab." [emphasis added]

[42] In *Irivbogbe v. Canada (Citizenship and Immigration)*, 2016 FC 710, at para 32.

[43] See, for example, *Cortes v. Canada (Citizenship and Immigration)*, 2016 FC 684, at para 18:

> Ms. Cortes says that the RPD engaged in a microscopic analysis of the evidence, in particular her failure to include her part-time job as manager of the bingo halls in her initial PIF. However, her management of the bingo halls for a period of three years was central to her claim for refugee protection. This was the reason she gave for her fear of persecution by the FARC. In my view, it was open to the RPD to regard this as a significant omission.

See also *Seenivasan v. Canada (Citizenship and Immigration)*, 2015 FC 1410, at paras 17 to 19 and 25:

are secondary or peripheral to the refugee protection claim as it is a mistake to engage in a microscopic analysis.[44]

In *Paulo,* the Court explained that an analysis can be rigorous without being microscopic:

> An analysis cannot be called "microscopic" or over-vigilant because it is exhaustive. It is not the thorough, detailed and rigorous nature of the analysis or examination conducted by an administrative decision maker that makes it "microscopic". Quite the contrary, such an approach reflects the rigour that we have the right to expect from an administrative decision maker's analysis. I would even say that such rigour is expected to satisfy the requirement for a "justified" decision established in *Vavilov*. An administrative decision maker's analysis veers towards being "microscopic" when it delves into peripheral issues and examines contradictions that are insignificant or irrelevant to the

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> . . . [T]he applicant left out significant portions of his story from both his POE interview and his PIF. In his testimony, he provided contradictory responses and contradicted the specific answers he provided at his POE interview. The omitted details were essential to understanding the applicant's claim, including the risks he allegedly faced in India, that he was directly involved in the illegal land grab scheme, that he had been in hiding and that he had left India because of a change in government that put him at risk of being criminally charged because of his involvement in the illegal land grab scheme. These were not mere elaborations on the general and brief narrative provided in his PIF. . . . The Board noted that both the POE notes and applicant's PIF omitted the key incidents that he later raised at the hearing. This was not a situation of omissions of minor details nor was the Board microscopic in its examination. A review of the transcript reveals that the Board member probed the applicant's testimony, providing an opportunity for clarification and explanation and to better understand the applicant's claims regarding the complicated land scheme and the role of the politicians . . . . [emphasis added.]
>
> In *Ugbaja v. Canada (Immigration, Refugees and Citizenship)*, 2018 FC 835, at paras 11–12, the Court rejected the claimants' argument that the RPD had engaged in a microscopic examination of the evidence: "The RPD is entitled to expect a degree of specificity with respect to the agents of persecution. Mr. Ugbaja's provision of four names in the course of oral testimony does not detract from the RPD's overall conclusion that his testimony was unacceptably vague, particularly given the Applicants' numerous opportunities to expand upon or correct their written narratives."

[44] See *Gomez Florez v. Canada (Citizenship and Immigration)*, 2016 FC 659, at paras 29 and 32:

> Of course, the RPD cannot base its findings regarding the claimant's lack of credibility on minor contradictions arising in evidence that is secondary or peripheral to the refugee protection claim. The tribunal must therefore not delve too deeply in its approach or conduct a "microscopic" analysis of the evidence. In other words, not all inconsistencies or implausibilities will support a negative finding of credibility; such findings should not be based on microscopic examination of issues irrelevant or peripheral to the claim [citations omitted]. The RPD's findings on Mr. Florez's lack of credibility in this case are based on several valid grounds. It suffices to mention the following: the fact that Mr. Florez did not satisfactorily explain in what manner the employee of the Attorney General's office in Cali incorrectly recorded his deposition; the implausibility of the incident in Pereira; Mr. Florez's behaviour after the alleged incidents; and Mr. Florez's failure to seek refugee protection in the United States. These are central elements of Mr. Florez's account.

purpose of the refugee claim. In that case, the Court's intervention may be required.[45]

However, it has also been recognized in some cases that, even if the differences or contradictions seem unimportant when taken individually, they may lead to a conclusion of lack of credibility when considered together and in context[46] (see section *2.1.3. General finding of lack of credibility*).

2.2.3. Contradictions, inconsistencies and omissions

Contradictions, omissions or inconsistencies in the testimony of a claimant or witness can justify a finding of lack of credibility.[47] However, as noted above (see section *2.2.2. Materiality),* the inconsistencies must be sufficiently material and relate to matters relevant enough to the case to justify an adverse finding.

These considerations also apply to contradictions, omissions or inconsistencies in the claimant's prior statements, whether made to Canadian immigration authorities[48] (see section *2.2.4. BOC forms and statements made to immigration officials*) or authorities elsewhere;[49] in

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[45] *Paulo v. Canada (Citizenship and Immigration),* 2020 FC 990, at para 60.

[46] See *Occean v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1234, at paras 42–43:

> . . . The RAD upheld the RPD's conclusion that the female applicant's lack of credibility was due to significant contradictions in a central element of her account. It is well established by jurisprudence that contradictions that may appear minor in isolation may be fatal to a witness's credibility when they add up and are considered in the context of the refugee protection claim. [citations omitted]

See also *Gomez Florez v. Canada (Citizenship and Immigration)*, 2016 FC 659, at para 28:

> . . . Furthermore, even though they may be insufficient when taken individually or in isolation, the accumulation of contradictions, inconsistencies and omissions regarding crucial elements of a refugee protection claimant's account can support a negative conclusion about his credibility [citations omitted]

[47] *Bushati v. Canada (Citizenship and Immigration),* 2018 FC 803, at para 33.

[48] For example, in *Abdi v. Canada (Citizenship and Immigration)*, 2020 FC 172, at paras 15 and 103-104. The RAD came to an adverse conclusion regarding the identity of the claimant due to multiple inconsistencies in his date of birth. The RAD concluded that, although a typographical error would probably not justify an adverse finding, the claimant had entered January 1, 1990, as his date of birth on several of his refugee claim forms, and even on his U.S. refugee claim documents. In addition, his testimony and birth certificate indicated that his date of birth was January 11, 1990. Although the Court was of the opinion that "this matter had a very minor impact on the overall decision, which deals with the [claimant]'s identity", it noted that the claimant could not satisfactorily explain why he made the same error so many times.

[49] See *Bidima v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 556, at paras 5 and 11. The RPD found that Ms. Bidima was not credible, in part because the story she recounted in her Personal Information Form (PIF) and at the hearing of her claim was in many respects quite different from the story she had previously told to U.S. immigration authorities. While acknowledging that Ms. Bidima had been upset by the way she had been treated in the U.S., the RPD was of the view that this did not explain the many differences between Ms. Bidima's story to the U.S. authorities and her testimony before the RPD. The Court was not convinced that this conclusion was patently unreasonable.

a previous hearing where, for example, the claim is heard de novo[50] (see section *2.1.4. Joined and related claims*); or in the claimant's BOC form[51] (see section *2.2.4. BOC forms and statements made to immigration officials*) or that of a relative (see section *2.1.4. Joined and related Claims*).

However, it appears that no substantial conclusion can be drawn from the claimant's failure to inform immigration authorities abroad of his or her fear of persecution when he or she applied for a visa to come to Canada[52] or, depending on the totality of the evidence and explanations, to provide certain information in his or her admissibility interview notes (see section *2.2.4. BOC forms and statements made to immigration officials*).

Regardless of where contradictions, discrepancies or omissions may be found in the evidence provided by, or concerning the claimant, the following general principles set out in *Sheikh*[53] apply to the assessment of credibility:

> The inconsistencies relied on by the Refugee Division must be real (*Rajaratnam v. M.E.I.*, 135 N.R. 300 (F.C.A.).

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[50] *Huang v. Canada (Citizenship and Immigration)*, 2019 FC 1123, at para 32. The Court noted that:

> . . . The mischief is not the RPD's reliance upon testimony from the first hearing, even for purposes of adverse credibility determinations. As noted, the Applicant accepts this use is permissible. The unfairness arises when the RPD does not afford the Applicant an opportunity to address specific credibility concerns, in front of the current decision-maker, before it draws adverse credibility determinations. I regard this principle as related to the Applicant's right to know the case to be met and to have an opportunity to address that case. [emphasis added]

This is consistent with *Darabos v. Canada (Citizenship and Immigration)*, 2008 FC 484, at para 17, where the Court states: "Further, the use of transcripts of prior hearings to make adverse credibility findings does not violate principles of fairness where the claimants are provided, as they were here, with an opportunity to be heard and make representations." [emphasis added]

[51] See *Balasubramaniam v. Canada (Citizenship and Immigration)*, 2012 FC 228, at para 22:

> The reasonableness of drawing a negative inference as to credibility based on omissions or inconsistencies regarding important facts in POE notes, the PIF and oral testimony is well-established . . . [citations omitted].

See *Ugbaja v. Canada (Immigration, Refugees and Citizenship)*, 2018 FC 835, at para 14: "Omissions from the BOC and in oral testimony may reasonably be considered when assessing credibility."

[52] See *De Almeida v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 506, at para 4:

> First [the claimant's] Counsel argues that by drawing a negative inference as to the claimant's credibility because of the misinformation she provided to the Visa Officer it relied on an irrelevant consideration which tainted the whole decision. He referred to the Court of Appeal decision in *Fajardo* v. *Canada* (1993), 157 N.R. 392 at 394 where that Court said that one could not draw a negative inference as to credibility from the fact that a claimant had lied to a Visa Officer to conceal his or her intent of making a refugee claim once in Canada: the Court observed that this is something that all but 'the most naive applicant for a visitor's visa' would do in order to obtain quickly a visitor's visa allowing departure for Canada where the refugee claim could then be made in the safety of Canada. I agree with Counsel for the claimant that this was not a proper inference to draw as to the credibility of her subsequent refugee claim. It was an irrelevant consideration and patently unreasonable. [emphasis added]

[53] From the summary in *Sheikh v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15200 (FC), at paras 23–24.

> The Refugee Division must not display a zeal "to find instances of contradiction in the applicant's testimony. . . . [I]t should not be over-vigilant in its microscopic examination of the evidence" (*Attakora v. M.E.I* (1989), 99 N.R. 168).
>
> The contradiction or inconsistency must be rationally related to the claimant's credibility (*Owusu-Ansah v. Minister of Employment and Immigration* (1989), 98 N.R. 312 (F.C.A.)).
>
> Explanations which are not manifestly implausible must be taken into account (*Owusu-Ansah, supra*).
>
> The inconsistencies found by the Refugee Division must be significant and be central to the claim (*Mahathmasseelan v. Canada (M.E.I.)*, 15 Imm L.R. (2d) 30 (F.C.A.)) and must not be exaggerated (*Djama v. The Minister of Employment and Immigration*, A-738-90, dated June 5, 1992).
>
> (See also sections *2.2.1. Relevance* and *2.2.2. Materiality*)

Also, as would ideally be the case for any analysis of a credibility issue, particularly where the issue raised is material, the RPD should take into account the claimant's explanations, any relevant evidence on the record and the procedural circumstances that could reasonably explain the discrepancies raised.[54]

2.2.4. BOC forms and statements made to immigration officials

Admissibility of port of entry notes

It is well established in the case law that the Board may take statements made to immigration authorities at the port of entry into account to assess the claimant's credibility.[55] As the Court noted in *Markandu*, "[o]ne of the key tools available to the Board to test the credibility

[54] See, for example, *Owochei v. Canada (Citizenship and Immigration)*, 2012 FC 140, at paras 55–58, where the RPD relied on an alleged serious contradiction between the claimant's statement in her PIF that her husband *physically assaulted* her and her testimony at the hearing that he *verbally threatened* her. The claimant testified that she never changed her story about the kind of abuse she had experienced from her husband and that the translation was inaccurate. She asked the RPD to determine whether it was a translation issue rather than a credibility issue, but despite the fact that the record showed that there were translation difficulties in the claimant's case, the RPD did not respond. The RPD did not refer in its reasons to the explanation offered by the claimant to justify this discrepancy, nor did it specify how the explanation was inadequate or unreasonable. The Court found that it was unreasonable for the RPD not to address the translation problems cited by the claimant to explain an apparent contradiction.

[55] *Navaratnam v. Canada (Citizenship and Immigration)*, 2011 FC 856, at para 12.

of an applicant is to compare his PIF and POE statements and question him about any discrepancy during the hearing."[56]

Notes taken at the port of entry or documents prepared by Canadian immigration officers are admissible at RPD hearings without any further participation by the Minister at the hearing. The Court states the following in *Fernando*:

> While this Court recognizes the different circumstances under which the POE notes and the PIF are prepared, it has long been established that POE notes are admissible evidence before the Board (*Multani v. Canada (Minister of Citizenship and Immigration)* 2000 CanLII 15022 (FC)). Furthermore, . . . there is ample jurisprudence to the effect that discrepancies between the POE notes and the PIF may be considered by the Board in assessing the credibility of an applicant and that the Board is entitled to draw negative inferences from any significant omission in the POE notes [citations omitted]. [57]

Port of entry notes or other documents prepared by immigration officers are admissible even if they are not signed and dated[58] and even if the author is not called or available to testify.[59] Port of entry notes are admissible even if there is no evidence that they were prepared in accordance with a ministerial order.[60]

Disclosure

In accordance with the requirements of natural justice and subsection 34(1) of the RPD Rules, the RPD must make timely disclosure of any document, including port of entry notes, that it intends to use at a hearing. This was explained by the Court in *Nrecaj*:

> Failure to disclose impedes the ability of the accused in criminal proceedings to make full answer and defence, a common law right which has acquired new vigour since its inclusion in Charter, section 7 as one of the principles of

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[56] *Markandu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 771, at para 5.

[57] *Fernando v. Canada (Citizenship and Immigration)*, 2006 FC 1349, at para 20.
See also *Rahman v. Canada (Minister of Employment and Immigration),* [1994] F.C.J. no 2041(FCTD)(QL) at paras 5-6, where the judge concludes that the admission of such documents does not contravene the *Privacy Act* since the use made of them is compatible with the purposes for which they were obtained, an exception provided for in paragraph 8(2)(a) of that Act.

[58] See *Minister of Employment and Immigration v. Boampong* [1993] F.C.J. No. 791 (FCA)(QL). The panel held that notes taken from statements made by the respondent to an immigration officer upon arrival in Canada were inadmissible because they did not bear any signature or date. The Court held (at para 14) that the panel erred in refusing to admit the port of entry notes into evidence, but that once admitted, it was for the panel to assess their probative value.

[59] *Nowa v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14904 (FC), at para 6. The immigration officers did not appear before the Division because one of them was in Western Canada and Mr. Nowa did not have the means to bring him before the Division to testify.

[60] *Nowa v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14904 (FC), at para 11: "The issue of the form's legality is irrelevant to the issue of the admissibility of the document as evidence of the facts contained therein."

> fundamental justice. Likewise, the ability of a Convention refugee claimant to make full answer and defence to evidence adduced against his claim or to impeach his credibility is critical. The role of an RHO is similar in many ways to that of Crown counsel in criminal proceedings. Immigration's own manuals indicate that the RHO is required to disclose all documentary evidence to be used at the hearing. While the interview notes may not be "documentary evidence", the principles enunciated with respect thereto would extend to them. With particular reference to the CRDD, the *Immigration Act* ensured a claimant the right to be represented and a reasonable opportunity to present evidence, cross-examine witnesses and make representations. These provisions could be rendered illusory if the applicant can be precluded from making the equivalent of full answer and defence. To meet the test of fairness, disclosure must be sufficiently timely to allow counsel to fully and effectively fulfill his role and to allow the party requesting disclosure to prepare.[61] [emphasis added]

Summoning the immigration officer to testify

A claimant who wants to challenge the accuracy of the documents prepared at the port of entry must summon the immigration officer to testify at the hearing.[62] Even though a party can request that the Division issue a summons ordering a person to testify at the hearing, it is the requesting party who is responsible for providing the issued summons to the witness.[63]

In *Zaloshnja*, Justice Tremblay-Lamer rejected the argument that the Board had improperly exercised its discretion by refusing to require the immigration officer at the POE to be summoned for cross-examination:

> The applicant further argues that the Board improperly exercised its discretion by refusing to require the immigration officer at the POE to be summoned for

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[61] *Nrecaj v. Canada (Minister of Citizenship and Immigration)*, 1993 CanLII 2980 (FCA)

See *Gandour v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. no 1085(FCTD)(QL), at para 6, where the Court, citing *Nrecaj*, held that the notes taken at the port of entry should not have been admitted without timely prior disclosure.

See also *Tetteh-Louis v. Canada (Secretary of State)*, [1994] F.C.J. no 1315 (FCTD)(QL), at para 2. The Board acted contrary to the rules of procedural fairness by receiving in evidence the document entitled "Case Highlights" when this document had not been disclosed to the claimant until after the claimant's testimony in chief, during cross-examination by the Hearing Officer. [emphasis added]

See *Johnpillai v. Canada (Secretary of State)*, [1995] F.C.J. no 194 (FCTD)(QL), where the claimant alleged that a principle of natural justice was violated because the panel members read very harmful notes before the hearing began. These notes reported statements made by the claimant and described his conduct when he arrived in the country. At para 7, the Court concluded that there is no breach of a principle of natural justice if such documents are given to the decision maker prior to the hearing, even if they contain prejudicial information, provided that the claimant is given sufficient opportunity to respond to this information. [emphasis added]

[62] *Navaratnam v. Canada (Citizenship and Immigration)*, 2011 FC 856, at para 13.

See also *Lara v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1391, at paras 11–12. If the claimant argues that the interpreter is responsible for the shortcomings in the documents, it is up to the claimant to decide whether to call the interpreter as a witness.

[63] 45(1) and (3) of the RPD Rules; 62(1) and (3) of the RAD Rules.

> the purpose of cross-examination. I disagree. There was no duty on the Refugee Division to call the immigration officer. If the applicant believed that cross-examining the officer would assist her claim, it was up to her to call him as a witness. Rule 25(1) of the Convention Refugee Determination [now 45(1) of the RPD Rules] specifically direct claimants to make an application in writing if they wish to summon a witness. The burden of proof is on claimants to substantiate their claims and to call whatever evidence and witnesses they require.[64]

The Division must be cautious in exercising its discretion regarding whether or not to issue a summons. In a case where the immigration officer's testimony is required to prove that the port of entry notes are inaccurate, the panel's refusal to issue a summons may constitute a breach of natural justice.[65]

Inconsistencies between port of entry notes and BOC form or testimony

The RPD may find a claimant not to be credible, or make findings that undermine a claimant's credibility, due to inconsistencies in statements made on the claimant's BOC form or to an immigration officer at the port of entry.

In *Navaratnam,* Justice Shore sets out four general principles regarding discrepancies and omissions in statements made in a BOC form or at the port of entry:

> It is trite law that statements to immigration authorities at the POE may be considered by the Board in order to evaluate a claimant's credibility and that a person's first story is usually the most genuine, and therefore the one to be believed. [emphasis added, citations omitted]
>
> As well, contradictions between the Applicant's oral and written statements justify a negative finding of credibility. [citations omitted]
>
> Moreover, it [is] entirely open to the Board to conclude that the Applicant's failure to mention important facts in his Personal Information Form [PIF] was the basis for a negative conclusion as to the Applicant's credibility, most especially after he had the opportunity to amend his PIF at the hearing and declared it to be complete and accurate. [citations omitted]

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[64] *Zaloshnja v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 206, at para 8.

[65] *Kusi v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. no 523 (FCTD)(QL), at para 9. The claimant argued that the answers recorded by the immigration officer at the port of entry were inaccurate and required the officer's appearance for cross-examination. The Tribunal denied his request. The claimant argued that the failure to allow him to cross-examine the immigration officer who wrote the notes violated the requirements of natural justice and fundamental justice. The Court accepted his argument.

See also *Jaupi v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 658, at para 3. The Court found that the CRDD breached the rules of natural justice by dismissing the claimants' motion for cross-examination of the immigration officer and the interpreter at the hearing regarding the obvious inconsistencies in the notes taken at the port of entry by the immigration officer.

> A hearing is an opportunity for an applicant to complete his evidence and not to introduce new and important facts to his story. [citations omitted][66]

However, it is well established that decision makers in refugee protection cases must exercise caution before calling into question a claimant's credibility on the basis of inconsistencies, omissions and details between a document signed at the port of entry upon arrival in Canada and subsequent submissions such as oral testimony or a BOC form.[67]

In *Mojica Romo*, the Court found that the RPD had committed errors described in the case law that the claimants cited:

> The applicants are correct in contending that the Federal Court has pointed out some of the pitfalls for tribunals using port of entry notes and PIFs, going overboard to identify contradictions and omissions in order to find a lack of credibility, as these are not always indicative of a lack of credibility. The Commission should, in each case, consider the relevance and significance of the contradiction or omission and take into account any explanation, evidence or circumstances that might explain the discrepancy.[68] [emphasis added]

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[66] *Navaratnam v. Canada (Citizenship and Immigration)*, 2011 FC 856, at paras 15–18.

[67] *Chikadze v. Canada (Citizenship and Immigration)*, 2020 FC 306, at para 21.

See *Guven v. Canada (Citizenship and Immigration)*, 2018 FC 38, at paras 39–42 cited in *Chikadze*, at para 21.

At para 39 the Court notes, "With respect to making credibility findings based on the POE forms and notes, the jurisprudence cautions against relying on inconsistencies in testimony between the POE notes and later testimony and documents, unless those inconsistencies are about 'crucial elements' of the applicants claim."

Para 40 refers to *Wu*, 2010 FC 1102, where Justice O'Reilly states, "The circumstances surrounding the taking of those statements is far from ideal and questions about their reliability will often arise."

Para 41 refers to *Cetinkaya*, 2012 FC 8 where Justice Russell makes the following caveat: "The purpose of the POE interview is to assess whether an individual is eligible and/or admissible to initiate a refugee claim. It is not a part of the claim itself and, consequently, it should not be expected to contain all of the details of the claim."

At para 42: "To summarize, the jurisprudence cautions against reliance on POE notes with respect to omissions and lack of detail as the sole basis for negative credibility findings. When an applicant swears the truth of certain allegations, there is a presumption that those allegations are true, unless there is a reason to doubt their truthfulness (*Maldonado* at para 5 (CA)). If there is a valid reason to doubt an applicant's credibility, decision-makers can seek corroborating evidence, and can draw a negative inference from the lack of corroboration. However, an applicant's explanation for failing to provide corroborating evidence must first be considered before such inferences can be drawn. . . ." [emphasis added, citations omitted]

[68] *Mojica Romo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 543, at para 10. The RPD rejected the claim for refugee protection on the basis of what it described as a "fundamental contradiction [at] the very heart of their refugee protection claim." At the port of entry, the claimants stated that the death threats came from "strangers" although they stated in their PIFs that it was corrupt judicial police officers who accompanied the drug trafficker "Tata". According to the Court, the contradiction was not major one, being of the view that it was plausible that the claimants had used the term "stranger" to describe the people who harassed them because they did not know who these individuals were, even though they learned after some time that they probably had links with "Tata" and were probably judicial police officers. The Court found that the IRB made a patently unreasonable error in failing to give any credibility to the claimants' account solely on the basis of a *minor contradiction* between what was said at the port of entry and in the PIFs.

(See sections *2.2.1. Relevance* and *2.2.2. Materiality*)

However, where the inconsistency concerns a key element of the claim, such as its very basis, the Court will uphold a negative credibility finding. For example, in *Eker*, where the RPD did not believe the account of persecution based on the principal claimant's imputed political opinion, the Court concluded as follows:

> . . . Thus, the RPD committed no reviewable error by examining the answers given at the port of entry by the applicant. In this case, the contradictions in the applicant's narrative relate to key elements of the applicants' claim. In particular, the applicant was mistaken about, or contradicted himself on, the date of the general election, on the name of the party with which he was associated, the detention to which he was subject and on whether he had been sought by police.[69]

Where the claimant provides an explanation for an omission, it is a mistake to reject the explanation without giving reasons. In *Diaz Puentes*, when listing his persecutors during his interview at the port of entry, the claimant had mentioned the Bolivarian Circles, but not FARC. He explained this omission by the fact that he had been told to be brief and that the Bolivarian Circles were the group he feared most. The RPD rejected this explanation and concluded that he had made up the facts about FARC since he had failed to mention them. As the RPD did not provide any reason for its conclusion and did not consider the port of entry evidence in the given context, the Court found the conclusion to be patently unreasonable.[70]

Factors to Consider

In its assessment of inconsistencies, the RPD must take into account factors such as the psychological state of the claimant, his or her young age and the particular vulnerability of abused women. (See also section *2.5. Taking the Claimant's Circumstances into Account*)

Medical or psychological reports may reveal that inconsistencies or omissions are due to medical reasons rather than a claimant's lack of credibility. In *Joseph*, the Court stated as follows:

> While it is not for an expert to determine if the inconsistencies in a refugee protection claimant's testimony can be excused by post-traumatic stress syndrome [. . .], the fact remains that caution must be exercised where there is a connection between the inconsistencies or omissions identified by the RPD and the cognitive errors referred to in a medical or psychological report. . . ."[71] [citations omitted]

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[69] *Eker v. Canada (Citizenship and Immigration)*, 2015 FC 1226, at para 10.

[70] *Diaz Puentes v. Canada (Citizenship and Immigration)*, 2007 FC 1335, at para 23.

[71] *Joseph v. Canada (Citizenship and Immigration)*, 2015 FC 393, at para 33.

Even if the claimant is a minor,[72] the claimant will generally not be able to use his or her age (17 in this case) to explain significant omissions in their PIF.

In *Joseph*, the Court refers to the Guidelines on *Women Refugee Claimants Fearing Gender-Related Persecution*:

> According to Guideline 4, footnote 30, refugee women who have been raped and are suffering from PTSD have symptoms that include difficulty in concentration and memory loss or distortion. The RPD's conclusion that the applicant should have coherently explained her fear of being forcibly confirmed in her claim for refugee protection because [TRANSLATION] "the initial stress, upheaval and worries" were past her therefore takes no account of the duration and effects of PTSD as explained in the evidence submitted.
>
> . . . Since it is clear from the reasons for decision that the RPD relied mainly on temporal inconsistencies and memory problems as a basis for disregarding the impact of the PTSD diagnosis on the applicant's ability to testify, I am of the view that the RPD engaged in a circular and inadequate analysis in which it disregarded the experts' diagnosis on the basis of the symptoms associated with that diagnosis. Given the impact that the applicant's severe PTSD may have on her ability to give coherent testimony, this reasoning is unreasonable.[73]

In *Mabuya*, the Court explains that decisions that ignore the difficulties which can affect the credibility of female claimants are likely to be overturned:

> There are numerous cases in which this Court has set aside RPD decisions that fail to exhibit adequate sensitivity to the issues enshrined in the Gender Guidelines. Often, these cases turn on a finding that the Board's credibility determinations fail to take account of the realities faced by a female claimant, such as the impact of cultural taboos surrounding sexual violence. As a result of such taboos, survivors of sexual violence may fail to report assaults or even to speak about them contemporaneously, but such failures are not necessarily indicative of a lack of credibility. In addition, there are almost invariably no

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See also *Ogbebor v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 490, at para 40, where the Court held that the CRDD was wrong to fault the claimant for not mentioning in his PIF account that he had been raped during his period of detention. Thus, the Court ignored the psychologist's comment that the claimant felt extremely humiliated about this and was reluctant to talk about it.

[72] *Huang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1239, at para 12.

[73] See *Joseph v. Canada (Citizenship and Immigration)*, 2015 FC 393, at paras 45 and 47.

In *Chiebuka v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16411 (FC), at para 5 the Court found that the Member made sexist comments, demonstrating an unacceptable lack of sensitivity and compassion, when he stated that the claimant had testified unemotionally about her rape and that he was surprised that the claimant could have forgotten to mention in her PIF that she had been raped twice.

In *Simba v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14777 (FC), at para 37, the Court stated that the assessment of the claimant's testimony on the issue of the sexual assaults she allegedly suffered in prison must be made with circumspection and open-mindedness (her description of the assaults differed significantly from that in her PIF).

See also *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 875, at paras 3-5.

> witnesses to sex-related crimes. As a result, it is often difficult for claimants who allege to have experienced sexual assault to provide corroboration for their claims. Moreover, many women find it difficult to speak about sexual violence to a stranger in the context of a hearing. Decisions which are not adequately sensitive to these sorts of realities and which impugn the credibility of claimants based on lack of corroboration or difficulty in speaking about the assault have often been set aside as unreasonable.[74] [citations omitted]

BOC form omissions

Regarding omissions in the document that a claimant sends to the RPD to make a claim,[75] this document, when compared to the port of entry notes, must contain much more detailed information. The Court described the content and extent of the details provided in the BOC form's narrative in *Basseghi*:

> It is not incorrect to say that answers given in a PIF should be brief but it is incorrect to say that the answers should not be complete with all of the relevant facts. It is not enough for an applicant to say that what he said in oral testimony was an elaboration. *All* relevant and important facts should be included in one's PIF. The oral evidence should go on to explain the information contained in the PIF . . . .[76] [emphasis added]

For example, in *Ogaulu*,[77] the claimant stated in his BOC form that none of his family members were with him when he was assaulted. This statement directly contradicted his testimony that his brother was present. In addition, in the BOC form, the claimant mentioned a friend who was present at the time of his assault, but did not mention the presence of his brother, who, according to his testimony, played a more significant role in the incident. Taking into account the omissions as well as the significant inconsistencies, the RAD found that the claimant's refugee protection claim lacked credibility. The claimant argued that he simply

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[74] *Mabuya v. Canada (Citizenship and Immigration)*, 2013 FC 372, at para 5.

See also *Varga v. Canada (Citizenship and Immigration)*, 2020 FC 102, at para 84. In this case, the claimant had failed to disclose her rape, at the port of entry and in her initial BOC form. However, she did disclose the rape in her amended BOC form and reported it to the health care professionals who were treating her. In its decision, the Court recalled that, while it is open to the RPD to conclude that the rape story was not credible, it must first consider any reasonable explanation for the claimant's omissions. The Court held that "Ms. Varga's initial reluctance and failure to disclose her rape at the port of entry and otherwise was not reasonably dealt with in accordance with the Chairperson Guidelines 4 . . . and Court jurisprudence." In particular, the Court reiterated that importance of taking into account the claimant's own cultural norms as well as the sense of shame associated with sexual abuse.

[75] In December 2012, the Basis of Claim form (BOC form) replaced the Personal Information Form (PIF).

[76] *Basseghi v. Canada (Minister of Citizenship and Immigration)* [1994] F.C.J. no 1867 (FCTD)(QL), at para 33.

In *Bains v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8350 (FC), at para 5, the Court noted that claimants are asked in the PIF to set out the significant incidents of their claim. It was therefore not unreasonable for the claimant to omit "very ordinary problems" (incidents of harassment and detention by the police) and to recount only the major problems that are the focus of the claim in the narrative.

[77] *Ogaulu v. Canada (Citizenship and Immigration)*, 2019 FC 547, at paras 17–20.

provided further details during his testimony to support the narrative in his BOC form and that this fact should not be used to cast doubt on his credibility. However, in the Court's view, the details of the assault were important because they went to the very heart of the claimant's refugee protection claim. Therefore, their omission from the BOC form was not a minor detail or incidental information, but rather an important element of the claim. The Court upheld the RAD's decision.

In *Husyn,*[78] the claimants argued that information that becomes known after the BOC form is filed can be certified at the hearing and that it is generally not necessary to amend the BOC form. While the Court agreed with the claimants that they were not required to file an amended BOC form, in the circumstances of this case, the failure to do so supported the adverse inference drawn by the RPD.

Similarities in narratives of unrelated claimants[79]

The similarity between a claimant's BOC form and the BOC forms of other claimants can be used to call into question the credibility of the claim, although the Board must consider whether there is an explanation for these similarities.

For example, in *Liu*, the Court upheld the RPD's decision rejecting the claim that it found not credible, largely because of the similarity of the PIF to those of six other claimants. All of the narratives were "strangely similar" in form and content. The Court stated as follows:

> It was open to the Board to examine the striking similarities between the six other claims which had been filed through the services of the same translator and legal counsel, and to draw a negative inference as to the credibility of the allegations in the principal applicant's PIF narrative. The fact that the Board did not question the translator's integrity or credibility does not bar it from taking a critical view of his explanations for the similarities between the seven claims. This case is

[78] *Husyn v. Canada (Citizenship and Immigration)*, 2016 FC 1386, at paras 18–26. The RPD found that the claimants lacked credibility when the principal claimant testified at the hearing that since his arrival in Canada in 2014, his agents of persecution were still looking for him, visiting his family once or twice a month and threatening to kill him. This information was not contained in the BOC form or the amended version filed approximately one week prior to the hearing date. When the RPD asked him to explain this omission, he stated that he had filed an email from his brother, which referred to the visits of the agents of persecution. The RPD rejected his explanation and concluded that the omission was significant as it related to the constant, frequent and persistent interest of the agents of persecution, whereas the brother's email was dated more than two years before the hearing and dealt with an incident that occurred shortly after the BOC form was filed. The Court noted that at the outset of the hearing, the RPD indicated that it had the original BOC forms on file, as well as an amended BOC form. It asked that the claimants confirm that these documents were complete, true and correct. The claimants agreed that this was the case, and they did not report any action by the agents of persecution after the incident described in the email of March 27, 2014. In these circumstances, the Court found that it was reasonable for the RPD to make negative findings of credibility due to the omission of material aspects of a claim in a BOC form.

[79] On March 14, 2019, Refugee Appeal Division (RAD) decision X (Re), 2018 CanLII 101516 (CA IRB), TB7-16268 was designated as a persuasive decision. This decision is persuasive to RPD and RAD members who are presented with Basis of Claim forms that closely resemble those of unrelated claimants.

distinguishable from Justice Campbell's decision in *Bao v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 301, [2006] F.C.J. No. 411 (T.D.) (QL), in which he wrote at paragraphs 2 and 6:

> A unique element of the decision by the RPD is the comparison of the Applicant's PIF narrative against the details of the PIF in six other Falun Gong claims. […]
>
> Given this result, I find that it was incumbent on the RPD to exclude the unsubstantiated suspicion from the decision-making process. This the RPD did not do. Indeed, the way the decision reads, the RPD proceeded to use the unsubstantiated suspicion to find that the Applicant's "PIF narrative is insufficiently personal to be credible". […]

In the case at bar, the Board gave "little weight" [...] to Exhibit C-6 because of the specifics of the strikingly similar seven cases. It did not dismiss the applicants' claim only on the basis of these strikingly similarities. It found implausibility and inconsistencies.[80]

In *Zhang*, the facts were very similar to those in *Bao*. The Court found that the RPD could not reasonably conclude from the mere fact that the seven PIFs were similar that it was more than likely that the claimant's detailed narrative was not true. Such a conclusion did not take into account the evidence before the Board as to why the PIFs were similar. The translator admitted to having used a list of questions. There was a clear similarity between the questions and the form of each of the seven PIFs, which may explain the identical words in some places in the PIFs.[81]

2.2.5. Implausibilities

The RPD and the RAD are not necessarily required to admit testimony solely because it was not contradicted at the hearing. The panel is entitled to evaluate the testimony on the basis of reasonableness, common sense and rationality and may reject unrefuted evidence if it is not consistent with the probabilities of the case as a whole.[82]

Adverse findings of credibility must be reasonable and not be based solely on conjecture or speculation. It is not appropriate for decision-makers to base their assessment of credibility on their own ideas about how events actually took place or should have taken place. See, for example *Selvarasu*, where the claimant had asserted at the first sitting of the hearing that his passport had been obtained via regular means, whereas at the second

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[80] *Liu v. Canada (Citizenship and Immigration)*, 2006 FC 695, at paras 39–42.

[81] *Zhang v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 550, at para 25.

[82] *Kanyai v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 850 (CanLII), at para 11. These fundamental principles have been repeated in many cases over the years, for example, *Ye v. Canada (Citizenship and Immigration)*, 2014 FC 1221, at para 29, and in *Luo v. Canada (Citizenship and Immigration)*, 2019 FC 823, at para 4.

hearing he stated that it had been obtained through a bribe. He explained that he was not aware of the bribe until he spoke to his father after the first session. The RPD rejected his explanation and concluded that it was not plausible that the claimant did not know beforehand that his passport had been obtained through a bribe and that he took no steps to inquire, once he was safe in Canada, about the circumstances in which his passport was obtained. The Court found the RPD's conclusion to be unreasonable. "In so finding, the RPD was speculating about what the applicant should have done or what would have been the reasonable course of action." [83] [emphasis added]

It is not enough to state that the claimant's story is "implausible" without further explaining the reasoning behind this conclusion.[84] Where the RPD makes a finding of lack of credibility based on the implausibility of evidence, its conclusions must be supported by the evidence. This also means that all the evidence that supports the likelihood of a claimant's allegations must be considered and weighed before concluding that the allegations are implausible.[85]

In *Santos,*[86] Justice Mosley cites passages from *Valtchev* and *Leung* in which these principles are set out:

> In *Valtchev* [citations omitted], Justice Muldoon stated the following at paragraphs 7-8 with regards to plausibility findings of the Board:

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[83] *Selvarasu v. Canada (Citizenship and Immigration)*, 2015 FC 849, at paras 31 and 32.

See *Senadheerage v. Canada (Citizenship and Immigration)*, 2020 FC 968, at paras 18-19. The RAD found it unlikely that the Criminal Investigation Department [CID] and the henchmen visited the claimant's empty house in February 2018. It assumed that they had known at that time that he had left the country. However, there was no evidence to support such a conclusion. The Court found that this finding by the RAD amounted to an assumption about what a "reasonable agent of persecution" would do. [emphasis added]

See also *Lin v. Canada (Citizenship and Immigration)*, 2014 FC 683, at para 20. The RPD did not find it plausible that the head of an underground church house would so quickly accept the claimant, a 17-year-old girl, into its activities. The Court noted: "In the absence of a concrete grounding in evidence, the Board's plausibility findings were merely speculative." [emphasis added]

[84] *Yu v. Canada (Citizenship and Immigration)*, 2015 FC 167. The RPD found it implausible that the claimants' friend willingly disclosed to them her membership in an illegal church. At para 12, the Court noted, "A conclusion that a matter is implausible without articulation of the basis in the record (rather than just some personal opinion) is arbitrary and unreasonable."

[85] See *Hassan v. Canada (Citizenship and Immigration)*, 2010 FC 1136, at para 13: The Court notes, "The consideration of plausibility is largely subjective and requires the Board to refer to evidence which could refute their implausibility conclusions and explain why such evidence does not do so." [emphasis added, citations omitted]

See also *George v. Canada (Citizenship and Immigration)*, 2019 FC 1385, at paras 12 and 35–39. The RPD found Mr. George's overall story to be implausible, considering it was "implausible that after being outside his country for so many years, the agents of persecution are still looking for him." The Court concluded at para 38, "I find the RPD's cursory conclusion of implausibility, undertaken without assessment of relevant evidence [the claimant had submitted letters and statements from 10 individuals], and without apparent consideration for the cultural and factual context in which the stated fear of persecution arose, to be unreasonable." [emphasis added]

[86] *Santos v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 937, at para 14.

> A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. . . .[87] [emphasis added]
>
> In *Leung* [citations omitted] . . . Associate Chief Justice Jerome stated:
>
> [14] [T]he Board is under a very clear duty to justify its credibility findings with specific and clear reference to the evidence.
>
> [15] This duty becomes particularly important in cases such as this one where the Board has based its non-credibility finding on perceived "implausibilities" in the claimants' stories rather than on internal inconsistencies and contradictions in their narratives or their demeanour while testifying. Findings of implausibility are inherently subjective assessments which are largely dependant on the individual Board member's perceptions of what constitutes rational behaviour. The appropriateness of a particular finding can therefore only be assessed if the Board's decision clearly identifies all of the facts which form the basis for their conclusions. The Board will therefore err when it fails to refer to relevant evidence which could potentially refute their conclusions of implausibility . . . .[88] [emphasis added]

The principles deriving from these two decisions were succinctly summarised by the Court in *Santos* as follows:

> . . . [A]s stressed in *Valtchev, supra*, plausibility findings involve a distinct reasoning process from findings of credibility and can be influenced by cultural assumptions or misunderstandings. Therefore, implausibility determinations must be based on clear evidence, as well as a clear rationalization process

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[87] *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, at para 7.

[88] *Leung v. Canada (Minister of Employment and Immigration)* [1994] F.C.J. No. 774 (FCTD)(QL), at paras 14-15.

The subjective nature of plausibility assessments is highlighted in the RAD decision *X (Re)*, 2019 CanLII 76820 (CA IRB), at paras 16–20. The panel mentions, in particular, as follows:

> Clearly, as is the case here, different decision-makers may reach different conclusions on what behaviour might be considered reasonable under a certain set of circumstances. In many cases, the inherent subjectivity of these judgments renders these types of implausibility findings arbitrary. It is for this reason that *Valtchev* sets out the standard that these findings should only be made in the clearest of cases. As I disagree with the RPD's credibility findings as discussed above, I have set them aside on appeal.

supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions . . . .[89] [emphasis added]

In *Al Dya,* the Court revisited the interpretation to be given to the principles set out in *Valtchev* that conclusions of implausibility should only be drawn in "the most obvious cases." The Court made the following observations:

> . . . *Valtchev* does not create a standard of impossibility. In other words, it does not limit implausibility findings to cases where it is impossible that the alleged events occurred. Rather, this Court has equated the "clearest of cases" and "could not have happened" language from *Valtchev* to situations where it is "clearly unlikely" that the events occurred in the asserted manner, based on common sense or the evidentiary record . . . .[90] [emphasis added]
>
> . . . In my view, the "clearest of cases" standard from *Valtchev* neither displaces the balance of probabilities standard nor reverses the legal burden of proof.[91] [emphasis added]
>
> . . . Its use of "clearest of cases" or "clearly unlikely" language does not mean that facts need not be proved on a balance of probabilities, and does not disturb the overall burden. Rather, this language recognizes that the unusual or improbable does occur, and that it is unreasonable to reject evidence as not credible simply because the events it describes are unusual. In other words, it avoids a fallacy that would equate the overall probability of an event occurring in another country with either the likelihood of it having happened to a particular claimant, or the likelihood the claimant is lying in claiming it happened to them.[92]

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[89] *Santos v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 937, at para 15.

In *Yu v. Canada (Citizenship and Immigration)*, 2015 FC 167, the RPD found it unlikely that the claimants' friend would willingly reveal to them her membership in an illegal church. At para 12, the Court held : "A conclusion that a matter is implausible without articulation of the basis in the record (rather than just some personal opinion) is arbitrary and unreasonable."

[90] *Al Dya v. Canada (Citizenship and Immigration)*, 2020 FC 901, at para 32.

[91] *Al Dya v. Canada (Citizenship and Immigration)*, 2020 FC 901, at para 33.

[92] *Al Dya v. Canada (Citizenship and Immigration)*, 2020 FC 901, at para 35.

