



Immigration and  
Refugee Board

Commission de l'immigration  
et du statut de réfugié

## **Refugee Protection Division**

# **Assessment of Credibility in Claims for Refugee Protection**

**Legal Services  
January 31, 2004**



Immigration and  
Refugee Board

La Commission de l'immigration  
et du statut de réfugié

**MEMORANDUM      NOTE DE SERVICE**

**To/à** Chairperson; RPD Deputy Chairperson;  
RPD ADCs; PDB;  
All RPD Members and RPOs

**From/de** Krista Daley  
General Counsel and Director, Legal

**Subject / Objet**

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**Paper on Assessment of Credibility in Claims for Refugee Protection**

Attached please find the updated version of the Legal Services paper *Assessment of Credibility in Claims for Refugee Protection*, dated January 31, 2004. The electronic version will be available shortly in Intranet and in the IRB's website.

This update replaces the previous version of this paper in its entirety.

I trust that you will continue to find this paper useful. If you have any comments about the format or the content, please forward them to Richard Tyndorf, Legal Adviser, who is responsible for updating this paper.

"original signed by"

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Krista Daley

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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)*<sup>1</sup> 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. In determining this, members must assess the credibility of the claimant, other witnesses and the documentary evidence.

It is important to bear in mind, as the Federal Court has pointed out, that a negative credibility determination which may be determinative of a Convention refugee claim under section 96 of *IRPA* is not necessarily determinative of a claim as a person in need of protection under section 97. Whether the Board has properly considered both the section 96 and section 97 claims is determined in the circumstances of each individual case, bearing in mind the different elements required to establish each claim.<sup>2</sup>

Under the former *Immigration Act*,<sup>3</sup> the determination of whether a person is a Convention refugee was made by members of the Convention Refugee Determination Division (CRDD). The references to the CRDD in previous versions of this paper have been changed to the RPD or the Board, as applicable. The Refugee Hearing Officer (RHO) or Refugee Claim Officer (RCO) is now known as the Refugee Protection Officer (RPO) under *IRPA*. All references to “the Court” mean the Federal Court of Canada, unless stated otherwise. The paper includes the relevant jurisprudence up to January 31, 2004.

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<sup>1</sup> S.C. 2001, c. 27. *IRPA* was proclaimed on November 1, 2001 and is to come into effect on June 28, 2002. “Convention refugee” is defined in in s. 96 and “person in need of protection” in s. 97 of that Act. The definition of “Convention refugee” has not been changed in substance.

<sup>2</sup> *Nyathi, Sehlule v. M.C.I.* (F.C., no. IMM-5122-02), Blanchard, September 30, 2003, 2003 FC 1119.

<sup>3</sup> R.S.C. 1985 (4<sup>th</sup> Supp.), c.28.

## 1. GENERAL PRINCIPLES AND OBSERVATIONS

### 1.1. Credible or Trustworthy Evidence<sup>4</sup>

Assessment of credibility is guided by legislative provisions and principles found in the jurisprudence. *IRPA* states in section 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.

A similar provision was found in the former *Immigration Act*:

68.(3) The Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

Thus the RPD cannot reject evidence simply because it is hearsay: reasons must be provided for considering such evidence to be unreliable.<sup>5</sup>

Where the Board finds a lack of credibility based on inferences, there must be a basis in the evidence to support the inferences. It is not open to Board members to base their decision on assumptions and speculations for which there is no real evidentiary basis.<sup>6</sup>

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<sup>4</sup> See also IRB Legal Services, *Weighing Evidence*, December 31, 2003.

<sup>5</sup> *Yabe, Said Girre v. M.E.I.* (F.C.A., no. A-945-90), Hugessen, Desjardins, Létourneau, March 17, 1993; *M.E.I. v. Boamong, Sheikh Jedges* (F.C.A., no. A-1219-91), Isaac, Marceau, McDonald, August 6, 1993.

<sup>6</sup> *Frimpong v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 183 (F.C.A.); *Canada (Minister of Employment and Immigration) v. Satiacum* (1989), 99 N.R. 171 (F.C.A.); *Vallejo, Juan Ernesto v. M.E.I.* (F.C.A., no. A-799-90), Mahoney, Stone, Linden, March 26, 1993.

In *Satiacum, supra*, at 179, MacGuigan J.A. cited Lord Macmillan in *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39, at 45, 144 L.T. 194, at 202 (H.L.), for an explanation of the distinction between a reasonable inference (which a decision-maker is entitled to draw) and pure conjecture (which is not permissible):

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 deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.

The Federal Court of Appeal stated, in *Maldonado*,<sup>7</sup> 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.

An important indicator of credibility is the consistency with which a witness has told a particular story.<sup>8</sup> The RPD may also take into account matters such as the plausibility of the evidence and the claimant's demeanour.

As for the standard of proof, the Federal Court of Appeal pointed out in *Orelien*<sup>9</sup> that

one cannot be satisfied that the evidence is credible or trustworthy, unless satisfied that it is probably so, not just possibly so.

Therefore, findings of fact, as well as the determination as to whether the claimant's evidence is credible, are made on a balance of probabilities.