See, for example, *Zaiter v. Canada (Citizenship and Immigration),* 2019 FC 908, at paras 7 and 9–11. The issue for the Court was whether the RAD had unreasonably concluded that the claimant was not credible because his allegation that Hezbollah had attempted to forcibly recruit him was implausible. While the RAD reasonably concluded that the preponderance of evidence on the record regarding the organization's recruitment practices "does not support the fact that Hezbollah engages in forced recruitment," the Court states: "Individual experiences need not always follow the norm. Unlikely events can still happen. Something more is required before a claimant may be found not to be credible on the basis of implausibility alone." The Court concluded that the RAD erred in failing to take this high threshold into account in rejecting the credibility of the claimant's story:

> [11] In the present case, the evidence reasonably supports the conclusion that it is unlikely that Hezbollah would engage in forced recruitment. On this basis, the member found the applicant's account not to be credible. However, the [RAD] member never addresses whether the evidence supports the conclusion that forced recruitment by Hezbollah was "clearly unlikely," that it was "outside the realm of what could reasonably be expected," that it did not make sense, or that it "could not have happened." There is a serious question as to whether the evidence reasonably

[emphasis added, except for the word "avoids," which was underlined in the original.]

Also, in *Al Dya,* the Court emphasized the importance that *Valtchev* placed on documentary evidence in assessing whether the claimant's allegations are plausible:

> *Valtchev* also seeks to ensure that implausibility findings do not rely on misplaced assumptions about what is likely or rational from a Canadian frame of reference. In this regard, it is worth noting that *Valtchev* describes two related aspects of plausibility findings: the sense of what is rational or logical ("outside the realm of what could reasonably be expected"), and the assessment of the relevant documentary evidence ("documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant"). These are related since what is considered rational or logical - what "makes sense" - in a given context may be impacted by the documentary evidence, notably the evidence of country conditions . . . .[93] [emphasis added, citations omitted]

The Federal Court has repeatedly stated that extreme care must be taken in assessing different cultural norms, for example, the practices followed in different political, police and social systems.[94]

> supports such conclusions. Even if Hezbollah did not usually engage in forced recruiting in the past, it does not necessarily follow that the applicant must not be telling the truth when he claimed that it attempted to recruit him by force. . . . The evidence of Hezbollah's usual recruitment techniques is insufficient to establish that the applicant must not be telling the truth about how it had tried to recruit him [citations omitted] By watering the test down as she did, the member failed to carry out the correct analysis and reached an unreasonable result. [emphasis added.]

See *Senadheerage v. Canada (Citizenship and Immigration)*, 2020 FC 968, at para 17. "The RAD did not explain the basis for its implausibility findings" and "the findings appear to be based on the RAD's own views of what is likely or unlikely. In doing so, however, the RAD did not avert to the distinction between plausibility and likelihood, which is at the core of cases such as *Valtchev* and *Al Dya*." [emphasis added]

[93] *Al Dya v. Canada (Citizenship and Immigration)*, 2020 FC 901, at para 38.

[94] See, for example, *Yasun v. Canada (Citizenship and Immigration)*, 2019 FC 342, at para 22:

> In addition, the RPD's decision contains an implausibility finding that is not reasonably grounded in the evidence. The RPD found that it was unlikely that the Turkish authorities would have issued a passport to Ms. Yasun if they were targeting her because of her political activities. That finding, however, assumes that the authority that issues passports would communicate with the local police who mistreated her. This may or may not be the case. Nothing in the record supports such an assumption … .

Another example of where evidence of cultural context was important is *George v. Canada (Citizenship and Immigration)*, 2019 FC 1385, at paras 34–35 and 38: The RPD did not believe that the agents of persecution would continue to persecute Mr. George given the passage of time. The Court found this finding of implausibility to be superficial and unreasonable. The Court was of the view that the RPD had implicitly relied on its assessment that a police group, belonging to a Ghanaian tribe, which allegedly pursues and even kills members of tribe who do not accept its practices, would only do so for a certain period of time. The RPD does not explain why its temporal conclusion is justified in this atypical context. Nor did it consider whether, in this cultural context, the evidence that Mr. George had provided supported the plausibility of his fears. [emphasis added]

Actions that may seem implausible by Canadian standards may be plausible in the context of the claimant's social and cultural background. For example, in *Manan*, the Court held that the RAD was not reasonable in concluding that it was implausible that Mr. Manan did not seek medical attention for his physical injuries after his release. Findings of implausibility are only permitted in the clearest of cases. Bearing in mind *Valtchev*'s warning regarding cultural norms, the Court stated:

> The circumstances in which Canadians might seek professional medical care should not be superimposed upon non-Canadians, especially those living in highly-volatile environments such as Afghanistan and suffering from psychological trauma. I note both Mr. Manan and the RAD liken Mr. Manan's physical injuries to minor [childhood] injuries—i.e. not very serious. Further, both Mr. Manan and his brother provided evidence their family did not leave their house unless absolutely necessary because of ongoing security concerns, concerns which are reinforced in the [disallowed] father's letter . . . .[95]

In *Al Dya*, the Court also points out that even in the absence of documentary evidence showing that the events could not have occurred in the manner alleged by the claimant, *Valtchev* does not rule out the possibility of drawing conclusions of implausibility if the facts go beyond what can logically be expected.

> At the same time, *Valtchev* does not preclude consideration of plausibility or likelihood in making credibility assessments. If the evidence shows that a particular occurrence never occurs or is clearly unlikely, this may form a reasonable basis for an adverse credibility finding, particularly if there is nothing to explain or corroborate the clearly unlikely occurrence. Similarly, an assertion may be so far-fetched, so far outside the realm of what could be reasonably expected, even after taking cultural differences into account, that it is implausible, even if the objective evidence does not directly address the likelihood of its occurrence.[96] [emphasis added.]

See also *Lin v. Canada (Citizenship and Immigration)*, 2014 FC 683, at para 20. The RPD did not find it plausible that the head of an underground church house would so quickly accept a 17-year-old girl into its activities. The Court noted:

> While it may be inadvisable for an underground church to admit a young member or distribute any literature for fear of drawing attention, such a situation does not demonstrate a "clear case" in the sense that the facts at issue are outside the realm of what could reasonably be expected. Furthermore, the Board did not cite any objective evidence that would support its implausibility finding. No evidence was cited which described the level of scrutiny these churches receive by police, their typical proselytizing practices, or the profile of individuals who are admitted to the church. In the absence of a concrete grounding in evidence, the Board's plausibility findings were merely speculative. [emphasis added]

[95] *Manan v. Canada (Citizenship and Immigration)*, 2020 FC 150, at paras 46–47.

[96] *Al Dya v. Canada (Citizenship and Immigration)*, 2020 FC 901, at para 39.

For example, in *Eyong,*[97] the claimant failed to convince the Court that the RAD had erred in concluding that his claim was not credible on the basis that it would be implausible for the police to allow the claimant's wife to take photographs showing the police abusing him.

While the panel has the right to assess the evidence and evaluate credibility, decisions where the finding of lack of credibility is based on perceived implausibilities may be more likely to be subject to review by a higher court. The Federal Court has indicated that it will not give undue judicial deference to the Board's assessment of the plausibility of testimony, as this assessment is based on inferences and is open to challenge, particularly where those inferences are based on "rationality" and "common sense".[98]

Regarding the standard of review of findings of implausibility, the Court, in *Contreras*,[99] responded to the claimant's argument in *Giron*[100] that a lower standard of review should be applied to findings of implausibility than to the Board's findings of credibility. The Court rejected this argument by referring to the Federal Court of Appeal's comments in *Aguebor*, where Justice Décary stated:

> It is correct, as the Court said in *Giron*, that it may be easier to have a finding of implausibility reviewed where it results from inferences than to have a finding of non-credibility reviewed where it results from the conduct of the witness and from inconsistencies in the testimony. The Court did not, in saying this, exclude the issue of the plausibility of an account from the Board's field of expertise, nor did it lay down a different test for intervention depending on whether the issue is "plausibility" or "credibility".

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[97] *Eyong v. Canada (Citizenship and Immigration)*, 2020 FC 764, at paras 20 and 24.

See also *Mohamed v. Canada (Citizenship and Immigration)*, 2015 FC 1379, at para 29:

> Ms. Mohamed takes issue with the RPD's finding that it was implausible that officers with the Canada Border Services Agency [CBSA] did not ask her a single question upon her entry to Canada. She also disputes the RPD's finding that it was implausible that a person travelling under a fraudulent British passport would not know the full name they had adopted. I disagree. It was reasonable for the RPD to assume that CBSA officers would question Ms. Mohamed upon her arrival in Canada, particularly given that she was travelling under a passport issued by an English-speaking country. I agree with the RPD that a person travelling on a fraudulent passport would make an effort to learn the name that appeared on the document.

[98] In *Giron v. Canada (Minister of Employment and Immigration),* [1992] F.C.J. No. 481 (FCA.)(QL), at para 1, the Court states:

> The Convention Refugee Determination Division of the Immigration and Refugee Board ("the Board") chose to base its finding of lack of credibility here for the most part, not on internal contradictions, inconsistencies, and evasions, which is the heartland of the discretion of triers of fact, but rather on the implausibility of the claimant's account in the light of extrinsic criteria such as rationality, common sense, and judicial knowledge, all of which involve the drawing of inferences, which triers of fact are in little, if any, better position than others to draw.

[99] *Contreras v. Canada (Minister of Citizenship and Immigration),* 2005 FC 708, at para 27.

[100] *Giron v. Canada (Minister of Employment and Immigration),* [1992] F.C.J. no 481, (FCA)(QL).

> There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. In *Giron*, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, *Giron* in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn . . . .[101] [emphasis added]

The finding will be upheld where the inferences that led to the finding of lack of credibility are not so unreasonable as to justify the intervention of a higher court. In other words, the Federal Court will not substitute its assessment for that of the panel if the panel could legitimately have made the conclusion it did, even though the Court might have drawn other inferences or concluded that the evidence was plausible.[102]

2.2.6. Incoherent or vague testimony

A claim may be rejected as lacking in credibility if the claimant's testimony is found to be incoherent[103] or vague, or lacking in sufficient knowledge or detail that could reasonably

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[101] *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732, (FCA)(QL) at paras 3–4.

[102] See, for example, *Bastiampillai v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 7876 (FC), where Justice Tremblay-Lamer stated at para 6:

> . . . Having reviewed the implausibilities identified by the Board, I believe that the findings were open to it on the evidence. If confronted with the same evidence, I may have concluded differently. However, the fact that I could have reached a different conclusion does not allow me to intervene in the absence of an overriding error. There was no such error in this case.

[103] *Magonza v. Canada (Citizenship and Immigration)*, 2019 FC 14, at para 19. Consistency is listed among the factors frequently used to assess credibility.

See, for example: *Jean v. Canada (Citizenship and Immigration)*, 2020 FC 838, at paras 8, 15, and 17. Although the applicant alleges that she received threats and many anonymous calls that were also threatening, the nature of the threats and the reasons why she was targeted are inconsistent.

Braveus v. Canada (Citizenship and Immigration), 2020 FC 1153, at paras 14 and 20. The description of the October 15, 2015, incident was inconsistent, and the applicant did not establish that this incident, after which she allegedly left Haiti to join her spouse in Brazil, had actually occurred.

De Delgado v. Canada (Citizenship and Immigration), 2017 FC 967, at paras 11–12: The negative credibility findings were based on inconsistencies or implausibilities relating to important elements of the applicants' claims. The testimony about the assault, which was a fundamental element in the claims, was vague and imprecise. The RPD also identified several inconsistencies in the account, particularly regarding dates.

Rahal v. Canada (Citizenship and Immigration), 2012 FC 319, at para 65: "…the various versions of events provided by the Applicant surely afforded the RPD a sound basis for disbelieving the Applicant."

be expected of a person in the claimant's position and with the claimant's social and cultural background.[104]

The Board must be cautious and not make negative findings on the basis of an expectation of finer details or an unreasonably high standard of knowledge, particularly when it comes to religion or politics, because the claimant's responses may vary depending on their degree of religious practice and instruction or their level of political involvement.

For instance, in *Yilmaz*,[105] the Court held that the RPD had required a level of political knowledge usually required of an active member, rather than a simple supporting member of the party, and erred by comparing the plaintiff with an informed person in a free world.

However, in the decisions listed below,[106] the Court held that it was reasonable to conclude that the applicant's lack of political knowledge could form the basis of a negative credibility finding:

> *Mbuyamba*: The Court found the negative inference drawn by the RPD from the applicant's inability to provide more than general examples of the organization's

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[104] In *Mirzaee v. Canada (Citizenship and Immigration)*, 2020 FC 972, at paras 13 and 53, the Court concluded that the RPD had considered the applicant's particular circumstances, background and education when it drew a negative credibility finding based on her failure to recollect events or details.

See also *Fermin Mora v. Canada (Citizenship and Immigration)*, 2018 FC 521, at paras 38–39. The Court noted that the RAD had correctly considered the applicant's cultural and personal profile (as an educated person) when it concluded that, given her profile as an educated person, the applicant was capable of providing more specific responses to key questions about her refugee claim.

Boyce v. Canada (Citizenship and Immigration), 2016 FC 922, at paras 3, 17–18 and 64–68. The RAD found that the applicant was vague about her lesbian relationship in Canada and that it was not credible that she would forget when her first lesbian experience had occurred and that she would not know how many lesbian relationships she had had, given that being in a lesbian relationship would have been a breach of cultural norms in her country. The Court did not agree with the applicant's allegation that the RAD failed to take into account her social, cultural and economic context in Barbados as a victim of domestic violence.

In *Baines v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 603, at para 13, the Court held that knowing little about a very close friend of the family or any other piece of information that should be in an applicant's knowledge has nothing to do with cultural differences. "In any event, it is not sufficient to raise 'cultural differences'. Proof thereof must be made."

[105] In *Yilmaz v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 844.

See also *Mushtaq v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1066. At para 5, the Court noted that the amount of precision required by the Board, and the extent of political knowledge which it expected the applicant to have, went beyond the "basic facts" and were unreasonable in the context of his claim. The Board did not consider the applicant's particular circumstances or the fact that he worked for the Pakistan People's Party (the "PPP") only in his local village and not on a national scale.

[106] *Mbuyamba v. Canada (Citizenship and Immigration)*, 2020 FC 918, at paras 9 and 31.

Lunda v. Canada (Citizenship and Immigration), 2020 FC 704, at paras 24–25.

Ahmed v. Canada (Citizenship and Immigration), 2019 FC 1210, at paras 32–34.

M.T.A. v. Canada (Citizenship and Immigration), 2019 FC 1508, at para 33.

activities was reasonable, given that he said he had been an "activist" who had been involved since 2016.

Lunda: It was not unreasonable for the RPD to draw an adverse inference as to Mr. Lunda's credibility because of his lack of basic knowledge of the party that he claimed to have actively supported and represented for several years. The questions that Mr. Lunda was unable to answer were basic questions.

Ahmed: The Applicant did not have a level of knowledge that would be expected of a person of his asserted profile, i.e., someone who alleged he had been an active member of the Broad National Movement in Saudi Arabia for several years.

M.T.A.: The Court concluded that it was open to the RAD to doubt the Applicant's past political involvement when she was unable to speak to the first demonstration she attended, how many she attended or what she was protesting.

In the same way as for political knowledge, the Board may make negative credibility findings when a claimant's religious knowledge is not proportionate to their alleged religious profile. However, such findings must be founded on reasonable expectations.

For instance, in *Ullah*,[107] the Court had the impression that the CRDD member had erroneously expected the claimant's answers about his religion to be equivalent to the member's own knowledge of that religion. In *Lin*,[108] the Court found that the RPD had engaged in an overly stringent and microscopic examination of the applicant's knowledge of Falun Gong. It had erroneously weighed his testimony on this issue against its own misguided idea of what a person in the claimant' circumstances would or should know or understand. The RPD had based its finding on unattainable and unreasonable requirements for knowledge of Falun Gong.

However, in *Bouarif*,[109] Justice Roy explains that the Board can reasonably conclude that the sincerity of the claimant's religious beliefs is not genuine if their knowledge is lacking:

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[107] *Ullah v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16589 (FC), at para 11.

[108] *Lin v. Canada (Citizenship and Immigration)*, 2012 FC 288, at para 61.

See also *Zhang v. Canada (Citizenship and Immigration)*, 2012 FC 503, at paras 12-24. Justice Campbell drew on case law and applicable doctrine on questioning claimants about their knowledge of their religious doctrine.

Huang v. Canada (Citizenship and Immigration), 2012 FC 1002, at para 17. The Court concluded that "the RPD held the Applicant to an unrealistically high standard of knowledge of Falun Gong and imposed its own understanding of Falun Gong upon the Applicant."

Dong v. Canada (Citizenship and Immigration), 2010 FC 55, at para 20: "In assessing a claimant's knowledge of Christianity, the Board should not adopt an unrealistically high standard of knowledge or focus on a 'few points of error or misunderstandings to a level which reached the microscopic analysis'…"

[109] *Bouarif v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 49, at para 10.

> It is well established in law that it is open to the RPD to assess and consider a refugee protection claimant's motive for practicing a religion, including the genuineness of those religious beliefs, and to rely on that motive in rejecting the refugee protection claim in cases such as this one where the essence of the refugee claim rests on the allegation that continuing a newly acquired religious practice in the country of origin might place the refugee claimant at risk (*Su v Citizenship and Immigration* 2013 FC 518, at para. 18). In so doing, the RPD is entitled to assess the refugee claimant's knowledge of the details of the religion, although such inquiry must be approached with caution given the highly subjective and personal nature of a person's religious beliefs (*Lin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 288, at para. 61).

The Court has confirmed decisions in which the Board rejected claims for refugee protection that it deemed not credible because of the claimant's lack of religious knowledge. For example:

> *Hou:*[110] The Court was of the opinion that given the level of alleged study and the other aspects of the applicant's evidence, the Board's questioning of the applicant regarding his knowledge of Falun Gong was appropriate. It held that there was evidence before the Board to support its finding that the applicant's knowledge was insufficient to prove he was a sincere practitioner, given the perfunctory nature of the applicant's responses to the questions posed and his inability to answer other questions, including the question on the eight characteristics [of Falun Gong].
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> *Gao*:[111] In the opinion of Justice Southcott, the Board may engage in religious questioning in an effort to assess the genuineness of a claimant's beliefs, but "such questioning and resulting analysis must focus on the genuineness of those beliefs and not whether they are theologically correct." The Board posed relatively basic questions and, for the most part, based its conclusion as to the lack of genuinely held belief not upon an assessment of the correctness of the claimant's answers but rather upon the claimant's failure to provide answers or answers of any detail. [emphasis added]
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> *Bakare*:[112] Both the RAD and the RPD concluded that the Applicant should have had a basic knowledge of the Ogboni cult's practices and rituals if he was privy to meetings over the course of 13 years.
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> *Wang*:[113] It is reasonable for a decision-maker to expect a person to have rudimentary knowledge of their religious beliefs. The Court found that the RPD and RAD only sought minimal knowledge, given the low bar in the jurisprudence and the Applicant's personal circumstances, and even then he was unable to make a rudimentary

[110] *Hou v. Canada (Citizenship and Immigration)*, 2012 FC 993, [2014] 1 FCR 405, at paras 57 and 59.

[111] *Gao v. Canada (Citizenship and Immigration)*, 2015 FC 1139, at paras 26-27.

[112] *Bakare v. Canada (Citizenship and Immigration)*, 2017 FC 267, at para 22.

[113] *Wang v. Canada (Citizenship and Immigration)*, 2018 FC 668, at paras 29-39.

comment about the nature or purpose or principles of Falun Gong or sufficiently explain why he lacked such knowledge.

Kao:[114] Mentu Hui is a Christian sect that is outlawed in China. The claimant had reportedly attended only four of its services before disassociating himself from the faith. The Court was of the opinion that the RAD's expectations had been modest. Mr. Kao had identified the concept of the "three times Jesus" as central to both the Mentu Hui faith and his personal beliefs, but when asked about it, he was unable to provide specific or cogent answers.

Zheng:[115] Justice Bell states that "…[I]t would be erroneous to suggest that subjective sincerity cannot be evidenced by objective knowledge. […] While I am not suggesting that objective knowledge is determinative of the question of sincerely held beliefs, it is certainly an evidentiary factor to be considered by the RPD."

Bouarif:[116] The Court was of the opinion that "not being able to answer such basic questions as naming religious holidays, or identifying Mary as one of the twelve apostles, or for the applicant to offer a nebulous testimony when questioned on the knowledge of prayers [...] clearly illustrates that the RAD had before it evidence on which to base its conclusion that the applicant did not demonstrate the genuineness of his religious practice."

Naturally, inconsistencies and a lack of sufficiently detailed testimony are not confined to cases based on religion or political opinion. In all cases where vague or inconsistent testimony raises questions of credibility, it is essential for decision-makers to determine whether there are cultural or psychological obstacles[117] that could explain the manner in which the testimony has been presented.

Chairperson Guidelines 4[118] describe a number of reasons why women might have trouble testifying with the level of detail that decision-makers would normally expect.

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[114] *Kao v. Canada (Citizenship and Immigration)*, 2018 FC 1204, at para 19.

[115] *Zheng v. Canada (Citizenship and Immigration)*, 2019 FC 731, at para 18.

[116] *Bouarif v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 49, at para 12.

[117] See, for example, *Yasun v. Canada (Citizenship and Immigration)*, 2019 FC 342, at paras 10 and 18. The RPD erred in ignoring the finding of cognitive impairment in the psychological report which explained that Ms. Yasun was unable to consistently recall the events giving rise to her claim for refugee protection.

See also *2.3.9. Medical and psychological reports* and *2.5. Taking the claimant's circumstances into account*

[118] Chairperson Guidelines 4: *Women Refugee Claimants Fearing Gender-Related Persecution* (November 13, 1996). Section D describes special problems that women claiming refugee protection face in demonstrating that their claim is credible and trustworthy. Some of these difficulties may arise because of cross-cultural misunderstandings.

See *Arachchilage v. Canada (Citizenship and Immigration)*, 2018 FC 994, at para 29. The Court criticized the RAD for describing Ms. Arachchilage's testimony as "vague and non-specific" regarding the injuries she had suffered from a sexual assault: "The RAD's limited consideration of Ms. Arachchilage's evidence in the context of the medical report fails to consider the Gender Guidelines' express note that due to culture or trauma, victims of gender-based violence may be reluctant to disclose their experiences."

Chairperson's Guideline 9[119] contains a section on assessing credibility and evidence pertaining to SOGIE, including assessing testimony that is vague and lacking in detail. As in other cases, when making a vagueness finding in a case involving an individual with diverse SOGIE, the decision-maker must establish whether there are cultural, psychological or other barriers that may explain the manner in which the testimony is delivered.

A claimant's level of education,[120] their age[121] and their past social experiences are also factors to consider. This last factor may encompass a wide range of experiences. In *Lubana*,[122] for instance, the Court took into consideration the fact that the applicant was a woman from a rural region of India and that she had never travelled to a Western country before, and concluded that her inability to present a smooth and coherent story of how she travelled to Canada did not raise any serious problems. The Court also stated that it was prepared to accept that the applicant's alleged maltreatment by the police in India would have made her suspicious and afraid of any officials, which would have affected her communication with Canadian immigration authorities. Therefore, it is "natural to expect that the applicant would not be very clear in her recollection of making a refugee claim."

2.2.7. Demeanour at the hearing

The Court has recognized multiple times that in the context of a judicial review, the Board is in a better position than the Court to assess the applicant's credibility *since it has the*

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[119] Chairperson's Guideline 9: *Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* (May 1, 2017), section 7.6.

[120] See, for example *Fermin Mora v. Canada (Citizenship and Immigration)*, 2018 FC 521, at para 38. The RPD had found that "the applicant's testimony was at best vague". The RAD confirmed the RPD's findings on the testimony and added in its decision that, considering her profile as an educated person, the applicant was capable of providing more specific responses to key questions about her refugee claim.

[121] The Chairperson Guideline 3: *Child Refugee Claimants: Procedural and Evidentiary Issues* (September 30, 1996) states that, when assessing the evidence presented in support of the refugee claim of a child, the panel should take note of the following: (i) If the child has given oral testimony, then the weight to be given to the testimony must be assessed. In determining the weight to be given, the panel should consider the opportunity the child had for observation, the capacity of the child to observe accurately and to express what he or she has observed, and the ability of the child to remember the facts as observed. These factors may be influenced by the age, gender and cultural background of the child, as well as other factors such as fear, memory difficulties, post-traumatic stress disorder and the child's perception of the process at the [RPD]. (ii) There may be gaps in the evidence. For example, a child may indicate that men in uniforms came to the house but not know what type of uniforms they were wearing, or a child may not know the political views of his or her family. The child may, due to age, gender, cultural background or other circumstances, be unable to present evidence concerning every fact in support of the claim. In these situations, the panel should consider whether it is able to infer the details of the claim from the evidence presented.

See, for example *Abdinur v. Canada (Citizenship and Immigration)*, 2020 FC 880, at para 39. Mr. Abdinur was five when he came to Canada. It was unreasonable, in the Court's view, to conclude that his inability to recall the name of the aunt who accompanied him on that flight undermined his credibility. It is not reasonable to assume that a 30-year-old individual would necessarily remember this detail of an event that took place when they were five, even if other details are remembered.

[122] *Lubana v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, at paras 12 and 18.

benefit of seeing the applicant, his mannerisms and hearing his testimony.[123] It is also well-recognized in law that the RPD can assess the credibility of the evidence by evaluating the witness's general demeanour during their testimony. However, it is important to understand that the "demeanour" used to assess credibility refers to the manner in which the claimant testifies.

In *Aguilar Zacarias*, Justice Gleason noted that, in her view:

> …the Board [...] employed an inappropriate understanding of demeanour in its analysis. The RPD buttressed its negative credibility determination by noting that during the hearing the applicant sat with his arms crossed and appeared "sullen and arrogant" which was "not an attitude one would reasonably expect from someone asking a foreign country to save his life (Decision at para 35). While this Court has recognized that the Board is well-positioned to assess a claimant's demeanour in its credibility determinations, demeanour is intended to encompass the way in which the claimant responds to questions, such as whether the claimant appears uncertain or hesitates. For instance, in *Gjergo v Canada (Minister of Citizenship and Immigration)*, 2004 FC 303 at para 22, 131 ACWS (3d) 508, Justice Harrington wrote: "This Court has previously held that the panel may take into account the demeanor of an applicant during his testimony. When the witness has difficulty giving adequate and direct answers, the panel may make a negative credibility finding." […] In contrast, overly subjective conclusions based on an individual's posture or perceived attitude are not within the appropriate purview of a credibility assessment.[124] [emphasis added]

However, in *Amador Ordonez*,[125] the Court did not find that the PRRA officer's reference to the applicant's gestures or behaviour, particularly his wringing of his hands or the pauses in his testimony, made the decision unreasonable. While acknowledging that a decision-maker's *reliance on demeanour alone as a basis to assess credibility is fraught with danger, here, the applicant's demeanour is one of many factors considered by the officer.* The Court stated that it was impossible to find that any of the references in the decision to the Applicant's demeanour reflected undue attention to a particular aspect, or incorporated

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[123] *Navaratnam v. Canada (Citizenship and Immigration)*, 2011 FC 856, at para 22.

[124] *Aguilar Zacarias v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155, at para 24.

[125] *Amador Ordonez v. Canada (Citizenship and Immigration)*, 2019 FC 1216, at paras 13–15.

See also *Matharoo v. Canada (Citizenship and Immigration)*, 2020 FC 664, at paras 38–44, where the Court found that it was not unreasonable for the immigration officer to observe that the applicant "started coughing" and "clearing his throat," which the officer interpreted as "demonstrating nervousness" when he was asked whether he had considered that his wife may have married him only for assistance with her studies in Canada. The Court noted that although the use and relevance of demeanour assessments to determine credibility is not without controversy, it is still accepted in Canadian courts. However, a decision-maker should not rely on demeanour alone, which may include hesitations and vagueness, to assess credibility. It is preferable if there are additional objective facts to support a negative credibility finding. [emphasis added]

stereotypes or biased assumptions. The fact that there are other plausible explanations does not make the officer's assessments unreasonable.

Guideline 9[126] warns against using behavioural stereotypes as an indicator of sexual orientation. Even before the publication of Guideline 9, the Federal Court was ruling along the same lines. In *Herrera*, Justice Teitelbaum wrote:

> There is really no reason for the Board to even mention the Applicant's "effeminacy" or lack thereof in its decision unless it is assuming that someone who is homosexual must be effeminate in appearance or behaviour […] This is a thoroughly discredited stereotype which should not have any bearing on the Board's judgment of the Applicant's credibility.
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> … Homosexuals are subject to extensive prejudice, of which effeminate stereotypes form a part. The Applicant's lack of "effeminacy" is not a proper basis on which to impugn the credibility of his claim to be a homosexual … [emphasis added][127]

Although it is necessary to be very cautious before basing a negative credibility finding on a claimant's demeanour, a panel may legitimately have regard to the way a witness responds to questions, including hesitations, vagueness, changing or elaborating on their versions of events, and memory.[128]

Some examples of demeanours[129] that were found to have undermined credibility may be noted in the following cases:

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[126] Chairperson's Guideline 9: *Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* 6. Avoiding stereotyping when making findings of fact – 6.1. Decision-makers should not rely on stereotypes or inappropriate assumptions in adjudicating cases involving SOGIE as they derogate from the essential human dignity of an individual. Examples of stereotypes include, but are not limited to: Individuals with diverse SOGIE have feminized or masculinized appearances or mannerisms.

[127] *Herrera v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1233, at paras 12 and 15.
See also *Lekaj v. Canada (Citizenship and Immigration)*, 2006 FC 909, at para 17. The Court cites *Herrera*: "[T]he application of stereotypical considerations based on appearance and mannerisms is not a proper basis upon which to impugn the credibility of a claimant."

[128] In *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319, at para 45. The Court expands on this principle: "These sorts of matters may reasonably underpin a credibility finding, but it is preferable if there are additional objective facts to support the finding." [emphasis added]

[129] *Exantus v. Canada (Citizenship and Immigration)*, 2015 FC 1118, at para 15.
Radics v. Canada (Citizenship and Immigration), 2014 FC 110, at para 31.
Abbas v. Canada (Citizenship and Immigration), 2016 FC 911, at para 31.
Kao v. Canada (Citizenship and Immigration), 2018 FC 1204, at para 10.
Li v. Canada (Citizenship and Immigration), 2020 FC 783, at paras 35 and 37.

Exantus: The Applicant was often not spontaneous with his answers and the Board member sometimes repeated questions several times before obtaining a direct response from the Applicant.

Radics: The Principal Applicant was found to be "very reluctant" in his testimony regarding the events he had experienced, to the point that the Principal Applicant had to be asked the same question three times before he gave an answer, an answer which the RPD ultimately found not to be credible.

Abbas: "The review of the written transcript of Mr. Sheikh's testimony [...] does reveal the manner of the testimony, which the RPD found to be vague, evasive and unresponsive to direct questions, many of which were repeated and clarified."

Kao: The RPD found that Mr. Kao's behaviour, combined with his inability to readily answer other questions, suggested he had memorized his BOC narrative and was simply reiterating its content. The applicant recited the narrative from his Basis of Claim [BOC] form despite the RPD interjecting a number of times, urging him to answer the questions asked.

Li: On the matter of the raid on the home church, a notable and life-altering event, the applicant offered testimony that was vague and appeared rehearsed because when asked for details, she repeated basic information and was not able to elaborate with simple specifics about what happened, even though the RPD member had offered Ms. Li ample opportunity to describe and explain what happened, allowed Ms. Li to calm her nerves, and asked her clear and open-ended questions.

However, a witness's demeanour is not an infallible indicator of whether a person is telling the truth or is credible. A great deal of restraint must be exercised before basing a negative credibility finding on a claimant's demeanour. For instance, an individual's personality traits and cultural background may create a false impression of the witness. In *Tkachuk*, where the Board drew negative inferences from the claimant's confident delivery and his answers which sometimes provided more detail than the question required, the Court noted:

> … Although the applicant's demeanour was not the only basis for the adverse credibility findings, it appears to have been a significant factor and begs the question of how an applicant is expected to provide answers. It appears that if an applicant is hesitant and vague, inferences may be drawn, but if they are confident and explicit, inferences may also be drawn. Although the Court should not second guess the Board's comments or findings about demeanour, given that the Board observed the applicant and the Court did not, in the present case, the Board's findings do not logically flow from its observations of the applicant's demeanour or from his testimony on the record. In addition, the Board did not appear to take into account that the applicant was a senior police

officer and his confidence may be due to his experience and his profession.[130] [emphasis added]

There could be many reasons why a claimant may not be as emotional as the Board would expect, including cultural differences, translation issues or a stoic personality.[131] A claimant's psychological state arising out of traumatic past experiences may have an impact on his or her ability to testify.[132] Where the RPD has found the claimant to not be credible, the failure to address such factors in its reasons could be a reviewable error.

It is only in an exceptional case that demeanour alone would be sufficient to undermine the credibility of the testimony provided in support of the claim. In general, a questionable demeanour is accompanied by other indicators that point to a lack of credibility. As a general rule, courts have attempted to reduce the role of demeanour in the final assessment of credibility.[133]

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[130] *Tkachuk v. Canada (Citizenship and Immigration)*, 2015 FC 672, at para 37.

See also *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, at para 25. The Convention Refugee Determination Division (CRDD) noted that the applicant was overly assertive and shouted to emphasize points. As to his manner of speaking, the CRDD stated that the applicant was verbose, voluble, prolix and that the interpreter could not keep up with him. Given the applicant's voluble and bombastic testimony, the panel drew a negative inference regarding the applicant's credibility. The Court found that the CRDD wrongly put the applicant's personality on trial, forgetting that claimants from different cultural backgrounds may act and express themselves differently.

And see also *Downer v. Canada (Immigration, Refugees, and Citizenship)*, 2018 FC 45, at para 47: "...the Applicant was rambling, oblique and muddled before the RPD. She could be dishonest or she could simply be someone whose personality causes her to speak and answer in an indirect and circuitous way. It is difficult to tell."

[131] *Rajaratnam v. Canada (Citizenship and Immigration)*, 2014 FC 1071, at para 46.

For example, in *Kathirkamu v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 409, at para 50, the Court found that the Board had erred in drawing an adverse inference from the fact that the Applicant testified about his beating in an unemotional manner. Claimants cannot all be expected to explain incidents of violence and persecution with emotion. This imposes a standard that is unsupportable and insensitive to the variety of reactions people have to acts of persecution.

See also *Abeer v. Canada (Citizenship and Immigration)*, 2011 FC 1424, at paras 18–21, and 23. The Board member drew a negative inference as to the applicant's credibility, because he frequently smiled and laughed when answering questions. The Board found that his demeanour indicated that he took the proceedings lightly, when it would have expected a more serious approach by the claimant. The claimant explained that this was his style of talking, that his life was full of violence, so he tried to "show [him]self happy." The case had other examples where laughter was his response to a stressful situation. The Court found that "[f]ar short of suggesting a lack of credibility, it reflected his anxiety, his manner of coping with stress and the importance he placed on not showing fear or weakness."

[132] See *2.3.9. Medical and psychological reports* and *2.5.2. Trauma-informed assessment of credibility*

[133] *Amador Ordonez v. Canada (Citizenship and Immigration)*, 2019 FC 1216, at para 15. The officer's findings as to demeanour were reasonable because demeanour was one of many factors considered by the officer and the references to the applicant's demeanour did not reflect undue attention to a particular aspect, or incorporate stereotypes or biased assumptions.

Matharoo v. Canada (Citizenship and Immigration), 2020 FC 664, at paras 41 and 43: "Although the use and relevance of demeanor assessment to determine credibility is not without controversy, it is still accepted in Canadian courts. [...] However, a decision-maker should not rely on demeanour alone, which may include

Assessments of credibility based on demeanour may be subject to scrutiny on judicial review. Accordingly, clear and cogent reasons must be given for such findings.[134]

2.2.8. Delay in claiming refugee protection and other inconsistent behaviours

A delay in claiming refugee protection is not an automatic bar to making a refugee protection claim. Refugee protection claimants are not obliged under the *Convention Relating to the Status of Refugees* to seek asylum in the first country in which they arrive after fleeing, or in the country nearest to their home country.[135]

Nonetheless, the Federal Court of Appeal has held that a delay in claiming refugee status is a relevant and potentially important factor that the Board is entitled to consider in weighing a claim for refugee status.[136]

A claimant who is genuinely fearful of persecution or harm as set out in s. 97 of the IRPA is generally expected to seek protection at the first opportunity.[137] As a result, a delay in claiming refugee protection may be inconsistent with an alleged subjective fear, an essential element of a claim under s. 96. Similarly, in claims made under s. 97(1), where the risk is assessed objectively without consideration of the subjective element of the fear, the Federal

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hesitations and vagueness, to assess credibility. It is preferable if there are additional objective facts to support a negative credibility finding." [emphasis added]

Rajaratnam v. Canada (Citizenship and Immigration), 2014 FC 1071, at para 46. The Court states, "Although I accept that the Board is entitled to consider a claimant's demeanour and that such findings are often difficult to describe, it should usually not be the only reason for dismissing a person's claim." [emphasis added]

[134] In *Abdinur v. Canada (Citizenship and Immigration)*, 2020 FC 880, at paras 47–49, the Minister's delegate does not indicate what "vagueness" she found in Mr. Abdinur's answers. This is also unclear on review of the transcript of the hearing. The Minister's delegate is even less explanatory in identifying what in Mr. Abdinur's "demeanour" during the hearing undermined his credibility. Justice McHaffie wrote at para 49 that, "…in my view it is insufficient to simply refer to a witness's 'demeanour' without any indication as to what aspects of their demeanour undermined their credibility. It does not allow this Court to reach a conclusion as to whether the assessment of demeanour, or the reliance on it, was reasonable. While I appreciate that defining a non-credible 'demeanour' may be difficult (one of the identified problems with relying on it), a mere statement that a finding of credibility is based on 'demeanour,' without more, is of little value."

[135] In *Gavryushenko v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15798 (FC), the CRDD cited the judgment in *Ilie* and concluded "that a claimant should take the first opportunity he has to claim refugee status in a country which is a signatory of the 1967 *Convention* or *Protocol*." The Court held that the CRDD would have arrived at a more correct interpretation if it had referred to the comment of Prof. James C. Hathaway in *The Law of Refugee Status* (Toronto, Butterworths, 1991) at page 46: "There is no requirement in the Convention that a refugee seek protection in the country nearest her home, or even in the first state to which she flees. Nor is it requisite that a claimant travel directly from her country of first asylum to the state in which she intends to seek durable protection."

[136] *Heer v. Canada (Minister of Employment and Immigration)*, [1988] FCJ No. 330 (FCA)(QL).

[137] *Chen v. Canada (Citizenship and Immigration)*, 2019 FC 334, at para 24, citing *Osorio Mejia v. Canada (Citizenship and Immigration)*, 2011 FC 851, at para 14.

Court has held that a delay may be one of the factors to consider when determining a claimant's credibility.[138]

That being said, the Court of Appeal has stated that the credibility of a claimant's fear cannot be rebutted solely on the basis that the claim for refugee status was late in coming.[139] In *Huerta*, Justice Létourneau writes, "The delay in making a claim to refugee status is not a decisive factor in itself. It is, however, a relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant."[140]

In a series of decisions, certain Federal Court judges have taken the view that the decision in *Huerta* sets out a general principle and that, although the presence of a delay does not mandate the rejection of a claim as the claimant may have a satisfactory explanation for the delay, a delay may nonetheless, in the right circumstances, constitute sufficient grounds upon which to reject a refugee protection claim. That decision will ultimately depend on the facts of each claim.[141]

The following Federal Court decisions, among others, have upheld RPD decisions rejecting claims under both sections 96 and 97 of the IRPA because of inordinate delays in claiming refugee protection or a return to the country of alleged persecution that, in the RPD's view, reflected a lack of subjective fear or a lack of credibility:

> *Duarte*[142] The applicant's return to Cuba after arriving in Canada following her first arrest and her delay in claiming refugee status in Canada were cited as actions inconsistent with her assertion that she had a subjective fear of persecution. The RPD did not accept her explanation of having to return to Cuba to transfer her home to her mother as consistent with a credible subjective fear of persecution.
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> *Espinosa*[143] Considering the applicant's alleged fear of imprisonment, torture and death in Mexico because of his sexual orientation, the CRDD considered the applicant's 14-month delay in claiming refugee status to be inexplicable. While the applicant was granted admission as a visitor for the first six months and may not have

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[138] There are numerous cases in which the Federal Court has upheld Board decisions that considered the issue of a delay as a factor in assessing a claimant's overall credibility. In *Bello v. Canada (Citizenship and Immigration)*, 1997 CanLII 16345 (FC), the Court concluded that the Board's finding concerning the subjective fear was integrally related to the credibility of the claimant's evidence.

In *Chen v. Canada (Citizenship and Immigration)*, 2019 FC 334, at para 24, point (b), the Court sets out the principle by which a delay can indicate a lack of fear or, put another way, be probative of the credibility of the claimant's assertion that he or she fears persecution in the country of reference. [emphasis added]

[139] *Hue v. Canada (Minister of Employment and Immigration)*, [1988] FCJ No. 283 (FCA)(QL).

[140] *Huerta v. Canada (Minister of Employment and Immigration)*, [1993] FCJ No. 271 (FCA)(QL).

[141] *Duarte v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 988, at para 14.

[142] *Duarte v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 988, at para 4.

[143] *Espinosa v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324, at paras 17 and 20.

felt a pressing need to make a claim for refugee status during this time, he was unable to explain his later delay. The Court agreed with the CRDD when it stated that the importance one gives to a delay depends on the circumstances of each case and that the more inexplicable the delay, the greater the probability that subjective fear is lacking. The Court accepted that it was not unreasonable for the CRDD to conclude, based on the evidence before it, that the applicant's inaction following his arrival in Canada demonstrated that he had no fear of serious harm in Mexico and that there was therefore "no subjective basis" to his claim.

Pina Gaete[144] The refugee protection claim was based on the risk that a gang of drug traffickers would kill the family or cause them serious harm. According to the Court, the Board was justified in concluding that the male applicant's substantial delay (three years) in making a refugee protection claim undermined his allegation that he and his family would face serious harm in Chile if they were to return. [emphasis added]

Licao[145] The Board did not accept that a family who had left the Philippines because they feared for their lives as they described would take the chance that their visitor visas would not be renewed on four occasions, prior to seeking refugee status. That is, their conduct was inconsistent with that of persons exposed to the risk, experience and the fear that they alleged in the Philippines. [emphasis added]

Paul[146] The applicant was in Canada for nearly four years before he claimed refugee protection. He had a valid work visa for the first year, but he had felt no need to regularize his status before his visa expired. The RPD made negative findings with regard to the applicant's credibility based specifically on the applicant's behaviour. A claimant's failure to regularize their status as soon as possible, though not decisive in and of itself, remains a relevant element.

In a recent decision,[147] the Federal Court states that, to assess the significance of a delay in claiming refugee protection, three key factual questions must be answered. First, according to the claimant, when did their subjective fear of persecution crystalize? Second, when did the claimant first have an opportunity to make a refugee claim? And third, why, according to the claimant, did they not take up that opportunity? It is only unexplained delay after the fear has crystalized and after it was possible to seek protection that can reasonably support an inference that the claim of subjective fear should not be believed because of the delay in seeking protection.

The length of the delay must be determined with regard to the time of inception of the claimant's fear as determined from the claimant's personal narrative.[148] For *sur place* claims,

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[144] *Pina Gaete v. Canada (Citizenship and Immigration)*, 2011 FC 744, at para 24.