## 1.2. Consistency on Findings of Credibility

The credibility and probative value of the evidence has to be evaluated in the light of what is generally known about conditions and the laws in the claimant's country of origin,<sup>10</sup> as well as the experiences of similarly situated persons in that country.<sup>11</sup>

The Federal Court has cautioned, however, that, as between different cases, “[t]here can be no consistency on findings of credibility.” Credibility cannot be prejudged and is an issue to be

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In *Mahalingam, Shyama Ushandhini v. M.C.I.* (F.C.T.D., no. IMM-833-97), Gibson, January 30, 1998, Reported: *Mahalingam v. Canada (Minister of Citizenship and Immigration)* (1998), 44 Imm.L.R. (2d) 210 (F.C.T.D.), the Court found that the panel, which had used words such as “we feel”, had made a speculative finding—for which it cited no evidence—that the police would not again humiliate or harass her.

<sup>7</sup> *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.).

<sup>8</sup> *Dan-Ash v. Canada (Minister of Employment and Immigration)* (1988), 93 N.R. 33 (F.C.A.).

<sup>9</sup> *Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 592 (C.A.), at 605, per Mahoney J.A.

<sup>10</sup> *Sathanandan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 310 (F.C.A.); *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.); *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593.

<sup>11</sup> *Chaudri v. Canada (Minister of Employment and Immigration)* (1986), 69 N.R. 114 (F.C.A.); *M.E.I. v. Jawhari, Sari* (F.C.T.D., no. T-1477-92), Denault, December 16, 1992; *Handal, Sandra Iris Rencinos v. M.E.I.* (F.C.T.D., no. 92-A-6875), Noël, June 10, 1993.

determined by the Board members in each case based on the circumstances of the individual claimant and the evidence.<sup>12</sup>

Credibility findings have to be explained and must be supported by the evidence. (This topic is discussed in 2.2. *Making Clear Findings on Credibility and Providing Adequate Reasons.*)

### 1.3. Benefit of the Doubt

The *Handbook on Procedures and Criteria for Determining Refugee Status*<sup>13</sup> 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*.<sup>14</sup> 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 [claimant] should be given the benefit of the doubt, often by considering hypotheticals which could support the...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:

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]

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<sup>12</sup> *Oduro, Ebenezer v. M.E.I.* (F.C.T.D., no. IMM-903-93), McKeown, December 24, 1993. See also *Santizo, Carlos Ulin v. M.E.I.* (F.C.T.D., no. IMM-1093-93), Gibson, April 22, 1994.

<sup>13</sup> Issued by the United Nations Office of the High Commissioner for Refugees, Geneva, January 1988.

<sup>14</sup> *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593.



The Supreme Court went on to discuss the evidence, contrasting the appellant's testimony with the documentary evidence:

Since the...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 [claimant's] case.<sup>15</sup>

The benefit of the doubt does not apply to situations where the Board finds a story implausible.<sup>16</sup>

#### 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.<sup>17</sup> Some cases have held, however, that issues such as identity, delay or failure to claim elsewhere require specific notice.<sup>18</sup> Moreover, the Board

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<sup>15</sup> Ibid., at 669-71. The dissenting analysis, to which the aforementioned majority reasons refer, is set out, in part, below. The dissenting justices, at 627, found that the claimant's account did not run contrary to the available evidence and generally known facts; consequently, it was appropriate in their view to apply the benefit of the doubt:

The [claimant'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 [claimant] 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 [claimant's] testimony in isolation. Indeed, I find such a technique antithetical to the guidelines of the UNHCR Handbook (see paragraph 201).

<sup>16</sup> *Sedigheh, Ghahramaninejad v. M.C.I.* (F.C.T.D., no. IMM-1213-02), Snider, February 11, 2003; 2003 FCT 147.

<sup>17</sup> *Ayimadu-Antwi, Yaw v. M.C.I.* (F.C.T.D., no. IMM-4821-94), Simpson, May 10, 1995. This was reiterated in *Bains, Iqbal Singh v. M.C.I.* (F.C.T.D., no. IMM-2055-94), Muldoon, August 25, 1995, at pages 11-12: "So it is that credibility is always in issue. So it is that no one should ever be deceived about credibility always being in issue." See also *Paranawithana, Tissa Rupananda v. M.C.I.* (F.C.T.D., no. IMM-670-96), Heald, November 21, 1996.

<sup>18</sup> In *Abubakar, Suadh v. M.C.I.* (F.C.T.D., no. IMM-422-98), Campbell, July 31, 1998, Reported: *Abubakar v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm.L.R. (2d) 186 (F.C.T.D.), the Court held the CRDD erred in not giving notice of the importance of an issue—namely the claimant's identity, "which forms the heart of its decision"—which did not seem important to counsel at the time. See also, to the same effect, *Lembagusala, Sungi Chantal v. M.C.I.* (F.C.T.D., no. IMM-3593-99), Campbell, April 20, 2000. In *Ali, Nawal El v. M.C.I.* (F.C.T.D., no. IMM-3327-00), Dawson, April 27, 2001, 2002 FCT 405, the Court held that the CRDD violated the principles of natural justice when it relied on the issues of delay and failure to claim elsewhere without giving the claimant notice. (The breach of natural justice, however, did not affect the final decision of the CRDD in the circumstances of that case.)

acts at its peril when it isolates some concerns and draws those to the attention of the claimant, but actually decides the case on the basis of others, which are not identified as issues.

For example, in *Velauthar*, the Federal Court pointed out that, if the decision-makers have concerns about the claimant's credibility but direct the claimant's counsel to address only other areas of the claim in submissions, it would be a breach of natural justice to base a negative determination on an adverse finding of credibility, as the claimant would be denied an opportunity to know and address the case against him or her.<sup>19</sup> Similarly, there is a denial of natural justice when a panel leads the claimant to believe that the issue of identity is resolved and then refuses the claim based primarily on that issue.<sup>20</sup>

It is permissible for the Board to identify credibility as an issue during the course of the hearing, should an issue concerning credibility arise, even where it has not been identified as an issue previously. The RPD must do so in clear terms and provide the claimant with an opportunity to address the issue.<sup>21</sup>

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<sup>19</sup> *Velauthar, Navaaneethakrishnan v. M.E.I.* (F.C.A., no. A-350-90), Mahoney, Hugessen, Gray, May 8, 1992. See also *Perera, Nandasena v. M.E.I.* (F.C.T.D., no. IMM-4381-93), Wetston, August 10, 1994; *Mark, Pramakanthan v. M.E.I.* (F.C.T.D., no. A-1272-92), Teitelbaum, June 1, 1994; *Thiara, Ravinder Singh v. M.C.I.* (F.C.T.D., no. IMM-1353-96), MacKay, March 6, 1996; *Butt, Sarmad Zahoor v. M.C.I.* (F.C.T.D., no. IMM-475-97), MacKay, March 6, 1998. In *Kante, Abdoulaye v. M.E.I.* (F.C.T.D., no. IMM-2585-93), Nadon, March 23, 1994, the Court stated that if the CRDD is satisfied with certain aspects of the claimant's evidence, it should so indicate clearly on the record before making suggestions or asking the claimant's counsel not to question his or client in regard to issues which counsel may consider relevant. In *Griffith, Marion v. M.C.I.* (F.C.T.D., no. IMM-4543-98), Campbell, July 14, 1999, during the hearing the CRDD stated that credibility was not in issue, but in rejecting the claim, the CRDD seriously impugned the claimant's credibility and thereby denied natural justice.

In *Derbas, Ahmad Issa v. S.G.C.* (F.C.T.D., no. A-1128-92), Pinard, August 18, 1993, the Court stated: "the Board did not violate the requirements of natural justice by telling the [claimant] he was credible and needed not call further evidence, and then rejecting his claim on the ground there was no objective foundation for the expressed fear." In *Mohamed, Kamil v. M.C.I.* (F.C.T.D., no. IMM-2445-96), Muldoon, August 27, 1997, the Court found that accepting the fear of persecution in the Eastern Province did not preclude the CRDD from assessing the general credibility of the claimant on the particular evidence relating to his experiences there." In *Sivagnanam, Sitha v. M.C.I.* (F.C.T.D., no. IMM-2357-97), Pinard, April 17, 1998, the Court held that the CRDD member's comment, during the hearing, that the information "does no more than cast a shadow," did not preclude that member from forming a different opinion once he had time to fully consider the evidence. In *Jezly, Roshan Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2721-98), Cullen, June 2, 1999, the Court held that the CRDD's finding that the claimant was not in the area of the country he alleges he was in, did not mean that the panel found identity to be an issue after having indicated that it was not an issue.

<sup>20</sup> *Sivamoorthy, Sivasothy v. M.C.I.* (F.C.T.D., no. MM-2112-02), Russell, April 8, 2003, 2003 FCT 408. In *Augustine, Sylvester Sri Rajakulendran v. M.C.I.* (F.C.T.D., no. IMM-2732-97), Teitelbaum, July 15, 1998, the Court overturned the CRDD decision, based on credibility, because counsel may have misunderstood what the panel meant when they said that they would not discuss the issue of personal identity.

<sup>21</sup> *Liu, Zhi Gan v. M.C.I.* (F.C.T.D., no. IMM-3143-96), Gibson, August 29, 1997, Reported: *Liu v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm.L.R. (2d) 168 (F.C.T.D.). See, however, *Mandar*,

## 1.5. Allowing Testimony, Witnesses and Examination of Documents

A claimant must be provided a reasonable opportunity to present evidence.<sup>22</sup> When the Board rejects a claim because it doubts that certain pivotal events occurred or that they were connected to the activities on which the claim is based, some Federal Court—Trial Division cases suggest that the claimant should be given an opportunity to testify about those events.<sup>23</sup>

The Board errs when it does not allow the claimant to adduce the testimony of a witness who could corroborate the very issue on which the claimant was found not to be credible.<sup>24</sup> There is no duty on the RPD, however, to call a witness who could have supported the claim.<sup>25</sup>

The right to call further evidence is not absolute. 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 or the claimant's identity) or would have testified about matters not in issue.<sup>26</sup>

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*Kashmeer Singh v. M.C.I.* (F.C.T.D., no. IMM-4605-96), Reed, October 3, 1997, where the issue of identity was raised by the RCO at the end of the hearing, although the panel had indicated at the outset that identity was not an issue. Since the panel did not endorse that assertion, the Court held that the claimant was entitled to assume identity was still not an issue.