[145] *Licao v. Canada (Citizenship and Immigration)*, 2014 FC 89, at para 60.

[146] *Paul v. Canada (Citizenship and Immigration)*, 2015 FC 1324, at para 15.

[147] *Zeah v. Canada (Citizenship and Immigration)*, 2020 FC 711, at para 62.

[148] This is one of the governing principles concerning delay in seeking refugee protection set out in *Chen v. Canada (Citizenship and Immigration)*, 2019 FC 334, at para 24, point (c). The applicant's evidence was that

the date as of which the person became aware that they would allegedly face persecution or be subjected to a risk described in subsection 97(1) on return to their country of nationality is the relevant date, not the date on which they arrived in Canada.[149]

When a claim is based on a number of discriminatory or harassing incidents that culminate in an event which forces a person to leave his country, then the issue of delay cannot be used as a significant factor to doubt that person's subjective fear of persecution. Cumulative acts which may amount to persecution will take time to occur. If a person's claim is actually based on several incidents which occur over time, the cumulative effects of which may amount to persecution, then looking to the beginning of such discriminatory or harassing treatment and comparing that to the date on which a person leaves the country to justify rejection of the claim on the basis of delay undermines the very idea of cumulative persecution.[150]

The RPD must inquire into and examine the claimant's specific circumstances giving rise to the delay in order to determine whether or not the delay can be said to be indicative of a lack of fear. For example, the SOGIE Guideline stresses that the same factors, such as cultural or psychological barriers, that may reasonably explain the inconsistencies or omissions in a claimant's account can also have a direct bearing on the significance of a delay in claiming refugee protection.[151] The RPD should also bear in mind the special circumstances

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he was not concerned about any risk to himself until he was arrested. His fear of being removed from Canada only crystalized after he was arrested, and that is when he made his refugee claim. What is most important, is what the applicant claimed to have believed at the time. However, the RAD measured his actions against what, in the RAD's view, he ought to have feared—namely, that he could be removed from Canada to China at any time. Having found that the applicant did not act consistently with this, the RAD concluded that the applicant therefore did not subjectively fear persecution in China. By approaching the issue in this way, the RAD did not conduct the necessary subjective inquiry, focusing instead on an irrelevant objective factor. (at para 27) [emphasis added]

See also *Zeah v. Canada (Citizenship and Immigration)*, 2020 FC 711, at para 64: The applicant never claimed that she feared persecution in Nigeria because she was bisexual until she disclosed her secret to her cousin in June 2014.

George v. Canada (Citizenship and Immigration), 2019 FC 1385, at para 42. The RPD's findings concerning the applicant's prior travel and failure to claim refugee protection were unreasonable, as the events associated with the persecution had not yet occurred.

[149] *Tang v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15688 (FC), at para 6.

[150] *Ibrahimov v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1185, at para 19.

[151] *Zeah v. Canada (Citizenship and Immigration)*, 2020 FC 711, at para 72.

and pressures which refugees may face, such as a psychological condition, the vulnerable circumstances of abused women[152] or the claimant's age.[153]

In other circumstances, failure to claim refugee protection without delay was not considered reasonably explained. In *Dahal*,[154] for example, the Court considered it reasonable

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[152] *Velasco Chavarro v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 310, at para 26. The Court noted that the RAD had set aside the RPD's holding that the applicant's failure to report the sexual assault to medical staff in Colombia negatively affected her credibility and that the RAD also should have rejected the application of the doctrine of recent complaint in relation to the time she took to disclose and then file her refugee application.

However, see *Renee v. Canada (Citizenship and Immigration)*, 2020 FC 409, at para 30. The applicant submitted a refugee protection claim eight years after arriving in Canada in which she alleged violence and abuse at the hands of a former boyfriend. Her counsel pointed out that the delay could be attributed to the applicant's psychological condition. The Court stated that it was not questioning the fact that it can be difficult for victims of domestic violence to testify about their experiences but that, in the case at hand, the applicant never raised this as an explanation for her delay in seeking protection. Accordingly, the RAD's decision was held to be reasonable.

Del Carmen Aguirre Perez v. Canada (Citizenship and Immigration), 2019 FC 1269, at para 30. The RPD erred in neglecting to analyze whether the sexual violence and the applicant's post-traumatic stress contributed to her delay in filing her claim.

Bibby-Jacobs v. Canada (Citizenship and Immigration), 2012 FC 1176, at para 7. The applicant was a young woman who had been victimized by her employer, a prominent businessman and sexual predator. Without addressing the reason advanced by the applicant as to why she had continued working for him for three years, the RPD concluded that the applicant did not have a subjective fear. The RPD stated that "if the risk were of a level of severity that could be described as persecution, the claimant would have left her job." The Court noted that "this particular use of the concept of 'subjective fear' by the Board member is hardly applicable in a sexual harassment case."

[153] In *Pulido Ruiz v. Canada (Citizenship and Immigration)*, 2012 FC 258, at para 61, the Court stated:

> It goes without saying that a child does not have the same capacities as an adult. Even though the IRB seemed to have considered [the refugee protection claimant's] age in its decision, it concluded that he should have behaved like an adult and claimed asylum at the earliest opportunity. However, [he] was barely 15 years old. It seems unlikely to us that an adolescent would know the complexities and subtleties of the administrative apparatus with respect to asylum and be able to gauge the rough waters of the immigration process in the United States without an adult's help. Imposing such a burden on an adolescent seems unreasonable to us.

To the same effect, in *Manege v. Canada (Citizenship and Immigration)*, 2014 FC 374, at para 39, the RPD concluded that the applicants' failure to seek asylum in Kenya and Germany, while in transit to Canada, demonstrated a lack of subjective fear. The Court held that this finding was not reasonable based on the applicants' circumstances and youth (17 and 14 years of age). The RPD unreasonably expected the applicants to appreciate that their failure to seek asylum in the very first country they landed would jeopardize their claim and undermine their subjective fear of persecution.

Dion John v. Canada (Citizenship and Immigration), 2010 FC 1283, at paras 27–30. The applicant was sent to Canada when she was 12 years old. She was entirely dependent on family members, none of whom assisted her in regularizing her status. She submitted her application for protection when she was 19 years old after being informed of the possibility of filing for refugee protection. The RPD did not point to any evidence that, in the Court's view, renders it reasonable to conclude that the delay in that case undermined the applicant's credibility.

[154] *Dahal v. Canada (Citizenship and Immigration)*, 2017 FC 1102, at paras 59–60.

See also *Mallampally v. Canada (Citizenship and Immigration)*, 2012 FC 267, at para 37. The Court ruled that the RPD had not committed any reviewable error in considering the principal applicant's delay in making a refugee protection claim. The RPD considered it reasonable to expect that the principal applicant, a doctor

for the RAD to concur with the RPD's decision, in which the latter drew a negative inference regarding Mr. Dahal's credibility and concluded that his two-year delay in claiming refugee protection in Canada demonstrated a lack of subjective fear on his part. The RPD concluded that his explanation that he did not know much about the refugee process was not reasonable given his level of education, his demonstrated ability to obtain work permits in two countries and discussions that he had had with various persons regarding how he could remain in Canada.

Decision-makers must clearly express and provide reasons for their findings as to the credibility of a claimant's explanation in relation to his behaviour.[155]

The following acts and omissions, considered individually or, more often, together with other inconsistent behaviours, may lead to a finding of a lack of subjective fear and credibility, but only if the claimant does not provide reasonable explanations:

- **Failure to flee one's country of origin at the first opportunity after serious threats or incidents** indicating the intention to do harm to the applicant.[156]

  Enyinnayaeke: The Court was of the opinion that it was reasonable for the RAD to find it improbable that the applicant would wait seven years without finding a means to leave Nigeria if he had a true subjective fear.

  Osinowo: The RPD and RAD concluded that it made little sense for the applicant to hide in Nigeria for two months hoping that a Canadian visa would be issued to him

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and consequently an educated woman, would make a claim at the first possible opportunity and determined that a failure to do so undermined her credibility and subjective fear.

[155] *Guecha Rincon v. Canada (Citizenship and Immigration)*, 2020 FC 173, at para 25: The Court allowed the application for judicial review on grounds that the RAD's brief statement serving as a conclusion concerning the claimants' failure to seek asylum in the United States could not be said to exhibit the requisite degree of justification, intelligibility and transparency;

Gbemudu v. Canada (Citizenship, Refugees and Immigration), 2018 FC 451, at paras 65–66. The Court found that instead of addressing the applicant's clear explanation for his failure to claim in the United Kingdom to the effect that he did not feel he was in any danger because he had not yet been outed as bisexual, both the RPD and RAD embarked upon speculative assessments of what they thought the applicant would have done had he truly been bisexual.

Riche v. Canada (Citizenship and Immigration), 2019 FC 1097, at paras 14–16. The brief reasons did not allow the Court to determine whether in fact the RPD had considered all of the explanations given by Mr. Riche for failing to claim asylum in the United States.

Kassab v. Canada (Citizenship and Immigration), 2020 FC 139, at para 40. The RPD was of the view that the applicant had failed to credibly establish the subjective element of his fear because he had decided to abandon his claim for asylum in the United States and flee to Canada. The Court criticized the RPD for failing to explain why it decided to overlook this ground of fear of islamophobia in the United States. The sheer volume of documentary evidence should have resulted in a more thorough analysis of that alleged fear. This omission was unreasonable.

[156] *Enyinnayaeke v. Canada (Citizenship and Immigration)*, 2019 FC 1511, at para 6.
Osinowo v. Canada (Citizenship and Immigration), 2018 FC 284, at paras 18–19.
Gebremichael v. Canada (Minister of Citizenship and Immigration), 2006 FC 547, at para 44.

shortly after having been denied one, when he had a valid multiple-entry UK visa and had travelled to the UK previously. These findings were, in the Court's view, open to the RPD even if other decision-makers might have decided otherwise.

Gebremichael: The applicants remained in hiding in their country for a month despite having obtained visas for the United States. The Board drew an adverse inference concerning their subjective fear, a conclusion which the Court upheld as reasonable and clearly explained. It is interesting to note, however, that as a preface to its analysis of the issue, the Court wrote that delay in fleeing a country may normally be justified if the claimant was in hiding at that time. [emphasis added]

- **Failure to go into hiding immediately after learning that one may be in danger or to take precautions or modify one's routine.**[157]

In the following cases, the RPD's concerns were confirmed:

Abolupe: The RAD reasonably found that it was incoherent and implausible that the applicant, who claimed he was in hiding from the police who were searching for him because he had been identified as a member of the LGBTIQ community, would continue to go to the same job at the bank that he had held for the prior 12 years for another 5 months until he fled Nigeria.

Tang: It was reasonable to say that if the applicant believed she required international protection, she would have taken minimal steps, for example finding a different apartment or leaving the city, before fleeing to Canada.

Noël: The applicant was kidnapped, but one of the abductors released her after learning that his cohorts had decided to kill her. She returned directly to her home, the first place where her ex-spouse, the agent of harm, would look for her, and stayed there from June 8 to June 22, 2016. She sought to justify her behaviour by stating that she was sure that her ex-spouse would find her anywhere in Haiti and that, at any rate, she had to be at home in Port-au-Prince to retrieve her passport at the Canadian embassy, which she did the day after she returned. The Court was of the opinion that it was reasonable for the RAD to conclude that the applicant's behaviour was inconsistent with a genuine fear of being mistreated.

However:

Fernando: The Court found that the refugee protection claimant's two-month delay in leaving Mexico was not an unreasonable amount of time in the circumstances, since he explained that he kept himself sequestered.

Guarin Caicedo: The refugee protection claimant delayed her departure from the country after she received the first threat, even though she already had a visa to enter

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[157] *Abolupe v. Canada (Citizenship and Immigration)*, 2020 FC 90, at paras 26–28.
Tang v. Canada (Citizenship and Immigration), 2019 FC 1478, at para 25.
Noël v. Canada (Citizenship and Immigration), 2020 FC 281, at para 26.
Fernando v. Canada (Citizenship and Immigration), 2010 FC 76, at para 3.
Guarin Caicedo v. Canada (Citizenship and Immigration), 2010 FC 1092, at paras 19 and 26. However, the Court held a different view concerning the fact that she had spent four years in the United States without seeking protection there (at paras 20 and 24).

the United States. Justice Near did not consider the delay in leaving Colombia to be so unreasonable as to lead to finding that she was not credible, especially considering all that she did to remain sequestered:

> …taking six weeks to arrange to permanently leave your family, home and country while experiencing escalating threats does not seem to me to be unduly unreasonable. Especially when we consider that the PA did take other reasonable steps in line with the threat similar to sequestration—she stopped doing volunteer work, going to the party office, changed her telephone number and fled as soon as she decided that was her only option.

- **Failure to claim Convention refugee status in a country signatory** to the *Convention relating to the Status of Refugees* where the claimant resided or sojourned or through which the claimant travelled before coming to Canada.[158]

  Rana: The RPD found that the applicant's failure to claim protection while living and working illegally in the United States for 19 months was inconsistent with the conduct expected of someone who feared for his life. The Court was of the opinion that the RPD's decision was reasonable.

  Gaprindashvili: The RPD considered the applicant's lengthy stay (15 months) in France prior to coming to Canada and did not accept the applicant's explanation that he was waiting for papers prior to leaving. Given the length of the stopover and the fact that France is a signatory to the Geneva Convention, the panel concluded that it was not unreasonable to expect that the applicant would have sought protection in France. The Court found that the RPD committed no reviewable error in its consideration of this issue and that its finding was not determinative of its refusal of his claim.

  Mirzaee: The Court writes, "Ms. Mirzaee provided no reasonable explanation for not seeking asylum in the US. To the contrary, the evidence illustrates that it was a well-calculated assessment on her part, as she in fact measured the pros and cons of the various possible options before opting for making her refugee claim in Canada. Her behaviour has all the attributes of asylum shopping. It was therefore entirely reasonable for the RPD to conclude that, in the circumstances, this was not compatible with a subjective fear of persecution. It is well recognized that a failure to claim refugee protection at the first reasonable opportunity to do so, or a return to the country of persecution, are factors undermining a refugee claimant's credibility with respect to a subjective fear."

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[158] If, however, a claimant submitting a claim in Canada on or after April 8, 2019, has previously sought asylum in the United States, the United Kingdom, Australia or New Zealand, the Minister must be advised pursuant to rule 28 of the RPD Rules, as the claim in Canada may be inadmissible under paragraph 101(1)(c.1) of the IRPA.

Rana v. Canada (Citizenship and Immigration), 2016 FC 1022, at paras 10 and 16.

Gaprindashvili v. Canada (Citizenship and Immigration), 2019 FC 583, at paras 17 and 40–41.

Mirzaee v. Canada (Citizenship and Immigration), 2020 FC 972, at para 51.

The following reasons are most frequently cited for failure to claim asylum in third countries:

- Legal status in the third country – Jurisprudence exists suggesting that when the claimant has legal status in the third country and is consequently not at risk of being removed, it is not reasonable to draw a negative inference from failure to claim asylum in that country. See, for example, *Salomon*:[159]

  > With respect to the Applicants' decision to travel through the US to Canada before claiming asylum, the RPD concluded that the Applicants' explanation that they did not have relatives in the US (as they do in Canada) was not reasonable. Considering that the Applicants were in the US legally on a valid visa (and therefore not in imminent danger of being deported), it is my view that the RPD's expectation that persons who are genuinely at risk would necessarily seek asylum at the first opportunity is unreasonable in that it is not adequately justified, transparent and intelligible. I do not understand why the RPD was not satisfied that people in the position that the Applicants alleged they were in might want to come to Canada to seek asylum.

- The intention to come to Canada (stopover) – The Court has held in multiple decisions that a short stopover was inconsequential or that the claimant had provided plausible and uncontradicted explanations for not seeking to remain or claim refugee status in various countries en route to Canada. In *Nel*,[160] for example, in which the applicants spent approximately seven hours in an airport in the United Kingdom while waiting for a flight to Canada, the Court held that the RPD had erred in seizing upon this brief layover to conclude that they must have lacked any subjective fear. The Court observed that it is unsurprising that someone who actually fears persecution would want to go to a country where their claim has the best chance of success.

- Whether they have family members in Canada – Failure to make a refugee protection claim in a transit country because the claimant would rather make the claim in Canada because they have family here may be a valid reason for not making the claim at the first opportunity.[161]

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[159] *Salomon v. Canada (Citizenship and Immigration)*, 2017 FC 888, at para 13.

However, there are also decisions to the contrary. See, for example, *Augustin v. Canada (Citizenship and Immigration)*, 2018 FC 166, at paras 23–24: The applicant was in the United States legally, but nothing indicated that he had more than a short-term visa; the threat of needing to return to his country of origin was therefore more imminent than it was for a claimant who could reasonably expect to be able to stay for many years as a temporary or permanent resident.

[160] *Nel v. Canada (Citizenship and Immigration)*, 2014 FC 842, at paras 53–57.

See also *Packinathan v. Canada (Citizenship and Immigration)*, 2010 FC 834, at para 8. The Board considered that the fact that the applicant had not claimed refugee protection during a two-hour stopover in Switzerland indicated a lack of subjective fear. The Board's conclusion was held to be unreasonable, as the claimant was at all times in transit to Canada.

[161] In *Alekozai v. Canada (Citizenship and Immigration)*, 2015 FC 158, at para 12, the Court noted that family reunification is a valid reason for failing to claim protection at the first opportunity.

However, having a relative in Canada does not always constitute a reasonable excuse for failing to claim protection elsewhere. Failing to claim refugee protection before arriving in Canada is a legitimate factor that the Board may consider in evaluating the subjective aspects of a claim, but this factor is to be evaluated in light of any other relevant factors. In *Ndambi*,[162] for example, the Court was of the view that the RPD had ample proof to conclude that the subjective fear was not present. The fact that the applicant chose to wait more than two weeks to leave his country after the visas for the United States and Belgium were issued and that he did not claim refugee protection after arriving in the United States seem to be solid reasons for the RPD to conclude as it did. His choice to come to Canada because his nephew lived here was more of a choice that was made consciously for immigration purposes than a decision to seek refuge wherever he could.

- Ignorance of the process – The credibility of this explanation is questioned in cases where the claimant has shown resourcefulness in navigating other immigration procedures or other family members have previously claimed refugee protection. In *Perez*,[163] for example, the Court upheld the Board's determination that the applicant, who waited five years in the United States before claiming refugee protection in Canada, did not provide convincing evidence of his subjective fear. His testimony that he was unaware he could claim asylum in the United States was considered implausible considering his multiple application attempts under another program in the United States offering temporary protection.

  In *Idahosa*,[164] the credibility of the primary applicant's statements concerning her knowledge of refugee law and policy in the United States was undermined by her explanation regarding her decision to come to Canada. She testified that as an "intellectual individual" and "highly educated woman who speaks English fluently," she was concerned about upcoming changes in American refugee policies.

  In *Pena*,[165] the Court found that the applicant's failure to claim in the United States for two and a half years when she was subject to deportation meant that she did not have subjective fear, considering that the applicant was well-travelled and her family members had experience in securing the advice needed to make refugee claims.

- Little hope of success[166] – In *Gurusamy*, the RPD concluded that the applicant did not have a subjective fear because he had not sought protection in the United States. The

See also: *Demirtas v. Canada (Citizenship and Immigration)*, 2020 FC 302, at para 30; *Yasun v. Canada (Citizenship and Immigration)*, 2019 FC 342, at para 21; and *Ntatoulou v. Canada (Citizenship and Immigration)*, 2016 FC 173, at paras 14–17.

[162] *Ndambi v. Canada (Citizenship and Immigration)*, 2014 FC 117, at paras 18–19.

[163] *Perez v. Canada (Citizenship and Immigration)*, 2010 FC 345, at para 19.

[164] *Idahosa v. Canada (Citizenship and Immigration)*, 2019 FC 384, at para 31.

[165] *Pena v. Canada (Citizenship and Immigration)*, 2020 FC 1135, at para 24.

[166] *Gurusamy v. Canada (Citizenship and Immigration)*, 2011 FC 990, at paras 36 and 42.
Pelaez v. Canada (Citizenship and Immigration), 2012 FC 285, at para 14.
Nel v. Canada (Citizenship and Immigration), 2014 FC 842, at para 55.

applicant's explanation was that he had been told by friends who had previously been employed at the Sri Lankan embassy that if he did so, he would be deported back to Sri Lanka and that it would be unreasonable to expect him to approach a foreign government when he believed it to be futile. The RPD did not accept or evaluate this explanation. The Court considered it unreasonable for the RPD to hold the applicant's transit through the United States against him, stating, "No one in their right mind would seek protection in a country that will not, or which they believe will not, protect them."

In *Pelaez*, the applicant explained that he did not claim asylum in the United States because he wanted only to temporarily flee his country so that he would be forgotten. He also maintained that a claim for asylum would have been illusory in the United States anyway, since legislation in that country does not recognize risks arising from crime, as was the case in Canada before section 97 was introduced in the Act. The Court held that these explanations warranted at least being considered by the panel.

In *Nel*, the RPD considered that failure to claim protection during a brief layover in transit to Canada was reason enough to conclude that there was a lack of subjective fear. The applicants explained that they had decided to claim protection in Canada because they had heard about another white South African whose claim had been successful here. The Court acknowledged that forum shopping could be relevant to public policy but considered that the applicants' explanation was not incompatible with a subjective fear of persecution. As the Court observed:

> On the contrary, it is unsurprising that someone who actually fears persecution would want to go to a country where their claim has the best chance of success, since the price of failure is a return to the persecution they fear.

The unjustified rejection of the explanation made the RPD's finding non-transparent.

- **Failure to await the outcome of a claim made in a country before coming to Canada**.[167]

Bains: The refugee protection claimant from India had applied for asylum in England. After waiting for five or six years, still without an answer, he left the country because he had heard that the British authorities were deporting asylum seekers awaiting status. The Court noted that the British authorities had clearly told the applicant he would not be deported before a decision on his status had been made. The Court ruled that it was reasonable for the CRDD to conclude that his decision to leave England indicated that the applicant did not have a subjective fear.

Murugathas: The Board was entitled to consider the significance of the fact that the applicant had failed to pursue his claim in the United States, especially since he had already passed the preliminary credible fear interview. While Mr. Murugathas may

[167] *Bains v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 7872 (FC), at para 33.
Murugathas v. Canada (Citizenship and Immigration), 2017 FC 469, at paras 15–16.
El Atrash v. Canada (Citizenship and Immigration), 2019 FC 102, at para 22.
Kassab v. Canada (Citizenship and Immigration), 2020 FC 139, at paras 38–40 and 26.

have had reasons to prefer living in Canada, the Board's conclusion that his conduct showed a lack of subjective fear of returning to Sri Lanka was not unreasonable.

El Atrash: In this case, the Court held that the RPD's approach to the applicant's abandonment of his refugee claim in the United States was unreasonable. The Libyan applicant had applied for asylum in 2015 but abandoned his claim before a hearing was held and came to Canada in March 2017. According to the Court:

> While it was true that his claim would not have been terminated by the government's introduction of a policy to refuse entry to people from a number of countries including Libya, it is reasonable to accept the Applicant's explanation that, in that political climate, he believed that his refugee claim would not be fairly considered.

Kassab: The RPD was of the view that the applicant had failed to credibly establish the subjective element of his fear because he had abandoned his claim for asylum in the United States. In its decision, the RPD noted that the applicant had declared a fear based on the prevailing climate of islamophobia and on policies specifically targeting Muslims in the United States. The applicant stated that this was one of the factors he had taken into consideration when he decided to flee the United States, not wishing to wait for an outcome he believed to be inevitable. The RPD did not explain why it decided to overlook this basis of fear. The Court considered that such an omission was unreasonable and stated that the fact that the applicant had not completed the asylum process in the United States did not justify the incomplete analysis of the file.

- **Returning voluntarily to one's country of origin,[168] after obtaining or renewing a passport or travel document,[169] or leaving or emigrating through lawful**

[168] *Castillo Avalos v. Canada (Citizenship and Immigration)*, 2020 FC 383, at para 68. The Court saw nothing unreasonable in the RAD's conclusion that a two-month stay in Spain without claiming asylum in that country and a voluntary return to Mexico constituted conduct inconsistent with the principal applicant's alleged fear.

El Atrash v. Canada (Citizenship and Immigration), 2019 FC 102, at para 18. The Court held that it was reasonable for the RPD to conclude that the applicant's four reavailments to Libya after his first abduction and six reavailments after his second abduction undermined his credibility regarding his subjective fear.

Chhetri v. Canada (Citizenship and Immigration), 2017 FC 735, at paras 26–27. The applicant returned to Nepal multiple times, with three of these returns being because of his parents' health problems. The RAD inferred that the applicant did not have a subjective fear of persecution. The Court considered that this conclusion was reasonable given the repeated long periods of visitation. The RAD clearly laid out why it found elements of the applicant's story to be inconsistent with a subjective fear.

Hartono v. Canada (Citizenship and Immigration), 2017 FC 601, at paras 18–20. The applicants travelled extensively and had returned multiple times to Indonesia since the start of their alleged persecution. Even after the incidents in February 2015 that allegedly led them to decide to claim refugee protection in Canada and a trip to Singapore to "calm down," the applicants returned again to Indonesia, where they worked and lived at the same place until their departure in April 2015. At paragraph 20, the Court notes, "This Court has consistently held that the voluntary return of a claimant to his or her country of origin is behaviour that is incompatible with a subjective fear of persecution." [citations omitted]

[169] *Badihi v. Canada (Citizenship and Immigration)*, 2017 FC 64, at para 13. The Court held that it was not unreasonable for the RAD to conclude that Ms. Badihi's ability to renew her Iranian passport without any difficulty was inconsistent with the claim that she was being actively sought by Iranian authorities.

channels.[170] However, although returning to one's country, renewing a passport or leaving the country through lawful channels may point to a lack of credibility with regard to the existence of a risk or subjective fear, none of these behaviours is determinative. The Court has set aside decisions in which the Board failed to consider all of the circumstances or disregarded a claimant's reasonable explanations for acting in a manner that, on its face, appeared inconsistent with a subjective fear.

For example, the Court has found it unreasonable to conclude that there is a lack of subjective fear in cases where someone returns to their country temporarily but remains in hiding or far removed from their agents of harm.[171]

The RAD's determination in *Asri*[172] is another example of what the Court considers an unreasonable error. The applicant testified that he had travelled to Azerbaijan and back to provide biometrics at the Canadian consulate for his visa application. The RAD was of the view that his returning to Iran contradicted his alleged fear, and it asserted, without explanation, that the applicant could have come to Canada from Azerbaijan. According to the Court, there was no evidence showing that the Iranian applicant could have continued on to Canada from Azerbaijan without returning to Iran.

A majority of decisions concerning claimants who apply for and obtain official documents, such as passports, from a country in which they allege they face a risk of persecution or other serious harm are analyzed in terms of subjective fear and

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[170] In *Mao v. Canada (Citizenship and Immigration)*, 2020 FC 542, at paras 36 and 40, the Court found that it was reasonable for the RAD to make a negative finding concerning the applicant based on the fact that he was able to exit China using his own passport without being arrested, considering the Golden Shield program.

See also *Murugesu v. Canada (Citizenship and Immigration)*, 2016 FC 819, at para 22, where the Court concluded that it was open to the Board to draw an inference from the fact that an applicant was able to leave her country using her own passport.

In *Mejia v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5465 (FC), the applicants encountered no problems in leaving the country. Their departure was meticulously documented by the Honduras authorities without any difficulty. The Court concluded that "it was reasonably open to the Board to conclude, as it did, that the applicants were not being sought by the police or military given the ease with which they were able to depart."

[171] In *Martinez Requena v. Canada (Citizenship and Immigration)*, 2007 FC 968, at para 7, the Court specifically pointed out that the mere fact that a refugee protection claimant returns to their country of nationality is not determinative of whether they possess a subjective fear. For example, evidence of a claimant's belief that country conditions have changed or evidence of a claimant's temporary visit while they remained in hiding would be evidence inconsistent with a finding of a lack of subjective fear.

In *Gutierrez v. Canada (Citizenship and Immigration)*, 2015 FC 266, at para 49, the Court did not agree with the RPD's finding that two returns to Mexico, for one month each time, to a state other than one's home state in order to renew a student visa, constituted re-availment and was behaviour inconsistent with a subjective fear of persecution.

[172] *Asri v. Canada (Citizenship and Immigration)*, 2020 FC 303, at paras 48–49.

credibility,[173] particularly if the agent of persecution or harm they allegedly fear has connections with the government.

In *Chandrakumar*,[174] the CRDD ruled that the principal applicant's act of renewing his Sri Lankan passport in Germany indicated that he had re-availed himself of the protection of Sri Lanka. In the Court's view, this conclusion was unreasonable. The CRDD erred in assuming that the simple action of renewing the passport from outside of his country of nationality, without more, was sufficient to establish re-availment of the protection of his country. The CRDD did not engage in an analysis of the principal applicant's intention[175] in renewing his passport.

Camayo[176] addresses the use, rather than the acquisition, of a passport, but serves as a warning with regard to assessing a person's intention to re-avail themselves of the protection of their country. The Court concluded that interpreting her use of her passport in itself as satisfying all three essential and conjunctive elements of availment (voluntary, intentional, and actual availment) left no room for Ms. Camayo to demonstrate that despite her acquiring and using her passport, she did not intend to avail herself of state protection.

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[173] *Cheema v. Canada (Citizenship and Immigration)*, 2020 FC 1055, at paras 43–45. The PRRA officer made an adverse credibility finding concerning the applicant on the basis that he was able to get a new passport and leave Pakistan through the airport despite his allegation that he was wanted by prominent government officials and by the authorities in Pakistan. However, there was no evidence to suggest that his agents of harm would have any authority to control the state apparatus in a way that would prevent Mr. Cheema from leaving the country.

In *X.Y. v. Canada (Citizenship and Immigration)*, 2020 FC 39, at paras 48 and 44, the Court held that the RAD's finding that the applicant could not have obtained a passport and visa while she was wanted by the authorities or left Ethiopia through the airport if she was actually wanted by the authorities was not supported by the evidence. Rather, it raised a question as to why she would run the risk if she was truly wanted by security authorities.

Maldonado v. Canada (Minister of Employment and Immigration), [1979] F.C.J. No. 248 (FCA)(QL). The Immigration Appeal Board (IAB) inferred, from the fact that the claimant had no difficulty obtaining a passport and other documents, that contrary to the applicant's alleged fear of being persecuted by the Chilean authorities, the latter had no interest in him. However, the Court pointed out that the IAB ignored the fact that the applicant was able to obtain his passport and exit papers through his brother's contacts with the government.

[174] *Chandrakumar v. Canada (Employment and Immigration)*, 1997 CanLII 24852 (FC).

[175] According to paragraph 121 of the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR Handbook), if a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality.

[176] *Camayo v. Canada (Citizenship and Immigration)*, 2020 FC 213. See paras 38 to 53 and consult chapter 12, "Applications to Cease Refugee Protection," of the document *Interpretation of Convention Refugee and Person in Need of Protection in the Case Law.*

- **Delay in making a refugee claim in Canada**. The Federal Court of Appeal established the basic principle in *Huerta*,[177] in which it stated the following:

> The delay in making a claim to refugee status is not a decisive factor in itself. It is, however, a relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant.

However, a claim may have merit even though it was not made at the first opportunity. Genuine refugees may well wait until they are safely in the country before making a claim and cannot be expected, in every case, to claim refugee protection at the port of entry.

In *Asri*,[178] for example, the RAD drew a negative inference with respect to the credibility of the appellant's allegations and his subjective fear because it took him seven months to file his claim for refugee protection. He explained that once he was safe in Canada on a visitor visa, he followed the advice of the agent who had assisted him and who instructed him that he would contact him and advise him on the next step he should take to permanently legalize his status. In the Court's view, there was nothing inherently implausible about this explanation. The applicant was a nervous newcomer to Canada who was unaware of how to make a refugee protection claim. Why wouldn't the applicant wait to hear from an agent who has earned his trust by getting him safely out of Iran and into Canada? The applicant was safe in Canada on a visitor visa. He eventually contacted a lawyer because he did not hear from the agent as promised to advise him on the next step he should take to permanently legalize his status in Canada.

Having legal status in Canada is one reason often cited by claimants to explain why they did not claim refugee protection upon arriving in Canada.

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[177] *Huerta v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 271 (FCA)(QL), at para 4.
In *Singh v. Canada (Citizenship and Immigration)*, 2007 FC 62, at para 24, the Court makes the link with subjective fear: "Such a delay indicates a lack of a subjective fear of persecution, since there is a presumption to the effect that a person having a well-founded fear of persecution will claim refugee protection at the first opportunity."[emphasis added]
In *Chinwuba v. Canada (Citizenship and Immigration)*, 2019 FC 312, at para 18, the Court ruled that the RAD was entitled to consider an applicant's delay in bringing forth a claim, and that while delays need not be determinative, they can fatally impugn an applicant's credibility, such that the claim is rejected. [emphasis added]
Zhou v. Canada (Citizenship and Immigration), 2020 FC 676, at para 24. The Court found that the RAD's conclusion was not unreasonable. The RAD found that if, as alleged, the appellants were wanted when they left China, they would have claimed refugee status before two and a half years had passed; moreover, they would have been aware of Canada's refugee system because the applicant's mother made a claim before the applicant and his father (the appellants at the RAD) did.

[178] In *Asri v. Canada (Citizenship and Immigration)*, 2020 FC 303, at paras 50–53.

In *Gyawali*,[179] for example, the applicant had fled Nepal due to fear of persecution but arrived in Canada with a valid student visa and applied for permanent residence. It was not until he lost his financial support from his family that he feared having to return there and claimed refugee protection. The RPD concluded that the 17-month delay between his arrival in Canada and his claim for refugee status was not consistent with a genuine subjective fear of persecution and affected his overall credibility. The applicant submitted that he had no obligation to file a refugee protection claim at any earlier time because from the time he arrived in Canada until the time he filed his claim, he had enjoyed a valid temporary status and was not in a position where he might be forced to go back to Nepal. The Court agreed with him, ruling that in the circumstances, his failure to apply for refugee status immediately upon arrival could not be the sole basis for the RPD's questioning the claimant's credibility. [emphasis added]

Genuine refugees may not know they have the right to claim refugee status and may be in the country for some time before they become aware of the Canadian refugee determination procedure, as was the case in *Velasco Chavarro*.[180]

The delay may be a result of the fact that the person concerned tried to obtain the right to stay in the country through other means.[181] Thus, the fact that the claimant did not

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[179] *Gyawali v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1122, at paras 15–16.

However, in many cases, the Court has upheld Board decisions in which having a valid but temporary status was not found to be an acceptable reason to delay claiming protection. For example, in *Nijjer v. Canada (Citizenship and Immigration)*, 2009 FC 1259, at para 25, the applicant knew upon his arrival in Canada that he was only authorized to stay in Canada for a specific and limited period of time. The Court found that under these circumstances, it was reasonable to expect that he would regularize his status as soon as possible if he truly feared for his life and physical integrity in India.

See also: *Ndoungo v. Canada (Citizenship and Immigration)*, 2019 FC 541, at para 23; *Murugesu v. Canada (Citizenship and Immigration)*, 2016 FC 819, at para 24; *Mallampally v. Canada (Citizenship and Immigration)*, 2012 FC 267, at paras 36 and 38.

[180] *Velasco Chavarro v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 310, at para 10. The applicant arrived in Canada in April 2016 on a temporary visa and started to live with a host family. She did not reveal the sexual assault to them at the beginning, but eventually disclosed the sexual assault to them some 2 months after she started to live with them. At or about that time she learned of the possibility of making an application for refugee status in Canada.

See also *Correia De Vasconcelos Melo v. Canada (Citizenship and Immigration)*, 2008 FC 150, at paras 15–17. The applicants remained in Canada after their student visas lapsed. In response to why there was a delay of approximately two years between the time that they arrived in Canada and the time they submitted their refugee claim, they testified that they were frightened of being deported but they were unaware that they were eligible to make refugee claims. They did so once they found out they were eligible. The Court found that without a negative credibility finding to rebut the applicants' evidence, the RPD's conclusion that there was no subjective fear on the part of the applicants was patently unreasonable.

[181] *Gurung v. Canada (Citizenship and Immigration)*, 2010 FC 1097, at para 22. The applicant reasonably assumed that she would be receiving permanent residence through the Live-In Caregiver Program. The Court agreed with the applicant that this was a more reliable avenue for obtaining status in Canada and that it was a valid explanation for not claiming refugee status sooner. According to the Court, the delay was not inconsistent with a subjective fear of returning to Nepal.

file their claim until after their temporary status expired or after they consulted a lawyer is not relevant to Criminal and fraudulent credibility.[182]

2.2.9. Criminal and fraudulent activities in Canada

In *Fouladi*[183] and other decisions,[184] the Federal Court ruled that an offence committed in Canada that involved deceit can be taken into account in assessing a claimant's credibility.

However, in another case,[185] the Federal Court described as "questionable" the panel's negative finding as to the claimant's subjective fear of persecution based on his criminal behaviour in Canada. The CRDD concluded that Mr. Tvauri lacked a fear of returning to Georgia if he took the risk of breaking the law in Canada by stealing a bicycle. In the Court's view, the CRDD's inference shows the great danger of placing undue reliance on prejudicial evidence with little probative value.

According to the Federal Court, it is justified to conclude that multiple applications for Convention refugee status under multiple different names is sufficient for reaching a negative assessment of the claimants' overall credibility.[186]

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[182] In *Papsouev v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8132 (FC), at para 15, the Court stated, "It is perfectly conceivable that a lawyer would advise a claimant who fits both criteria to file an application for permanent residence as opposed to a refugee claim."

[183] In *Fouladi v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1904 (FCTD)(QL) at para 11, the Court notes that the fact that the applicant was convicted of a fairly serious charge of fraud committed in Canada is a factor that may have influenced the Board's decision, even if it was not mentioned in its analysis. The Court goes on to state that it is within the Board's jurisdiction to take account of such an offence and that it "may discount much of the applicant's story if they conclude that he is not a person who concerns himself about whether or not he tells the truth."

[184] *Stoilkov v. Canada (Citizenship and Immigration)*, 2017 FC 53, at para 40. The applicant was found to be inadmissible to Canada on the grounds of serious criminality because he had been convicted in Canada of fraud. He was therefore ineligible for refugee protection and his claim was not referred to the RPD. However, he remained eligible for a PRRA. The Court set aside the PRRA officer's decision because of errors in the officer's assessment of evidence, but the Court concluded that the presumption of truthfulness described in *Maldonado* did not apply given that the applicant crossed into Canada illegally and had been convicted of fraud. The Court therefore considered that it was reasonable to give his evidence close scrutiny and require some corroborating evidence.

Kuba v. Canada (Citizenship and Immigration), 2019 FC 1298, at paras 21 and 24. While the proceedings before the RPD were ongoing, Ms. Kuba was convicted of six counts of fraud and identity theft. The Court confirmed the RPD's decision finding that the applicant's credibility was also undermined by her previous criminal activity.

[185] *Tvauri v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15913 (FC), at paras 23-24.

[186] *James v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 385, at para 32.

The Court reached a different conclusion in *Olutu v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1704 (FCTD)(QL), at para 5, where the applicant used three different names in order to obtain welfare assistance and had charges laid against him. The Court ruled that misrepresentations in other matters do not constitute misrepresentations for the purpose of a Convention refugee status under s. 69.2(2) of the *Immigration Act* (s.109(1) of the IRPA). The Minister was unable to show misrepresentation leading to the determination of the refugee status. (The two cases—*James* and *Olutu*—pertain to applications to vacate.)

2.3. Relying on trustworthy evidence to make adverse credibility findings

2.3.1. Trustworthy evidence on which to base findings

The Federal Court has emphasized that adverse credibility findings must be supported by trustworthy evidence. The courts have given the terms "credible" and "trustworthy" the same meaning[187] for the credibility of evidence.[188] Credibility encompasses both truthfulness (i.e. the honesty of a witness) and reliability (i.e. the issue of whether, supposing the witness is honest, the evidence is an accurate account of the material facts).[189]

When part of the testimony raises questions, the decision-maker must have credible evidence to the contrary[190] or find this part of the testimony incoherent or inherently suspect or improbable,[191] if it is to be rejected.

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[187] *Sheikh v. Canada (Minister of Employment and Immigration)*, 1990 CanLII 8017 (FCA). In a footnote to paragraph 6, Justice MacGuigan writes: "I find no linguistic warrant for distinguishing the words 'credible' and 'trustworthy', and so for the most part simply use the word 'credible'".

[188] *Magonza v. Canada (Citizenship and Immigration)*, 2019 FC 14, at para 16: […] Chief Justice Green once wrote that "[c]redibility means simply worthiness of belief" (*Cooper v Cooper*, 2001 NFCA 4 [*Cooper*] at para 11). In other words, credibility is the answer to the question, "is this a trustworthy source of information?"

[189] In *Magonza v. Canada (Citizenship and Immigration)*, 2019 FC 14, at para 18, Justice Grammond recognizes that some writers use "credibility" to refer only to "veracity" and consider "trustworthiness" as a separate issue.

See also *Talanov v. Canada (Citizenship and Immigration)*, 2020 FC 484, at para 47 of the decision, that associates credible and trustworthy. In the same decision, the Court makes a distinction between the notion of credibility and that of probative value; the notion of credibility refers to whether a source of information is "trustworthy," while probative value refers to the "strength" of the "inferences".

[190] There are numerous reasons why the Court might conclude that it is unreasonable to find evidence not credible. For example, in *Lin v. Canada (Citizenship and Immigration)*, 2012 FC 288, at para 27, the RPD found that the summons was fraudulent. This finding was unreasonable because the examples in the Response to Information Request (RIR) that the RPD relied upon were outdated. Furthermore, the RIR did not say that the examples it contained are the only form of summons all over the PRC.

See also *Ansong v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 728 (FCA)(QL):

> There is no basis to disbelieve that a Christian association might find its responsibility to organize a demonstration in the case of the killing of individuals. In the absence of evidence to the contrary, and none appears on file, it was not open to the Board to draw a negative inference as to what might have been the activities of an organization such as the YMCA in Ghana.

[191] *Lawani v. Canada (Citizenship and Immigration)*, 2018 FC 924, at para 26:

> ... the RPD is also entitled to draw conclusions concerning an applicant's credibility based on implausibilities, common sense and rationality. It can reject evidence if it is inconsistent with the probabilities affecting the case as a whole, or where contradictions are found.… [emphasis added]

Rahal v. Canada (Citizenship and Immigration), 2012 FC 319, at paras 43-44. Real, as opposed to illusory contradictions in the evidence, particularly in the claimant's testimony, usually afford the RPD a reasonable basis for finding that the claimant lacks credibility, and while the sworn testimony of a claimant is to be presumed to be true in the absence of contradiction, it may reasonably be rejected if the RPD finds it to be implausible. [emphasis added]

To determine whether the evidence that contradicts the claimant's testimony is trustworthy, the decision-maker must consider the source of the information, the objective of the person in providing it and the methods used to obtain it. In addition, the decision-maker must determine the weight or probative value to be given to this contradictory evidence.[192]

2.3.2. Presumption of truthfulness

In *Maldonado*,[193] the Court of Appeal established an important principle, that when a claimant swears that certain facts are true, this creates a presumption that they are true, unless there is valid reason to doubt their truthfulness.