<sup>22</sup> See s. 170(e) of IRPA.

<sup>23</sup> *Joseph, Chandani v. M.E.I.* (F.C.T.D., no. IMM-2623-93), Cullen, March 9, 1994; *Mayeke, Yai Florence Futila v. M.C.I.* (F.C.T.D., no. IMM-2496-98), Tremblay-Lamer, May 5, 1999. In *Arandarajah, Murugathas v. M.C.I.* (F.C.T.D., no. IMM-3861-96), Rouleau, July 3, 1997, although the CRDD indicated that identity was a serious issue, the Court found no obligation on the part of the panel to ask for evidence regarding that matter.

<sup>24</sup> *Kaur, Diljeet v. M.E.I.* (F.C.T.D., no. 93-A-377), Noël, June 2, 1993, Reported: *Kaur v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm.L.R. (2d) 301 (F.C.T.D.); *Parnian, Saeid v. M.C.I.* (F.C.T.D., no. IMM-2351-94), Wetston, May 19, 1995; *Papsouev, Vitali v. M.C.I.* (F.C.T.D., no. IMM-4619-97), Rouleau, May 19, 1999, Reported: *Papsouev v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm.L.R. (2d) 48 (F.C.T.D.).

<sup>25</sup> *Villalobos, Andrea Elizabeth Nunez v. M.C.I.* (F.C.T.D., no. IMM-2890-96), Teitelbaum, September 2, 1997, Reported: *Villalobos v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm.L.R. (2d) 153 (F.C.T.D.). In *Ndombele, Joao Kembo v. M.C.I.* (F.C.T.D., no. IMM-6514-00), Gibson, November 9, 2001, 2001 FCT 1211, the claimant offered to make his brother available for cross-examination but the CRDD declined the offer. The Court found no breach of fairness. The burden of proof was on the claimant and it was up to him to call the brother as a witness, but he and his counsel chose not to do so.

<sup>26</sup> *Singh, Kewal v. M.E.I.* (F.C.T.D., no. IMM-5177-93), MacKay, September 19, 1994; *Wang, Tian Rong v. M.C.I.* (F.C.T.D., no. IMM-534-98), Wetston, December 17, 1998; *Katambala, Adric v. M.C.I.* (F.C.T.D., no. IMM-5827-98), Reed, July 19, 1999.

The RPD should accommodate reasonable requests by the claimant to examine documents whose authenticity is impugned by Canadian officials.<sup>27</sup>

## 1.6. Interlocutory Decisions on Credibility

There is no obligation on the Board to signal its conclusions on the general credibility of the evidence or the plausibility of the story in advance of its final decision on the claim.<sup>28</sup> The Federal Court has noted such a procedure is “not to be recommended nor is it acceptable.”<sup>29</sup>

## 1.7. Proper Evidentiary Basis for Findings on Credibility

An adverse finding of credibility must have a proper foundation in the evidence. The RPD can err in this regard by ignoring evidence, by misapprehending or misconstruing evidence, or by basing its conclusions on speculation.

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.<sup>30</sup> Consequently, a finding of lack of credibility based on a misunderstanding or ignoring of the evidence, or for which there is no basis in the evidence to support an inference arrived at by the tribunal, will not be allowed to stand.

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<sup>27</sup> *Mayela, Dave Nzongo v. M.C.I.* (F.C.T.D., no. IMM-3776-98), Lutfy, June 18, 1999.

<sup>28</sup> In *Sarker, Jalal Uddin v. M.C.I.* (F.C.T.D., no. IMM-2597-97), MacKay, July 3, 1998, Reported: *Sarker v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm.L.R. (2d) 209 (F.C.T.D.), the Court stressed that “the onus remains on the [claimant] to establish by credible evidence his claim to be considered a Convention refugee.” The Board has no duty to inform a claimant that it finds the claimant’s witness’s evidence to be non-persuasive: *Salim, Abdul Salaam v. M.C.I.* (F.C.T.D., no. IMM-4080-01), Dawson, August 15, 2002, 2002 FCT 864.

<sup>29</sup> See *Rahmatizadeh, Ali v. M.E.I.* (F.C.T.D., no. IMM-2696-93), Nadon, April 6, 1994, where the Court held that the CRDD “need not render an interlocutory judgment [respecting the credibility of trustworthiness of the evidence] before rendering its decision concerning the claim to refugee status.” In *Pascu, Viorel v. M.C.I.* (F.C.T.D., no. IMM-2441-00), Nadon, May 4, 2001, 2001 FCT 436, the Court held that the CRDD did not prejudice the issue of credibility before the completion of the hearing by reason of the fact that a member indicated disbelief in regard to certain answers given by the claimants.

<sup>30</sup> Among many Federal Court decisions, see especially *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 106 (F.C.A.); *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.); *Abubakar, Suadh v. M.C.I.* (F.C.T.D., no. IMM-422-98), Campbell, July 31, 1998, Reported: *Abubakar v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm.L.R. (2d) 186 (F.C.T.D.). In *Maruthapillai, Navaneethan v. M.C.I.* (F.C.T.D., no. IMM-1371-99), Pelletier, May 30, 2000, the Court pointed out that in assessing the evidence, the CRDD is required to respect the claimant’s testimony, and it cannot distort that testimony and then find it lacking in credibility.