Therefore, this presumption of truth is not unchallengeable, and the claimant's lack of credibility may suffice to rebut it.[194]

Even if the Board does not find the claimant lacks credibility, it is not required to accept everything a claimant says as established fact. The *Maldonado* presumption is simply that a sworn witness is telling the truth. It is not a presumption that everything the witness believes to be true, but has no direct knowledge of, is actually true.[195]

As the Federal Court pointed out in *Hernandez*, this presumption does not extend to the inferences that the claimant draws from the facts that he or she testifies to: "... the presumption of truth that applies to the facts recounted by the [claimant] does not apply to the deductions made from those facts."[196] [emphasis added]

Consequently, the Board is entitled to reject the inferences drawn by the claimant, especially if they are speculative in nature. For example, in *Rahman*,[197] the RAD did not impugn the credibility of the claimants as to the reality of the kidnapping, nor as regards any evidence put forward by the claimants as to the identity of the kidnappers. However, the

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[192] *Gjeta v. Canada (Citizenship and Immigration)*, 2019 FC 52, at para 31: The RPD extensively analyzed the conflicting evidence and explained why it preferred the evidence it did. The RPD relied on the most recent evidence from a neutral party. This was not unreasonable.

[193] *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302, [1979] F.C.J. No. 248 (FCA) (QL), at para 5, where the Court states: "When a claimant swears that certain facts are true, this creates a presumption that they are true, unless there is valid reason to doubt their truthfulness."

[194] *Tovar v. Canada (Citizenship and Immigration)*, 2016 FC 598, at para 19.

Lunda v. Canada (Citizenship and Immigration), 2020 FC 704, at para 29.

[195] See, for example, *Olusola v. Canada (Citizenship and Immigration)*, 2020 FC 799, at para 25. Ms. Olusola, who alleged that the Nigerian police were continuing to look for her, had no personal knowledge of the facts that would establish this ongoing interest of the police in pursuing her. "While she may have truthfully believed that the police were pursuing her, the *Maldonado* presumption does not require the RAD to accept this as objectively true."

[196] *Hernandez v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 657 (FCTD) (QL), at para 6.

[197] *Rahman v. Canada (Citizenship and Immigration)*, 2020 FC 138, at paras 28 to 32.

claimants' conclusion that their kidnappers were members of the police or security forces was mere conjecture on the part of the claimants.

In the same decision, the Court explains that the *Maldonado* presumption pertains to credibility (i.e. truthfulness), and not probative value. It is for that reason that courts may believe the truthfulness of the claimant's claims or testimony yet determine that the claimant failed to provide *sufficient* evidence to support the inferences he or she seeks to draw from the evidence.[198]

Also on the topic of speculation, if a panel asks the claimant questions for which the claimant could not be expected to know the answers (for example, why the authorities acted in a particular way), the claimant should not be penalized for speculating or providing hearsay information by way of a response.[199]

2.3.3. Corroborating evidence

In *Luo* the Court notes:

> [I]t is beyond dispute that the onus is always on the claimant to prove his or her refugee claim.[…] This is also reflected in Rule 11 of the *Refugee Protection Division Rules*, SOR/2112-256, which states that claimants must provide acceptable documents establishing their identity and other elements of their claims and, if they do not, they must explain why the documents were not provided and what steps they took to obtain them.[200]

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[198] *Rahman v. Canada (Citizenship and Immigration)*, 2020 FC 138, at para 69.

See also *Derbas v. Canada (Solicitor General)*, [1993] F.C.J. No. 829, (FCTD)(QL), at para 3:

> By accepting the applicant's version of events as fact, the Board was certainly not bound to accept the interpretation he put on those events. The Board still had to look at whether the events, viewed objectively, provided sufficient basis for a well-founded fear of persecution. [emphasis added]

[199] In *Ukleina v. Canada (Citizenship and Immigration)*, 2009 FC 1292, at paras 12 to 14, the Court notes that a question along the lines of why do you think someone else knew something, as was asked in this case, is fraught with danger because it invites speculation. The claimant did not know, she was invited to speculate, and she did so. There is absolutely no basis in fact to permit the RPD to come to the conclusion that the claimant's evidence was untrustworthy.

See also *Mbuyi Tshiunza v. Canada (Citizenship and Immigration)*, 2018 FC 1216, at para 17, where the Court writes:

> Mr. Mbuyi Tshiunza was criticised for not being able to explain away the inconsistencies between his own narrative and the article in the newspaper. With respect, he was being asked to speculate about another person's knowledge, which was at best a conjectural basis for challenging Mr. Mbuyi Tshiunza's credibility and not a reasoned inference....

[200] *Luo v. Canada (Citizenship and Immigration)*, 2019 FC 823, at para 18.

However, there is no general requirement for a claimant to provide corroborating documents.[201] This is because a refugee may have been forced to flee their home on little or no notice, taking little or nothing with them, and such circumstances of flight render it impossible or unreasonable to expect them to provide supporting documentary evidence.

This absence of a general requirement for corroboration is also considered a corollary of the presumption of truthfulness set out in *Maldonado.* Requiring corroboration in the absence of a pre-existing "reason to doubt" would effectively reverse the presumption.[202] Consequently, it has been held that it is an error to make an adverse credibility finding *solely* on the basis of the absence of corroborating evidence.[203]

In *Khamdamov*, the Court explains how consideration of the absence of corroboration as the reason for doubting the credibility of a claim can result in a circular analysis:

> By applying the decision in *Maldonado*, in order for the RAD to require corroborative evidence from the Applicant to substantiate the Applicant's claim, it was first necessary for the RAD to find reasons to doubt the truthfulness of the Applicant's sworn testimony. I find that the cardinal error in the RAD's decision is the failure to follow this straight-forward point of law. Instead of clearly identifying an evidentiary reason to rebut the presumption that the Applicant was telling the truth in the giving of his evidence, the RAD engaged corroboration in an erroneous circular analysis. That is, the fact that the Applicant did not file corroborating documentary evidence in support of his claim was found by the RAD as a reason to disbelieve his sworn evidence, and, thus, upon disbelieving his sworn evidence, the Applicant was required to provide corroborating evidence to avoid the dismissal of his claim. I find that this error alone renders the RAD's decision unreasonable.[204]

Justice Strickland in *Luo*[205] drew the following principles from the case law:

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[201] The reasoning behind this general principle is found in paragraphs 196-197 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*. However, it should be noted that, while recognizing that claimants may have difficulty gathering documentation to establish their claim, paragraph 205(ii) of the UNHCR Handbook nonetheless places responsibility on claimants to provide evidence to support their claim and to attempt to obtain additional evidence if required.

See also *Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration),* 2019 FC 1126, at para 183, where the Court explains that the rationale underlying this presumption of truthfulness is that claimants for refugee protection who have come from certain types of exigent circumstances cannot reasonably be expected to have documentation or other evidence to corroborate their claims. There may be circumstances in which claimants had only a brief window of opportunity in which to escape their persecutor(s) and are subsequently unable to access documents or other evidence from Canada.

[202] *Senadheerage v. Canada (Citizenship and Immigration),* 2020 FC 968, at para 27.

[203] *Triana Aguirre v. Canada (Citizenship and Immigration),* 2008 FC 571, at paras 16-22 and 26.

[204] *Khamdamov v. Canada (Citizenship and Immigration),* 2016 FC 1148, at para 16.

[205] *Luo v. Canada (Citizenship and Immigration),* 2019 FC 823, at paras 18-22.

(1) A claimant's sworn evidence is presumed to be true unless there are reasons to doubt its truthfulness;

(2) It is an error to make an adverse credibility finding solely on the basis of the absence of corroborating evidence;

(3) However, where there is a valid reason to doubt the claimant's credibility, the lack of corroborating evidence, where no reasonable explanation is provided, can be a valid consideration when assessing credibility;

(4) In spite of the principle of truthfulness, an adverse credibility finding may be drawn if the claimant fails to produce evidence that the decision-maker reasonably expects should be available in the claimant's circumstances, and the claimant does not provide a reasonable explanation for failing to produce that evidence.

The third point sums up the line of case law that is consistent with the *Maldonado* presumption and that has been followed in a number of important decisions. Based on this line, if there are good reasons to doubt the claimant's credibility, or if the claimant's version of the facts is not plausible, the absence of corroborating evidence can be a valid consideration when assessing the claimant's credibility if the claimant is unable to provide a reasonable explanation for the failure to provide this evidence.

In *Amarapala*, the Court stated:

> It is well established that a panel cannot make negative inferences solely from the fact that a refugee claimant failed to produce any extrinsic documents to corroborate a claim. But where there are valid reasons to doubt a claimant's credibility, a failure to provide corroborating documentation is a proper consideration for a panel if the Board does not accept the applicant's explanation for failing to produce that evidence.[206]

In *Ortega Ayala*,[207] the Court found the RPD's logic "puzzling," as it gave no reason other than the lack of documentation corroborating the central facts of the narrative to disbelieve the claimant's testimony. Justice Near stated:

> This reasoning is out of line with the body of case law of this Court and is unreasonable in that it plants as the seed of incredibility the lack of

[206] *Amarapala v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 12, at para 10.

In *Dundar v. Canada (Citizenship and Immigration)*, 2007 FC 1026, at paras 21-22, Justice Tremblay-Lamer stated that she concurred with Justice Kelen's approach in *Amarapala* and added that "these inferences may only be drawn where the applicant has also been unable to provide a reasonable explanation for his or her lack of corroborating material."

In *Chen v. Canada (Citizenship and Immigration)*, 2019 FC 162, at paras 28-29, the Court found that it was an error for the RPD to require corroboration of the claimant's account, absent some reason to doubting his veracity.

[207] *Ortega Ayala v. Canada (Citizenship and Immigration)*, 2011 FC 611, at paras 19-21.

corroborating documentary evidence instead of using the lack of documentary evidence to buttress an existing adverse credibility finding.

Justice Kane in *Ndjavera* cites *Dundar* when making the general proposition that the claimant was not required to corroborate her allegations and that it would be an error to make an adverse credibility finding based on the absence of corroborating evidence alone, but then states:

> If there is a valid reason to question the claimant's credibility, the Board may draw a negative inference from a failure to provide corroborative evidence that would reasonably be expected. Much depends on the type of evidence at issue and whether it relates to a central aspect of the claim. Corroborative evidence is most valuable when it is independently generated by a neutral source. It may be unreasonable to expect a refugee claimant to generate or collect documentation not already available before fleeing. Furthermore, when the alleged assailant controls the documents at issue, as here, it would be unreasonable to expect an applicant to obtain it.[208]

In *Ismaili*,[209] the RPD was faced with a record that did not contain any evidence as to the claimant's sexual orientation other than his PIF and his testimony. The Court was of the opinion that *if the RPD had a valid reason to doubt the claimant's credibility*, it would not have been unreasonable for it to request corroborating evidence to prove this crucial element of the claim, such as proof of his divorce, as he testified that his divorce resulted from his homosexual relationship. However, the RPD did not specify any reasons for doubting the claimant's credibility. The Court found that the RPD could not base a credibility finding solely on the lack of corroborating evidence, which seemed to be what it did.

On the other hand, in *Pazmandi*,[210] the RAD referred to concerns about Ms. Pazmandi's credibility arising from her evidence regarding incidents of persecution. It also explained why it expected corroborating evidence to be available and why it did not accept Ms. Pazmandi's explanation for not obtaining such evidence.

The fourth point made by Justice Strickland in *Luo*[211] seems to describe the other line of case law, more in line with RPD rule 11 because it recognizes that there is an exception to, or distinction from, the *Maldonado* principle of truthfulness. According to that line, a decision-maker may draw an adverse inference regarding a claimant's testimony if he or she fails to produce evidence that the decision-maker reasonably expects should be available in the

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[208] *Ndjavera v. Canada (Citizenship and Immigration)*, 2013 FC 452, at paras 6-7.

[209] *Ismaili v. Canada (Citizenship and Immigration)*, 2014 FC 84, at paras 51-53.

[210] *Pazmandi v. Canada (Citizenship and Immigration)*, 2020 FC 1094, at para 27.

[211] *Luo v. Canada (Citizenship and Immigration)*, 2019 FC 823, at para 21.

claimant's circumstances, and if the claimant does not provide a reasonable explanation for failing to produce that evidence.

This line of case law, like the one described previously, does not require the existence of an independent and pre-existing credibility issue in order to consider the absence of corroborating evidence. The *lack of a reasonable explanation* for not providing evidence that is available in itself constitutes a credibility issue.[212]

In *Murugesu*,[213] where RAD shared the conclusion of the RPD that there was insufficient credible and reliable proof to corroborate the alleged sexual orientation of Ms. Murugesu, it appears that the Court followed this line:

> [30] … this Court has recognized an exception to the *Maldonado* principle. The Board may draw a negative inference regarding a claimant's testimony if she fails to produce evidence that the Board reasonably expects should be available in the claimant's circumstances, and does not provide a reasonable explanation for failing to produce that evidence (*Radics v Canada (Minister of Citizenship and Immigration),* 2014 FC 110 at paras 30-32 [*Radics*]).
>
> [31] In this case, it was open to the RAD to draw a negative inference from Ms. Murugesu's inability to provide supporting documentation with respect to a central aspect of her claim, as required by Rule 11 of the *Refugee Protection Division Rules,* SOR/2012-256. Rule 11 states that claimants who do not provide acceptable documentation must explain why they have not done so, and what steps they have taken to obtain them. Whether it is reasonable to require corroborating evidence depends on the facts of the case (*Dayebga v Canada (Minister of Citizenship and Immigration),* 2013 FC 842, at para. 30).

In *Rojas*,[214] the Court allowed the application for judicial review in which the RPD found that the claimants were not credible, in part because of the "utter lack of corroborating documents," without specifying what corroborating evidence was missing. Also, it did not ask for an explanation as to explain why certain documents that it might have considered to be corroborative were not produced. The RPD should have specified the nature of the documentation it expected and made a finding to that effect.

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[212] See for example, *Ryan v. Canada (Citizenship and Immigration),* 2012 FC 816, at para 19:

> Further, although there is a presumption that sworn evidence is true and cannot be undermined by a lack of corroborative evidence, there is an exception. The exception is triggered when a tribunal does not accept the applicant's explanation for failing to produce evidence when it would reasonably be expected to be available.…

[213] *Murugesu v. Canada (Citizenship and Immigration),* 2016 FC 819, at paras 30-31.

[214] *Rojas v. Canada (Citizenship and Immigration),* 2011 FC 849, at para 6.

> …While it is possible that the Board sought to frame its analysis within the exception to this principle, namely that a failure to produce corroborative documentation is a proper consideration where it does not accept the applicant's explanation for failing to produce that evidence when it would reasonably be expected to be available.

In *Radics*,[215] the Court was of the opinion that the RPD did not make an error in finding that the lack of corroborating evidence undermined the applicants' credibility. Its credibility findings were not based "solely" on the applicants' failure to produce documents, but also on their testimony. The RPD rejected the applicants' explanation for failing to produce the evidence on a central element of their claims which it found could reasonably be expected to be available.

In a recent decision of the Court,[216] Justice Grammond recognized the existence of these two lines of case law, as well as the importance of their respective purposes of granting fair consideration to those who claim persecution and, at the same time, maintaining the integrity of the Canadian refugee protection system. The judge was of the opinion that these two goals could be achieved by broadening the categories of cases in which corroboration may be required, while implementing appropriate safeguards. According to this procedure, a decision-maker can only require corroborating evidence in the following cases:

> (1) The decision-maker clearly sets out an independent reason for requiring corroboration, such as doubts regarding the applicant's credibility, implausibility of the applicant's testimony or the fact that a large portion of the claim is based on hearsay;
>
> (2) The evidence could reasonably be expected to be available and, after being given an opportunity to do so, the applicant failed to provide a reasonable explanation for not obtaining it.

With regard to the availability of corroborating evidence, it is interesting to note the general observation of the Court in *Ramos Aguilar*,[217] where it states that technology has changed the situation in terms of the availability and accessibility of information from countries of origin: "Technology has greatly facilitated the availability of corroborative evidence in comparison with the circumstances in 1980 when the *Maldonado* decision was issued."

The answer to the question of whether corroborating evidence can reasonably be required depends on the facts of each case.[218] Without being exhaustive, the following factors

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[215] *Radics v. Canada (Citizenship and Immigration)*, 2014 FC 110, at para 31-32.

[216] *Senadheerage v. Canada (Citizenship and Immigration)*, 2020 FC 968, at paras 25-36.

[217] *Ramos Aguilar v. Canada (Citizenship and Immigration)*, 2019 FC 431, at paras 44-45.

[218] *Stoilkov v. Canada (Citizenship and Immigration)*, 2017 FC 53, at para 40, where the Court notes that it would be unreasonable to require evidence that is unlikely to exist or would be impossible to obtain.

Khine Nay v. Canada (Citizenship and Immigration), 2012 FC 1317, at paras 13-15. The Court has cautioned against reliance on the absence of media reports of an event as a failure to produce corroborating evidence. In the absence of evidence or a reasonable basis to believe that an event would be normally reported in the media, the absence of a media report is proof of nothing and a negative credibility inference is, in this context, based on pure speculation. Moreover, in this case, the press is not free, and the regime monitors the Internet, mail and telephones.

or circumstances may influence the claimant's ability to provide corroborating evidence: the claimant's psychological condition, gender considerations,[219] issues related to sexual orientation,[220] the claimant's young age, cultural factors and inherent difficulties in the

Paxi v. Canada (Citizenship and Immigration), 2016 FF 905, at paras 49-50. The RPD drew a negative inference "[d]ue to the claimant's lack of effort in acquiring evidence to substantiate such an important element in the claim...." There was, however, no evidence before the RPD of a "lack of effort." The RPD did not ask the claimant what efforts she had made to obtain documentation after she left or explore whether there was any such documentation, or whether any efforts could have succeeded in this kind of local, tribal, oral context, where women play a subservient role.

In *Sidiqi v. Canada (Citizenship and Immigration)*, 2017 FC 17, at para 32-33, the Court noted that the claimant had time to prepare for his claim while in Kabul, during the five months between his first and second trips to the Canadian border and a further two months after being allowed entry to Canada. Despite having had this ample preparation time, he attended the hearing without any copies of documents concerning his family, although it was a family conflict that was at the heart of his claim.

Mendez Lopera v. Canada (Citizenship and Immigration), 2011 FC 653, at paras 31-32. The Board held that given the fact that the claimant's father remains in Colombia, they should be able to get some documentation.

See also section 2.3.5. *Lack of identity and other personal documents*.

[219] Chairperson Guidelines 4: *Women Refugee Claimants Fearing Gender-Related Persecution*, section C.

Triana Aguirre v. Canada (Citizenship and Immigration), 2008 FC 571, at para 23:

> The Guidelines advise board members to be sensitive to issues arising from gender-related persecution as is asserted here by the applicants. Both the principal applicant and her son testified that the friends they contacted to obtain documents declined to get involved because of the trouble they could get into. Given that the Guidelines advise the Board to be sensitive to gender-related issues, it is surprising the Board does not consider the principal applicant's self-isolation, the alienation from family, or the disconnect from friends in relation to the non-support victims of domestic violence receive from both officialdom and Mexican society.

[220] *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* (May 1, 2017), sections 3.2 and 7.2.

Ogunrinde v. Canada (Public Safety and Emergency Preparedness), 2012 FC 760, at para 42:

> At the same time, the acts and behaviours which establish a claimant's homosexuality are inherently private. When evaluating claims based on sexual orientation, officers must be mindful of the inherent difficulties in proving that a claimant has engaged in any particular sexual activities. Claimants may not be in contact with past sexual partners for various reasons, including relationship breakdown, distance, or simply the passage of time.

Sadeghi-Pari v. Canada (Citizenship and Immigration), 2004 FC 282, at para 38. The Court set aside the RPD decision that capriciously doubted the truthfulness of the claimant's testimony and found that her testimony was not plausible. However, the Court writes:

> …if such plausibility findings had been supported by evidence, then in my opinion, the Board would have been entitled to draw an adverse inference from the fact that the applicant had no pictures of herself and her partner or other evidence supporting her allegations.… However, a lack of corroborating evidence of one's sexual orientation, in and of itself, absent negative, rational credibility or plausibility findings related to that issue, would not be enough, in my opinion, to rebut the *Maldonado* principle of truthfulness. [emphasis added]

McKenzie v. Canada (Citizenship and Immigration), 2019 FC 555, at paras 53-56. The Court was of the opinion that the RAD decision to require corroboration of the allegation of having had a homosexual relationship 20 years prior was unreasonable. The RAD failed to apply common sense (considering the passage of time and the death of the partner) and to take into account the SOGIE Guidelines (sections 3.2 and 7.2.1). More importantly, the RAD provided no reason for needing corroboration. As no reason was provided to doubt the truthfulness of Mr. McKenzie's affidavit, his affidavit was presumed to be true. No corroboration was required.

administration of the claimant's country of nationality. For example, on this last factor, the difficulty in obtaining official documents from Somalia has been recognized by the Court in numerous cases. In *Ali*, the Court states:

> Turning to the issue of identity documentation for the country in question, it is well-established that government documents in Somalia are virtually unobtainable, such that its refugee claimants must establish their identities through secondary sources. [221]

The same principle applies to other types of documents and to other countries. The burden of providing documentary evidence cannot exceed what can be reasonably expected of the claimant, in light of the conditions in the country from which the claimant should obtain

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Gergedava v. Canada (Citizenship and Immigration), 2012 FC 957, at paras 11-12. The RPD based its finding that Mr. Gergedava had not established that he had been involved in two homosexual relationships in part on the failure to produce objective documentary evidence. Mr. Gergedava's mother had provided him with some documents, but no documents had been provided to corroborate his homosexual relationships. In particular, his mother had not provided the death certificate for his second partner, Tamaz, and she had never tried to contact Tamaz's family. Based on the evidence before the Board, Mr. Gergedava's mother was mortified by her son's behaviour and Tamaz's family was enraged to discover that Mr. Gergedava was engaged in a sexual relationship with Tamaz. Mr. Gergedava testified that Tamaz had likely been killed by his relatives. The Court found that in these circumstances, it was simply unreasonable for the RPD to have expected that Mr. Gergedava's mother would have approached Tamaz's family to obtain documents to support her son's refugee protection claim.

There are also cases where the RAD has taken the SOGIE Guidelines into account and found that the answers and explanations for the lack of corroborating evidence were not adequate:

Ikeme v. Canada (Immigration, Refugees and Citizenship), 2018 FC 21, at paras 23-24 and 29. The claimant argued that the RAD had inappropriately impugned his credibility by insisting on documentary evidence, when much of that evidence could not be produced because the claimant had to conduct homosexual relationships in secret. However, the Court was of the opinion that the RAD's findings were reasonable. Regarding his relationship with EN, the negative credibility finding was based on a perceived inconsistency: the RAD found that if the claimant spent every day with EN, he would have attended his funeral. Regarding his relationship with OO, in the absence of corroborating evidence and the other negative credibility findings, it was not unreasonable for the RAD to expect evidence of private communications between the claimant and his partner. Since the communications that the RAD and the RPD sought are private, there is no reason why the claimant could not have produced them, even in light of the necessary secretiveness which would define a Nigerian homosexual relationship.[emphasis added]

Singh v. Canada (Citizenship and Immigration), 2020 FC 179, at paras 7 and 19. The RAD acknowledged the *Sexual Orientation and Gender Identity and Expression Guidelines* (SOGIE Guidelines), which highlight that in many cases a person may have difficulty obtaining evidence to corroborate their sexual orientation. However, it found the serious credibility concerns with the claimant's evidence, combined with the absence of any evidence to corroborate his one long-term relationship, as well as his difficulty explaining why he did not try to obtain such evidence, led to the conclusion that he had not established his sexual orientation. The Court found that the RAD's findings were not based on the lack of corroboration, but rather on the claimant's inadequate answers and explanation for his failure to obtain such evidence. This was not unreasonable.

[221] *Ali v. Canada (Citizenship and Immigration)*, 2018 FC 688, at para 6.

See other examples regarding documentation from Somalia: *Abdullahi v. Canada (Citizenship and Immigration)*, 2015 FC 1164, at para 9; *Abdourahman v. Canada (Citizenship and Immigration)*, 2018 FC 1193, at para 22; *Mohamoud v. Canada (Immigration, Refugees, and Citizenship)*, 2019 FC 665, at paras 27-28; *Laag v. Canada (Citizenship and Immigration)*, 2019 FC 890, at para 17; and *Nur v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1444, at para 37.

the documents. For example, in *Elamin*,[222] the RPD and the RAD were of the opinion that the authenticity of the document establishing Mr. Elamin's jail sentence was doubtful. When he was asked why he did not have the original document, Mr. Elamin answered that a friend had taken a picture of the document and sent it to him, adding that it was very difficult and dangerous to get access to this document. This was confirmed by the National Documentation Package (NDP), which reveals that Sudan is plagued by serious problems with respect to arbitrary behaviour of the police and security forces, corruption and the lack of an independent judiciary. The RPD did not give any weight to the document because Mr. Elamin had been unable to obtain a certified copy. The RAD acknowledged that it could have been risky to try to obtain a certified copy, but it was of the opinion that the failure to obtain an affidavit from the friend affected the authenticity of the document. The Court was of the opinion that it was unreasonable to expect the friend to sign an affidavit in which he would essentially confess to stealing the document from the Sudanese authorities.

Corroborating evidence is not always documentary. Testimony can also corroborate allegations or substantiate corroborating evidence such as affidavits. According to one line of case law, it is not open to the RPD to make a negative credibility finding based on the claimant's failure to produce a witness.[223] However, other decisions state that the RDP is entitled to draw an adverse inference against the claimant and refuse to give any weight to a written letter if the witness is at the hearing or could have been, or could have testified on the content of the letter but refuses to or simply fails to.[224]

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[222] *Elamin v. Canada (Citizenship and Immigration)*, 2020 FC 847, at paras 16-19.

[223] *Nezhalskyi v. Canada (Citizenship and Immigration)*, 2015 FC 299, at para 17. The Court states:

> ... [I]t was not open to the Board to make a negative finding of credibility based on the Applicant's failure to produce his former Canadian boyfriend as a witness. As Justice Tremblay-Lamer remarked in *Naidu v Canada (Citizenship and Immigration)*, 2007 FC 527, [2007] FCJ No 719 at para 28, referring to Justice Russell's decision in *Mui v Minister of Citizenship and Immigration*, [2003] FCJ No 1294, 2003 FC 1020, in the refugee context "there is a presumption of truth that whatever a claimant swears to is true and the truthfulness of a claimant's allegations cannot be rebutted through negative inferences." [emphasis added]

See also *Mohamed c. Canada (Citizenship and Immigration)*, 2020 FC 1145, at para 73, where Justice McHaffie finds it unreasonable to rely on the fact that the letters were not sworn or that the authors were not put forward as witnesses. He cites Justice Mahoney of the Federal Court of Appeal: "[i]t is not for the Refugee Division to impose on itself or claimants evidentiary fetters of which Parliament has freed them": *Fajardo v. Canada (Minister of Employment and Immigration)*, [1993] FCJ No. 915, 157 NR 392. [emphasis added]

[224] In *Ma v. Canada (Citizenship and Immigration)*, 2010 FC 509, at paras 2-3, regarding corroborating evidence, the Court writes:

> Reasonableness dictates that in the case of the Immigration and Refugee Board (and all its divisions), although the rules of evidence in its regard are relaxed, nevertheless, when evidence is available, or could be made available but not produced, or when a person can testify, is given the opportunity to testify, but does not testify, then an adverse inference can be drawn.
>
> The adverse inference is drawn not merely from the failure to produce [evidence], "but from non-production when it would be natural for the party to produce" such evidence. [emphasis added]

Regarding witnesses who offer to provide corroborating testimony, there is a risk in refusing to hear this testimony. In *Kaur*,[225] the Federal Court states that if a panel dispenses with the need to call a witness to corroborate the claimant's testimony, it cannot then make an adverse finding of credibility because of a lack of corroboration of that testimony.

2.3.4. Silence of the documentary evidence

The Court of Appeal states as follows in *Adu*:[226]

> The "presumption" that a claimant's sworn testimony is true is always rebuttable, and, in appropriate circumstances, may be rebutted by the failure of the documentary evidence to mention what one would normally expect it to mention.

Therefore, the fact that the documentary evidence does not confirm the claimant's testimony, or refer to an event reported by the claimant, may be grounds for rejecting this testimony.[227]

In *Jele v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 24, at para 39, the Court was of the opinion that while an adverse inference should not be drawn against a party if there is a reasonable explanation for failing to call a witness, such an inference is possible in the absence of such an explanation. In this case, the claimant's explanation was unreasonable. Therefore, the Court found it was open to the RPD to determine that if the brother refused to testify, it was because his testimony would have been unfavourable to his sister.

In *Obinna v. Canada (Citizenship and Immigration)*, 2018 FC 1152, at para 32, the RPD did not draw a distinct adverse inference because of the lack of testimony, but instead gave the affidavit little weight. The Court found that it was reasonable for the RPD to give the affidavit of the principal applicant's alleged partner little weight due to the principal applicant's failure to call her as a witness at the hearing, despite her partner's attendance as a support person.

[225] *Kaur v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 561 (FCTD)(QL).

[226] *Adu v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 114 (FCA)(QL), at para 1. In this instance, there was no documentary evidence referring to the existence of a law.

[227] *Wu v. Canada (Citizenship and Immigration)*, 2018 FC 779, at para 8. The RAD analyzed the documentary evidence on the treatment of Christians in the province of Guangdong and reasonably found that the situation there was not as alleged by the applicants. It was also reasonable for the RAD to conclude that, if events of the kind alleged by the applicants had actually happened, they would have been mentioned in the documentary evidence.

Momanyi v. Canada (Citizenship and Immigration), 2018 FC 431, at para 31. Mr. Momanyi stated that he feared the Sungusungu group, which he described as being known for attacking and killing anyone who goes against the tribe's norms, morals, or values. It was reasonable for the RAD to search for documentary evidence to corroborate this fear, that the Sungusungu would target Mr. Momanyi because of his alleged sexual orientation, and to conclude as it did in the absence of such evidence.

Diadama v. Canada (Citizenship and Immigration), 2006 FC 1206, at paras 18–19. It was reasonable for the Panel to have expected the country condition reports of Liberia to include reference to forced marriage and problems of persecution relating to inter-faith marriages in the Liberian culture, considering that Liberian country condition reports discuss freedom of religion, discrimination, female genital mutilation by some societies and different treatment of insular groups, - i.e. women and homosexuals.

Caution should be exercised, however, especially when the documentary evidence before the panel is silent about a particular matter[228] or is less than comprehensive.[229] A document containing general information may not always be sufficient to refute testimony dealing with a specific, individualized event.

It is doubtful that a finding of lack of credibility can be drawn on the basis of documents such as letters that do not corroborate the claimant's story. Generally, such documents cannot be relied on to contradict a claimant's story merely because they do not confirm it.[230]

Documents that corroborate some aspects of a claimant's story cannot be discounted merely because they do not corroborate other aspects of the story or do not provide sufficient detail.[231]

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[228] *Arslan v. Canada (Citizenship and Immigration)*, 2013 FC 252, at para 92. It was unreasonable for the RPD to rely upon general country reports to draw a negative inference about what had happened to Kurds in this particular town.

Wei v. Canada (Citizenship and Immigration), 2013 FC 539, it was unreasonable to reject the applicant's testimony, which was not presumed to be true, and conclude that the house church that the applicant attended was never raided because there is no reference in the general documentation to recent arrests or incidents.

[229] *Zhou v. Canada (Citizenship and Immigration)*, 2019 FC 948, at para 16. There was no evidence that the *China Aid Reports* are so comprehensive that they include every arrest based upon religious grounds that occur in China. In fact, if, as the authors state in the preamble to the 2012 *China Aid Report,* this report is only the tip of the iceberg, it is unreasonable and incorrect for the RPD to make a negative credibility finding based upon the absence of a report when the majority of such incidents are not reported.

Bao v. Canada (Citizenship and Immigration), 2015 FC 606 at paras 18 and 20. It was unreasonable for the Board to doubt the applicant's story simply because it had not been reported by the China Aid Association. There is no reason to expect that an activist organization has the ability to report every single incident that falls within its area of interest.

[230] *Mahmud v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8019 (FC), at para 11. The Court concluded that the CRDD erred in its decision with regard to credibility because the CRDD found the letters submitted by the applicant to be contradictory of the applicant's evidence, not for what they say, but for what they do not say. The Court held that to follow established authority, the letters must be considered for what they do say. On their face they support the applicant's evidence, and do not provide evidence contradicting that evidence.

Magonza v. Canada (Citizenship and Immigration), 2019 FC 14, at para 49

> [T]he officer…fell into the common trap of discounting evidence for what it does not say. When witnesses are asked to provide a letter or an affidavit to be filed in evidence, they will usually focus on the events that corroborate the applicant's claim of persecution, not on what they did afterwards. What this Court has repeatedly said is that such statements should be assessed on the basis of what they contain (*Sitnikova,* at paras 22–24; *Arachchilage v Canada (Citizenship and Immigration)*, 2018 FC 994, at para 36; *González v Canada (Citizenship and Immigration)*, 2018 FC 1126). Perhaps the facts as stated in the letter or affidavit will raise additional questions in the mind of the decision-maker. That those questions remain unanswered – especially, as in this case, where there is no hearing – is not a reason to doubt or discount the information actually provided.

[231] *Belek v. Canada (Citizenship and Immigration)*, 2016 FC 205, at para 21.

In *Adeleye*, the Court notes that silence does not amount to a contradiction; at most it is simply a lack of corroboration.

> The prohibition on discounting evidence for what it does not say arises in the context of the assessment of credibility. It is impermissible to disbelieve one witness's evidence simply because another witness corroborated only part of that evidence and remained silent as to another part.... In such a situation, there is no contradiction affecting credibility. At most, the issue is simply a lack of corroboration. [reference to *Magonza* omitted] [232]

No piece of evidence should be dismissed simply because it is a single piece of the *totality* of evidence provided.[233] It is not appropriate to consider such evidence in isolation; rather one must consider the whole of the evidence purposively and contextually.

2.3.5. Lack of identity documents and other personal documents

The Federal Court established the following principles regarding the absence of identity documents and other personal documents.

- The onus rests on the claimant to establish their identity on a balance of probabilities[234] and failure to prove identity is fatal to a claim in and of itself. There is no need for the administrative decision-maker to pursue further consideration of the merits of the claim.[235]

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[232] *Adeleye v. Canada (Citizenship and Immigration)*, 2020 FC 640, at para 9.

[233] *Warsame v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 118, at para 18.

[234] *Hadi v. Canada (Citizenship and Immigration)*, 2018 FC 590, at para 15.

[235] In *Terganus v. Canada (Citizenship and Immigration)*, 2020 FC 903, at para 31. The Court writes at paragraphs 22 and 23:

> [22] The identity of a refugee protection claimant is a preliminary and fundamental issue, and failure to establish identity is fatal to a claim for refugee protection (*Daniel* at para 28; *Bah v Canada (Citizenship and Immigration)*, 2016 FC 373 [*Bah*] at para 7). As Justice Norris wrote in *Edobor*, "[i]t is incontrovertible that proof of identity is a prerequisite for a person claiming refugee protection"; in the absence of such proof, "there can be no sound basis for testing or verifying the claims of persecution or, indeed for determining the Applicant's true nationality" (*Edobor* at para 8, citing *Jin v Canada (Minister of Citizenship and Immigration)*, 2006 FC 126 at para 26).
>
> [23] A refugee claimant's identity, it should be recalled, remains the cornerstone of Canada's immigration system. Identity establishes the uniqueness of an individual. It is what sets a person apart and differentiates him or her from all others. Also, identity is the basis for issues such as admissibility to Canada, assessment of the need for protection, evaluation of potential threats to public safety, and the risks of a subject evading official examination by authorities (*Bah* at para 7, citing *Canada (Minister of Citizenship and Immigration) v Singh*, 2004 FC 1634 at para 38 and *Canada (Citizenship and Immigration) v X.*, 2010 FC 1095 at para 23).

See also: *Omaboe v. Canada (Citizenship and Immigration)*, 2019 FC 1135, at para 14:

> Proof of identity is an essential requirement for a person claiming refugee protection. Without this, there can be "no sound basis for testing or verifying the claims of persecution or, indeed

- Therefore, the claimant must come to the hearing with all of the evidence that they are able to offer and believe is necessary to establish the claim.[236]

- "Identity" refers to the personal identity of the refugee protection claimant (name, date of birth) as well as their national identity. The Court has held that although the terms "identity" and "national identity" are often used interchangeably, establishing national identity without having established personal identity is not sufficient in refugee determination proceedings.[237] Certain documents, such as a passport, make it possible to establish both the national identity and personal identity of a refugee protection claimant.

- Where applicable, the claimant should be advised that identity is an issue and that they need to present specific documents and other supporting corroborating evidence.[238]

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for determining the Applicant's true nationality"…. A failure to prove identity is fatal to a claim in and of itself. There is no need to examine the evidence or the claim any further…. [citation omitted]

[236] Section 106 of the *Immigration and Refugee Protection Act* (IRPA):

The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain it.

Rule 11 of the *Refugee Protection Division Rules*:

The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.

[237] *Warsame v. Canada (Citizenship and Immigration)*, 2016 FC 596, at paras 39–40: "One is hard pressed to assess risk if the identity and the personal history of an applicant cannot be established. The mere fact that someone may hail from Somalia is relevant but will not suffice…."

See also *Hadi v. Canada (Citizenship and Immigration)*, 2018 FC 590, where the Court concluded, at para 43, that although the RPD erred in its assessment of the applicant's nationality and tribe, the RPD's finding that the applicant had not established her personal identity was reasonable.

See also *Terganus v. Canada (Citizenship and Immigration)*, 2020 FC 903, at paras 11, 22, 23 and 36, where the Court upheld the RAD's decision confirming the RPD's rejection of Ms. Terganus's claim on the grounds that she had not established her personal identity, although national identity was not at issue.

[238] The claimant's identity is always an issue at section 96 and 97 hearings.

In *Behary v. Canada (Citizenship and Immigration)*, 2015 FC 794, at paras 17–18, the Court concluded that there was no merit to the Applicant's submission that the RPD was obliged to provide him with notice that his identity was the primary issue and, specifically, that it had concerns with his submitted identity documents. In addition, this would have been known to his counsel. The communication from the RPD to the applicant's counsel had asked that she provide any and all documents to corroborate the claimant's identity as a national of Iran, as well as other matters.

See also *Katsiashvili v. Canada (Citizenship and Immigration)*, 2016 FC 622, at para 24, where the Court stated that the Applicant's counsel would have known that identity is always an issue in refugee determinations and also that if the Applicant was unable to satisfy the RPD as to his identity then it was not compelled to consider his case on the merits …. Therefore, it was reasonable for the RPD to infer that the Applicant would have known of the importance of identity and of the proper documentation in establishing identity. [citations omitted]

- The panel should take into account in its decision any explanation given by the claimant for why corroborative evidence was not provided and the efforts made to obtain such evidence. The panel should also provide reasons for its decision not to accept the explanations offered by the claimant as being reasonable.[239]

  What is "reasonable" (a "reasonable explanation" or "reasonable steps") will depend on the circumstances of the case. For example, it may be unreasonable to expect a claimant to obtain documents from abroad when the claimant has no control over this process[240] or due to difficulties inherent in the administration of the claimant's country of citizenship.[241] It may be unreasonable, or even implausible, for a claimant not to have brought certain documents with them or not to have made efforts to obtain the

Tesfagaber v. Canada (Citizenship and Immigration), 2018 FC 988, at para 27, takes the same position.

In *Estimable v. Canada (Citizenship and Immigration)*, 2020 FC 541, at paras 28 and 30–33, the Minister provided his Notice to Intervene in the applicants' claim 10 months before the RPD hearing, clearly stating that it is based on the fact that "the claimants do not have acceptable identity documents and cannot reasonably explain why they have not taken the reasonable steps to obtain them". At the very end of the hearing, counsel for the applicants asked the RPD to adjourn the hearing to allow her to obtain sworn statements from the applicants' family members attesting to their identity. The RPD denied this request. The applicants argued that this refusal denied them the right to adequately pursue their rights. The Court disagreed: "The applicants were entitled to all relevant information and they received it well before appearing before the RPD."

[239] See section *2.3.3 Corroborating evidence*, which highlights the importance of considering gender and other factors that could influence the claimant's ability to obtain documentary evidence.

[240] For example, in *Triana Aguirre v. Canada (Citizenship and Immigration)*, 2008 FC 571, at para 23. The friends they contacted to obtain documents declined to get involved because of the trouble they could get into. The Court found it surprising that the Board did not consider the principal applicant's self-isolation, the alienation from family, or the disconnect from friends in relation to the non-support victims of domestic violence receive from both officialdom and Mexican society.

Buwu v. Canada (Citizenship and Immigration), 2013 FC 850, at para 47. The applicant's credibility is further questioned because of her failure to file letters or affidavits from "any former partners." She testified that she only had one real relationship, but she had lost touch with the female involved. The RPD said it understood. The Court noted that an explanation that was understandable at the hearing became support for a negative credibility finding in the reasons. The Court found the whole decision unfair, unsafe and unreasonable.

[241] *Nur v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1444, at paras 35 and 37, the Court found the RAD's treatment of some of the evidence to be unreasonable, because the RAD appears to ignore the Applicant's testimony as to the many problems he either did or would encounter in trying to obtain corroborating evidence of his identity from Somalia, problems substantiated in the country information.

In *Anto v. Canada (Citizenship and Immigration)*, 2017 FC 125, at para 22. Although the Court recognized that there may be circumstances under which a claimant is unable to establish identity, such as for reasons related to health, age, statelessness, difficulties encountered in a failed state or childhood trauma, there was no evidence of such circumstances in this case concerning a citizen of the DRC.

documents requested by the RPD.[242] The panel may draw a negative inference where the claimant fails to provide documents that they agreed to provide at the hearing.[243]

- The RPD or the RAD, once it has given notice of having specialized knowledge and has given the claimant an opportunity to respond, can rely on its specialized knowledge of the documentation from a particular country or the fact that claimants coming from a particular country normally produce certain documents.[244]

- It may or may not be reasonable, depending on the circumstances of the case, for the RPD to conclude that a refugee protection claimant should have obtained identity documents from their country's diplomatic officials in Canada.[245]

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[242] *Olaya Yauce v. Canada (Citizenship and Immigration)*, 2018 FC 784, at paras 18 and 29. The Applicant was forewarned that identity was an issue and that he should bring identity documents to the hearing. It was open to the RPD to assess the Applicant's explanation for not seeking a replacement of his passport and to reject it on the basis that it lacked credibility. Near the end of the hearing, the Applicant's counsel asked whether the RPD would like to hear from the Applicant's friend on the issue of identity. The RPD declined, indicating that, while such testimony would usually be allowed in cases of countries where there is a problem in getting documentation, Peru was not one of those countries. The RPD found that if the Applicant had wanted to prove his identity through alternative means, such as through the oral testimony of a witness, he should have disclosed the witness information in advance. In the absence of any information regarding the relevance and the probative value of the proposed testimony, it was reasonably open to the RPD to refuse the testimony of the witness.

Janvier v. Canada (Citizenship and Immigration), 2020 FC 142, at paras 10 and 31. The RAD determined that Mr. Janvier's credibility was undermined by two main factors: (1) his failure to provide documentary evidence about his employment, which the RPD specifically asked him to submit before the hearing; and (2) his failure to provide the evidence necessary to corroborate the allegations at the heart of his story. The entire risk of persecution he claimed arose from his activities with his employer, with whom he remained in contact. His inability to obtain the work-related documents requested by the RPD is incomprehensible. In the absence of any explanation for the failure to provide a company document corroborating his testimony about events at his workplace attributable to his work, it was not unreasonable for the RAD to conclude that his credibility was undermined.

[243] *Daniel v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15977 (FC), at paras 6–9. At the conclusion of the hearing, the applicant was given two weeks within which to submit three documents to the CRDD, two regarding her witness's refugee claim and one letter from a Jehovah's Witnesses congregation to confirm her attendance and affiliation with that congregation. This letter was not submitted by the applicant within the agreed upon time or at any time afterward. The CRDD rejected her claim, concluding that the applicant had failed to provide sufficient evidence in support of her claim based on her affiliation with the Jehovah's Witnesses religion.

[244] *I.P.P. v. Canada (Citizenship and Immigration)*, 2018 FC 123, at paras 217 to 219. The member relied on his specialized knowledge to impugn the applicants' evidence that they could not locate media reports concerning [the Gang] or obtain certain medical reports from Mexico. The Court, citing *Razburgaj*, stated that it was not improper for the member to do so.

Razburgaj v. Canada (Citizenship and Immigration), 2014 FC 151, at paras 19–20. It was not improper for the member to rely on his knowledge of gang violence and the availability of medical documents.

[245] *Estimable v. Canada (Citizenship and Immigration)*, 2020 FC 541, at para 22. The female applicant never contacted the Haitian embassy to obtain any document whatsoever, even though she alleged no fear of the Haitian state. [emphasis added]

- The Federal Court of Appeal has held that the fact that a claimant destroyed or disposed of *false* travel documents en route to Canada is not a satisfactory basis on which to challenge a claimant's credibility, as this is a peripheral matter of limited value to the determination of general credibility.[246] However, in other decisions, the Trial Division has held that the Board was correct in attaching importance to this

However, in *Mishel v. Canada (Citizenship and Immigration)*, 2015 FC 226, at paras 30–31, the Court stated, in *obiter*, that it is problematic to expect an applicant to request identity documentation from a consulate or embassy of the country from which he is seeking protection.

[246] *Rasheed v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 587, at para 18:

> Where a claimant travels on false documents, destroys travel documents or lies about them upon arrival following an agent's instructions, it has been held to be peripheral and of very limited value as a determination of general credibility. First, it is not uncommon for those who are fleeing from persecution not to have regular travel documents and, as a result of their fears and vulnerability, simply to act in accordance with the instructions of the agent who organized their escape. Second, whether a person has told the truth about his or her travel documents has little direct bearing on whether the person is indeed a refugee (*Attakora v. Canada (Minister of Employment and Immigration*), [1989] F.C.J. n°444 (C.A) (QL); and *Takhar v. Canada (Minister of Citizenship and Immigration*), [1999] F.C.J. n° 240, at para 14 (F.C.T.D.) (QL)).

See also *Chen v. Canada (Citizenship and Immigration)*, 2019 FC 162, at paras 14 and 31–32. The member concluded that the failure to provide corroborating travel documents, without a reasonable explanation, in addition to other credibility concerns, impugns the claimant's overall credibility. The applicant destroyed his travel documents on route on the instructions of the smugglers who facilitated his travel. Justice Norris found that the member erred in relying on *Elazi* to support that an adverse finding could be drawn as to the applicant's general credibility based on his failure to provide travel documents to corroborate the account of the route taken from China to Canada, which was irrelevant to why he was claiming protection in Canada.

matter.[247] The destruction of *genuine* documents appears to be a relevant consideration[248].

- Even if the required documents are not provided and the claimant does not offer a satisfactory explanation for not doing so or make reasonable efforts to obtain them, the panel should nevertheless assess the other evidence, particularly if it may corroborate the claimant's story.[249]

- A lack of relevant documents may lead to a finding that that the claimant has not discharged the burden of establishing their identity and other elements of the claim. Such a finding is generally made after considering other factors relating to credibility.[250] Where a claimant's story has been found to be implausible or otherwise

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[247] In *Elazi v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14891 (FC), at para 17, the Court states:

> [I]t is entirely reasonable for the Refugee Division to attach great importance to a claimant's passport and his air ticket. In my opinion, these documents are essential to establish the claimant's identity and his journey to come to Canada. Unless it can be assumed that a refugee status claimant is actually a refugee, it seems unreasonable to me to ignore the loss of these documents without a valid explanation. In my view, it is too easy for a claimant to simply state that he has lost these documents or the facilitator has taken them. If the Refugee Division insists on these documents being produced, the facilitators may have to change their methods.

Matanga v. Canada (Minister of Citizenship and Immigration), 2003 FC 1410, at para 4: Citing *Elazi* and section 106 of the IRPA, the Court indicated that it is essential that claimants be able to produce acceptable identification documents to establish their identity and their route to Canada.

Toora v. Canada (Minister of Citizenship and Immigration), 2006 FC 828, at para 45. The Court stated that "it is trite law that an applicant's failure to produce his passport and establish credibly the route he took to Canada is a factor that can affect his credibility."

Hui Li v. Canada (Minister of Citizenship and Immigration), 2007 FC 1030, at para 8. It was not patently unreasonable for the Board to draw a negative inference regarding Mr. Li's credibility, based upon the fact that he had no passport, plane ticket or boarding pass.

In Okafor v. Canada (Citizenship and Immigration), 2012 FC 99, at para 5, the applicant was unable to produce the false British passport on which he claims to have flown, his boarding pass or baggage tags, as they were all taken back by the facilitator. The Court stated that the member, who did not believe the applicant, rightly relied on *Elazi.*

[248] *Katsiashvili v. Canada (Citizenship and Immigration)*, 2016 FC 622, at para 26. The RPD placed no weight on the copy of the Applicant's passport page. Given that the Applicant failed to provide a reasonable explanation as to why he had destroyed his Georgian passport and had not taken any steps to have his expired passport sent to him, it was open to the RPD to afford no weight to the photocopy of the passport.

Wang v. Canada (Citizenship and Immigration), 2019 FC 216, at para 23. The RAD rejected Ms. Wang's explanation that she simply followed the smuggler's instructions in destroying her passport. The Court was of the opinion that the RAD could reasonably draw a negative inference regarding Ms. Wang's credibility.

[249] *Isakova v. Canada (Citizenship and Immigration)*, 2008 FC 149, at paras 17–19.

[250] *Abrha v. Canada (Citizenship and Immigration)*, 2020 FC 226, at paras 18-19. The conclusion that Ms. Abrha had not successfully established the national identity that she had built her refugee claim upon was supported by several shortcomings.

Singh v. Canada (Citizenship and Immigration), 2019 FC 1375, at para 22. The contradictions, inconsistencies and implausibilities highlighted by the RAD are supported by the evidence on record, and, particularly, it was reasonable for the RAD to conclude that there was insufficient evidence to prove the fact that Mr. Singh owned a taxi, a key element of his claim.

lacking in credibility, a lack of documentary corroboration, or a lack of effort to obtain the documentation, can be a valid consideration for the purpose of assessing credibility. The circumstances in which a document is provided[251] or the fact that the claimant provides documents selectively may be a basis for drawing an adverse credibility finding.[252]

2.3.6. Self-serving evidence

Justice Tremblay Lamer notes in *Ahmed*[253] that it is likely that any evidence submitted by a claimant will be beneficial to their case and could thus be characterized as "self-serving."

Therefore, the Court has repeatedly held that the dismissal of evidence produced by a claimant's family members or other relations on the sole grounds that this evidence is self-serving is a reviewable error.[254]

See section *2.3.3. Corroborating evidence*

[251] *Tameh v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1468, at para 40.

> In the present case, the Board drew a negative inference from the applicant's failure to produce a document he had in his possession. The letter was given "no weight" because the contents of the letter were inconsistent with the applicant's explanation of the source of the letter. Therefore, the Board's decision was not merely based on the fact that the letter failed to corroborate the applicant's claims, but on the fact that the substance of the letter was inconsistent with the applicant's explanation of the source of the letter. In my view, it was reasonable for the Board, in its assessment of the applicant's credibility, to have considered all the circumstances in which the letter was provided. Consequently, I am of the view that the Board did not err in drawing a negative inference with respect to the letter in question. [emphasis added]

[252] *Chowdhury v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 407, at para 5. The applicant had asked her mother to send over documents, but she only requested her deed of marriage and notice of divorce, and not the medical reports that would have substantiated the applicant's claim of physical abuse. It was reasonable for the Board to draw a negative inference from the lack of evidence to support her allegation.

Amarapala v. Canada (Minister of Citizenship and Immigration), 2004 FC 12, at para 11:

> …[T]he applicant provided documents about his father's and brother's involvement in the UNP, and the Board reasonably expected documents would be produced about the applicant's involvement with the UNP. The failure to produce documents one would normally expect is a relevant consideration in assessing and rejecting the credibility of the applicant.[emphasis added]

In the absence of indications of a lack of credibility other than the lack of corroboration, another possible finding would be the *insufficiency* of the evidence submitted.

[253] *Ahmed v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 226, at para 31.

[254] See *Aisowieren v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 305, at para 15:

> The RAD gave no weight to an affidavit of the husband supporting this claim. The RAD endorsed the RPD's reasoning that it should be given little weight because "it is from a non neutral source who has a vested interest in the outcome of the claims". This Court has repeatedly held that decision-makers such as the RAD act unreasonably if they reject the

However, Justice Annis seems to be of a different opinion in *Fadiga* and *Pathmaraj.*[255] In *Fadiga*, he concludes there is no error in giving reduced weight to the affidavit from the applicant's sister. In more general terms (at paragraph 15), he expresses his opinion that "partiality is usually the nub of the issue in terms of the reliability of evidence from family members." He agrees with Justice Zinn's observation at paragraph 27 of *Ferguson*[256] that "this sort of evidence requires corroboration if it is to have probative value."

Rahman[257] emphasizes that even if the question of self-interest has an impact on the assessment of credibility and the weight that the evidence is to be afforded, there are other factors to consider:

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evidence of family members for reasons such as this: see *Tabatadze v Canada (Citizenship and Immigration),* 2016 FC 24.

Tabatadze v. Canada (Citizenship and Immigration), 2016 FC 24, at paras 4–6:

> [4] While counsel canvassed a number of issues, in my view, the determinative issue is the RPD's blanket rejection of all affidavit evidence filed by the Applicant's family and relatives. The RPD gave this evidence "no weight", saying: "[d]ocuments signed by his family members are self-serving since they are from his family members who have interests in the outcome of the claimant's refugee claim in Canada and as a result, the panel gives no weight to these documents." This Court has repeatedly criticized the outright rejection of evidence provided by relatives and family members of an applicant or claimant because such evidence is self-serving: see *Kaburia v Canada (Citizenship and Immigration)*, 2002 FCT 516, at para 25; *Ahmed v Canada (Citizenship and Immigration)*, 2004 FC 226, at para 31; *Mata Diaz v Canada (Citizenship and Immigration)*, 2010 FC 319, at para 37; *Magyar v Canada (Citizenship and Immigration)*, 2015 FC 750, at para 44, and *Cruz Ugalde v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 458, at para 26, as examples. I repeat those criticisms here.
>
> [5] This Court stated one of the underlying reasons why this approach is unreasonable in *Varon v Canada (Citizenship and Immigration)*, 2015 FC 356 at para 56:
>
> > ...If evidence can be given "little evidentiary weight" [or no weight at all in the case at bar] because a witness has a vested interest in the outcome of a hearing then no refugee claim could ever succeed because all claimants who give evidence on their own behalf have a vested interest in the outcome of the hearing....
>
> [6] In addition, rejection of evidence from family and friends because it is self-serving or because the witnesses are interested in the outcome, is an unprincipled approach to potentially probative and relevant evidence. To allow a tribunal to reject otherwise relevant and probative evidence in this manner creates a tool that may be used at any time in any case against any claimant. It therefore defeats a primary task of such decision-makers which is to assess and weigh the evidence before them.

[255] *Fadiga v. Canada (Citizenship and Immigration)*, 2016 FC 1157, at para 14 and *Pathmaraj v. Canada (Citizenship and Immigration)*, 2016 FC 1273, at para 11.

[256] *Ferguson v. Canada (Citizenship and Immigration)*, 2008 FC 1067, at para 27.

[257] *Rahman v. Canada (Citizenship and Immigration)*, 2019 FC 941 at paras 28–30. In this instance, the Officer's analysis was premised on the fact that the Letters were self-serving. There was no reason given for why the evidence was insufficient other than its authorship.

In the same vein, in *Rubaye v. Canada (Citizenship and Immigration)*, 2020 FC 665, at paras 20–22, the Officer assigned low probative value to the family members' letters because of their inherently self-serving nature. While recognizing that, as indicated in *Fadiga*, evidence of this nature may raise questions about its value, the Court considered the officer's explanation insufficient:

> Self-interest is not a binary concept. The importance of an author's potential self-interest or bias as against the credibility and weight to be afforded their evidence will vary with such considerations as: the role the author played in the events recounted - were they a witness or did the applicant merely recount the events in question to the author; the relationship of the author to the applicant - is the author a close family member but, as a witness, nonetheless able to speak independently to the events; the content of the witness statement - does it merely parrot the applicant's evidence or does it have a degree of independence based on the author's own vantage point, and what was that vantage point; any inconsistencies between their statements and other objective evidence in the case, etc.

The Federal Court[258] points out that in the vast majority of cases, the family and friends of the claimant are the main, if not the only first-hand witnesses of past incidents of persecution. Therefore, if their evidence is presumed to be unreliable from the outset, many real cases of persecution will be hard, if not impossible to prove.

The fact that a claimant asked for the evidence to support their refugee protection claim does not diminish its corroborative value.[259]

> Nonetheless, in the present matter the Officer did not explain why he did not accept this evidence, particularly the letters of the brother and brother-in-law, other than by referring to its provenance. Further explanation was required as to why the letters were given little or no weight. It is not enough that the Officer's reasons simply note the fact that the family members had an interest in assisting the Applicant as this does not substantively address why the evidence is being dismissed or minimized. [emphasis added]

[258] In *Cruz Ugalde v. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 458, at para 28, Justice de Montigny writes as follows:

> ... I do not believe it was reasonable for the Officer to award this evidence low probative value simply because it came from the Applicants' family members. Presumably, the Officer would have preferred letters written by individuals who had no ties to the Applicants and who were not invested in the Applicants' well-being. However, it is not reasonable to expect that anyone unconnected to the Applicants would have been able to furnish this kind of evidence regarding what had happened to the Applicants in Mexico. The Applicants' family members were the individuals who observed their alleged persecution, so these family members are the people best-positioned to give evidence relating to those events. In addition, since the family members were themselves targeted after the Applicants' departure, it is appropriate that they offer first-hand descriptions of the events that they experienced. Therefore, it was unreasonable of the Officer to distrust this evidence simply because it came from individuals connected to the Applicants. [emphasis added]

In *Duroshola v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 518, the PRRA officer did not assign significant weight to the affidavit from the Principal Applicant's sister because she was closely related to the Principal Applicant and, therefore, she lacked objectivity and independence. At paragraph 23, the Court concluded that the Officer's treatment of the sister's affidavit was unreasonable, considering that the only source of information regarding what happened after the Applicants left Nigeria was a family member, namely the sister.

[259] See *Kaburia v. Canada (Citizenship and Immigration)*, 2002 FCT 516, at para 25: "[S]olicitation does not *per se* invalidate the contents of the letter, nor does the fact that the letter was written by a relative."

See also *Magonza v. Canada (Citizenship and Immigration)*, 2019 FC 14, at paras 44 and 46. The Court ruled that the fact that the letters obtained from the applicant's family members as corroboration are dated from

2.3.7. Preferring documentary evidence to the claimant's testimony

The Board is entitled to rely on documentary evidence in preference to the testimony provided by a claimant,[260] even if it finds the claimant trustworthy and credible.[261] However, RPD members must provide clear and sufficient reasons for accepting documentary evidence over the testimony of the claimant, especially when it is uncontradicted.[262]

The Federal Court has upheld, in a number of decisions, the Board's reliance on documentary evidence originating from a variety of independent sources, none of which could be said to have any vested interest in the claim at hand (and were, to that extent, free of bias), in preference to the claimant's testimony.[263]

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after the claim was filed is not sufficient reason to consider these letters as "self-interested" evidence and to reject them. It is obvious that letters such as those filed in evidence in this case are written at the applicant's request, for the purpose of buttressing her case. It is unreasonable to discount them because they were not written immediately after the events.

[260] *Navaratnam v. Canada (Citizenship and Immigration)*, 2011 FC 856, at para 24.

[261] *Yu v. Canada (Citizenship and Immigration)*, 2010 FC 310, at paras 26–34.

[262] *Csoke v. Canada (Citizenship and Immigration)*, 2015 FC 1169, at para 17. The Court refers to *Okyere-Akosah v. Canada (Minister of Employment and Immigration)*, [1992] FCJ No. 411 (QL), at para 5, where the Federal Court of Appeal states, "… Since there is a presumption as to the truth of the appellant's testimony [citation omitted], the Board was bound to state in clear and unmistakable terms why it preferred the documentary evidence over the appellant's testimonial evidence…"

In *Kandasamy v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5686 (FC), Justice Reed explains:

> The danger in preferring documentary evidence over an applicant's direct evidence, is that documentary evidence is usually general in nature. An applicant's recitation of what occurred to him, or her, is particular and personal. Thus, without some clear explanation as to why the general is preferred over the particular one may doubt a conclusion that is based on a preference for the former over the latter. [emphasis added]

Chavarria v. Canada (Citizenship and Immigration), 2005 FC 1166, at para 31:

> The Board also stated that if there was a conflict between the evidence of the applicant and the documentary evidence, the Board would prefer the documentary evidence because it came from reliable, independent sources which, unlike the applicant, have no interest in the outcome of the proceedings. The Board gave more weight to the documentary evidence without finding the applicant to not be credible. If this process was allowed, then an applicant would always have their claim denied when the documentary evidence conflicted with the testimony. There is no doubt that a board can prefer documentary evidence over the evidence of the applicant, but if it does so, it must give the reasons why it preferred the documentary evidence over that of the applicant. In my view, the Board made a reviewable error in this respect. [emphasis added]

[263] *Navaratnam v. Canada (Citizenship and Immigration)*, 2011 FC 856, at para 24: The Court held that it was open to the RPD, as a specialized Board, "to rely on the evidence that it considered most consistent with reality, and to prefer the documentary evidence from various objective sources to the testimony of the Applicant".

Yu v. Canada (Citizenship and Immigration), 2010 FC 310, at para 33. The RPD chose to prefer, over the claimant's evidence, independent documentary evidence from "a large number of different commentators … none of whom have a personal interest in the pursuit of an individual claim for protection".

This does not necessarily apply to information obtained from an interested party in response to a particular inquiry, as such evidence does not have the same "circumstantial guarantee of trustworthiness" as documentary evidence prepared by independent agencies that is published and circulated.[264]

2.3.8. Assessing documents

The Board is considered to have the necessary expertise to determine the authenticity of documents.[265]

The Federal Court has held that documents issued by foreign governments are presumed to be authentic unless evidence (external to the document itself) is produced to show otherwise or the Board is able to make a determination based on the contradictory evidence that calls the authenticity of the document into question.[266]

Where the Division is satisfied that one or more of a claimant's identity documents have been fraudulently obtained or are otherwise inauthentic, the presumption that the claimant's remaining identity documents are valid can no longer be maintained. Nevertheless, the Division is still required to at least consider or assess the authenticity and probative value

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He v. Canada (Citizenship and Immigration), 2011 FC 1199, at para 16. The RPD took into account documentary evidence from various sources. It acknowledged that church leaders had been targeted by the authorities in the past but that the applicant was simply a member of an underground church. The Court found that it was open to the RPD to place greater emphasis on the documentary evidence, given its concerns regarding the credibility of the applicant's uncorroborated testimony about the arrests of members of her church group.

[264] *Veres v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16449 (FC), at paras 14–19. The CRDD erred in asserting that it had no reason to doubt the report (which had been mentioned in an RIR prepared by the IRB's documentation centre and had been written by a party official in Bucharest whose rank and means of knowledge were unknown, making uncorroborated comments on local party officials in another centre), whereas the applicant had presented a local Romanian newspaper article contradicting this information and corroborating the name of the person who had allegedly signed his party membership card as that of the local president.

[265] *Bahati v. Canada (Citizenship and Immigration)*, 2018 FC 1071, at paras 16 and 20. The Court recognized that there is no obligation for the Board to send identity documents for authentication, although in this case it was unreasonable for the RPD not to have done so. The Court also noted that the jurisprudence confirms that the Board may avail itself of its documentation authentication expertise.

Obozuwa v. Canada (Citizenship and Immigration), 2019 FC 1007, at paras 29–30. While the Court agreed that the Board avails itself of documentation authentication expertise from time to time, this was not such a case given the plethora of other credibility issues, including the RPD's finding that the police report was inauthentic, having compared the report to accepted samples in the National Documentation Package.

[266] *Liu v. Canada (Citizenship and Immigration)*, 2020 FC 576, at paras 85–86.

of each of those documents, as well as any other supporting documents submitted by the claimant.[267]

In *Liu*,[268] the Court provides a non-exhaustive list of reasons for concluding, in the absence of a satisfactory explanation, that the presumption of document authenticity has been rebutted:

a) Discrepancies on the face of the document that one would not reasonably expect to find on a validly issued public document (e.g. spelling mistakes or formatting flaws);[269]

b) Alterations or modifications that appear on the face of the document;[270]

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[267] In *Denis v. Canada (Citizenship and Immigration)*, 2018 FC 1182, at para 47, the Court states:

> … [T]he RAD cannot reasonably ignore documents tendered by claimants to establish their identities; the RAD must conduct an independent assessment of each identity document in the record, even if other identity documents are held to be inauthentic (*Aytac v Canada (Citizenship and Immigration)*, 2016 FC 195, at paras 40-42; *Teweldebrhan v Canada (Citizenship and Immigration)*, 2015 FC 418, at paras 19-21). [emphasis added]

[268] *Liu v. Canada (Citizenship and Immigration)*, 2020 FC 576, at para 87.

[269] In *Adebayo v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 330, at para 34, the Court concluded that the errors in the newspaper articles went well beyond typographical and clerical errors. The RPD had the benefit of reviewing the quality of the original article and comparing it to other articles in the same newspaper. The RPD acknowledged that other articles contained some awkward language, but not to the extent of the article relied on by the applicants. The RPD also noted the odd border, which suggested that the article had been pasted into the newspaper.

In *Azenabor v. Canada (Citizenship and Immigration)*, 2020 FC 1160, at para 31, the Court made a distinction regarding the type of typographical error, for example a clerical error in the body of a document versus material errors in the printed portions of what is contended to be an official identity card. The Court gave the example of a typographical error appearing in the paragraph of its decision and a misspelling of the words "Federal Court" in the Court's letterhead. While either might be possible, the latter might reasonably raise greater concerns about the genuineness of a document purporting to be a judgment of the Court. In that case, the RAD's concerns on these issues were not sufficient by themselves to find an affidavit to be non-genuine, but they were reasonable.

In other decisions, however, the Court has concluded that spelling and grammatical errors could not ground a finding of inauthenticity: Citing *Ali* in *Muwenda v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 502, at para 13, the Court found that it was unreasonable to focus on superficial errors in grammar or spelling to discredit a medical report.

Oranye v. Canada (Citizenship and Immigration), 2018 FC 390, at paras 22–25.

Mohamud v. Canada (Citizenship and Immigration), 2018 FC 170, at paras 6–7.

Ali v. Canada (Citizenship and Immigration), 2015 FC 814, at para 31. Justice Zinn held :

> The Member unreasonably focused on superficial errors in grammar and spelling to discredit documents. … In the court's assessment, minor typographical errors of this nature, whether found in a Pakistani medical report, a judgment of the Federal Court, or indeed reasons of a Member of the RPD, cannot be reasonably used to suggest that the document may be fraudulent, as was done in this case.

[270] *Keqaj v. Canada (Citizenship and Immigration)*, 2020 FC 563, at para 44:

> The forensic report clearly stated there were alterations to the documents that were examined. The report included graphic representations pinpointing those alterations and additions. The Board was entitled to take note of and give no weight to documents found to contain alterations.

c) Inconsistencies with standard templates for the type of document in question;[271]

d) Other credible or trustworthy evidence that is inconsistent with the contents of the document in question (e.g. discrepancies between the claimant's testimony and the documentary evidence as to how the claimant obtained the document);[272]

Where an alteration appears on the face of the evidence, the Board is entitled to give no weight to the document and need not seek further expertise before doing so: *Diarra v. Canada (Citizenship and Immigration)*, 2014 FC 123, at para. 24; *Saleem v. Canada (Citizenship and Immigration)*, 2008 FC 389, at para. 37.

In *Diarra v. Canada (Citizenship and Immigration)*, 2014 FC 123, at para 24, Justice Shore cites *Su v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 743, at para 12: "Forensic examination of a document that results in an 'inconclusive' finding (particularly when specific problems with the document are identified) does not establish the authenticity of the document." [emphasis in original]

[271] *Ahmedin v. Canada (Citizenship and Immigration)*, 2018 FC 1127, at para 48. The RPD had identified material inconsistencies in format and content between the applicant's birth certificate and the sample Eritrean birth certificates contained in the NDP for Eritrea.

Gong v. Canada (Citizenship and Immigration), 2020 FC 163, at para 22. In the RAD's view, the structure and format of the summons were inconsistent with the NDP sample, and the NDP indicated that there had been no changes in this regard since 2003.

Zhou v. Canada (Citizenship and Immigration), 2018 FC 182, at paras 8–9. It was reasonable for the RAD to base its findings on objective country information to the effect that the form of summonses had not changed since 2003 and was meant to apply uniformly across China.

Obozuwa v. Canada (Citizenship and Immigration), 2019 FC 1007, at para 29. The RAD had found the police report inauthentic after comparing it to accepted samples in the NDP for Nigeria.

But, see *Liang v. Canada (Citizenship and Immigration)*, 2019 FC 58, at paras 19–21, where the Court found that it was unreasonable for the RPD to conclude that the summons produced by the applicant was fraudulent because of the misplacement of one Chinese character on the document without making any assessment of the whole of the document, particularly as to whether this character goes to the form or the substance of the summons.

See also *Karim v. Canada (Citizenship and Immigration)*, 2020 FC 566, at paras 34 and 35, where the Court held that the applicant's explanation that an organization's letterhead may have changed over a five-year period was reasonable.

In *Ma v. Canada (Citizenship and Immigration)*, 2018 FC 163, at paras 22–24, the 2013 documentary evidence showed that the sample summons had not been updated since 2003. There was no evidence relating to the period after 2013 and the date of the RAD decision. The small differences may have been attributable to changes made during the intervening time. Moreover, the differences were not material. They primarily related to formatting and spacing, and not substantive content.

[272] *Hassan v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 459, at para 28. The RAD had reasonably relied on the country documentation to conclude that the applicant's passport was not genuine, particularly given that attendance in Somalia would have been required to obtain it, whereas the applicant claimed to have obtained it while in the US.

Kagere v. Canada (Citizenship and Immigration), 2019 FC 910, at paras 18–20. Given the circumstances in which the applicant had obtained her passport (she had allegedly given two photographs, but no photo identification and not her birth certificate, to a woman who had filled out her passport form), how the CBSA found an identity card issued under the applicant's name that did not match her facial appearance and date of birth, as well as the ease of obtaining identity documents through fraud in Uganda, there were valid reasons to doubt the genuineness of the applicant's passport and hence the applicant's identity.

See also *Estimable v. Canada (Citizenship and Immigration)*, 2020 FC 541, at paras 17–20.

e) Doubts about the credibility or trustworthiness of other evidence that says the same thing as the document whose genuineness is in issue (e.g. the testimony of a party, finding that documents produced in support of said document are not genuine).[273]

A finding of inauthenticity may be based on one or more considerations.

Where there is sufficient evidence to cast doubt on a document's authenticity, whether because of an irregularity on its face or the questionable circumstances in which it was obtained or provided, it may be assigned little (or no) weight, without expert verification or where such verification is inconclusive.[274] This arises from the general principle whereby the

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[273] *Digaf v. Canada (Citizenship and Immigration)*, 2019 FC 1255, at para 43. In the Court's view, "the fact that the ID card and birth certificate were not reliable identity documents was properly the foundation of the RAD's refusal to accept the passports as proof of the Applicants' identities."

In *Khan v. Canada (Citizenship and Immigration)*, 2020 FC 834, at para 7, the applicant's new passport was based on information from an altered identity document.

Festus v. Canada (Citizenship and Immigration), 2017 FC 424, at para 10. The RAD reasonably made negative credibility findings because of the applicant's failure to explain how the affidavit and birth attestation, issued in March 2012, could have been used to obtain a driver's license issued a month earlier. The former were required for the latter.

[274] In *Culinescu v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5539 (FC), the Court held that the Board has no duty to have the authenticity of doubtful documents verified.

Also, in *Allouche v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15152 (FC), at para 4, the Court found that the CRDD's refusal to have an assessment made of certain documents was not unreasonable, especially since the panel was under no legal obligation to do so.

In *Riveros v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1009, the Board did not err in concluding that the plaintiff's service record was not genuine because the photograph in the document was recent even though the document had been issued 28 years before.

In *Jin v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 126, at paras 19–20, the Court wrote:

> While it is correct that the Board is not itself an expert in the field of forensic analysis, it also has no duty to submit suspect documents for expert assessment provided that there is sufficient evidence before it to cast doubt upon their authenticity…
>
> Here, however, there was ample evidence before the Board to support its decision to reject the Applicant's identity documents as unreliable and, hence, the Board did not err in declining to seek further expert evidence on the issue. [emphasis added]

With respect to the assessment of photographs, in *Liu v. Canada (Citizenship and Immigration)*, 2012 FC 377, in which the applicant maintained that the RPD ought to have engaged an expert to provide an opinion on identity instead of determining on its own that the applicant was not the individual in the identity card, the Court rejected this argument. Citing seven supporting decisions, it wrote, at para 10:

> The first point raised by the Applicant can be disposed of very quickly as the case law firmly establishes that the RPD is empowered to make a finding that an individual is – or is not – the person in the photograph in a piece of identity documentation filed by a claimant and need not have resort to expert testimony before making such a finding [citations omitted]. Thus, it was not unreasonable for the Board to have made the determination in question concerning the Applicant's identity without expert evidence.

More recently, the Court confirmed its position concerning photographs. See *Olaya Yauce v. Canada (Citizenship and Immigration)*, 2018 FC 784, at paras 8–9.

Keqaj v. Canada (Citizenship and Immigration), 2020 FC 563, at paras 35–45. The RCMP forensically examined four documents. Its forensic report raised issues with each one of the documents but found their authenticity was "inconclusive". After examining the evidence and forensic reports, the RAD concluded that, on a balance of probabilities, the documents were fraudulent. The applicant argued that it was inherently

RPD does not have an obligation to have identification or other documents reviewed by experts.[275] That said, it may, and may have to, do so in certain circumstances.[276]

According to the Court, without evidence that specific security features are required, a lack of verifiable security features is not a reasonable basis to rebut the presumption that a foreign-issued document is valid.[277] It is also to be noted that the Court has previously held that official stamps do constitute security features for the purposes of evaluating authenticity.[278]

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unreasonable to treat as conclusive a document that has been assessed by a forensic expert and determined not to be so. The Court held that the Board is entitled to take note of and give no weight to documents it has found to contain alterations.

[275] In *Jacques v. Canada (Citizenship and Immigration)*, 2010 FC 423, at para 14, the Court wrote:

> It is clear that the Board does not have an obligation to have documents reviewed by experts before concluding that they are fraudulent… However, there must be some evidence before the Board on which to base a finding that a document is not genuine, unless the problem is apparent on the document's face… [citations omitted]

[276] In *Agyemang v. Canada (Citizenship and Immigration)*, 2016 FC 265, at para 14, Justice Annis wrote:

> It is obviously not for the Court to substitute its opinion for that of the RAD, but nevertheless I am concerned that the implication that the Applicant tendered a fraudulent document is serious enough that the appropriate response may have been to require proper authentication, as any opinion based on the document itself would normally require the assessment of an expert in document verification. [emphasis added]

Bahati v. Canada (Citizenship and Immigration), 2018 FC 1071, at paras 16–19. While the Court recognized that there is no obligation for the Board to send identity documents for authentication, other factors in the case signalled that it was unreasonable on its part not to have sent the electoral card for verification. This card is one of the few Democratic Republic of the Congo identity documents, and the RPD had perceived only minor imperfections, such as words in a different font from that used on a sample electoral card.

In *Mohamed v. Canada (Citizenship and Immigration)*, 2019 FC 1537, at para 82, Justice Annis made a distinction between, on the one hand, the physical alterations that may be made to a document, where, unless the alteration is plain to see, the document should be referred to an expert, and, on the other hand, the irreconcilable contents of a document in relation to the applicant's other statements, which require no expertise to consider :

> The further cases cited by the Applicant, including that rendered by me in *Agyemang* and applied in *Bahati* [citations omitted], all deal with physical alterations where, unless the alteration is plain to see, the document should normally be referred to experts in fraudulent documentation. In any event as indicated, the issue is not one of physically forged cards, which are often referred to experts for determination, but the irreconcilable contents of the Applicant's card which requires no expertise to consider.

[277] *Denis v. Canada (Citizenship and Immigration)*, 2018 FC 1182, at para 41.

Duroshola v. Canada (Immigration, Refugees and Citizenship), 2017 FC 518, at para 24.

In *Chen v. Canada (Citizenship and Immigration)*, 2015 FC 1133, at paras 10–11, Justice Zinn writes:

> With respect to the issue of security features, there is no evidence in the record, nor does the RPD cite any, that indicates that the document should have any additional security features. From this I infer that the RPD surmised that the document could be more easily forged than one with greater security features. However, even if true, that is not evidence that this document was fraudulent.

See also *Bahati v. Canada (Citizenship and Immigration)*, 2018 FC 1071, at paras 21–22.

[278] *Dai v. Canada (Citizenship and Immigration)*, 2015 FC 723, at para 27.

Evidence of widespread availability of fraudulent documents in a country is not, by itself, sufficient to reject foreign documents as forgeries,[279] but may be relevant if there are other reasons to question the documents or a claimant's credibility.[280]

Lastly, if a panel is not satisfied as to the authenticity of a document, then it should state so explicitly, provide grounds and give the document no weight whatsoever. Decision-makers should not cast doubt on the authenticity of a document, and then endeavour to hedge their bets by giving the document "little weight."[281]

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[279] *Lin v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 157, at paras 53–54.

Chen v. Canada (Citizenship and Immigration), 2015 FC 1133, at paras 12–13.

Reis v. Canada (Immigration, Refugees and Citizenship), 2018 FC 1289, at para 26:

> [T]he mere fact fraudulent documents are widely available in a country (as indicated in the NDP) is not enough to rebut the presumption of validity of documents issued by foreign authorities. The decision-maker must provide reasons to rebut the presumption.

[280] *Gong v. Canada (Citizenship and Immigration)*, 2020 FC 163, at para 44: Given that the easy availability of fraudulent documents was not treated as an independent ground for finding a booklet to be fabricated but was instead simply used to conclude that it did not dispel the doubts otherwise raised about the genuineness of the document, the RAD's determination was reasonable.

Azenabor v. Canada (Citizenship and Immigration), 2020 FC 1160, at para 34:

> Unlike the situation in *Oranye*, I do not read the RAD's decision in this matter as being "influenced by mere suspicion from the reputation of a given country." *Oranye*, at para. 29. Nor did the RAD rely on the availability of fraudulent documents from Nigeria, by itself, as a basis for its conclusion: Cheema at para. 7. Rather, the RAD made brief, albeit repeated, reference to the prevalence of fraudulent documents in Nigeria after first assessing the documents on their face and identifying its concerns as to why the specific documents appeared to be fraudulent. Reviewing the decision as a whole, I am satisfied that the RAD's reference to and reliance on the RIR regarding the availability of false documents in Nigeria did not render its credibility findings unreasonable. [emphasis added]

Dai v. Canada (Citizenship and Immigration), 2015 FC 723, at para 30:

> The Member, when weighing the probative value of the driver's licence, the certificates, the electric bill and the Summons, also considered the fact that the Principal Applicant had submitted a fraudulent document and, in the case of the latter documents, the ready availability of fraudulent documents in China. However, these were not the sole bases upon which the documents were assessed and weighed.

Hodanu v. Canada (Citizenship and Immigration), 2011 FC 474, at paras 19–20:

> Therefore, it would be improper for the Board to give little weight to identity documents solely because there is general evidence that shows that these types of documents are frequently forged. The Board must have something else to base its conclusions on, which the Board in this case did: there were discrepancies arising on the face of the identity documents and the inconsistencies in the applicant's evidence with respect to explanations offered in response to the inconsistencies. [emphasis added]

[281] *Osikoya v. Canada (Citizenship and Immigration)*, 2018 FC 720, at para 53:

> Justice Anne Mactavish has observed that "[i]f a decision-maker is not convinced of the authenticity of a document, then they should say so and give the document no weight whatsoever. Decision-makers should not cast aspersions on the authenticity of a document, and then endeavour to hedge their bets by giving the document 'little weight'" (*Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20). Building on this,

Where there is conflicting evidence, the RPD is entitled to choose the documentary evidence that it prefers, provided that it addresses the contradictory documents and explains its preference for the evidence on which it relies.[282]

A claimant's overall lack of credibility may affect the weight given to documentary evidence (including medical evidence) and, in appropriate circumstances, may allow the Board to discount that evidence, unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim.[283] Conversely,

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> Justice Shirzad Ahmed stated recently: "Fact finders must have the courage to find facts. They cannot mask authenticity findings by simply deeming evidence to be of 'little probative value'" (*Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 27). Respectfully, I agree with my colleagues.

See also *Liu v. Canada (Citizenship and Immigration)*, 2020 FC 576, at para 91, where Justice Norris states, "Finally, where a foreign public document is central to a claim and, if it is genuine, it would have high probative value, any doubts about its genuineness should be stated expressly rather than disguised as assessments of weight". [emphasis added, citations omitted]

[282] In *B381 v. Canada (Citizenship and Immigration)*, 2014 FC 608, at paras 50–52, the Court recognized that the Board is entitled to weigh the documentary evidence. However, the Board errs when it engages in a selective analysis of the documentary evidence, accepting evidence that supports its conclusions but ignoring relevant contradictory evidence without explanation. The more relevant the evidence, the more likely that failure to mention it will render the decision unreasonable. In this case, the Board did not explain why it gave greater weight to the attributed statement of the Sri Lankan High Commissioner, which is also not an independent source, than to the AI report.

[283] *Canada (Citizenship and Immigration) v. Sellan*, 2008 FCA 381, at para 3.

In *Vall v. Canada (Citizenship and Immigration)*, 2019 FC 1057, at para 34, Justice Gascon explains the significance of *Sellan*: This means that if there is independent and credible documentary evidence, a claim may be accepted even if the applicant is found not to be credible. It does not mean that a negative credibility finding cannot be made in the first place.

In *Geneus v. Canada (Citizenship and Immigration)*, 2019 FC 264, at para 10, Justice Bell writes:

> I consider the approach used to analyze the evidence, particularly the decision to disregard evidence that is clearly relevant, objective and untainted by any suggestion of fraud, to be illogical and unintelligible. A lower tribunal or court cannot shield itself from review in declaring a party not to be credible unless it has considered all the evidence, particularly when there is evidence supporting the credibility of that party. Moreover, the RPD disregarded this evidence because it had already established that the applicant was not credible. In my opinion, this turns the reasoning process on its head. It is not reasonable to conclude that someone is not credible and subsequently reject any and all relevant and reliable evidence obtained from independent third parties. The lack of reasonableness becomes even more evident when one considers that the disregarded evidence was independent and reliable and could have confirmed the party's credibility. [emphasis added]

In *Gaprindashvili v. Canada (Citizenship and Immigration)*, 2019 FC 583, at para 36, Justice Walker writes:

> I find that the RPD did not err in its treatment of the Applicant's supporting letters. The jurisprudence is clear that a valid negative credibility finding is sufficient to dispose of a claim in the absence of independent and credible evidence (*Sellan* at para. 3). In the cases cited by the Applicant, the evidence in question derived from independent sources (a police report, newspaper article, marriage certificate). The documentary evidence in this case is comprised in part of letters from the Applicant's family members…It is not independent and objective evidence…

Li v. Canada (Citizenship and Immigration), 2019 FC 307, at para 18. While true as a general proposition that a claimant's credibility may affect the weight given to the documentary evidence, adverse overall credibility

submitting a false or irregular document may have an impact on the weight assigned to other documents provided by the claimant (especially when they are interrelated) and on the overall credibility of a claimant[284] or the sufficiency of the evidence as a whole. Not every discrepancy in a document, however, will necessarily be material to the success of a claim.[285]

It is unreasonable to draw a negative credibility inference stemming from the use of fraudulent or irregularly obtained documents when their use was necessary to escape persecution.[286]

2.3.9. Medical and psychological reports

By its nature, an expert's testimony or report is an opinion based on facts reported to the expert by the claimant.[287] Experts are not usually, if ever, eyewitnesses to the experiences that led a person to claim refugee protection. Medical or psychological reports are sometimes presented to corroborate the claimant's allegations,[288] but psychological reports are primarily

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findings alone are not sufficient grounds for rejecting potentially corroborative evidence. Such evidence must be examined independently of concerns about the claimant's credibility before it can be rejected.

In *Mahamoud v. Canada (Citizenship and Immigration)*, 2014 FC 1232, the Court found the Board's decision unreasonable because the member had dismissed the claim on the basis of the applicant's testimony alone, "failing to consider, with an open mind, the police certificates and medical certificates" (at para 18).

However, in *Jele v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 24, the RPD had placed no weight on a warrant because it did not outweigh the RPD's other adverse credibility findings: "Put otherwise, this is a situation where the RPD examined the Applicant's testimony and determined, in light of the contradictions, inconsistencies and omissions and other concerns which it identified, no probative value should be afforded to this documentary evidence" (at para 48).

[284] *Gong v. Canada (Citizenship and Immigration)*, 2020 FC 163, at para 40: The RAD's determination that the summons is not genuine is in turn reasonably capable of supporting a negative finding about the applicants' credibility more generally given the centrality of that document to the applicants' own narrative. That being said, the finding that documents found to be false or irregular can have an effect on a claimant's overall credibility must be "cautiously approached".

[285] *Hohol v. Canada (Citizenship and Immigration)*, 2017 FC 870, at para 30. The RPD had found, on a balance of probabilities, that two documents submitted by the applicant were fraudulent: the police report and a letter from his grandmother. Consequently, it gave no weight to other documents submitted. A finding that one or more documents are fraudulent does not necessarily mean that all documents are fraudulent. It was unreasonable for the RPD to make a general finding of lack of credibility while ignoring or rejecting other, corroborative, important evidence fundamental to the applicant's position and risk.

[286] *Koffi v. Canada (Citizenship and Immigration)*, 2016 FC 4, at paras 41–44.