The Federal Court will not, however, interfere with a decision if the Board had before it evidence that, 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.<sup>31</sup>

## 1.8. Considerations on Judicial Review and Appeal

Findings of credibility by the Board are given considerable deference by the reviewing court: It is the Board members who have the benefit of observing witnesses directly and are in the best position to determine credibility.<sup>32</sup> It is not the role of the Federal Court, on judicial review, to substitute its decision for that of the Board even if it might not have reached the same conclusion.<sup>33</sup>

## 1.9. Assessing a Witness's Testimony

A decision-maker customarily takes into account the integrity and intelligence of a witness and the overall accuracy of the statements being made. The witness's 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.

Factors considered by the courts<sup>34</sup> in assessing credibility include the witness's

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<sup>31</sup> *Larue, Jacqueline Anne v. M.E.I.* (F.C.T.D., no. 92-A-6666), Noël, May 13, 1993. In more recent decisions, the Federal Court has adopted "patently unreasonable" as the correct standard of review for findings of credibility. See, for example, *Horvath, Ferenc v. M.C.I.* (F.C.T.D., no. IMM-2203-00), Blanchard, June 4, 2001, 2001 FCT 583.

<sup>32</sup> *Aguebor, Clement v. M.E.I.* (F.C.A., no. A-1116-11), Marceau, Desjardins, Décary, July 16, 1993, Reported: *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.).

<sup>33</sup> In *Sommariva, Monica v. M.C.I.* (F.C.T.D., no. IMM-54-95), Jerome, March 28, 1996, Reported: *Sommariva v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm.L.R. (2d) 25 (F.C.T.D.), at 27, the Court stated: "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." See also *Abdurahaman, Farah Shire v. M.E.I.* (F.C.A., no. A-1127-82), Ryan, Stone, Hyde, November 18, 1983, Reported: *Abdurahaman v. Canada (Minister of Employment and Immigration)* (1983), 50 N.R. 315 (F.C.A.); *Singh, Jasvir v. M.E.I.* (F.C.A., no. A-1272-82), Mahoney, Hugessen, Stone, May 3, 1984; *Brar, Iqbaljit Singh v. M.E.I.* (F.C.A., no. A-987-84), Thurlow, Hugessen, Cowan, May 29, 1986; *Mansour, Sleiman v. M.E.I.* (F.C.A., no. A-654-90), Marceau, Desjardins, Décary, December 5, 1991; *Samad, Fani Abdi v. M.E.I.* (F.C.A., no. A-735-90), Heald, MacGuigan, Linden, February 10, 1992; *Varnousefaderani, Hamid Reza v. M.E.I.* (F.C.A., no. A-386-90), Hugessen, Desjardins, Henry, May 26, 1992; *Ankrah, Bismark v. M.E.I.* (F.C.T.D., no. T-1986-92), Noël, March 16, 1993; *Oduro, Prince v. M.E.I.* (F.C.T.D., no. 92-A-7171), Noël, June 2, 1993; *Muhammed, Jamal v. M.E.I.* (F.C.T.D., no. A-714-92), MacKay, August 12, 1993.

<sup>34</sup> Courts have developed a hierarchy of preferences concerning various types of witnesses. As between involved witnesses or "actors" and mere bystanders, the former are preferred. There is however, no authority requiring preference to be given to the testimony of "actors" over that of expert witnesses. While the testimony of

- ❑ desire to be truthful
- ❑ their motives
- ❑ general integrity
- ❑ general intelligence
- ❑ relationship or friendship to other parties
- ❑ opportunity for exact observation
- ❑ capacity to observe accurately
- ❑ firmness of memory to carry in the mind the facts as observed
- ❑ ability to resist the influence, frequently unconscious, to modify recollection
- ❑ capacity to express what is clearly in the mind
- ❑ ability to reproduce in the witness-box the facts observed
- ❑ demeanour while testifying

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involved, but disinterested, witnesses is preferred (at least in the absence of extenuating circumstances), over that of interested witnesses, whether involved or not, a court will not disbelieve testimony solely because a witness is interested and without reference to the facts and other relevant factors. See *J.P. Porter Co. Ltd. v. Bell et al.*, [1955] 1 D.L.R. 62 (N.S.S.C.); *Lefeunteum v. Beaudoin* (1898), 28 S.C.R. 89; *Bateman v. County of Middlesex* (1912), 6 D.L.R. 533 (Ont. C.A.); *Re Direct Exeter* (1850), 3 DeG&Sm 214.

## 2. SPECIFIC CONCERNS

From a review of the Federal Court jurisprudence, it is possible to identify six areas that have caused particular difficulty for Board members when assessing the credibility of claimants or other witnesses.