[287] *Ndoungo v. Canada (Citizenship and Immigration)*, 2019 FC 541, at para 26.

[288] For example, see *Syed v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15299 (FC), at paras 17–18. A counsellor with the equivalent of a Master of Arts degree in psychology prepared a report stating that she believed it was extremely difficult, almost impossible, for Mr. Syed to invent his narrative or misrepresent the truth. (The RPD found it very difficult to ascribe weight to these conclusions without understanding the methodology or the rigour of the examination used to reach them, given that there were several inconsistencies and implausibilities in the claimant's story.)

See also *Ameir v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 876, at para 27, where the Court refers to a medical report which was based, at least in part, on independent and objective testing. It says, "In

submitted to explain how the claimant's health conditions could influence their behaviour or ability to testify.[289] These factors must be taken into account.

An expert does not necessarily have to be a medical doctor, psychiatrist or psychologist to provide an opinion on a claimant's condition.[290] However, the RPD must be certain that the so-called expert submitting the evidence is qualified to do so and that their "opinion testimony" pertains to their particular area or areas of expertise. "Opinion evidence" that is beyond the scope of a witness's expertise may be given little, if any, weight.[291]

It is not for a medical expert to assess and determine a claimant's credibility; that is the function of the RPD.[292] Consequently, the RPD is not required to defer to the opinion of the

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such cases, expert reports may serve as corroborative evidence in determining a claimant's credibility and should be dealt with accordingly before being rejected." [emphasis added]

[289] *Warsame v. Canada (Immigration, Refugees and Immigration)*, 2019 FC 118, at para 32, the Court writes:

> Analogously here, the Member rejected the reports on the basis that they did not prove the Applicant's story; this was not their purpose. The reports should have alerted the Member to the Applicant's mental health conditions and the impact these conditions might have upon the Applicant's testimony. The Member's failure to appreciate the Applicant's mental health contextually was, in these circumstances, unreasonable. [emphasis added]

Yasun v. Canada (Citizenship and Immigration), 2019 FC 342, at para 17. The report was not put forward as evidence of the claimant's persecution in Turkey, but rather as evidence of a mental condition that could affect her manner of testifying. [emphasis added]

In *Mico v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 964, at para 49, Justice Russell writes:

> The main problem with the Decision, however, is the RPD's failure to grasp the significance of the psychological evidence or to explain why it was not taken into account when assessing the discrepancies in the Applicant's evidence and the explanations that the Applicant gave for those discrepancies. … Nowhere does the RPD address the issue of whether the symptoms of post-traumatic stress disorder described in the report could have impacted the Applicant's powers of recall and his ability to give evidence, which are highly material considerations for the RPD's negative credibility findings based upon inconsistencies and its rejection of the Applicant's explanation for those inconsistencies. In other words, the psychological report was not put forward as proof of persecution in Albania; its purpose was to alert the RPD to the Applicant's current mental condition and the impact this might have upon his testimony. [emphasis added]

[290] *Enam v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1117, at paras 28–29, the Court found that the RAD's decision to give little weight to the expert report on the claimant's psychological state was unreasonable given that the social worker was part of a regulated profession authorized to perform certain functions. In determining the scope of that expertise, the RPD should consider the expert's education, professional designations and any other relevant experience. Provincial legislation may provide that only certain professionals with specific professional designations are permitted to communicate a diagnosis of a disease or disorder to a patient.

[291] *Khan v. Canada (Immigration, Refugees and Citizenship)*, 2018 FC 309, at para 14. The RAD was entitled to consider that the psychotherapist's report merited little weight given that it was not authored by a licensed physician, psychologist or psychiatrist.

Momanyi v. Canada (Citizenship and Immigration), 2018 FC 431, at paras 25–26. The RAD pointed out that the nurse who conducted the memory test did not have any qualifications in cognitive impairments or learning disabilities. In light of these observations, the Court found that it was not unreasonable for the RAD to give no weight to her report.

[292] *Ameir v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 876, at para 27. The Board gave no weight to the psychologist's report or the medical report in establishing that the applicant suffered the harm

report's author, particularly as it concerns the claimant's credibility, which the panel must assess independently.

The author must provide only their expert opinion and not cross over into advocating for the claimant.[293] The question of determining whether the RAD erred in giving little weight to the psychologist's report was analyzed by Justice Brown in *Asif.*[294] He examined the reasons why the RAD gave little weight to the report, and then commented on each reason:

> A. ***It crossed the line separating expert opinion from advocacy***. In my view, while it is expected that expert reports will be supportive of the claim made by the person filing them, there is a line between providing a diagnosis and prognosis with appropriate support and open advocacy: *Egbesola* [reference omitted]. The determination of which side of the line an expert report falls on comes down to a matter of weighing the

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that he claimed. Dr. Devin's psychological report dealt with the applicant's symptoms resulting from the ill-treatment he had received allegedly at the hands of the Tanzanian authorities. Dr. Hirsz's report expressed his clinical opinion that the applicant had suffered an assault and that his scars were consistent with the allegations of trauma. The applicant argued that these reports related to his credibility and should have been considered by the Board in assessing his credibility. The Court stated that it is not for a medical expert to assess and determine a claimant's credibility; that is the function of the Board. It is open to the Board to afford no probative value to a medical report if that report is founded essentially on a claimant's story, which is disbelieved by the Board. The Board here, however, had rejected the two reports based solely on its finding that the applicant was generally not credible. Given that the Board had erred in its general credibility finding, it followed that its finding in respect to these reports was not sustainable. [emphasis added]

Iyere v. Canada (Citizenship and Immigration), 2018 FC 67, at para 49: "The RAD is entitled to scrutinize psychological reports and discount opinions on the issues that it or the RPD, as the decision-maker, should make...."

[293] As for example, in *Lumala v. Canada (Citizenship and Immigration)*, 2019 FC 775, at para 41. The authors of the psychological report strongly suggested that the claimant be granted refugee status and be permitted to remain in Canada.

In *Czesak v. Canada (Citizenship and Immigration)*, 2013 FC 1149, at paras 37–40, Justice Annis expressed reservations about psychological reports voicing opinions arguing in favour of the patient and that "propose to settle important issues to be decided by the tribunal." In this case, Dr. Koczorowska specifically opined on the issue of the applicant's removal to Poland, stating that she cannot return to Poland because her condition will deteriorate and: "Therefore I fully support her request to be granted permanent residence in Canada on humanitarian basis." (at para 33) [Court's emphasis]

Molefe v. Canada (Citizenship and Immigration), 2015 FC 317, at para 32. Justice Mosley was of the opinion that in his report, Dr. Devins did not simply give his expert opinion; he advocated for the claimant when he wrote:

> Ms Molefe's condition can improve with appropriate care and guaranteed freedom from her threat of removal. It is fortunate, therefore, that she is currently receiving ongoing counselling. This should not be interrupted. If refused permission to remain in Canada, her condition will deteriorate. As noted, it will be impossible for Ms Molefe to feel safe anywhere in Botswana.

In *Egbesola v. Canada (Citizenship and Immigration)*, 2016 FC 204, at paras 13–15, virtually identical language is found in Dr. Devins' report. Justice Zinn also found that the doctor became an advocate and the statement that the principal applicant will not feel safe anywhere in Nigeria has virtually no probative value.

Osinowo v. Canada (Citizenship and Immigration), 2018 FC 284, at para 16: The RAD considered the psychotherapist's report at length but "gave it little weight, concluding that its author was not properly credentialed to offer the diagnosis made and ultimately crossed the line into advocacy." [emphasis added]

[294] *Asif v. Canada (Citizenship and Immigration)*, 2016 FC 1323, at para 33.

evidence and assessing its bearing on the facts at hand. That is a matter for the RAD as part of its duty to assess the evidence. …

B. ***It made findings of credibility that should have been reserved for the panel***. In my view, credibility findings are well known to lie at the heartland of tribunals such as the RPD and the RAD. While I do not know the practice of the particular expert in issue, it is rare that such reports deal with an applicant's credibility at all, much less delve into the level of detail as was the case here. Not only does this report purport to assess the Applicant's credibility, it goes further and may appear to counsel the trier of fact on how to assess the Applicant's credibility when he appears before it. …

C. ***It had not been subjected to any form of validation***. In my view, this is not a stand-alone basis for assigning little weight to the report. If it were so, most, if not all, such reports would be given little weight. Therefore, I conclude this basis of attack is not reasonable.

D. ***It reached very serious conclusions regarding the Applicant's psychological health after only one interview***. We know the Applicant met the psychologist only once; we do not know for how long. The Court was told this psychologist usually meets with such clients for 2 or 3 hours. With respect, this again involves an assessment of the weight assigned to the report, which is for the RAD to reasonably determine. …

E. ***It spoke to the lack of available resources in Pakistan without providing any evidence of knowledge regarding treatment options in that country***. On the one hand, the psychologist said there were "no psychological or psychiatric treatment options for MDD and PTSD in Pakistan"; however, nothing suggests he had expertise in this respect. On the other hand, the Applicant argues that this comment was meant to indicate the Applicant would be untreatable should he return to Pakistan, without speaking to the state of mental health treatment in that country. On balance, my view is that this finding is reasonable.

It is open to a panel to find that opinion evidence is only as valid as the truth of the facts on which that opinion is based. The recounting of events to a psychologist or a psychiatrist does not make these events more credible.[295] Therefore, if a panel does not believe the underlying facts, it may discount a medical report or give it little weight in light of that finding.[296]

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[295] *Moya v. Canada (Citizenship and Immigration)*, 2016 FC 315, at para 57.

> Other jurisprudence has also cautioned that the recounting of events to a psychologist or a psychiatrist does not make these events more credible and that an expert report cannot confirm allegations of abuse. For example, the RAD referred to *Rokni* and *Danailov*, which note that opinion evidence is only as valid as the truth of the facts upon which it is based. The same caution was noted by Justice Phelan in *Saha*, at para 16: "It is within the RPD's mandate to discount psychological evidence when the doctor merely regurgitates what the patient says are the reasons for his stress and then reaches a medical conclusion that the patient suffers stress because of those reasons." [citations omitted]

[296] *Lawani v. Canada (Citizenship and Immigration)*, 2018 FC 924, at para 34. The RPD is entitled not to give evidentiary weight to assessments or reports based on underlying elements it found not to be credible.

The Board can decide what weight, if any, to give to a psychological report, but since it has no specialized expertise in psychological assessment, it cannot reject a psychologist's diagnosis.[297]

Where reports are based on clinical observations that can be drawn independently from a claimant's credibility,[298] such expert reports can serve as corroborative evidence in determining credibility and the RPD should use the evidence in its assessment of the claimant's credibility.[299]

The Federal Court has also held that where a professional opinion as to a claimant's psychological state and whether they are suffering from post-traumatic disorder is submitted,

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Nteta-Tshamala v. Canada (Citizenship and Immigration), 2019 FC 1191, at para 33. The RAD may ascribe little probative value to a psychological assessment when it has doubts regarding the existence of the facts underlying the claim for refugee protection or the applicant's credibility.

Ndoungo v. Canada (Citizenship and Immigration), 2019 FC 541, at para 26:

> The problem with this kind of evidence, whether from psychologists, anthropologists or specialists in other disciplines, is that it depends on the facts reported by the person concerned. If the facts are not found to be credible, as in this case, the expert's view, however competent and well-intentioned, is generally no more valuable.

[297] *Lozano Pulido v. Canada (Citizenship and Immigration)*, 2007 FC 209, at paras 27–28:

> Dr. Diaz is a qualified psychiatrist, who by the time that he prepared his report in December, 2005, had been treating Mr. Lozano for over a year. His report is crystal clear and unequivocal: Mr. Lozano suffered from a bipolar disorder. As a result, the Board's statement that it was possible that Mr. Lozano was bipolar exhibits a degree of scepticism on the part of the presiding member with respect to Mr. Lozano's mental state that was entirely unwarranted in the circumstances.
>
> In this regard, it bears noting that while members of the Refugee Protection Division have expertise in the adjudication of refugee claims, they are not qualified psychiatrists, and bring no specialized expertise to the question of the mental condition of refugee claimants.

[298] Examples of objective assessments: 1. The expert conducted objective, independent tests; and 2. The expert independently confirmed physical evidence (for example, scars) consistent with the allegations.

[299] *Sterling v. Canada (Citizenship and Immigration)*, 2016 FC 329, at para 10.

See *Ameir v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 876, at para 27: The Board gave no weight to the psychologist's report or the medical report in establishing that the applicant had suffered the harm that he claimed. Dr. Hirsz's medical report expressed his clinical opinion that the applicant had suffered an assault and that his scars were consistent with the history of trauma. While it is open to the Board to afford no probative value to a medical report if that report is founded essentially on a claimant's story which the Board disbelieves, reports may also be based on clinical observations that can be drawn independently of the claimant's credibility. Dr. Hirsz's medical report was based, at least in part, on independent and objective testing. In such cases, expert reports may serve as corroborative evidence in determining a claimant's credibility and should be dealt with accordingly before being rejected. [emphasis added]

Gunes v. Canada (Citizenship and Immigration), 2008 FC 664, at paras 31–33. The medical doctor who had observed signs of torture or physical abuse on the claimant's body concluded in his report that the claimant suffered from post-traumatic stress disorder. This diagnosis was confirmed by two other experts. The Court stated that it was "difficult to understand how a tribunal could ignore the logical and obvious cause of torture such as cuts and 'cigarette burn'."

Joseph v. Canada (Citizenship and Immigration), 2015 FC 393, at para 39. The Court stated that "a health expert's report based on a current examination of a patient's symptoms must be given more weight than a report based exclusively on a patient's own account of what happened."

this opinion cannot be rejected because the doctor could not specifically corroborate the incidents reported by the claimant.[300]

Reports from health care professionals are of most value to the extent that they contain healthcare-related evidence; they should not be rejected because they fail to name a claimant's assailant(s).[301]

A medical report cannot be rejected for the sole reason that it does not indicate that the only possible cause of the injuries in question is the one stated by the claimant. It is sufficient that the report find that the injuries in question are consistent with the cause specified by the claimant.[302]

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[300] *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 49:

> Only rarely will a mental health professional personally witness the events for which a patient seeks professional assistance. To suggest that applicants for relief … may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence.

Yahia v. Canada (Minister of Citizenship and Immigration), 2019 FC 84, at para 41. The Court pointed out that the RPD had not explained why it would expect a medical report to diagnose the cause of the claimant's injuries. There was no suggestion that the report's detailing of body bruises and facial injuries was not consistent with the claimant's evidence of his mistreatment in detention. At the very least, the RPD made the mistake of using what the report does not say to support its overall negative credibility finding, which is a reviewable error. [citation omitted]

[301] *Tabatadze v. Canada (Citizenship and Immigration)*, 2016 FC 24, at para 10:

> This medical report is criticized because it does not name the victim's assailant(s). This is a questionable basis on which to attack a medical report. This is so because when a medical report fails to identify an assailant (as here) it is criticized for incompleteness or inconsistency with the claimant's narrative. But where a medical report does identify the causes of harm to the claimant, it is subject to attack as based on hearsay despite it being both complete and consistent. The Supreme Court of Canada criticized this latter attack in *Kanthasamy* [citation omitted], concerning a health care professional's report that identified a source of harm to the claimant.

Arachchilage v. Canada (Citizenship and Immigration), 2017 FC 433, at paras 14 and 19–20. The RAD had concluded that the medical certificate had no probative value because it did not identify the person who assaulted the appellant or whether she had actually been sexually assaulted or was only *treated* for sexual assault. In addition to finding this conclusion to be beyond understanding, the Court stated the following concerning the information that, in the RAD's opinion, was missing from the medical certificate:

> [I]t is also unreasonable to expect that a medical report would go further to identify the perpetrator of an aggression or give other details on the aggression. The information about whether Mrs. Arachchilage was assaulted or who assaulted her could not have been witnessed by the physician. In *Talukder*, Madame Justice Heneghan noted that "the doctor did not witness the beating and there was no justification for diminishing the value of the note" because of the fact that he "did not mention that the injury was the result of a beating" (*Talukder*, at para 12). In *Ismayilov*, Madame Justice Mactavish similarly indicated that "[g]iven that it is unlikely that the treating physicians were first-hand witnesses to his mistreatment by the police, I question whether this [the fact that it does not indicate who was responsible for his injury] was a valid reason for rejecting the evidence, as any reference in the medical reports to the individuals responsible for the injuries would likely have been based on hearsay reports by Mr. Ismayilov himself" (*Ismayilov*, at para 10).

[302] *Ukleina v. Canada (Citizenship and Immigration)*, 2009 FC 1292, at paras 9–10:

The psychological report must be sufficient to explain the impact of a medical condition on the claimant's ability to testify (e.g., the connection between the cognitive errors referred to in the report and the contradictions or omissions).[303]

Members must explain how the diagnosis in the psychological report affected their assessment of the claimant's testimony (i.e., they must consider whether the report adequately accounts for poor recollection or lack of coherence).[304]

> [9] The first key element of Mrs. Ukleina's claim is that she was injured during a protest rally in November 2005. As noted by the Panel:
>
> > The claimant submitted in evidence a medical note to corroborate her alleged beating by police at the demonstration in November 2005. The panel notes that the medical note does not allude to the cause of injury to her head, scratches and wound to the right elbow and determines, on a balance of probabilities, that this note was manufactured in an attempt to embellish her claim. The panel places no weight on this evidence. [emphasis added]
>
> [10] On what basis did the Panel decide that a medical report from Azerbaijan ought to state the cause of the injury? There is no basis to assume that the injury occurred in the presence of the medical doctor. There could be any number of reasons why Mrs. Ukleina suffered the injuries she did. Failure to state a cause, which in any event would have been hearsay, cannot possibly lead to the inference that the report is a forgery.

Yahia v. Canada (Minister of Citizenship and Immigration), 2019 FC 84, at para 41. The RPD found that the medical report "provides insufficient evidence to corroborate that his described injuries were caused by physical abuse while in detention." The Court stated:

> Why the RPD would expect a medical report to diagnose the cause of the applicant's injuries is not explained, and there is no suggestion that the report's detailing of body bruises and facial injuries is not consistent with the applicant's evidence of his mistreatment in detention. At the very least, the RPD made the mistake of using what the report does not say to support its overall negative credibility finding, which is a reviewable error (see *Mahmud v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8019 (FC), [1999] FCJ No 729 at para 11). [emphasis added]

See also *Mowloughi v. Canada (Citizenship and Immigration)*, 2019 CF 270, at para 69. The Court cited *Kanthasamy* 2015 SCC 61, at paragraph 49, where the Supreme Court pointed out the unavoidable reality that a psychological report will necessarily be based to some degree on "hearsay" because "only rarely will a mental health professional personally witness the events for which a patient seeks professional assistance."

[303] *Lumala v. Canada (Citizenship and Immigration)*, 2019 FC 775, at para 52. Other than a passing reference to cognitive difficulties, nothing in the psychological report would support an argument that the applicant's testimony at the RPD may have been affected by her mental health issues. There is nothing in the report to flag for the RAD that the applicant would or might have any issues testifying.

Al-Sarhan v. Canada (Citizenship and Immigration), 2019 FC 1438, at para 32. Absolutely nothing in the report supported the applicant's assertion that his mental health impacted his ability to put forward his evidence.

[304] *Feleke v. Canada (Citizenship and Immigration)*, 2007 FC 539, at para 18. The RPD, in finding a decision either way, with regards to credibility, has an obligation to explain how the diagnosis impacts its assessment of any discrepancies.

In *Ngombo v. Canada (Citizenship and Immigration)*, 1997 CanLII 16200 (FC), the Court held that the CRDD had erred in failing to consider the medical evidence that would have explained the problems posed by the claimant's vague, inconsistent and, at times, almost incomprehensible testimony.

In *Vijayarajah v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8116 (FC) at para 20, the Court criticized the reasoning adopted by the CRDD, which had found that the claimant was not credible because of inconsistencies in his testimony, then relied on this negative credibility finding to dismiss medical

Even if the Board considers a claimant to be not credible, it must still examine the documentary evidence. Where the medical report is relevant to the panel's findings of non-credibility, and credibility is central to the outcome of the claim, the RPD is obliged to explain how it dealt with the report in the context of making its non-credibility finding.[305]

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and documentary evidence that explained that torture victims may contradict themselves as a result of the confusion caused by their experiences.

In *Yilmaz v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1498, at para 80: The panel had rejected the medical report because it did not believe that the incident had actually taken place, refusing to recognize the "cognitive difficulties" referred to in the assessment that could account for the obvious problems the claimant had during his testimony.

Sokhi v. Canada (Citizenship and Immigration), 2009 FC 140, at paras 34 and 38. The Board had noted the medical, psychological and psychiatric evidence concerning the principal claimant, but decided it could not explain the frailty of the evidence. However, the Court was not convinced that the Board had properly considered the psychological and medical reports that warned about cognitive dysfunctions that would impede the principal claimant from giving a good and coherent testimony in front of the Board.

However, note the caution in *Khatun v. Canada (Citizenship and Immigration)*, 2012 FC 59, at para 94: No psychological report can act as a cure-all for deficiencies in the claimant's evidence.

Zararsiz v. Canada (Citizenship and Immigration), 2020 FC 692, at paras 87 and 88: In the RAD's view, the psychologist's report might explain some deficiencies in the applicant's accounts but neither the RPD nor the RAD relied on those deficiencies in drawing adverse conclusions about the applicant's credibility. On the other hand, the report shed no light on what the RPD and the RAD found to be the principal problem for the applicant's credibility—namely, the significant discrepancies between the various accounts he had given of his experiences in Turkey. In the Court's view, this was an entirely reasonable assessment of the value of the report.

Nwakanme v. Canada (Citizenship and Immigration), 2020 FC 738, at para 37: The RPD had a duty to consider whether the assessments in the medical reports explained, in whole or in part, the problems it identified with the applicant's evidence, but it did not do so.

[305] *Hassan v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8795 (FC), at paras 19–22:

> [22] To be sure, the panel did state in the introductory portion of its reasons that it had considered the various items of evidence before it, including the medical report submitted on behalf of the applicant. However, given the cogency of that report, its relevance to the panel's finding of non-credibility and the central importance of credibility to the outcome, the Refugee Division ought to have gone further than this. It was obliged to explain how it dealt with it in the context of making its non-credibility finding. [citation omitted]

Alibegi v. Canada (Citizenship and Immigration), 2018 FC 1245, at para 30. Justice Gagné found that the RAD had made a reviewable error by failing to mention the psychological report:

> I agree that psychological reports cannot cure all credibility concerns with regards to an applicant's testimony, but in the present case the RAD did not engage at all with the psychological evidence and did not explain why it discounted it. The report could explain why the Applicant had trouble answering questions and why portions of his testimony may have been inconsistent. These difficulties were compounded by the stress inherent to oral questioning and the use of an interpreter. The RAD should have at least explained why it decided to afford it little weight. It is impossible, by reading the RAD's reasons, to know whether or not it found that some of the inconsistencies could be explained by the Applicant's psychological state, and how this affected its credibility assessment.

George v. Canada (Citizenship and Immigration), 2019 FC 1385, at para 64.

> Given the potential impact of the medical evidence on the RPD's credibility findings, the RPD's statement that it had "considered" the evidence was inadequate. The situation is like that in *Fidan v Canada (Citizenship and Immigration)*, 2003 FC 1190, at paragraph 12, and the words of Justice von Finckenstein in that case are apposite:

The RPD must use the psychological report to assess the claimant's credibility. When the RPD draws conclusions about credibility and then uses those conclusions to discount the reports, it is performing its analysis backwards, which is not reasonable.[306]

2.4 Allowing the claimant to clarify contradictions or inconsistencies in the evidence

2.4.1. General principle

Procedural fairness is a "bedrock of administrative law."[307] A basic tenet of natural justice is the right to be heard (*audi alteram partem*), which includes a party's right to know the case they must meet. In *Baker*,[308] the Supreme Court of Canada emphasized that the requirements of procedural fairness are flexible, variable, and context-dependent. In the context of refugee determination, the third Baker factor, namely the importance of the decision to the persons affected, suggests a high level of participatory rights whereby claimants would have an

> In this case, credibility was also the "linchpin" to the Board's decision. Nonetheless, the Board failed to indicate how, if at all, the psychological report was considered when making its credibility finding. The Board was obliged to do more than merely state that it had "considered" the report. It was obliged to provide some meaningful discussion as to how it had taken account of the applicant's serious medical condition before it made its negative credibility finding. The failure to do so in this case constitutes a reviewable error and justified the matter being returned to a newly appointed Board.

[306] *Belahmar v. Canada (Citizenship and Immigration)*, 2015 FC 812, at para 8. Justice Martineau writes:

> I would also like to add the following to ensure that the scope of this decision is fully understood. In her report, Dr. Valenzuela states that she assessed the applicant's memory using the Wechsler Memory scale, and she concluded that the applicant's ability to testify was compromised and that it was likely that he would have difficulty remembering dates during his hearing. The RPD essentially performed its analysis backwards: instead of using the medical reports to assess the applicant's credibility, the RPD drew conclusions about credibility and then used those conclusions to reject the reports. [emphasis added]

Mendez Santos v. Canada (Citizenship and Immigration), 2015 FC 1326, at para 19:

> Neither Dr. Yawny-Burnett's report nor that of Dr. Ross is based essentially or only upon the Applicant's story. Each report is based on clinical observations drawn independently of the Applicant's credibility. This uncontradicted psychological evidence suggests that, regardless of whether the Applicant was fabricating his self-history, he nonetheless has serious deficiencies in his cognitive capacities. There was no other evidence before the RPD about the Applicant's intellectual deficiencies beyond the panel member's own observation of the Applicant's testimony and his responses to questions. It was not reasonable for the RPD to discount the psychological evidence in this case when that very evidence provides reasonable explanations for the lack of coherency in the Applicant's testimony. The RPD essentially performed its analysis backwards: instead of using the medical reports to assess the Applicant's credibility, the RPD drew conclusions about credibility and then used those conclusions to throw away the reports. [emphasis added]

[307] David J. Mullan, *Essentials of Canadian Law: Administrative Law* (Toronto: Irwin Law, 2001) at 232.

[308] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, at para 22.

opportunity to put forward their views and evidence fully and to have them considered by the decision-maker.

Generally, where a decision maker has a concern regarding the credibility of a party's evidence, the right to be heard mandates that the party have an opportunity to address the concern.[309] As explored below, the Federal Court has provided guidance on how this requirement may be satisfied in refugee determination proceedings.

2.4.2. Contradictions or inconsistencies internal to the claimant's testimony

The Federal Court has long held that, as a general rule, the Board should afford a refugee claimant the opportunity to explain any apparent contradictions, inconsistencies, or omissions within their oral testimony, Basis of Claim form (BOC), or port of entry notes that are central to the Board's determination of the claim.[310] The more the panel relies on a discrepancy to impugn the claimant's credibility, the greater the duty to provide this opportunity.[311]

In some cases, the Federal Court has departed from this general rule, finding it unnecessary for the Board to put a discrepancy to the claimant in the circumstances. For

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[309] *Canada (Citizenship and Immigration) v. Dhaliwal-Williams*, 1997 CanLII 6074 (FC).

Mohamed Mahdoon v. Canada (Citizenship and Immigration), 2011 FC 284 at para 20:" The IRB's obligation to give the Applicant the opportunity to address its concerns is a question of procedural fairness and is reviewable on the standard of correctness."

Also see *Zavalat v. Canada (Citizenship and Immigration)*, 2009 FC 1279, at paras 77-78, where the Federal Court relates this right to subsection 170(e) of the IRPA.

[310] In *Malala v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 94, the Court cites several examples of cases in which the Board erred by not confronting applicants with the alleged inconsistencies in their evidence and giving them an opportunity to respond. At para 24, the Court states that although the jurisprudence is not unanimous, it does establish that "generally, contradictions must be put to the applicant at the hearing to enable him or her to provide all relevant explanations. The applicant must be afforded an opportunity to explain fully the alleged inconsistencies." The Court also certified a question regarding the requirement to put alleged contradictions to the claimant; however, no appeal was filed.

[311] In *Jurado Barillas v. Canada (Citizenship and Immigration)*, 2019 FC 825, at para 14, Justice Manson found that it was an error for the RPD not to alert the Principal Applicant to its credibility concerns and to allow him the chance to address them. "While the RPD is not required to put every deficiency to an applicant, when a deficiency is central to the RPD's determination, the RPD's failure to put the matter to an applicant may be a violation of procedural fairness." [emphasis added; citation omitted]

In *Shaiq v. Canada (Citizenship and Immigration)*, 2009 FC 149, at para 77, the Court held that the "RPD should have provided the Applicant with an opportunity to address an issue that was central to its negative credibility finding."[emphasis added]

In *Woolner v. Canada (Citizenship and Immigration)*, 2015 FC 590, at para 48, the Court was "not convinced that the RPD raised its major concerns with the Applicant and that she had been given a meaningful opportunity to make observations to dispel the RPD's doubts in respect of her identity, as required by the principles of procedural fairness."

In *Shmihelskyy v. Canada (Citizenship and Immigration)*, 2016 FC 123, at para 15, the Court states that "any inconsistencies should have been put to the Applicant to provide him with an opportunity to address them […], particularly if used to impugn his credibility, which was the issue central in this matter." [citations omitted]

example, in *Ngongo*,[312] the panel relied upon a contradiction that was significant in nature, readily apparent and provided in response to a direct question from the panel. Moreover, the claimant was represented by counsel, who could have questioned his client about the issue. The Court found the panel did not err by failing to put the alleged contradiction to the claimant.

On the other hand, when the Board is considering relying upon a discrepancy that is less obvious, there may be an increased onus on the panel to allow the claimant an opportunity to explain, keeping in mind the panel must avoid a microscopic review or an overzealous approach to peripheral or insignificant discrepancies in the evidence.[313]

The Federal Court has found the Board breaches the rules of procedural fairness where it signals to the claimant that inconsistencies, contradictions, or omissions are not of concern, but then relies upon them in making negative credibility inferences.[314] This clearly can infringe upon the claimant's right to be heard, as can indicating that the claimant will have the opportunity to make submissions on a contentious point, but then rendering a decision without having given the claimant the opportunity promised.[315]

The Board must consider a claimant's explanations for any apparent discrepancies in their testimony. As the Federal Court of Appeal noted in *Owusu-Ansah*,[316] the Board cannot ignore an explanation for an apparent discrepancy and then make a negative credibility finding. The Board is not required to accept a claimant's explanation, but the explanation should be acknowledged in the reasons for decision and the panel should explain why it was rejected, if that is the case.[317] The explanation provided by the claimant must have been unreasonable or otherwise unsatisfactory to reject the claimant's testimony on the basis of credibility.[318]

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[312] *Ngongo v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8885 (FC), at para 17. At para 16, Justice Tremblay-Lamer lists a number of factors to consider when deciding whether or not a discrepancy should be brought to the attention of a refugee claimant.

See also *Ongeldinov v. Canada (Citizenship and Immigration)*, 2012 FC 656, at para 21

> As a general proposition, inconsistencies should be put to claimants before the Board relies on them to impugn a claimant's credibility […]. However, the failure of the Board to direct a claimant to an inconsistency is not always a reviewable error […]. Whether the inconsistency must explicitly be put to a claimant will depend on the facts of each case.

[313] *Mukamusoni v. Canada (Citizenship and Immigration)*, 2015 FC 196, at para 29.

[314] *Tar v. Canada (Citizenship and Immigration)*, 2014 FC 767, at para 64.

See also *Sarker v. Canada (Citizenship and Immigration)*, 2014 FC 1168, at para 15.

[315] *Zavalat v. Canada (Citizenship and Immigration)*, 2009 FC 1279, at paras 71-72 and 78.

[316] *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* [1989] F.C.J. No. 442 (FCA)(QL).

[317] *Farah v. Canada (Citizenship and Immigration)*, 2021 CF 116, at para 8.
Yasik v. Canada (Citizenship and Immigration), 2014 FC 760, at para 25.
Karakaya v. Canada (Citizenship and Immigration), 2014 FC 777, at para 18.

[318] In *Owusu-Ansah v. Canada (Minister of Employment and Immigration*, [1989] F.C.J. No. 442 (FCA)(QL), the Court found the Immigration Appeal Board had erred when its decision failed to deal with "[e]xplanations which, to say the least, [w]ere not obviously implausible."

2.4.3. Where testimony is vague

In *Danquah,* the Federal Court wrote the following with respect to a lack of detail in the applicant's account:

> Nor am I persuaded that the tribunal was unfair in its process in not alerting the [claimant] at the time of her hearing, of its concerns about the weakness of detail in her testimony about these matters. There was no instance of inconsistency in the [claimant's] evidence relied upon by the tribunal, which it ought in fairness to have brought to the attention of the claimant. A hearing tribunal has no obligation to point to aspects of the [claimant's] evidence that it finds unconvincing where the onus is on the [claimant] to establish a well-founded fear of persecution for reasons related to Convention refugee grounds[319].

Similarly, in *Kutuk,*[320] the Federal Court held that the Board is not obliged to alert a claimant to the vagueness of their evidence.

However, in *Jurado Barillas*,[321] the Federal Court found there was a denial of procedural fairness when the Board faulted the principal claimant for a lack of detail in his testimony. The Court found the principal claimant had provided detailed testimony, which was largely consistent with the other evidence on the record. It held that if the Board required even more detail than was provided, then it should have alerted the claimants and allowed them the opportunity to address its concern.

2.4.4. Documentary evidence

Generally speaking, the Board is not required to provide claimants opportunities to explain discrepancies in documents that they are aware of and have provided themselves.[322] The Federal Court has distinguished such documents from extrinsic or extraneous evidence relied on by the Board. Claimants should be allowed to address discrepancies concerning extrinsic evidence.[323]

In *Brodrick v. Canada (Citizenship and Immigration)*, 2010 FC 1118, at para 16, the Court found "[t]here was more than sufficient evidence available to support the Board's finding that the Applicant's explanations were unsatisfactory and unreasonable."

[319] *Danquah v. Canada (Secretary of State)*, [1994] F.C.J. No. 1704, (FCTD)(QL), at para 6.

[320] *Kutuk v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1754, (FCTD)(QL), at para 7.

[321] *Jurado Barillas v. Canada (Citizenship and Immigration)*, 2019 FC 825, at paras 17-18.

[322] *Belek v. Canada (Citizenship and Immigration)*, 2016 FC 205, at paras 7, and 17-18.
Konare v. Canada (Citizenship and Immigration), 2016 FC 985, at para 16.
Moïse v. Canada (Citizenship and Immigration), 2019 FC 93, at para 9.

[323] *Moïse v. Canada (Citizenship and Immigration),* 2019 FC 93, at para 10.

In *Konare*,[324] the applicant had submitted as evidence a complaint to a Malian court which stated that he joined his family two days after their relocation, whereas in his testimony, the applicant alleged he waited more than four months before joining his family. The Federal Court found there was no requirement to allow the applicant an opportunity to explain this inconsistency. The complaint to the court was not extrinsic evidence; rather, it was evidence submitted by the applicant and he was aware of its contents.

Similarly, in *Gu*,[325] the Federal Court found the responsibility for ensuring accurate translation of a summons provided by the applicant rested with her, and "the principles of procedural fairness do not require the Board to confront the applicant with information they had supplied themselves … ."

In *Moïse*,[326] the applicant's testimony and medical certificate were inconsistent regarding the date of an attack. The Federal Court held it could not "reproach the RPD for failing to confront him about the discrepancy."

However, in *Sarker*,[327] the Federal Court faulted the RPD for failing to allow the applicant an opportunity to explain discrepancies between the contents of newspaper articles and his testimony. The discrepancies were of questionable significance and did not originate entirely from the applicant himself.

Akanniolu v. Canada (Citizenship and Immigration), 2019 FC 311, at paras 48-49.

[324] *Konare v. Canada (Citizenship and Immigration)*, 2016 FC 985, at para 16.

[325] *Gu v. Canada (Citizenship and Immigration)*, 2017 FC 543, at para 29.

[326] *Moïse v. Canada (Citizenship and Immigration)*, 2019 FC 93, at para 10.

[327] *Sarker v. Canada (Citizenship and Immigration)*, 2014 FC 1168, at paras 19-21.

2.4.5. Where evidence seems implausible

The Federal Court has held that the Board is under no obligation to alert the claimant of its concerns about weaknesses in testimony that give rise to findings of implausibility,[328] unless perhaps they relate to an inconsistency that is at the heart of the claim.[329]

However, the Federal Court stated in *Nkrumah*:

> [W]here the panel's inferences are based on what seem to be "common sense" or rational perceptions about how a governmental regime in another country might be expected to act or react in a given set of circumstances, there is an obligation, out of fairness, to provide an opportunity for the [claimant] to address those inferences on which the panel relies.[330]

Some other decisions of the Federal Court also hold that a claimant should be afforded an opportunity to explain why they or others behaved in a particular way.[331]

In *Arumugam*, the Federal Court attempted to reconcile these divergent lines of authority when it stated:

> Board's [*sic*] cannot simply draw implausibilities "out of a hat". They must be founded on the evidence. If they are clearly highly speculative and a claimant has not been given an opportunity to address them, a reviewing Court will give the conclusion little weight. If they are firmly founded in and supported by the evidence they of course will be given greater weight.[332] [emphasis added]

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[328] *Appau v. Canada (Minister of Employment and Immigration)* [1995] F.C.J. No. 300, (FCTD)(QL), at para 12. Justice Gibson found that "the CRDD was under no obligation to alert the applicant, at the time of his hearing, of its concerns about weakness of testimony giving rise to implausibilities."

Tchaynikova v. Canada (Minister of Citizenship and Immigration) [1997] F.C.J. No. 583, (FCTD)(QL), at para 7: Citing the decision in *Akinlolu,*([1997] F.C.J. No. 296 (FCTD)(QL)) Justice Richard wrote "The Board is not required to bring to a claimant's attention every reservation held or implausibility found in reflecting upon the applicant's testimony as a whole, before its decision is made."

Awoh v. Canada (Minister of Citizenship and Immigration), 2006 FC 945, at paras 21-22.

Mialbaye v. Canada (Citizenship and Immigration), 2009 FC 427, at para 13.

[329] *Abdul v. Canada (Minister of Citizenship and Immigration),* 2003 FCT 260, at para 18. Justice Snider held "While the Board may not be required to put every inconsistency or implausibility to the plaintiff, when such findings are at the heart of the claim, the Applicant must be given an opportunity to explain."

[330] *Nkrumah v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. No. 698, (FCTD)(QL), at para 7.

[331] *Aden v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. No. 416, (FCA)(QL) (failure to obtain medical treatment)

Chand v. Canada (Minister of Employment and Immigration), [1994] F.C.J. No. 73, (FCTD)(QL), at para 6.

Estrada v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 8505 (FC), at para 5.

[332] *Arumugam v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 122, (FCTD)(QL), at para 5.

2.5 Taking the claimant's circumstances into account

2.5.1. Personal circumstances that may affect the evidence

The refugee determination process is unlike most other judicial processes in our legal system. It is specifically designed to be expeditious, informal, non-adversarial, and investigative in nature. The "normal" rules of evidence do not apply,[333] and decision making may involve the use of the Board members' "specialized knowledge."[334] Generally, claimants are in vulnerable circumstances and this process is new and unique for them. Much of the oral evidence is received through the filter of interpreters under layers of cross-cultural communication. As a result, misunderstandings may occur, even among people acting in good faith.[335]

Board members should account for a claimant's or other witness's unique circumstances when assessing the credibility of their evidence. Factors that may affect an individual's ability to observe events or recall or describe them during a hearing include but are not limited to the following:

- the passage of time;[336]
- nervousness caused by testifying before a tribunal;[337]
- the effects of having experienced trauma, including any relevant medical or psychological conditions (e.g., post-traumatic stress disorder);[338]

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[333] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 170(g) and (h), 171(a.2) and (a.3).

[334] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 170(i), 171(b).

[335] *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* [1989] F.C.J. No. 442 (FCA)(QL). *Owochei v. Canada (Citizenship and Immigration)*, 2012 FC 140, at paras 57-63.

[336] In *Navaratnam v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 523, at para 37, the Court disagreed with the applicants' submission that the Board did not allow for the effect of the passage of time on memory.

[337] *Epane v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8265 (FC), at paras 15 and 22. One of the reasons for which the Court determined that the Board's findings with respect to the applicant's credibility were unfounded, was that it failed to take into consideration his obvious severe nervousness.

Similarly, in *Gomez Posada v. Canada (Citizenship and Immigration)*, 2007 FC 216, at paras 5-6, although the RPD's reasons referred to Ms. Gomez as being "visibly nervous" while testifying, it nonetheless concluded that adjustments to her testimony indicated she was lying. The Court found this conclusion unreasonable and named other factors, including nervousness, as equally likely causes for her "confused, often disjointed and sometimes evolving answers.".

[338] In *Ozturk v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1219, Justice Tremblay-Lamer ruled that it was a denial of procedural fairness to refuse a request for an adjournment to allow a medical evaluation of the claimant. His inability to understand many of the questions he was asked raised a doubt on his capacity to understand the nature of proceedings. At paragraph 13, she wrote: "[A]n applicant's mental health is of the utmost importance when one is evaluating an applicant's testimony and the credibility of his claim."

In *Nwakanme v. Canada (Citizenship and Immigration)*, 2020 FC 738, at paras 35-38, Justice Elliott found that the RPD committed a reviewable error by making unreasonable credibility assessments as a result of its failure to consider the effect of two medical reports on the Applicant's testimony.

- age;[339]
- whether the claim includes allegations of gender-related persecution;[340]
- whether the claim includes allegations relating to a claimant's sexual orientation and/or gender identity and expression (SOGIE);[341]
- educational background;[342]

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[339] Chairperson Guideline 3: *Child Refugee Claimants: Procedural and Evidentiary Issues* (September 30, 1996).

Uthayakumar v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 8280 (FC), at paras 25 and 28. The Court found that the CRDD erred in failing to attach any credibility to the applicants' testimony, in part because it did not take into consideration that the applicants were ten and twelve years of age when they travelled to Canada.

Li v. Canada (Minister of Citizenship and Immigration), 2001 FCT 1245, at paras 7 and 10. The CRDD considered that inconsistencies in the 16-year-old applicant's story were not attributable to his age and undermined his claim to be fleeing from religious persecution.

Bin v. Canada (Minister of Citizenship and Immigration), 2001 FCT 1246, at para 16: "While the *Guidelines* admonish the CRDD to be sensitive to the ability of child claimants to recall and present facts and details, it was not unreasonable for the CRDD to expect a seventeen-year-old to say how many times the police came to his home prior to his father's arrest."

In *Ni v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1240 the CRDD found the 15-year-old claimant's testimony to be "confusing and incoherent" and "appeared to be rehearsed". The Court found that the CRDD was sensitive to the applicant's young age and did not act unreasonably in doubting the applicant's credibility. At para 10, the Court noted that "[*Guideline 3*] must be thought of as being a continuum. Clearly a twelve-year-old claimant must be given more latitude that a fifteen-year-old. The child's degree of maturity, as well as their age, must be taken into account in assessing their evidence."

In *Nsimba v. Canada (Citizenship and Immigration)*, 2019 CF 542, at para 18, Justice Diner wrote:

> Even though it would have been desirable that the guidelines be specifically mentioned in the RAD's reasons, the applicants did not demonstrate how the RPD or the RAD failed to comply with the principles established in those guidelines. In this case, the RPD provided Ms. Nsimba with ample opportunities to explain the contradictions in her testimony. Moreover, the RPD remained sensitive to the potentially traumatizing nature of the alleged facts. Also, the RPD took into account the age of Ms. Nsimba's daughters when they testified. I am of the view that the conclusions drawn from the children's testimony are not the result of a selective analysis of the evidence, but rather of the normal process of assessing evidence.

[340] See Chairperson Guidelines 4: *Women Refugee Claimants Fearing Gender-Related Persecution* (November 13, 1996).

Jones v. Canada (Minister of Citizenship and Immigration), 2006 CF 405, at paras 14-28.

Isakova v. Canada (Citizenship and Immigration), 2008 CF 149, at paras 13-14.

Zamaseka v. Canada (Citizenship and Immigration), 2014 CF 418, at paras 23-26.

In *Velasco Chavarro v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 310, at paras 18-19, the Federal Court found the Board made unreasonable inferences about an alleged sexual assault victim's credibility based on the discredited "doctrine of recent complaint."

[341] *Gabila v. Canada (Citizenship and Immigration)*, 2016 FC 574, at paras 31-32.

McKenzie v. Canada (Citizenship and Immigration), 2019 FC 555, at para 35.

[342] See *Ngombo v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 116, (FCTD)(QL), at para 5. The CRDD erred by not evaluating the psychological and medical reports and the limited education of the applicant as possible explanations for the weaknesses in the applicant's evidence that led to an adverse credibility finding.

- social position;[343] and
- any relevant cultural factors.[344]

Decision makers must ensure they do not to make credibility findings based on myths or stereotypes.[345] They should also consider that a claimant or other witness's personal circumstances may involve the intersection of two or more of the above factors or other significant factors.[346]

In *Aguilar Moncada v. Canada (Citizenship and Immigration)*, 2012 FC 104, at paras 20-21, 24 and 29-31, the Court held that the RPD was sensitive to the applicant's personal circumstances, namely his illiteracy and had committed no error in finding that he was not credible.

Fermin Mora v. Canada (Citizenship and Immigration), 2018 FC 521, at paras 38-39. The RAD confirmed the RPD's findings on the testimony and added in its reasons that as an educated person, the applicant was capable of providing more specific responses to key questions about her refugee claim. At para 39, the Court stated that the RAD correctly considered the applicant's profile (educated person with a good job who has travelled several times and who is not disadvantaged). The Court also stated that "the RPD did not err in adding the applicant's situation to the lack of credibility."

[343] In *Roble v. Canada (Minister of Employment and Immigration)* [1994] F.C.J. No. 1275,(FCTD)(QL), at paras 8-9, the Federal Court noted that the Board failed to consider the fact that the claimant was not a highly educated person and that in Somali culture, it is often the case that a wife is not privy to information concerning her husband's occupation.

In *Montenegro v. Canada (Minister of Citizenship and Immigration)* [1996] F.C.J. No. 265, (FCTD)(QL), at paras 12-14, the Court faulted the Board for ignoring the minor claimant's mother's explanation that her knowledge of her husband's political involvement in El Salvador was based entirely on what he had been willing to tell her, pointing out that "within their social order wives were not expected to question their husbands' activities."

Also see Chairperson Guidelines 4: *Women Refugee Claimants Fearing Gender-Related Persecution* (November 13, 1996), section D.(2).

[344] *Osarogiagbon v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8313 (FC), at para 5. The claimant explained that she did not know her boyfriend's exact age because in Nigeria men did not like to disclose their age or be questioned about it.

Lumaj v. Canada (Citizenship and Immigration), 2012 FC 763, at para 36. The claimant testified she was ashamed to tell her husband she had been raped because of Albanian cultural norms.

Chairperson's Guideline 9: *Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* (May 1, 2017), section 7.

[345] *Herrera v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1233, at para 12. It is a thoroughly discredited stereotype that someone who is homosexual must be effeminate in appearance or behaviour.

See also Chairperson's Guideline 9: *Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* (May 1, 2017), sections 6.1. and 7.5.1.

Velasco Chavarro v. Canada (Immigration, Refugees and Citizenship), 2020 FC 310, at para 2. Justice Brown granted the judicial review "because the RAD and the RPD applied the discredited doctrine of recent complaint which is predicated on the trope or stereotypical myth that all victims of sexual assault report the assault in a timely manner."

[346] See for example, in *Zeah v. Canada (Citizenship and Immigration)*, 2020 FC 711, at para 73:

> It was incumbent on the RAD to assess the applicant's actions in light of her individualized circumstances as disclosed in the record, including her age, her background, how long she claimed to have hidden her sexual orientation, her feelings of shame or embarrassment, the prevailing attitudes of her community, and so on. It failed to do so. The RAD's silence regarding the applicant's personal circumstances and the social and legal realities of someone who

2.5.2. Trauma-informed assessment of credibility

Decision makers should take a trauma-informed approach when assessing the credibility of claimants and other witnesses in refugee determination proceedings. This includes anticipating the possibility that past trauma will affect the person's memory or ability to testify and recognizing that sharing a traumatic experience in a formal proceeding with a stranger in a position of authority may be intimidating. Emotional reactions to recounting traumatic experiences are unique to the individual, therefore decision makers should not expect a claimant or witness to behave a certain way when testifying about such experiences.

For example, in *Jones*,[347] the Federal Court stated that the Board is obliged to take into consideration that victims of domestic abuse may exhibit symptoms of trauma which may impair their memory or make it difficult for them to describe their trauma. In that case, the Court quashed the decision because the RPD was "hypercritical" of differences between the claimant's Personal Information Form (PIF) and her testimony without considering whether those discrepancies resulted from her psychological difficulties rather than a desire to fabricate evidence.

Jones was cited in *Zamaseka*,[348] a case where the refugee claimant alleged she had been raped and as a result was having "acute symptoms of distress." The Court found the RPD erred in concluding that the rape did not take place based on an omission in her PIF regarding the presence of soldiers during the rape. The Court held the RPD should have asked itself whether the gaps between the PIF and her testimony resulted from psychological disorders related to the assault.

In *Isakova*,[349] the RPD made a negative credibility inference from the fact the claimant did not get medical attention after being raped. The Court held that this inflexible assumption was clearly at odds with a contextual approach that accounts for the trauma of sexual assault.

An allegation of past trauma will not preclude the panel from making a negative credibility finding based upon material deficiencies in the evidence that are not reasonably explained. For example, in *Zararsiz*,[350] the Court found that the RAD reasonably concluded that the appellant's mental health condition, which was allegedly the result of his lengthy incarceration and violence he suffered at the hands of his captors, did not explain the deficiencies in his evidence. The issue

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identifies as a sexual minority leaves the decision lacking transparency, intelligibility, and justification.

[347] *Jones v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 405, at paras 15 and 17.

[348] *Zamaseka v. Canada (Citizenship and Immigration)*, 2014 CF 418, at para 25.

[349] *Isakova v. Canada (Citizenship and Immigration)*, 2008 CF 149, at para 23.

[350] *Zararsiz v. Canada (Citizenship and Immigration)*, 2020 CF 692, at paras 82-89.
Also see *Mavangou v. Canada (Citizenship and Immigration)*, 2019 CF 177, at paras 38-48.

was not his inability to recall details, but rather significant inconsistencies between his statements at the port of entry and various iterations of his Basis of Claim narrative.

The jurisprudence recognizing the role of trauma in the assessment of credibility is reflected and expanded upon in the Board's Guidelines. For example, Chairperson Guideline 3: *Child Refugee Claimants: Procedural and Evidentiary Issues* directs members to consider the potential impact of trauma when assessing the evidence of children.[351] Chairperson Guidelines 4: *Women Refugee Claimants Fearing Gender-Related Persecution* promotes a trauma-informed approach to conducting hearings and assessing evidence in gender-related claims.[352] Finally, Chairperson's Guideline 9: *Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* includes the principle that an individual with diverse SOGIE may suffer from trauma which can impact their ability to testify.[353]

[351] (September 30, 1996), section II(1).

[352] (November 13, 1996), section D.

[353] (May 1, 2017), section 3.6.

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3. A FINDING OF "NO CREDIBLE BASIS"

3.1. Overview of the legislation

Subsection 107(2) of the *Immigration and Refugee Protection Act* (IRPA) states that:

> 107(2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.[1]

This "no credible basis" provision in the IRPA is substantially the same as its predecessor in the *Immigration Act*, which provided, in subsection 69.1(9.1) that:

> 69.1(9.1) If each member of the Refugee Division hearing a claim is of the opinion that the person making the claim is not a Convention refugee and is of the opinion that there was no credible or trustworthy evidence on which that member could have determined that the person was a Convention refugee, the decision on the claim shall state that there was no credible basis for the claim.

Prior to 1993, when the amendments to the *Immigration Act* came into effect, refugee determination was a two-stage process. Refugee claims did not gain access to a full determination by the Board unless a panel at the preliminary stage found them to have a credible basis in accordance with subsection 46.01(6) of the *Immigration Act.*

In *Rahaman*[2] the Federal Court of Appeal noted that when the *Immigration Act* was amended to eliminate the two-stage process and to add s. 69.1(9.1), the no credible basis test assumed a different function; instead of screening out claims at the preliminary stage, it served to restrict the post-determination rights of unsuccessful claimants whose claims were found not to be supported by any credible evidence.

The possibility of removing failed refugee claimants whose claims were unlikely ever to succeed before they embarked on futile appeals and reviews must have been what the Federal Court had in mind when it accepted that "an efficient use of limited resources necessitates that claims which clearly have no prospect of success be weaned from the

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[1] *Immigration and Refuge Protection Act*, S.C. 2001, c. 27, s. 107(2).

[2] *Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, [2002] 3 FC 537, at paras 14-16.

system at an early stage, and that subsection 107(2) of the IRPA reflects sound policy considerations." [emphasis added][3]

3.2. Analysis under subsection 107(2) is mandatory

When the Refugee Protection Division (RPD) rejects a claim, it "shall state" in its reasons for the decision that the claim has no credible basis where the necessary preconditions are satisfied based on the facts.

Subsection 107(2) does not grant any discretion to decision makers. Thus, where the RPD finds that there is no credible or trustworthy evidence in support of the claim, it is required to state that the claim has no credible basis.

Situations may arise where a decision maker must determine that a single claim has no credible basis and is also manifestly unfounded. The language in subsection 107(2) and section107.1 is mandatory and nothing suggests that a decision maker may choose one provision over the other. Thus, where the necessary conditions are present, a decision maker is required to make findings under both sections. Cases in which the RPD has done so have been upheld by the Court.[4] For example, in *Belay,* the RPD rejected the claim and found that it was manifestly unfounded under s. 170.1 of the IRPA and had no credible basis under s. 107(2). Justice Elliott clearly addressed this issue in the reasons:

> [16] […] the language in sections 107(2) and 107.1 of the *IRPA* are [*sic*] mandatory: if the RPD finds no credible or trustworthy evidence on which it could have made a favourable decision, it shall state that there is no credible basis to the claim. And if the RPD is of the opinion that a claim is clearly fraudulent then it must state that the claim is manifestly unfounded. It therefore stands to reason that if the RPD is of the opinion that there is no trustworthy or credible evidence on which it could have made a favourable opinion and that the claim is clearly fraudulent, then it must state both that the claim has no credible basis and that it is manifestly unfounded. That is what the RPD appears to have done in this case.[5]

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[3] *A.B. v. Canada (Citizenship and Immigration), 2020 FC 562*, at para 28.

[4] For example, in *Iyamu v. Canada (Citizenship and Immigration),* 2015 FC 1418, at para 7, Justice Annis, after examining the many negative credibility findings of the Board, concluded that "the Board's decision was reasonable in concluding that the Applicant's claim had no credible basis and was manifestly unfounded, and in rejecting the refugee protection claim pursuant to sections 96 and 97 of the Act."

[5] *Yared Belay v. Canada (Citizenship and Immigration),* 2016 FC 1387, at para 16. The RPD had concluded that in addition to having no credible basis, the claim was manifestly unfounded. After finding that the RPD's no credible basis conclusion was reasonable, the Court considered it unnecessary to determine whether the manifestly unfounded threshold was met, given that both conclusions have the same effect. (at para 55).

3.3. Excluded claimants

Although a claim can be both manifestly unfounded and also lack a credible basis, neither of these determinations is permissible after a claimant has been excluded. In *Singh*, the Federal Court of Appeal stated that the RPD is precluded from finding that a claim has no credible basis once it determines that the claimant is excluded under Article 1F of the *Refugee Convention*. *Justice Stratas reframed the certified question as follows and answered it in the affirmative:*

> Considering the authority of the Refugee Protection Division under subsection 107(2) and section 107.1 of the *Immigration and Refugee Protection Act* to determine that a claim has no credible basis or is manifestly unfounded, is the Refugee Protection Division precluded from making such a determination after it has found that the claimant is excluded under section F of Article 1 of the *Refugee Convention*?[6]

3.4. Notice requirement

In *Mathiyabaranam*, the Federal Court of Appeal held that the Board is not required to give the claimant any special notice before it finds that the claim has no credible basis.

> [9] The question to be decided, then, is whether specific notice must be given to a claimant before the Board may make a finding of no credible basis at the end of the hearing to decide Convention refugee status. There is no express statutory requirement to give any extra notice of this matter. Any such requirement to give notice, therefore, must be based on the natural justice right that a person has to know the case to be met in an administrative proceeding affecting his or her interests. In my view, as I shall explain, there is no right to receive any extra notice about the possibility of a finding of no credible basis. Hence, there has been no violation of natural justice in this situation.
>
> [10] Any claimant is aware or should be aware of the risk of a no credible basis finding even without any additional notice being given about this potential outcome. A refugee claimant must realize that he or she must establish, as part of his or her claim, a credible basis for his or her claim. You cannot establish a claim for refugee status without first establishing a credible basis for that claim; the one is totally dependent upon and included in the other. I cannot imagine what a claimant, if given special notice, could possibly add to his or her case.

[6] *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 300, [2017] 3 FCR 263, at para 18.

All of the available evidence should already have been placed before the Board as part of the claim for refugee status.[7]

However, as the Federal Court of Appeal indicates in paragraph 9, natural justice requires that a claimant know the case to be met. Thus, specific concerns related to the evidence pointing toward a s. 107(2) finding should be brought to the attention of the claimant at the earliest opportunity. A claimant must be provided with a reasonable chance to address all doubts of the decision maker before it is determined that the claim has no credible basis.

3.5. Serious consequences for the claimant

Two serious legal consequences flow from the no credible basis finding.[8]

First, if the RPD determines that the claim has no credible basis, the claimant is barred from appealing to the Refugee Appeal Division (RAD) in accordance with s. 110(2)(c) of the IRPA.[9] Consequently, a claimant challenging the no credible basis finding would have to seek leave for judicial review of the RPD's decision at the Federal Court in accordance with s. 72(1) of the IRPA.

Second, a claimant whose claim is rejected by the RPD is ordinarily entitled to a stay of removal from Canada pending the outcome of a review of that decision by the Federal Court. However, if the RPD determines that a claim has no credible basis, the claimant is not entitled to an automatic stay of removal pending the leave application.[10] Consequently, in

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[7] *Mathiyabaranam v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5829 (FCA); 156 D.L.R. (4th) 301, at paras 9-10.

In *Manimaran v. Canada (Minister of Citizenship and Immigration)*,1999 CanLII 8103 (FCA), at para 2, in response to the certified question of whether the Board was required to give notice that Section 69.1(9.1) of the *Immigration Act* might apply, the Court held that, "In view of the decision of this Court in *Mathiyabaranam*, the question must be answered in the negative."

In *Aboubacar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 162, counsel for the Applicant sought certification of a question as to whether given the significance of a decision on an applicant, the CRDD was required to invite submissions on the issue of no credible basis after hearing the evidence, but before deciding that no credible basis existed. Justice Dawson refused to certify the question, considering the law on the point to be well-settled in light of *Mathiyabaranam* (at para 46).

[8] *Hadi v. Canada (Citizenship and Immigration)*, 2018 FC 590, at para 52.

[9] Subparagraph 110(2)(c) of the IRPA provides that no appeal may be made in respect a decision of the Refugee Protection Division rejecting a claim for refugee protection that states that the claim has no credible basis or is manifestly unfounded.

[10] Section 231 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227(IRPR) provides that a removal order is stayed if the subject of the order makes an application for leave for judicial review in accordance with s. 72 of the *Act* with respect to a Refugee Appeal Division decision that rejects, or confirms the rejection of, a claim for refugee protection. By operation of IRPA ss. 49(2)(c) and 110(2.1) of the IRPA and

addition to applying for leave for the judicial review, the claimant must also apply to the Federal Court to stay the removal order. It must be noted that stays are granted on discretionary basis.[11]

3.6. High threshold for finding that a claim has no credible basis

The Federal Court has emphasized on multiple occasions that the threshold for finding that the claim has no credible basis is a high one because the finding has such a significant impact on rights of claimants.[12]

Due to the serious consequences of a no credible basis finding, the Federal Court is likely to closely scrutinize the RPD's s. 107(2) analysis. According to Mr. Justice Phelan in *Sterling*, "The RPD cannot insulate itself from appellate review merely by making [a no credible basis] finding. A court must carefully examine such a finding because it has significant legal consequences and could possibly be made too easily or conveniently."[13]

While there is a high threshold for finding that a claim has no credible basis, the Federal Court of Appeal (FCA) in *Rahaman* responded to the argument that in order to comply with international norms, a claim should be found to lack a credible basis only if it could be characterized as "manifestly unfounded" - the test used in international instruments. The Court analyzed relevant international law before stating that it was unnecessary to consider the argument, given the Court's conclusion that there was no international consensus on the meaning of "manifestly unfounded."[14]

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s. 159.91(1)(a) of the IRPR, the conditional removal order comes into force 15 days after the receipt of the written reasons for the RPD's decision. [emphasis added]

[11] See for example, *Rahman v. Canada (Citizenship and Immigration)*, 2020 CanLII 18939 (FC), where the Federal Court considered a motion for a stay of removal in the context of s. 107.1. Madam Justice Walker stated that a stay is extraordinary equitable relief, requiring an applicant to meet all three parts of the test articulated in *Toth v Canada (Minister of Employment and Immigration)*, 1988 CanLII 1420 (FCA), 86 NR 302 (FCA). In *Rahman*, the applicants failed to establish irreparable harm and the motion for a stay was dismissed.

[12] For some examples, see *Aboubeck v. Canada (Citizenship and Immigration)*, 2019 FC 370, at para 16; *Omaboe v. Canada (Citizenship and Immigration)*, 2019 FC 1135, at para 18; *Mohamed v. Canada (Citizenship and Immigration)*, 2020 FC 186, at para 60; *A.B. v. Canada (Citizenship and Immigration)*, 2020 FC 562, at para 30.

[13] *Sterling v. Canada (Citizenship and Immigration)*, 2016 FC 329, at para 14.

[14] In *Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, [2002] 3 FC 537, at para 50, the FCA noted that "although 'manifestly unfounded or clearly abusive' is the phrase used in international instruments, Parliament has retained the term 'no credible basis' in the Act."

3.7. Meaning of credible or trustworthy evidence

Section 107(2) of the IRPA, like its predecessor s. 69.1(9.1) of the *Immigration Act*, provides that a claimant's evidence must meet the "credible or trustworthy" standard.

In Rahaman, the Federal Court of Appeal (FCA) described that evidence as "independent and credible" and capable of supporting a positive determination of the refugee claim. [15] In Wright, the focus was on the objective nature of the evidence. [16]

Examples from the case law offer guidance on the kinds of evidence that do or do not qualify as credible or trustworthy evidence on which a favourable decision could be made.

In Paniagua, [17] a letter from the daughter's school referred to the Applicant's statement made to the principal that her daughter's behaviour was due to problems with the girl's father. The letter did not meet the independent and credible threshold because a recitation of the information supplied by the Applicant could not be regarded as independent evidence in support of the claim.

Similarly, in Wright, [18] the Applicant submitted three letters which were written by the Applicant's brother and two of her friends. The RPD noted that they were not firsthand reports of the events that had allegedly occurred. Specifically, the Federal Court stated with regard to the claimant's testimony, that these letters are not "objective evidence," before concluding that the "objective underpinnings" that would militate against a no credible basis finding were not present.

The Boztas decision highlights that a document that is given "little weight" by a decision maker may not support a no credible basis finding. Consequently, if the RPD dismisses the evidence based on credibility concerns, it should state that the document in

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[15] *Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, [2002] 3 FC 537, at para 19. The interpretation of what constituted credible or trustworthy evidence that would preclude a no credible basis finding was decided by the Federal Court of Appeal (FCA) in *Sheikh v. Canada (Minister of Employment and Immigration)*, 1990 CanLII 8017 (FCA), [1990] 3 F.C. 238 (C.A.). In *Rahaman*, it was argued that the *Sheikh* interpretation was too restrictive. However, the FCA disagreed with the Applicant's contention that in cases where there is some evidence that persecution of the kind alleged has in fact occurred in the country in question, that evidence precludes a "no credible basis" finding (para 20). The FCA stated at para 29 that non claimant-specific country reports do not normally provide a sufficient basis to uphold a claim.

[16] *Wright v. Canada (Citizenship and Immigration)*, 2016 FC 567, at paras 8-9.

[17] *Paniagua v. Canada (Citizenship and Immigration)*, 2016 FC 248, at para 24.

[18] *Wright v. Canada (Citizenship and Immigration)*, 2016 FC 567, at paras 5 and 9.

question is given "no weight".[19] In Boztas, the RPD accepted evidence that could support a positive determination and gave the evidence some, though little, weight. In addition to the evidence of persecution and discrimination of persons of the same ethnicity and religion as the Applicant, there were letters from his doctor who attested to treating the Applicant's injuries, and from his lawyer who tried unsuccessfully to secure his release from police detention. The Court found that the RPD erred in its application of the test for no credible basis: "The RPD gave little evidentiary weight to these letters, but did not say that it gave the letters *no weight at all, as would be required for a 'no credible basis' finding* [emphasis added]."[20]

A claimant's undisputed membership in a particular social group may constitute credible or trustworthy evidence.[21] Similarly, evidence of knowledge of the language, geography, history, political landscape and public affairs of a country may be sufficient to defeat a finding of no credible basis.[22]

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[19] For example, in *Paniagua v. Canada (Citizenship and Immigration)*, 2016 FC 248 at para 8, the Court upheld the no credible basis finding where the RPD gave no weight to letters in support of the claim, "due to their general lack of detail and inconsistency with the Applicant's narrative and testimony. The RPD found that these too were likely fabricated for purposes of the claim."

[20] *Boztas v. Canada (Citizenship and Immigration)*, 2016 FC 139, at para 12.

See also *Sterling v. Canada (Citizenship and Immigration)*, 2016 FC 329, at para 16: "[…] the RPD may assign little weight to […] a report (presuming it had grounds to do so), but that is a different finding than a 'no credible basis' finding."

[21] See *Singh v. Canada (Citizenship and Immigration)*, 2007 FC 732, at para 23, where the issue of the Applicant's membership in a particular social group, i.e. baptized Sikhs, was not addressed. According to the Federal Court, the Board could not refuse the claim on the ground that it had no credible basis without considering the credible and trustworthy evidence regarding the Applicant's status as a baptized Sikh and the risks of persecution associated with this status.

In *Boztas v. Canada (Citizenship and Immigration)*, 2016 FC 139, at para 12, the RPD accepted that the Applicant was a Kurd who followed the Alevi religion. Documentary evidence relating to the persecution and discrimination in Turkey of those of his particular profile constituted credible or trustworthy evidence in this particular case.

[22] *Ahmedin v. Canada (Citizenship and Immigration)*, 2018 FC 1127, at para 63. The Court agreed that while the Applicant's ability to testify in Tigrinya and his knowledge of Eritrea would have precluded a finding of no credible basis, had the RPD made such a finding, but in this case, it did not. The RPD's failure to take this evidence into account was not fatal to the reasonableness of its decision that the Applicant had not established his identity.

See also *Omar v. Canada (Citizenship and Immigration)*, 2017 FC 20, at para 20:

> I am not persuaded that there was no credible evidence upon which Mr. Omar's refugee claim could potentially succeed. His knowledge of Somalia, his facility with the language, and the identity witness were all potentially capable of establishing that he was a Somali national. […] The RPD's finding of no credible basis was therefore unreasonable.

Also see *Kebedom v. Canada (Citizenship and Immigration)*, 2016 FC 781, at para 31: "[…] the RPD's no credible basis finding is also flawed since the Applicant's knowledge of Tigrinya, the most widely spoken language in Eritrea, is credible evidence that could support the recognition of his refugee claim."

Evidence of a mother being granted refugee protection may amount to credible or trustworthy evidence in relation to the claim made by her own child, who witnessed the acts of violence being perpetrated upon her mother. For example, in A.B.,[23] the Applicant's claim and her mother's claim shared a common agent of persecution.

Medical reports based solely on the non-credible story of the claimant may not be viewed as credible or trustworthy evidence. However, where the reports are based on clinical observations that can be drawn independently from a claimant's credibility, such expert reports can serve as corroborative evidence.[24]

The Federal Court of Appeal has stated that country reports documents are not claimant-specific.[25] Consequently, claimants must demonstrate how country condition evidence applies in their particular circumstances.[26]

For example, in *Joseph*,[27] the Applicant argued that the RPD could not make a no credible basis finding while accepting that the documentary evidence showed that women faced endemic violence in Haiti. Justice Roussel noted that the RPD acknowledged that violence against women was endemic in Haiti, especially for single women. However, the Panel did not find that the evidence applied to the Applicant, given her situation. The RPD concluded that the Applicant failed to demonstrate that she could not be protected by her husband or her other family members. In other words, the RPD held that the Applicant did

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[23] *A.B. v. Canada (Citizenship and Immigration)*, 2020 FC 562, at para 68. However, the Court also observed that "it was certainly open to the RPD to give little weight to the mother's claim in assessing that of the Applicant."

[24] *Sterling v. Canada (Citizenship and Immigration)*, 2016 FC 329, at para 10. As the Court noted at para 11, "A psychologist's report based on the expert's observation and the conclusion that such observations or manifestations are consistent with the claimant's narrative are often relied upon with respect to physical injuries." According to the Court at para 15 "[…] the RPD did not properly consider the psychologist's objective considerations. Those observations offer "some" credible grounds for aspects of the Applicant's narrative. Unless the RPD rejects these observations, it cannot make the no credible basis finding."

[25] *Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, [2002] 3 FC 537, at para 29.

[26] *Iyombe v. Canada (Citizenship and Immigration)*, 2016 FC 565, at para 17. "While these documents may well establish a pattern of human rights abuses in the country, the applicant nevertheless failed to demonstrate how these conditions applied to her individual case, particularly in light of the fact that the RPD found key aspects of her story to lack credibility."

Also, in *Ramón Levario v. Canada (Citizenship and Immigration)*, 2012 FC 314, the Federal Court noted at para 17 that the RPD accepted that the Applicant was bisexual. Thus, it was an error not to consider the documentary evidence of persecution of sexual minorities, as this was credible evidence that could support the claim.

[27] *Joseph v. Canada (Citizenship and Immigration)*, 2018 FC 638, at paras 15-18. Although the evidence was credible or trustworthy, it did not preclude a "no credible basis" finding, given that the evidence was insufficient to sustain a positive determination of the claim.

not belong to the targeted group. Moreover, she acknowledged that, aside from the one incident which gave rise to the claim, she never experienced violence against her person. Before the Court, the Applicant did not dispute the RPD's interpretation of the documentary evidence or provide contrary evidence. Consequently, the RPD's no credible basis finding was upheld.

Similarly, in *Paniagua*,[28] the documentary evidence stated that violence against women was widespread in the Dominican Republic and there were concerns about the effectiveness of the state's efforts to address the problem. However, the Federal Court noted that the Applicant's own experience differed as she had obtained state protection.

In *Mohamed*,[29] the Federal Court held that "there was documentary evidence before the RPD, notably reports from the United Nations High Commissioner for Refugees, referenced in the National Documentation Package (April 30, 2018), which could support Mr. Mohamed's claim." Consequently, the RPD erred when it concluded that his claim had no credible basis without assessing the independent and credible documentary evidence capable of supporting the claim.

The phrase "credible and trustworthy evidence" is qualified by the phrase "on which [the RPD] could have made a favourable decision". Accordingly, the RPD may still find that a claim has no credible basis even if there is some credible or trustworthy evidence.[30] The legislation requires the decision maker to inquire whether the available evidence is "sufficient in law to sustain a positive determination of the claim."[31] [emphasis added]

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[28] *Paniagua v. Canada (Citizenship and Immigration)*, 2016 FC 248, at para 9.

[29] *Mohamed v. Canada (Citizenship and Immigration)*, 2020 FC 186, at para 63.

[30] In *Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, [2002] 3 FC 537, at para 30, the Federal Court of Appeal stated in reference to s. 69.1(9.1) of the *Immigration Act* that "[…] the existence of *some* credible or trustworthy evidence will not preclude a 'no credible basis' finding if that evidence is insufficient in law to sustain a positive determination of the claim." Although the wording of s. 107(2) of the IRPA is not identical due to the addition of s. 97(1), it has been interpreted in the same way in cases such as *Behary v. Canada (Citizenship and Immigration)*, 2015 FC 794, at para 53: "only if there is no independent or credible documentary evidence, or if any such evidence cannot support a positive decision, can the RPD make such a finding" [emphasis added].

[31] In *Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, [2002] 3 FC 537 at para 30, the Federal Court of Appeal went on to explain that:

> Indeed, in the case in bar, Teitelbaum J. upheld the 'no credible basis' finding, even though he concluded that, contrary to the Board's finding, the claimant's testimony concerning the intermittent availability of police protection was credible in light of the documentary evidence….

For example, in *Marquez*,[32] the medical information did not have the probative value necessary to undermine the no credible basis finding, as it provided no information other than the nature of the injuries, which could have been caused in many different ways.

Another example of credible or trustworthy evidence which lacked the requisite probative value to preclude a no credible basis finding can be seen in *Moïse,*[33] where the Federal Court held that the death certificate which provided only the date of death of the Applicant's mother did not amount to credible and trustworthy evidence on which a positive decision could be made.

In *Paniagua*,[34] the Applicant alleged that she was physically abused by her partner. The Federal Court agreed with the RPD that there was no credible or trustworthy evidence to support her claim for protection. Specifically, the daughter's birth certificate merely established paternity. A letter from the girl's school restated the Applicant's statement to the principal that the daughter's behavioural problems were due to problems with the girl's father, including aggression. Although a medical report was independent evidence of an injury to the Applicant, it contained no evidence of the cause. Finally, the protection order was not central to the claim as it captured events which occurred years prior to the matters mentioned in the claim.

In *Dimo*,[35] the Federal Court held that the RPD made reasonable findings that the evidence before it was either not credible or the parts that were credible did not support the Applicants' claim. Thus, the Court agreed that the claim had no credible basis.

In *Li*,[36] the Applicant claimed that he was persecuted because he protested against the forced sale of his land to the government. The RPD had concerns regarding the Applicant's identity and credibility. It dismissed the claim and found that it had no credible basis. The only objective evidence led by the Applicant were identifying documents indicating that he was an agricultural labourer (and not a landowner), a receipt for fertilizer, and a set of

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[32] *Marquez v. Canada (Citizenship and Immigration),* 2013 FC 325, at para 13.

[33] *Moïse v. Canada (Citizenship and Immigration),* 2019 FC 93, at para 17.

[34] *Paniagua v. Canada (Citizenship and Immigration),* 2016 FC 248, at paras 24-26.

[35] *Dimo v. Canada (Citizenship and Immigration)*, 2018 FC 173, at para 68. The Applicant claimed that he purchased a plot of land in Albania. The transaction was not recognized by Mr. Llupi. The Applicant was attacked, his house was burned down, and he was forced to flee to Greece where, the Applicant alleged, Mr. Llupi continued to pursue the family and was responsible for the death of the Applicant's brother. The RPD accepted that the Applicants purchased land from the Llupi family and that the brother died. It found, however, that neither fact supported the claims. Even if some weight had been given to any of the documents, they would not have changed the finding of no credible basis as they did not support the allegation that Mr. Llupi was pursuing the Applicants.

[36] *Li v. Canada (Citizenship and Immigration)*, 2018 FC 536, at para 25.

photographs which showed some land, but offered no indication that it was the Applicant's land subjected to expropriation. According to the Court, this evidence could not establish his claim. Thus, the no credible basis finding was reasonable.

3.8. Credibility and no credible basis findings

The following sections explore the interplay between negative credibility findings and s. 107(2).

3.8.1. A "no credible basis" finding requires more than a simple lack of credibility

The Federal Court of Appeal has stated that the Board should not routinely state that a claim has no credible basis whenever it concludes that the claimant is not a credible witness.[37]

In *A.B.*,[38] Justice Pamel explained that a "no credible basis" finding is not linked to a reasonable "not credible" finding. The RPD should not confuse and conflate the test for determining whether evidence is credible with its finding that there is no credible basis for the claim. To say that a claimant lacks credibility is not the same as saying that the claimant's claim has no credible basis.[39]

If a claimant adduces independent and credible evidence that is capable of supporting a positive decision, then the claim will have a credible basis even if the claimant's testimony is found not to be credible.[40]

In each of the following cases, the Court agreed that the claimant lacked credibility but found that the RPD erred in also concluding that the claim had no credible basis.

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[37] *Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, [2002] 3 FC 537, at para 51.

[38] *A.B. v. Canada (Citizenship and Immigration)*, 2020 FC 562, at para 31.

[39] In *Wu v. Canada (Citizenship and Immigration)*, 2016 FC 516, at para 12 the Court emphasized the following: "Importantly, to say that the Applicant lacked credibility is not the same as saying that the Applicant's claim has no credible basis."

See also *Eze v. Canada (Citizenship and Immigration)*, 2016 FC 601, at para 26, where Justice Strickland stated the following: "However, to find that the Applicants lacked credibility is different from saying that their claim had no credible basis."

[40] *Chen v. Canada (Citizenship and Immigration)*, 2015 FC 1133, at para 16.

In *Pournamnivas*,[41] the Federal Court found that the RPD's negative credibility findings were reasonable. However, it quashed the no credible basis finding. The RPD did not make explicit credibility findings about two witnesses. Moreover, the second witness was the Applicant's same-sex partner. The lack of any credibility findings against the second witness was particularly concerning to the Federal Court because the Applicant's homosexuality was squarely in issue before the RPD. Second, there was substantial documentary evidence before the RPD about the persecution of homosexuals in India. This evidence was not assessed by the RPD prior to making its no credible basis finding. In light of the country condition documentation about the treatment of homosexuals in India, and the fact the Member did not make any explicit negative credibility findings regarding the two witnesses, it was unreasonable to conclude that the claim had no credible basis.

In *Eze*,[42] the Federal Court was open to accepting the RPD's negative credibility findings, despite the presence of multiple errors in the Board's analysis. However, it held that the RPD's findings under s. 107(2) were unreasonable. Specifically, the RPD made no references to the emails and mentioned the affidavits of family members only in passing. The RPD also made a blanket finding giving no weight to any of the Applicants' supporting documents because of its serious concerns regarding the Applicants' credibility. The Federal Court held that the Board rejected the documents without assessing them based on its flawed credibility analysis. Thus, the decision was quashed.

In *Omar*,[43] the Federal Court agreed with the RPD that the claimant was not credible but overturned the no credible basis finding. The RPD accorded little weight to the letters of support and to the testimony of the identity witness, but did not reject this evidence in its entirety. According to the Court, this analysis of the evidence was heavily influenced by the RPD's general assessment of Mr. Omar's credibility. However, since there was some evidence on which the claim could potentially succeed, the no credible basis finding was unreasonable.

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[41] *Pournaminivas v. Canada (Citizenship and Immigration)*, 2015 FC 1099, at paras 5 and 10.

[42] *Eze v. Canada (Citizenship and Immigration)*, 2016 FC 601, at para 27.

[43] *Omar v. Canada (Citizenship and Immigration)*, 2017 FC 20. Given the numerous instances of uncorroborated, inconsistent, incoherent, and implausible evidence identified by the RPD, the Court found no fault with that the RPD's decision to reject Mr. Omar's refugee claim as lacking in credibility (at para 15). However, the Court considered that "[The claimant's] knowledge of Somalia, his facility with the language, and the identity witness were all potentially capable of establishing that he was a Somali national; and the letters of support from his family members were potentially capable of establishing that he had a well-founded fear of persecution in Somalia."

3.8.2. Erroneous credibility findings

The Federal Court is likely to overturn the no credible basis decision where the RPD makes erroneous negative credibility findings, particularly in relation to crucial evidence adduced by the claimant. Where the negative credibility findings are reasonable, the Court is less likely to intervene.

For example, in *Aboubeck*,[44] Justice LeBlanc held that one of major credibility findings was made in error. Consequently, the no credible basis conclusion was unreasonable.

In *Tsikaradzei*,[45] the Federal Court held that the RPD's findings concerning the Applicant's credibility could not be justified. The RPD did not believe that the Applicant was a member in a political organization and that he was assaulted. These conclusions were unreasonable in the face of the police reports, the medical reports, and the letter from the political party. Since the evidence contradicted its findings, the RPD was required to assess the documents provided by the Applicant. Its decision was "devoid of any analysis of why these documents were not credible." Consequently, the no credible basis finding was unreasonable.

In *A.B.*,[46] Justice Pamel reviewed the RPD's adverse credibility findings and concluded that many of them resulted from the RPD misconstruing elements of the Applicant's testimony. The RPD conflated the test for determining whether the evidence is credible with finding that there was no credible basis for the claim and failed to appropriately consider the documentary evidence before making a finding pursuant to s. 107(2) of the IRPA. Thus, the no credible basis finding was overturned.

Not every claim that lacks credibility also lacks a credible basis, but where negative credibility findings are reasonable, a no credible basis finding is less likely to be overturned.

In *Drammeh*,[47] the Federal Court upheld the RPD's findings on s. 107(2) because the underlying credibility assessment was reasonable. In that case, the minor Applicant alleged that he feared persecution due to his father's mid-level position with the National Intelligence Agency (NIA) under the former government of Gambia. However, the only evidence to

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[44] *Aboubeck v. Canada (Citizenship and Immigration)*, 2019 FC 370, at para 17. According to the Court, there was no contradiction between the Basis of Claim Form and the Applicant's testimony concerning how he got to the hospital after the assault, despite the presence of minor inconsistencies between the written narrative and the oral testimony.

[45] *Tsikaradzei v Canada (Citizenship and Immigration)*, 2017 FC 230, at paras 16 and 21.

[46] *A.B. v. Canada (Citizenship and Immigration)*, 2020 FC 562, at para 25.

[47] *Drammeh v. Canada (Immigration, Refugees and Citizenship)*, 2018 FC 1005, at paras 22-23, and 25-26.

support the core of the Applicant's claim was his father's affidavit which stated that he was a driver for the Agency and had witnessed atrocities committed by the former regime. The RPD made a negative credibility finding with respect to the affidavit, given the absence of any documentary evidence to confirm that the father had indeed worked with the NIA. The RPD also made a negative credibility finding in relation to the Applicant's claim that direct threats had been made against his family, because the father's evidence did not reference any such threats. Furthermore, the RPD questioned the fact that the father sent his son to Canada to save him from harm, reasoning that that if anyone was of interest to the authorities in The Gambia it was the Applicant's father himself. There was no evidence to indicate that anyone in The Gambia had any interest in the Applicant. The Federal Court found that the RPD had considered the Applicant's evidence and had reasonably determined that it was not credible or trustworthy.

Similarly, in *Fleury*,[48] the RPD considered that the contradictions and inconsistencies between the documentary evidence and the Applicant's testimony related to that evidence rendered her testimony devoid of any credibility. The Federal Court upheld the RPD's negative credibility findings and agreed that the contradictions in the documentary evidence led the RPD to a reasonable conclusion that the claim had no credible basis. It emphatically rejected the suggestion that the RPD would have conflated its finding that the Applicant lacked credibility with its finding that there was no credible basis for her claim for refugee protection.

3.8.3. Where the claimant's testimony is the only evidence

In practice, the claimant's oral testimony is often the only evidence linking the claimant to the alleged persecution. In such cases, if the claimant is not found to be credible, there will be no credible or trustworthy evidence to support the claim.[49] In other words, an automatic no credible basis finding may flow from general negative credibility findings where there is no evidence other than the claimant's impugned testimony.

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[48] *Fleury v. Canada (Citizenship and Immigration)*, 2019 FC 21, at paras 13, 26, and 28. In addition, the Court referred to the element of the absence of subjective fear, writing at para 30:

> When we also consider the fact that Ms. Fleury failed to apply for refugee protection during the year that she lived in the United States, as well as the contradictions in the documentary evidence, it is my opinion that the RPD reasonably concluded that there was no credible basis for Ms. Fleury's claim.

[49] *Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, [2002] 3 FC 537, at para 29.

> More recently, in *Chen v. Canada (Citizenship and Immigration)*, 2015 FC 1133, at para 16, Justice Zinn wrote, "[…] if the only evidence before the RPD is the testimony of the claimant, then a general finding that he or she lacks credibility will amount to a finding that there is "no credible basis" for the claim [emphasis in original]."

However, if there are errors in the assessment of the claimant's oral testimony, the Federal Court is likely to overturn the no credible basis finding. This is what happened in *Francisco,*[50] where the Federal Court quashed the RPD's decision, which included its finding of no credible basis under s.107(2). The Applicant's oral testimony was the only evidence at the RPD hearing and the RPD concluded, based on its cumulative negative credibility findings, that the Applicant was generally not credible. Moreover, it concluded that there was no credible or trustworthy evidence to support the Applicant's claim. Justice Russell agreed with the Applicant that some of the RPD's adverse credibility findings were unreasonable. Since those findings were among the reasons for the RPD's conclusion that the Applicant was generally not credible, the decision was sent back.

3.9. Failure to establish identity and no credible basis findings

In numerous cases, the Federal Court has found it reasonable for the Board to conclude that the claimant failed to establish identity and also to find that there was no credible basis for the claim.

For example, in *Ahmed*,[51] the RPD held that the Applicant had failed to establish her identity and found that the claim had no credible basis. It rejected the evidence offered by the Applicant and also rejected the evidence of two witnesses who testified on her behalf. The Federal Court upheld the decision without addressing the s. 107(2) findings.

In *Behary*,[52] the RPD held that the claimant failed to establish his identity. It further found that the claim had no credible basis. After hearing the claimant's testimony and examining all the documentary evidence, the RPD concluded that there was no persuasive evidence establishing the claimant's nationality. The Federal Court held that because the claimant failed to establish that his nationality was Iranian, the documentary evidence as to persons at risk in Iran had no connection to him. Consequently, the no credible basis finding was reasonable.

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[50] *Francisco v. Canada (Citizenship and Immigration),* 2018 FC 456, at paras 6, 15, 34-35 and 37.

[51] *Ahmed v. Canada (Citizenship and Immigration),* 2018 FC 201, at paras 4 and 6-7.