### 2.1. CONSIDERING ALL OF THE EVIDENCE

#### 2.1.1. Considering the Evidence in its Entirety

The Federal Court has made it clear in a number of cases that when assessing the credibility of a claimant, it is important to remember that *all* of the evidence, both oral and documentary, must be considered and assessed, not just selected portions of the evidence.<sup>35</sup> Thus the RPD should not selectively refer to evidence that supports its conclusions without also referring to evidence to the contrary.<sup>36</sup> Furthermore, when assessing all of the evidence, it must be assessed *together*, not parts of it in isolation from the rest of the evidence. Evidence should, therefore, be treated in a consistent manner.<sup>37</sup>

The Federal Court has also emphasized that it is important not just to concentrate on exaggerations,<sup>38</sup> but neither should a decision-maker disregard aspects of the evidence that are not favourable to the

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<sup>35</sup> *Owusu, Kweku v. M.E.I.* (F.C.A., no. A-1146-87), Heald, Hugessen, Desjardins, January 31, 1989; *Mensah, George Akohene v. M.E.I.* (F.C.A., no. A-1173-88), Pratte, Hugessen, Desjardins, November 23, 1989; *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 199 (F.C.A.); *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.). This would include a consideration of the conditions in the claimant's country or origin, as well as the experiences of similarly situated persons. See, respectively, *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.); and *Chaudri v. Canada (Minister of Employment and Immigration)* (1986), 69 N.R. 114 (F.C.A.).

<sup>36</sup> In *Polgari, Imre v. M.C.I.* (F.C.T.D., no. IMM-502-00), Hansen, June 8, 2001, 2001 FCT 626, the Court faulted the CRDD for "the absence of any analysis of the extensive documentation...coupled with the failure to adequately address the contradictory documents and explain its preference for the evidence on which it relied." In *Orgona, Eva v. M.C.I.* (F.C.T.D., no. IMM-4517-99), MacKay, April 18, 2001, 2001 FCT 346, the Court faulted the CRDD because "it made no reference to the significant documentary evidence which was supportive of the...claims. ...when evidence which supports the [claimants'] position is not referred to, and when other documentary evidence is selectively relied upon, the tribunal, in my opinion, errs in law by ignoring relevant evidence.

<sup>37</sup> In *Bosiakali, Mbokolo v. M.C.I.* (F.C.T.D., no. IMM-4948-00), Nadon, December 14, 2001, 2001 FCT 1381, the Court found that the CRDD had not reconciled the testimony of the daughter, which it found credible and which supported her mother's testimony concerning her arrest, and indirectly corroborated the fact that her father had also been arrested, with the testimony of the parents regarding these events, which was rejected for lack of credibility.

<sup>38</sup> *Yaliniz, Tacir v. M.E.I.* (F.C.A., no. A-648-87), Marceau, Teitelbaum, Walsh, March 8, 1988, Reported: *Yaliniz v. Canada (Minister of Employment and Immigration)* (1989), 7 Imm.L.R. (2d) 163 (F.C.A.);

claimant.<sup>39</sup> Thus the panel must do more than simply search through the evidence looking for inconsistencies or for evidence that lacks credibility, thereby “building a case” against the claimant, and ignore the other aspects of the claim.

The Board is presumed to have taken all of the evidence into consideration whether or not it indicates having done so in its reasons, unless the contrary is shown.<sup>40</sup> Therefore, the mere fact that the tribunal fails to refer to all of the evidence when rendering its decision does not necessarily signify that it ignored evidence, if a review of the reasons suggests that the tribunal did consider the totality of the evidence.<sup>41</sup>

Thus not every piece of evidence needs to be referred to and discussed in the reasons. However, as explained in *Cepeda-Gutierrez*,<sup>42</sup> the more relevant the evidence, the more likely the Federal Court will find an error if it is omitted from the analysis:

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*Mahathmasseelan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 29 (F.C.A.). In *Djama, Idris Mohamed v. M.E.I.* (F.C.A., no. A-738-90), Marceau, MacGuigan, Décary, June 5, 1992, the Court held that a panel will have erred if it allows itself to become so fixated on the details of the claimant’s testimony that it forgets the substance of the facts on which the claim is based.

<sup>39</sup> *M.C.I. v. Roitman, Isabella* (F.C.T.D., no. IMM-1446-00), Nadon, May 10, 2001, 2001 FCT 462.

<sup>40</sup> *Florea, Constantin v. M.E.I.* (F.C.A., no. A-1307-91), Hugessen, Desjardins, Décary, June 11, 1993; *Kisungu, Guyguy Tshika v. M.C.I.* (F.C.T.D., no. IMM-3807-00), Nadon, May 8, 2001, 2001 FCT 446. The inclusion of the “boilerplate” assertion that the Board considered all the evidence before it may not be sufficient to prevent this inference from being drawn. In *Sathanandan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 310 (F.C.A.), the CRDD rejected the claim stating there was no indication in the documentary evidence of forcible recruitment of females, when in fact there was some evidence on point, albeit feeble, which it neglected to consider. See, however, *Piber, Attila v. M.C.I.* (F.C.T.D., no. IMM-3282-00), Gibson, July 6, 2001, 2001 FCT 769, where the Court found no error on the part of the CRDD in failing to refer to relevant documents in the claimant’s very extensive package of documentary evidence where the claimant’s counsel did not direct the CRDD’s attention to the most relevant passages in that package. On the other hand, in *Nadarajan, Janapalarajan v. M.C.I.* (F.C.T.D., no. IMM-6298-00), Gibson, November 9, 2001, 2001 FCT 1222, the Court noted that this was not a case where the claimant had filed voluminous documentary evidence that no CRDD panel could be expected to have taken cognizance of in all its detail. In fact, the document in question was put into the record, at least by reference, by the CRDD itself.