[52] *Behary v. Canada (Citizenship and Immigration),* 2015 FC 794, at paras 51, 59 and at para 61 where Justice Strickland wrote:

> The Applicant points to no authorities that support his position that where identity is not established, there may still be a credible basis for the claim. The circumstances here are more in keeping with the cases that find that where identity is not established it is not necessary to further analyze the evidence and the claim (*Zheng v Canada (Citizenship and Immigration),* 2008 FC 877 at para 15; *Li v Canada (Minister of Citizenship and Immigration*), 2006 FC 296 at para 8; *Wang v Canada (Citizenship and Immigration)*, 2011 FC 1369, at para 3).

The Federal Court also upheld the RPD's findings concerning s. 107(2) in *Olaya Yauce*.[53] The Applicant argued that the RPD erred in its assessment of the weight to be given to his national identity card, sworn statements, and corroborative documents. According to the Applicant, there was credible evidence which his refugee claim could have succeeded. The Court however, held that the RPD reasonably found that the person in the photograph on the national identity card was not the Applicant. Although the Applicant failed to provide an English language translation of the national identity document as required by the *Refugee Protection Division Rules*, it was obvious from the decision that the RPD did consider the card because it explained why the document was not reliable. Furthermore, the Applicant failed to produce the original identity document or his passport. The Applicant produced a scanned copy of his birth certificate after the hearing had begun but no original or the English language translation as required by the RPD Rules; and he failed to provide the email print out showing the email address and the communication to which the copy was attached. The RPD refused to hear from a witness, again because of the Applicant's failure to comply with the RPD Rules. According to the Federal Court, the RPD reasonably found that there was no credible and trustworthy evidence on which it could rely.

In *Obamoe*,[54] the RPD rejected the Applicant's credibility and found that there was no credible or trustworthy evidence of his identity and nationality. The RPD found that the Applicant knowingly provided false information about all aspects of his journey to Canada and this undermined his overall credibility. The identity documents he submitted, including a photocopy of a birth certificate, were found to be fraudulent or improperly obtained and they were given no weight. The Member expressly found that there was no credible or reliable evidence that the Applicant was who he said he was. The Applicant contested only the no credible basis finding. As the Member rejected all available evidence concerning identity and nationality, the Federal Court upheld the no credible basis finding.

In other cases, the Federal Court found that the RPD reasonably concluded that the claimant's identity had not been established, but erred in finding that the claim had no credible basis because it either failed to consider, or else unreasonably assessed evidence that could establish the claimant's identity.

In *Mohamed*,[55] although the Federal Court concluded that the RPD's identity finding was within the scope of reasonableness, it was not sufficient to save the no credible basis finding as the RPD committed a reviewable error, described by the Court in paragraph 34:

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[53] *Olaya Yauce v. Canada (Citizenship and Immigration)*, 2018 FC 784, at paras 8-34.

[54] *Omaboe v. Canada (Citizenship and Immigration)*, 2019 FC 1135, at paras 20, 22 and 24.

[55] *Mohamed v. Canada (Citizenship and Immigration)*, 2017 FC 598, at paras 29 and 34.

> […] the RPD here did not give no weight to or otherwise reject the letters and declarations from Somali organizations, but gave them little evidentiary weight based on their lack of probative value, finding them insufficient to prove identity. Likewise, the RPD did not find that the Applicant's mother or cousin were not credible themselves, but gave their evidence little weight due to credibility concerns with respect to the Applicant's own evidence. Each of these pieces of evidence supported the Applicant's story. [emphasis added].

In *Hadi*,[56] the Federal Court agreed that the Applicant failed to establish her identity. However, the Court considered that there was some evidence before the RPD that was potentially capable of establishing the Applicant's claim. For that reason, the RPD's finding that there was no credible basis for the Applicant's claim was unreasonable. Specifically, the Applicant submitted a letter from a non-profit organization which assisted people from Africa in establishing their citizenship. Two versions of the letter were provided but both concluded that the Applicant was born in Afgoye, Somalia. The first version stated that the Applicant completed an application and answered a questionnaire. However, the Applicant was illiterate. The second version stated that the Applicant participated in an oral interview during which she was questioned in the Somali language about Somali history, heritage, geography, clan lineage, and culture. The discrepancy arose because a boilerplate paragraph was not removed from the first letter. This error was corrected prior to the hearing and the finding concerning the Applicant's nationality in the first letter was left unchanged in the second version. The RPD stated that it understood the explanation. Furthermore, it raised no concerns with the organization's expertise or the contents of the letter. Nonetheless, the RPD gave the letter no weight based on the existence of two versions. The Court found that the Board erred in its consideration of the letter, which affected its assessment of the Applicant's nationality and clan membership. Thus, the no credible basis finding was unreasonable.

In *Kebedom*,[57] the RPD's decision was overturned because its assessment of the Applicant's birth certificate was unreasonable. The Applicant claimed to fear persecution as a consequence of mandatory conscription in Eritrea. The RPD however, gave no weight to the Applicant's documents, including an Eritrean birth certificate despite its finding that there were no flaws on the face of the document. In light of the ready availability of fraudulent documents and its finding that the Applicant was not credible, the RPD concluded that the birth certificate was neither credible nor trustworthy. The Federal Court however, stated that the fact that fraudulent identity documents were available in Eritrea and in the Eritrean

[56] *Hadi v. Canada (Citizenship and Immigration)*, 2018 FC 590, at paras 2, 36, 39, 41 and 54.

[57] *Kebedom v. Canada (Citizenship and Immigration)*, 2016 FC 781, at paras 26 and 30. Justice Heneghan further added, at para 31, "In my opinion, the RPD's no credible basis finding is also flawed since the Applicant's knowledge of Tigrinya, the most widely spoken language in Eritrea, is credible evidence that could support the recognition of his refugee claim."

expatriate community in Canada was not a sufficient basis to reject the Applicant's birth certificate.

In *Liu*,[58] the RPD found no credible evidence to establish the Applicant's identity. Since the Applicant's identity was essential to the other elements of his claim, the RPD determined that there was no evidence on which it could have made a positive finding. Specifically, the RPD found that the Applicant's testimony about his Resident Identity Card, which the RPD considered the most important document to prove the identity of Chinese nationals, lacked credibility. As for other documents that could have served as proof of the Applicant's identity, the RPD did not make any negative credibility findings against them. Rather, it determined that in light of the low weight given to non-secure documents as confirmation of identity, they did not meet the evidentiary threshold of proving the Applicant's identity on the balance of probabilities. At paragraph 32 the Court pointed out that this was the wrong approach for deciding that a claim had no credible basis:

> [32] That approach is acceptable when making a finding on whether an applicant failed to establish their identity. However, it does not necessarily support the finding that there was no credible basis for this Applicant's claim. A finding of no credible basis requires that the RPD analyze whether, if the other identity documents were believed, the weight attributed to those documents could establish the Applicant's identity: *Rahaman v Canada (Minister of Citizenship and Immigration)* [citation omitted]. By failing to conduct that analysis, the no credible basis finding made by the RPD is unreasonable.

3.10. Duty to assess all relevant evidence

Since the threshold for finding that a claim has no credible basis is a high one, the Board is required "to examine all the evidence and to conclude that the claim has no credible basis only when there is no trustworthy or credible evidence that could support a recognition of the claim" [emphasis added].[59] In Mohamed, the Court held that "in advance of reaching a conclusion of no credible basis, the RPD must look to any objective documentary evidence for any credible or trustworthy support for an applicant's claim."[60] [emphasis added]

In Wu,[61] the Federal Court overturned the no credible basis finding because a significant piece of the evidence, a letter of dismissal from the employer, was not considered

[58] *Liu v. Canada (Citizenship and Immigration)*, 2018 FC 253, at paras 23-24 and 31-32.

[59] *Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, [2002] 3 FC 537, at para 51.

[60] *Mohamed v. Canada (Citizenship and Immigration)*, 2020 FC 186, at para 59.

[61] *Wu v. Canada (Citizenship and Immigration)*, 2016 FC 516, at para 13.

or rejected. The letter stated that the Applicant was a Falun Gong practitioner and that she was terminated for that reason. According to the Court, the letter could provide some credible evidence that could ground a positive finding, especially in light of the documentary evidence suggesting that the state pursues and monitors Falun Gong practitioners.

In *Pournaminivas*, the Federal Court held that the failure of the RPD to consider the evidence of two witnesses meant that it had failed to properly consider whether there was any credible evidence to support the claim.[62]

In *Moïse*,[63] Justice LeBlanc noted that while it would be preferable, if not desirable, for the RPD to address each piece of the evidence that the Applicant submitted in establishing whether there was a credible basis for the claim, the RPD is not required to do so, unless the evidence may substantiate the Applicant's claim for refugee protection. Rather, the RPD has an obligation to refer to the evidence which, on its face, contradicts its conclusions and to explain why the evidence concerned did not have the effect of changing those conclusions. In other words, the no credible basis finding may be upheld even if the RPD did not explicitly refer to the submitted evidence, provided that the evidence could not support the claim. According to Justice LeBlanc, in *Wu*, *supra*, the obligation to consider the evidence arose precisely because there was evidence which had the potential to contradict the RPD's findings concerning s. 107(2).

A similar approach was adopted in *Paniagua*.[64] The Applicant alleged that a medical report and other three documents were not adequately assessed by the RPD. The Federal Court determined that the RPD did not intend to refer to the four documents. Although the RPD failed to expressly assess the documents, it did not err because the documents were insufficient to sustain a positive determination of the claim.

In *Djama*,[65] the claimant argued that a letter written by her friend was not expressly considered by the RPD. The Federal Court held that the letter purported to confirm the existence of at least one fact that the RPD explicitly rejected during the hearing. Thus, the letter's general credibility was seriously undermined. Second, the Court distinguished *Djama* from *Wu*, *supra*, because the letter in *Wu* was more objective and did not purport to confirm one or more facts that had been found to be untrue by the panel. Notably, the Federal Court stated that the RPD had no duty to consider the letter even if it may have confirmed other facts that have not been found to be untrue. According to Justice Crampton, once a person

[62] *Pournaminivas v. Canada (Citizenship and Immigration)*, 2015 FC 1099, at paras 7-8.

[63] *Moïse v. Canada (Citizenship and Immigration)*, 2019 FC 93, at paras 18-21.

[64] *Paniagua v. Canada (Citizenship and Immigration)*, 2016 FC 248, at paras 16, 21-22 and 28.

[65] *Djama v. Canada (Citizenship and Immigration)*, 2019 FC 86, at paras 11-12.

has been found to be untruthful, the credibility of the rest of what the person has to say is seriously undermined to the point the RPD has no obligation to explicitly mention it in its decision. Accordingly, it was reasonably open to the RPD to implicitly consider that such a letter did not provide a credible basis for the Applicant's claim.

In summary, in situations where the claimant's evidence has not been expressly assessed by the RPD in relation to s. 107(2), the Federal Court has considered whether the evidence could have supported a positive determination of the claim. Where the evidence could reasonably have supported the claim, the findings made under s. 107(2) were quashed by the Federal Court.

3.11. Duty to provide adequate reasons

In several decisions, the Federal Court has faulted the RPD for failing to adequately articulate the analysis leading to its findings under s. 107(2).

For example, in *Boztas*,[66] the RPD accepted that the Applicant was a Kurd of the Alevi religion. It also accepted that Kurds and Alevi practitioners face discrimination, harassment, and, in particular cases, persecution. It acknowledged that a number of documents in evidence outlined the difficulties Kurds face. However, according to the panel, not all Kurds faced persecution based on their ethnicity. Without further discussion of the issue, the RPD concluded that the claim had no credible basis. Justice Brown found that the RPD acted unreasonably and incorrectly, given that there was indeed credible or trustworthy evidence that could support a positive determination and that the evidence had in fact been accepted by the RPD and given some weight. He overturned the decision, noting that the entirety of the RPD's finding was contained in one paragraph: "The panel finds that pursuant to subsection 107(2) of the IRPA, that there was no credible or trustworthy evidence on which a favourable decision could be made and therefore there was no credible basis for the claim."

In *Hadi*,[67] the Federal Court stated that, "[…] the RPD provided no discussion or analysis of its finding that there was no credible basis for the Applicant's claim. In order to properly make a finding that limited the Applicant's subsequent procedural rights, the RPD, as a matter of fairness, was required to do so."

[66] *Boztas v. Canada (Citizenship and Immigration)*, 2016 FC 139, at paras 6-7 and 12-13.

[67] *Hadi v. Canada Citizenship and Immigration*, 2018 FC 590, at para 54.

3.12. Court-ordered remedies

There is some uncertainty as to the most appropriate remedy where a no credible basis finding is overturned by the Federal Court. A review of the jurisprudence shows a number of different approaches:

- The Federal Court has quashed the no credible basis conclusion while upholding the RPD's decision based on reasonable negative credibility findings.[68]
- The Federal Court has remitted only the question concerning the no credible basis conclusion to a differently constituted panel of the RPD for re-determination.[69]
- In *Mahdi*,[70] the Federal Court suspended the operation of the RPD's decision to allow an applicant to commence an appeal to the RAD.
- In *Qiu*,[71] the Federal Court returned the matter to the RPD with directions that the portion of the decision declaring that no credible basis finding be set aside and that an amended decision to that effect be issued bearing the date of the amendment.

[68] *Kahin v Canada,* IMM-1894-15, January 5, 2016 (unpublished order). The Court found that the RPD erred in finding the claim had no credible basis in that there was witness testimony and a document from an aid organization attesting to the claimant's identity which constituted evidence capable of supporting the claim. The Court struck the no credible basis finding from the decision but confirmed the finding that the claimant was neither a Convention refugee nor a person in need of protection given the general lack of credibility of the claimant's testimony.

[69] *Omar v. Canada (Citizenship and Immigration)*, 2017 FC 20, at para 24; *Hadi v. Canada Citizenship and Immigration,* 2018 FC 590, at para 55.

[70] In *Mahdi v. Canada (Citizenship and Immigration),* 2016 FC 218, at paras 14-15, Justice Phelan held that the no credible basis conclusion was unreasonable. Rather than quashing the RPD decision, he suspended the operation of the Federal Court's decision to permit the Applicant to commence an appeal to the RAD. At a hearing on a motion for reconsideration (*Mahdi v. Canada (Citizenship and Immigration),* 2016 FC 422), the Applicant advised the Court that an appeal which had been filed prior to the Application for leave for judicial review was denied by the RAD. Consequently, the Federal Court amended its order and quashed the RPD's decision, allowing the matter to go back to the RPD for a redetermination.

[71] *Qiu v. Canada (Citizenship and Immigration),* 2016 FC 740, at para 12. Justice Hughes explained that by returning the matter to the RPD with these directions, the RPD would not need to conduct a new hearing and an appeal to the RAD would be possible. He also certified a question concerning the Federal Court's jurisdiction to issue such a direction but the FCA dismissed the appeal, finding the question should not have been certified. In *Qiu,* 2019 FC 389, Justice Pentney outlines these and subsequent proceedings in the case, which finally was not heard by the RAD.

- In most cases, the Federal Court has chosen to remit the entire decision to the RPD for redetermination by a different panel.[72]

[72] See for example, *Boztas v. Canada (Citizenship and Immigration)*, 2016 FC 139; *Sterling v. Canada (Citizenship and Immigration)*, 2016 FC 329; *Eze v. Canada (Citizenship and Immigration)*, 2016 FC 601; *Kebedom v. Canada (Citizenship and Immigration)*, 2016 FC 781; *Tsikaradzei v Canada (Citizenship and Immigration)*, 2017 FC 230; *Liu v. Canada (Citizenship and Immigration)*, 2018 FC 253; *Francisco v. Canada (Citizenship and Immigration)*, 2018 FC 456; *Chen v. Canada (Citizenship and Immigration)*, 2019 FC 162; *Mohamed v. Canada (Citizenship and Immigration)*, 2020 FC 186; *A.B. v. Canada (Citizenship and Immigration)*, 2020 FC 562.

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4. MANIFESTLY UNFOUNDED CLAIMS

4.1. Legislation

Section 107.1 of the *Immigration and Refugee Protection Act* ("IRPA")[1] provides that a claim must be deemed to be manifestly unfounded in certain circumstances.

> 107.1 If the Refugee Protection Division rejects a claim for refugee protection, it must state in its reasons for the decision that the claim is manifestly unfounded if it is of the opinion that the claim is clearly fraudulent.

The scope of section 107.1 is limited to cases where the claim is "clearly fraudulent". A determination that a claim is manifestly unfounded should not be confused with a finding under subsection 107(2) that a claim has no credible basis.

4.2. Analysis under section 107.1 is mandatory

Section 107.1 does not grant discretion to the RPD. If a panel rejects a claim and finds it is clearly fraudulent, it "must state" in its reasons for the decision that the claim is manifestly unfounded.

Situations may arise where a decision maker must determine that a single claim is both manifestly unfounded and without credible basis. The language in subsection 107(2) is also mandatory and nothing suggests that a decision maker may choose one provision over the other where the necessary conditions of both provisions are met.

In *Yared Belay,* the RPD rejected the claim and found that it was manifestly unfounded and had no credible basis. Justice Elliott clearly addressed this issue in her reasons:

> [T]he language in sections 107(2) and 107.1 of the *IRPA* are [*sic*] mandatory: if the RPD finds no credible or trustworthy evidence on which it could have made a favourable decision, it shall state that there is no credible basis to the claim. And if the RPD is of the opinion that a claim is clearly fraudulent then it must state that the claim is manifestly unfounded. It therefore stands to reason that if the RPD is of the opinion that there is no trustworthy or credible evidence on which it could have made a favourable opinion and that the claim is clearly fraudulent, then it must state both that the claim has no credible basis and that it is manifestly unfounded.[2]

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[1] SC 2001, c 27 [IRPA]. The provision was added as an amendment to the IRPA pursuant to the *Balanced Refugee Reform Act*, SC 2010, c 8, s. 11.1.

[2] *Yared Belay v. Canada (Citizenship and Immigration)*, 2016 FC 1387, at para 16.
In *Iyamu v. Canada (Citizenship and Immigration)*, 2015 FC 1418, at para 7, both provisions were applied.

4.3. Excluded claimants

In *Singh*, the Federal Court of Appeal said that the RPD is precluded from finding that a claim is manifestly unfounded once it determines that the claimant is excluded under Article 1F of the *Refugee Convention*. *Justice Stratas reframed the certified question as follows and answered it in the affirmative:*

> Considering the authority of the Refugee Protection Division under subsection 107(2) and section 107.1 of the *Immigration and Refugee Protection Act* to determine that a claim has no credible basis or is manifestly unfounded, is the Refugee Protection Division precluded from making such a determination after it has found that the claimant is excluded under section F of Article 1 of the *Refugee Convention*?[3]

4.4. Notice requirements

The RPD is not required to provide notice to a claimant that it is considering finding their claim to be manifestly unfounded. However, procedural fairness will often require that the claimant be given an opportunity to respond to credibility concerns that form the basis of such a finding, just as it would with respect to credibility concerns more generally.

4.5. Serious consequences for the claimant

Two serious legal consequences flow from a finding that a claim is manifestly unfounded.

First, the claimant is barred from appealing to the Refugee Appeal Division ("RAD") by subsection 110(2)(c) of the IRPA. Thus, a claimant challenging a manifestly unfounded determination would have to seek leave to have the RPD's decision judicially reviewed by the Federal Court.

Second, the claimant is not entitled to an automatic stay of removal when they seek leave for judicial review.[4] Consequently, the claimant must also apply to the Federal Court for a stay of removal, which is a discretionary remedy.[5]

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[3] *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 300, at para 18.

[4] Immigration and Refugee Protection Regulations, SOR/2002-227, s. 231: "… a removal order is stayed if the subject of the order makes an application for leave for judicial review in accordance with section 72 of the *Act* with respect to a decision of the Refugee Appeal Division that rejects, or confirms the rejection of, a claim for refugee protection … ." If a claimant is barred from appealing to the RAD, section 231 does not apply.

[5] In *Rahman v. Canada (Citizenship and Immigration)*, 2020 CanLII 18939, the Federal Court dismissed the stay application of failed refugee claimants whose claims were found to be manifestly unfounded. The Court explained that a stay is extraordinary equitable relief, and applicants seeking a stay must meet all three parts of the test articulated in *Toth v. Canada (Minister of Employment and Immigration)*, 1988 CanLII 1420 (FCA), namely that (i) a serious issue exists to be tried, (ii) the applicants would suffer irreparable harm if their removal was not stayed, and (iii) the balance of convenience favours staying the removal. To establish a serious issue,

4.6. Application of section 107.1 by the RAD

On several occasions, the RAD has noted the RPD could or should have determined appellants' claims were manifestly unfounded.[6] In some older decisions, the RAD substituted its own determinations that claims were manifestly unfounded.[7] However, more recently, the RAD has found it lacks jurisdiction to do so, as section 107.1 confers the authority to find a claim is manifestly unfounded only on the RPD.[8]

4.7. "Clearly" does not impose a higher burden of proof

The Federal Court has stated on multiple occasions that the threshold for finding a claim to be manifestly unfounded is a high one,[9] and such a finding must be grounded in the evidence.[10]

In *Warsame*, the Federal Court explained that "clearly fraudulent" refers to the firmness of the finding. It means the decision maker has the "firm conviction that refugee protection is sought through fraudulent means."[11]

The balance of probabilities standard applies to section 107.1 of the IRPA and the word "clearly" should not be interpreted as requiring a higher burden of proof.[12]

In *Warsame*,[13] the Court rejected the argument that a claim can be found to be clearly fraudulent only in "the clearest of cases." Similarly, in *Balyokwabwe*,[14] the Federal Court

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an applicant needs to show that the application is neither frivolous nor vexatious. Irreparable harm must consist of more than a series of possibilities and cannot be based on assertions and speculation.

[6] *X (Re)*, 2014 CanLII 32086 (CA IRB), at para 73; *X (Re)*, 2015 CanLII 63193 (CA IRB), at para 55; *X (Re)*, 2015 CanLII 104495, (CA IRB) at para 41; *X (Re)*, 2019 CanLII 124012 (CA IRB), at para 17.

[7] *X (Re)*, 2013 CanLII 69347 (CA IRB); *X (Re)*, 2013 CanLII 76472 (CA IRB); *X (Re)*, 2015 CanLII 30378 (CA IRB).

[8] *X (Re)*, 2018 CanLII 142823 (CA IRB), at paras 13-15; *X (Re)*, 2019 CanLII 145023 (CA IRB), at para 21.

[9] *Kahumba v. Canada (Citizenship and Immigration)*, 2018 FC 551, at para 55: "A finding that a claim is manifestly unfounded is not made lightly … "

Bushati v. Canada (Citizenship and Immigration), 2018 FC 803, at para 45: "… the threshold for finding a claim to be manifestly unfounded is high."

Also see *Yuan v. Canada (Citizenship and Immigration)*, 2018 FC 755, at para 45.

[10] *Warsame v. Canada (Citizenship and Immigration)*, 2016 FC 596, at para 24.

Balyokwabwe v. Canada (Citizenship and Immigration), 2020 FC 623, at para 45.

[11] *Warsame v. Canada (Citizenship and Immigration)*, 2016 FC 596, at para 31.

[12] *Balyokwabwe v. Canada (Citizenship and Immigration)*, 2020 FC 623, at paras 39-40.

[13] *Warsame v. Canada (Citizenship and Immigration)*, 2016 FC 596, at para 32.

[14] *Balyokwabwe v. Canada (Citizenship and Immigration)*, 2020 FC 623, at para 40.

rejected the argument that section 107.1 should be reserved for the "most egregious circumstances."

4.8. Meaning of "fraudulent"

4.8.1. Broad interpretation

The Federal Court has interpreted "fraud" broadly for the purposes of section 107.1. In *Warsame*,[15] the Court suggested that deceit is not an essential component. Rather, the gravamen of fraud is dishonesty, which may manifest itself through deceit or falsehood. The RPD must determine whether the claimant, as a matter of fact, represented that a situation was of a certain character, when in reality it was not. In other words, the decision maker needs to determine whether the claimant was dishonest.

In *He*, the Federal Court indicated the fraud contemplated by section 107.1 must be deliberate. Justice Norris wrote that for section 107.1 to apply, "the decision maker must find that the claimant has *deliberately* portrayed matters that go to the core of the claim for protection falsely."[16] [emphasis added]

4.8.2. "Fraudulent" refers to the claim

In *Warsame*,[17] the Court emphasized that "fraudulent" refers to the claim and not the fact that the claimant would have used, for instance, fraudulent documents to get out of the country of origin or gain access to Canada. However, once a claimant makes a claim for refugee protection, the person is expected to operate with clean hands. Otherwise, attempting to gain refugee protection through falsehoods may make the claim fraudulent.

4.8.3. The dishonesty must affect the claim in a material way

In *Warsame*, the Federal Court wrote:

> But not any misstatement or falsehood would make a refugee claim fraudulent. It must be that the dishonest representations, the deceit, the falsehood, go to an important part of the refugee claim for the claim to be fraudulent, such that the determination of the claim would be influenced in a material way. It seems

[15] *Warsame v. Canada (Citizenship and Immigration)*, 2016 FC 596, at paras 29-30.

[16] *He v. Canada (Citizenship and Immigration)*, 2019 FC 2, at para 21.
Also see *Omoijiade v. Canada (Citizenship and Immigration)*, 2019 FC 1533, at para 63, where the Federal Court upheld the RPD's conclusion that the claim was manifestly unfounded because the claimant submitted a fraudulent newspaper article to demonstrate his sexual orientation, his pursuit by the Nigerian authorities and the risk he would face; in other words, the core aspects of his claim.

[17] *Warsame v. Canada (Citizenship and Immigration)*, 2016 FC 596, at para 27.

> to me that a claim cannot be fraudulent if the dishonesty is not material concerning the determination of the claim. [18]

In other words, falsehoods that are merely marginal or antecedent to the refugee claim would not qualify. Nor would a claim be reasonably characterized as clearly fraudulent simply because the story is not believed.[19]

The following cases provide examples of significant acts of dishonesty that have led decision makers to conclude a claim is clearly fraudulent. Decision makers have often characterized such dishonest conduct as affecting the "core of the claim."

In *Wang*,[20] a Chinese citizen alleged that he joined the banned Eastern Lightening Church because conventional treatments had not improved his health issues. Among the documents seized by the Canadian Border Services Agency was a blank medical record that had been sent to the applicant's address. The RPD determined that the applicant had made a manifestly unfounded claim. In upholding the RPD's decision, the Federal Court agreed that the blank medical record was related to the central pillar of the claim and that the applicant could not escape "the obvious inference that he had been sent a blank form so that he could complete it himself in a way that would confirm the medical problems that were the basis for his turning to the Church."

In *Balyokwabwe*,[21] the Federal Court rejected the argument that the RPD had conflated a lack of credibility with a clearly fraudulent claim. According to the Court, the RPD based its findings on deceits and falsehoods that went to the very heart of the claim, including the key assertion that the applicant was a clinical officer who treated LGBTQ people.

In *Ahmad*,[22] the applicant alleged that he was the chief executive officer of a company that worked with American troops in Afghanistan. The RPD could not verify his identity and it appeared that his employment documents were fraudulent. The Federal Court upheld the RPD's determination that the claim was manifestly unfounded. According to Justice Gleeson, the evidence related to the company, in particular the business registration certificate, went

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[18] *Warsame v. Canada (Citizenship and Immigration)*, 2016 FC 596, at para 30.

[19] *Warsame v. Canada (Citizenship and Immigration)*, 2016 FC 596, at para 31.
Brindar v. Canada (Citizenship and Immigration), 2016 FC 1216, at para 11. It was not clear from the RPD's decision that it appreciated that "a negative credibility finding is not synonymous with submission of a fraudulent claim."

[20] *Wang v. Canada (Citizenship and Immigration)*, 2016 FC 184, at para 53.

[21] *Balyokwabwe v. Canada (Citizenship and Immigration)*, 2020 FC 623, at para 42. Although the RPD reasonably characterized the dishonest conduct as relating to the core of the claim, the decision was overturned because the RPD's negative credibility findings were based on exaggerations or misapprehension of the evidence.

[22] *Ahmad v. Canada (Citizenship and Immigration*, 2019 FC 11, at para 35.

to the core of the claim and the negative credibility findings in these areas allowed the RPD to reasonably come to its determination.

In *Omoijiade*,[23] the applicant had tendered a newspaper article as evidence that he was on a high-priority police search list in Nigeria due to his sexual orientation, which caused him to flee. The RPD found the article was fraudulent and the applicant had submitted it to deceive the RPD and gain refugee protection. The Federal Court upheld the RPD's determination that the claim was manifestly unfounded.

In *Varbanova*,[24] a core aspect of the claim involved an allegation that the applicant had been unlawfully detained and abused by Bulgarian police, who were intent on forcing her into prostitution. The RPD found that the applicant's medical reports and police summons were fabricated. The Federal Court held the RPD "had a reasonable foundation for rejecting Ms. Varbanova's evidence and for its finding that the claim was manifestly unfounded based on her dishonesty," noting that the documents were material to her story about a police assault.

The applicant in *Fatoye*[25] alleged she was persecuted because of her work as a human rights lawyer in Nigeria. The RPD held that the claim was manifestly unfounded because central documents, namely the threat letters and police report, were fraudulent. The Federal Court upheld the decision because the adverse credibility findings were not the result of minor inconsistencies that were secondary to the claim, but rather issues that went to the heart of the story.

In some cases, the Federal Court has disagreed with the RPD's characterization of the dishonest conduct as relating to the core of the claim and quashed the RPD's findings with respect to section 107.1. In *Hohol*,[26] the RPD concluded the claim was manifestly unfounded because the applicant had submitted fraudulent documents, including a police report relating to alleged beatings and a letter from his grandmother stating that the individuals who beat him had returned to his house looking for him. In finding those two documents were fraudulent, the RPD gave no weight to other documents submitted by the applicant. The Court quashed the decision, finding that the documents did not relate to any dishonesty material to the determination of the claim, which was based on the applicant's sexual orientation.

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[23] *Omoijiade v. Canada (Citizenship and Immigration)*, 2019 FC 1533, at para 65.

[24] *Varbanova v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 339, at paras 12-14.

[25] *Fatoye v. Canada (Citizenship and Immigration)*, 2020 FC 456, at paras 46 and 48.

[26] *Hohol v. Canada (Citizenship and Immigration)*, 2017 FC 870, at para 32.
Also see *Feboke v. Canada (Citizenship and Immigration)*, 2017 FC 855, at paras 3-4 where the Federal Court overturned the RPD's decision because it was based on "evidentiary features ancillary to the substance of the claim: use of and production of the Applicants' Nigerian passports; BOC error; BOC amendment; BOC deficiency; and perceived supporting witness affidavit irregularities."

4.9. Failure to establish identity

The Federal Court's decision in *Ntsongo*[27] highlights how dishonest conduct related to a claimant's identity may lead the RPD to reasonably conclude that the claim is manifestly unfounded. In that case, the RPD cited numerous credibility concerns, including in relation to the applicant's passports, number of children, marital status, religion, and employment history, as well as the fact that he possessed identity documents issued under two different identities. The Federal Court held the RPD had reasonably concluded that the claim was manifestly unfounded. According to the Court, a refugee claimant has a fundamental obligation to establish their identity, and based on the evidence in the case, it was impossible to determine the applicant's identity.

Similarly, in *Diallo*,[28] the RPD determined the applicant failed to establish his identity and the claim was manifestly unfounded. The RPD noted anomalies in the applicant's identity documents and questioned the manner in which he purportedly obtained them. The Federal Court upheld the decision without commenting on the RPD's section 107.1 finding.

4.10. Unreasonable credibility findings

The Federal Court may overturn the RPD's determination that a claim is manifestly unfounded if the negative credibility findings that informed the panel's section 107.1 analysis are unreasonable. In *Ali*, the applicant alleged his son was kidnapped and murdered by a criminal group. The RPD disbelieved the applicant's story about the death of his son and held that most of the documents in evidence, including the death certificate and police report, were fraudulent. Consequently, the RPD held that the claim was manifestly unfounded. The Federal Court overturned the decision, finding the panel had microscopically dissected the evidence with the presumption that it was fraudulent. Specifically, the panel made several unreasonable implausibility findings and focused on insignificant grammatical errors in the documents without considering objective country conditions documentation on Pakistan. [29]

The applicant in *Rahi*[30] had abandoned a claim for asylum in the United States. The RPD concluded that the claim was manifestly unfounded, relying in part on a note the applicant's former counsel made on a submission for the U.S. claim. The existence of that note was not within the knowledge of counsel for either party on judicial review before the Federal Court. The Court found the RPD's decision was unreasonable due to "errors in fact-finding."

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[27] *Ntsongo v. Canada (Citizenship and Immigration)*, 2016 FC 788, at paras 16 and 19-23.

[28] *Diallo v. Canada (Citizenship and Immigration)*, 2016 FC 741, at paras 21-22 and 45.

[29] *Ali v. Canada (Citizenship and Immigration)*, 2015 FC 814, at paras 17 and 27.

[30] *Rahi v. Canada (Citizenship and Immigration)*, 2017 FC 843, at paras 4-5.

In *Zhou*,[31] the RPD was concerned that the ink on the stamps on the applicant's documents was wet, smearing, and transferring to other documents. The panel concluded that the documents were fraudulent and the claim was manifestly unfounded. The Federal Court found that the RPD decision substantially overstated the ink problem and set it aside.

The applicant in *Yeganeh*[32] was an Iranian midwife who alleged she was persecuted because she had performed a hymenoplasty and converted to Christianity. The RPD did not believe the applicant had performed the procedure because she could not name the bodily organ or tissue that she purported to have stitched together (i.e. hymen), despite the interpreter's suggestion that Farsi has no word for "hymen", the applicant's description of the procedure, and the lack of contradictions in the testimony. The RPD rejected the claim and found it was manifestly unfounded. On judicial review, the Federal Court overturned the RPD's decision.

In *He*,[33] the RPD concluded the Wanted Circular and Release Certificates the applicant submitted were fraudulent. The panel wrote that "the law of criminal procedure in China does not expressly provide for the use of such documents" and concluded the claim was manifestly unfounded. However, nothing in China's criminal procedure law foreclosed the use of such documents in the applicant's situation. Given the centrality of the impugned evidence to the applicant's claim, the Federal Court found the decision was unreasonable.

In *Balyokwabwe*,[34] the Federal Court held that the RPD unreasonably extended negative credibility findings to other testimony and documents that were not otherwise impugned and failed to independently consider other relevant evidence. Thus, the RPD's negative credibility findings, even cumulatively, did not reasonably justify its determination that the applicant's claim was clearly fraudulent.

4.11. Cumulative and general credibility findings

The Federal Court has upheld findings of manifestly unfounded claims that were based on the cumulative effect of multiple negative credibility inferences or findings that claimants generally lacked credibility.

In *Warsame*,[35] the RPD had found the applicant was not a trustworthy witness due to a number of credibility issues concerning his narrative. In addition, the RPD found the

[31] *Zhou v. Canada (Citizenship and Immigration)*, 2017 FC 359, at paras 5 and 19.

[32] *Yeganeh v. Canada (Citizenship and Immigration)*, 2018 FC 714, at paras 34-37.

[33] *He v. Canada (Citizenship and Immigration)*, 2019 FC 2, at paras 14, 31 and 34.

[34] *Balyokwabwe v. Canada (Citizenship and Immigration)*, 2020 FC 623, at para 61.

[35] *Warsame v. Canada (Citizenship and Immigration)*, 2016 FC 596, at paras 13-14.

applicant had relied upon fraudulent marriage and birth certificates and failed to establish his identity. The panel concluded the claim was manifestly unfounded and the Federal Court upheld the decision.

In *Mbuyamba*,[36] Justice Pentney cited *Warsame* and noted a claim may be found to be manifestly unfounded based on a single fraudulent element or by cumulation. Similarly, in *Yuan*,[37] Justice Strickland wrote that *Warsame* could be taken to suggest that the RPD can find a claim is manifestly unfounded based on cumulative credibility findings.

The applicant in *Moriom*[38] seriously undermined her credibility and allegations by knowingly making false declarations about her name, birthdate, and passport and omitting evidence about her travels to the United Kingdom. The RPD emphasized the applicant's fraudulent intent and the "substantive nature" of her false declarations. Having found that the claimant generally lacked credibility and the record lacked independent and credible documentary evidence capable of supporting a positive disposition, the RPD dismissed the claim as manifestly unfounded. The Federal Court upheld the RPD's decision on judicial review.

In *Bushati*,[39] the RPD found the applicants generally lacked credibility, relied upon fraudulent documents, and failed to provide independent and credible evidence that would support a positive credibility finding. The RPD concluded the claim was manifestly unfounded. In upholding the decision, the Federal Court wrote that the "applicants' evidence was replete with inconsistencies, discrepancies, and omissions." The Court found the RPD had reasonably concluded that the claimant's blood feud certificate was fraudulent, among other reasonable findings that undermined the claims.

In *Nanyongo*,[40] the applicant alleged that she was arrested twice in connection with her political opinion before fleeing to Canada. The RPD found various documents the applicant provided were fraudulent, including a recognizance of surety, release orders, arrest warrants, and a medical report. The decision was unusual because the RPD's analysis under section 107.1 erroneously included an irrelevant paragraph that was apparently copied from an unrelated decision. While the Federal Court faulted the RPD for this oversight, it held that

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[36] *Mbuyamba v. Canada (Citizenship and Immigration)*, 2020 FC 918, at para 40.

[37] *Yuan v. Canada (Citizenship and Immigration)*, 2018 FC 755, at para 44.

Also see *Iyamu v. Canada (Citizenship and Immigration)*, 2015 FC 1418, at para 6, where the Federal Court cited numerous "areas where serious discrepancies were pointed out in [the applicant's] testimony" and upheld the RPD's conclusion that the claim had no credible basis and was manifestly unfounded.

[38] *Moriom v. Canada (Citizenship and Immigration)*, 2015 FC 588, at paras 11 and 27.

[39] *Bushati v. Canada (Citizenship and Immigration)*, 2018 FC 803, at paras 10-12, 31 and 45.

Also see *Kahumba v. Canada (Citizenship and Immigration)*, 2018 FC 551, at paras 54-55.

[40] *Nanyongo v. Canada (Citizenship and Immigration)*, 2018 FC 105, at paras 5 and 22.

the manifestly unfounded finding was reasonable due to the multitude of adverse credibility findings which supported the conclusion.

4.12. Sufficiency of reasons

The RPD's general obligation to justify its findings with sufficient reasons also applies with respect to a finding that a claim is manifestly unfounded. As explained above, not all dishonest representations amount to a clearly fraudulent claim, so the RPD must explain why the credibility concerns in a case make the claim clearly fraudulent.

In *Yuan*, the RPD's failure to properly justify its finding that the claim was manifestly unfounded led to the decision being overturned on judicial review. In her reasons, Justice Strickland wrote:

> In this matter, the RPD reasons devoted only one sentence to its finding that the claim was manifestly unfounded. … I am not satisfied that this demonstrated that the RPD appreciated the difference between a clearly fraudulent claim and one that is based on negative credibility findings, or otherwise adequately explained the basis for its conclusion. Accordingly, its finding is not justified, transparent and intelligible, and does not meet the reasonableness standard … .[41]

In *Liu*,[42] the Federal Court found the RPD had failed to justify its finding that the applicant's subpoena was fraudulent. Justice McDonald wrote that the "RPD then compounds the impact of this finding when it links the 'fraudulent summons' to the ultimate conclusion that Ms. Liu's claim is manifestly unfounded." The RPD failed to identify the dishonest representations, deceit, or falsehoods that led to its conclusion that the claim was manifestly unfounded. The decision was therefore unreasonable.

4.13. Court-ordered remedies

In *Nagornyak*, Justice Strickland observed there had not been many decisions concerning the proper remedy in cases where the court concluded that the RPD's finding that a claim was manifestly unfounded was unreasonable. However, she wrote that "the considerations and questions of the appropriate remedy surrounding s 107(2) apply equally

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[41] *Yuan v. Canada (Citizenship and Immigration)*, 2018 FC 755, at para 46.

[42] *Liu v. Canada (Citizenship and Immigration)*, 2018 FC 933, at para 17.

Also see *Nanyongo v. Canada (Citizenship and Immigration)*, 2018 FC 105, at paras 21-22, where the Federal Court upheld the RPD's decision, but did so "reluctantly" because it was "clear that the RPD's analysis of whether the claim was manifestly unfounded was prepared without due care and attention."

with respect to findings by the RPD that a matter is manifestly unfounded pursuant to s 107.1."[43] *See Chapter 3, section 3.12 for remedies in s.107(2) cases*

In *Nagornyak*, the Court considered the court's order in *Omar*,[44] where the Court found that the RPD's rejection of Mr. Omar's refugee claim was reasonable, but that its no credible basis conclusion was not. The only question remitted to the RPD for re-determination concerned the no credible basis finding. The Court in *Nagornyak* decided against ordering a similar remedy despite acknowledging that "it would perhaps be possible to only remit the question of whether the Applicant's claim is manifestly unfounded back to the RPD." The Court concluded that this was not appropriate in the circumstances because the reasonableness of the overall decision was undermined by problems relating to multiple credibility findings and other factual errors. Thus, the Court quashed the entire decision and sent the matter back to a differently-constituted panel of the RPD for redetermination. Justice Strickland further explained that it was preferable to avoid a scenario where the Court upheld the RPD's finding that the applicant was not a Convention refugee or person in need of protection and remitted only the section 107.1 issue. If, in that scenario, the new RPD panel found the claim was not manifestly unfounded, the RAD subsequently would have to render a decision on whether to grant refugee protection while knowing that the Federal Court had already ruled on the issue. [45]

In the recent *Balyokwabwe*[46] decision, the Minister proposed that if the Federal Court disagreed with the RPD's conclusion that the claim was manifestly unfounded but found the credibility findings to be reasonable, it could remit only the manifestly unfounded issue back to the RPD. The Court agreed that it could quash one aspect of a decision in a case where that aspect was clearly excisable from the rest of the decision. However, in this case, the unreasonable credibility findings that underpinned the manifestly unfounded determination also underpinned the denial of the applicant's claim, and therefore the Court remitted the matter back to the RPD to be entirely redetermined by a different panel.

As with s. 107(2) cases, most cases in which 107.1 findings were held to be unreasonable have been remitted to the RPD to be completely redetermined.[47]

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[43] *Nagornyak v. Canada (Citizenship and Immigration)*, 2017 FC 215, at paras 28 and 33.

[44] *Omar v. Canada (Citizenship and Immigration)*, 2017 FC 20, at para 24.

[45] *Nagornyak v. Canada (Citizenship and Immigration)*, 2017 FC 215, at paras 33-34.

[46] *Balyokwabwe v. Canada (Citizenship and Immigration)*, 2020 FC 623, at paras 22 and 67-69.

[47] *Ali v. Canada (Citizenship and Immigration)*, 2015 FC 814; *Brindar v. Canada (Citizenship and Immigration)*, 2016 FC 1216; *Yesuf v. Canada (Citizenship and Immigration)*, 2017 FC 677; *Rahi v. Canada (Citizenship and Immigration)*, 2017 FC 843; *Feboke v. Canada (Citizenship and Immigration)*, 2017 FC 855; *Hohol v. Canada (Citizenship and Immigration)*, 2017 FC 870; *Yeganeh v. Canada (Citizenship and Immigration)*, 2018 FC 714; *Liu v. Canada (Citizenship and Immigration)*, 2018 FC 933; *He v. Canada (Citizenship and Immigration)*, 2019 FC 2; *Balyokwabwe v. Canada (Citizenship and Immigration)*, 2020 FC 623.