<sup>41</sup> *Hassan, Jamila Mahdi v. M.E.I.* (F.C.A., no. A-831-90), Isaac, Heald, Mahoney, October 22, 1992, Reported: *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.); *Gourenko, Rouslan v. S.G.C.* (F.C.T.D., no. IMM-7260-93), Simpson, May 4, 1995.

<sup>42</sup> *Cepeda-Gutierrez, Carlos Arturo v. M.C.I.* (F.C.T.D., no. IMM-596-98), Evans, October 16, 1998. As for the question, “when is a document so important that it must be specifically mentioned in the [reasons for] decision,” see *Gourenko, Rouslan v. S.G.C.* (F.C.T.D., no. IMM-7260-93), Simpson, May 4, 1995:

In my view, a document need only be mentioned in a decision if, first of all, the document is timely, in the sense that it bears on the relevant time period. Secondly, it must be prepared by a reputable, independent author who is in a position to be the most reliable source of



...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": *Bains v. Canada (Minister of Employment and Immigration)* [(1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.)]. 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.

Thus, a presumption exists that the panel weighed each point of evidence, but there is still a duty, namely that of mentioning important evidence supporting the panel's decision.

Generally speaking, it is only necessary to refer explicitly to evidence that is directly relevant to the issue being addressed, and that which otherwise may appear to be in conflict with the conclusion reached.<sup>43</sup>

Where the claimant provides personal documentary evidence or medical reports, specific to and corroborative of his claim, it is not sufficient to simply make a blanket statement, without explanation, that no probative value was assigned to this evidence because of a general lack of credibility on the part of the claimant.<sup>44</sup>

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information. Thirdly, it seems to me that the topic addressed in the document must be directly relevant to [a claimant's] claim. For example, documents sent to or received by [a claimant], or prepared for [a claimant], or about [a claimant], which bear on relevant issues would, in the ordinary course be mentioned in reasons. In addition, if a document is directly relevant to the facts alleged by [a claimant], one would expect to see that document addressed in the Board's reasons. On the other hand, numerous other documents may be only marginally relevant. In my view, it is not a reviewable error for the Board to fail to deal with such documents in its reasons.

<sup>43</sup> Failure to refer to a relevant document which is specific to the claim and corroborates, or goes contrary to, the claimant's evidence may lead to the inference that the Board made its decision without regard to the evidence before it. See *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.); *Iordanov, Deian Iordanov v. M.C.I.* (F.C.T.D., no. IMM-1429-97), Muldoon, March 18, 1998; *Atwal, Pargat Singh v. S.S.C.* (F.C.T.D., no. IMM-4470-93), Gibson, July 20, 1994, Reported: *Atwal v. Canada (Secretary of State)* (1994), 25 Imm.L.R. (2d) 80 (F.C.T.D.); *Khan, Mohammed Azad v. M.C.I.* (F.C.T.D., no. IMM-2831-98), Teitelbaum, March 11, 1999.

<sup>44</sup> In *Lahpai, Aung Gam v. M.C.I.* (F.C.T.D., no. IMM-1620-00), Dubé, February 16, 2001, 2001 FCT 88, the Court held that the failure to deal with three documents that flagrantly contradicted the CRDD's conclusions on the central issue of the claimant's involvement in the student unrest constituted an error of law. See also *Sinko, Jozsef v. M.C.I.* (F.C.T.D., no. IMM-569-01), Blanchard, August 23, 2002, 2002 FCT 903; *Ahmed, Bashar v. M.C.I.* (F.C.T.D., no. IMM-2745-02), Tremblay-Lamer, April 17, 2003, 2003 FCT 456; *Voytik, Lyudmyla Vasylivna v. M.C.I.* (F.C., no. IMM-5023-02), O'Keefe, January 16, 2004, 2004 FC 66. However,

*Frimpong* and other cases<sup>45</sup> illustrate the related point that reasons must be given for disregarding uncontradicted statements, either expressly or implicitly. If this is not done, it will leave the decision open to attack.

### 2.1.2. Assessing the Balance of the Evidence Found to be Credible

Even if there are inconsistencies or exaggerations, the panel must still go on to assess the evidence which is found to be credible and determine the claim as the totality of the evidence warrants.<sup>46</sup>

In other words, the rejection of some of the evidence, or even all of the claimant's testimony, on account of lack of credibility does not necessarily lead to the rejection of the claim: the claim must still be assessed on the basis of the evidence that was found to be true, including documentation relevant to the claimant's situation and evidence regarding persons who are similarly situated.<sup>47</sup>

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other Federal Court decisions have held that where the panel concludes that a claimant'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. See *Ahmad, Nawaz v. M.C.I.* (F.C.T.D., no. IMM-944-02), Rouleau, April 23, 2003, 2003 FCT 471, which cites *Songue, André Marie v. M.C.I.* (F.C.T.D., no. IMM-3391-95), Rouleau, July 26, 1996, and *Hamid, Iqbal v. M.E.I.* (F.C.T.D., no. IMM-2829-94), Nadon, September 20, 1995. In *Husein, Anab Ali v. M.C.I.* (F.C.T.D., no. IMM-2044-97), Joyal, May 27, 1998, the Court held that once the Board had concluded that identity had not been established, it was not necessary to analyze the evidence any further.

<sup>45</sup> *Frimpong v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 183 (F.C.A.); *Sathanandan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 310 (F.C.A.); *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.).

<sup>46</sup> *Yaliniz, Tacir v. M.E.I.* (F.C.A., no. A-648-87), Marceau, Teitelbaum, Walsh, March 8, 1988, Reported: *Yaliniz v. Canada (Minister of Employment and Immigration)* (1989), 7 Imm.L.R. (2d) 163 (F.C.A.); *Djama, Idris Mohamed v. M.E.I.* (F.C.A., no. A-738-90), Marceau, MacGuigan, Décary, June 5, 1992.

<sup>47</sup> In *Tharmalingam, Kugathasalingam v. M.E.I.* (F.C.T.D., no. IMM-3318-93), Denault, August 23, 1994, the Court held that, since the CRDD did not make a general finding of lack of credibility, it had to consider the remaining credible evidence. In *Chong, Lim Man v. M.C.I.* (F.C.T.D., no. IMM-3438-97), Rothstein, July 7, 1998, the Court held that the panel seemed to have rejected the claim solely on the grounds that it did not believe the embellishments that it thought the claimant had made up, without addressing the primary issue before it (the claimant's religious affiliation). In *Burgos-Rojas, Juan Pedro v. M.C.I.* (F.C.T.D., no. IMM-3159-98), Rouleau, January 25, 1999, the CRDD failed to consider the question of whether the claimant had a well-founded fear of persecution simply on the basis of his sexual orientation (which was not questioned), even though his testimony was not found to be credible. In *Tshimbombo, Tshimanga v. M.C.I.* (F.C.T.D., no. IMM-680-99), Pinard, December 23, 1999, the Court held that the CRDD erred when it had merely mentioned, and not disposed of, the testimony of a third person corroborating the identity of the claimant, whose credibility was in question. In *Seevaratnam, Sukunamari v. M.C.I.* (F.C.T.D., no. IMM-3728-98), Tremblay-Lamer, May 11, 1999, the Court held that, even if much of the evidence were disbelieved, there was evidence linking her claim to the ongoing persecution of young Tamil women in Sri Lanka. In *Mylvaganam, Thayapanan v. M.C.I.* (F.C.T.D., no. IMM-3457-99), Gibson,

The claimant's failure to testify does not allow the RPD to reject the claim without first assessing the remaining evidence.<sup>48</sup>

### 2.1.3. General Finding of Lack of Credibility

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July 24, 2000, since the CRDD accepted the claimant's identity as a young Tamil male from the north, though not his alleged experience of persecution, it erred by then ignoring the substantial evidence before it that a person such as the claimant might well be at risk in Sri Lanka. Similarly, in *Kamalanathan, Rasaiah v. M.C.I.* (F.C.T.D., no. IMM-447-00), O'Keefe, May 30, 2001, 2001 FCT 553, the Court held that the CRDD should have considered the independent documentary evidence which states that certain Tamil males from the north face persecution and determine whether the claimant was a member of that class of Tamils.

On the other hand, in *Husein, Anab Ali v. M.C.I.* (F.C.T.D., no. IMM-2044-97), Joyal, May 27, 1998, the Court held that once the Board had concluded that identity had not been established, it was not necessary to analyze the evidence any further; the main claimant's failure to prove that she belonged to a persecuted clan effectively undermined any claim of a well-founded fear of persecution. In *Thiyagarajah, Thushyanthan v. M.C.I.* (F.C.T.D., no. IMM-2480-98), McKeown, June 24, 1999, the Court held that the CRDD was not required to review the documentary evidence with respect to a general fear of persecution as a general member of a group in a country (young Tamil males from the north of Sri Lanka), when the CRDD has made a general finding of credibility against a claimant and the claimant has not raised his fear in terms of a general group. In *Yogeswaran, Kulamanidevi v. M.C.I.* (F.C.T.D., no. IMM-1291-99), MacKay, February 9, 2001, 2001 FCT 48, the CRDD found that the Tamil claimants had not established that they were who they claimed to be (their identity documents contained many inconsistencies); the CRDD also relied on their lack of knowledge about the route travelled from Jaffna to Colombo. See also *Sinnasamy, Thavam v. M.C.I.* (F.C., no. IMM-423-02), Gauthier, July 10, 2003, 2003 FC 856 (the Board was not convinced the claimant was a Tamil from Jaffna actually living in Sri Lanka just prior to his arrival in Canada); *Mathews, Marie Beatrice v. M.C.I.* (F.C. no. IMM-5338-02), O'Reilly, November 26, 2003, 2003 FC 1387 (the documentary evidence on conditions in Sri Lanka was general and not corroborative of any specific aspect of the claim). In *Nasreen, Rehana v. M.C.I.* (F.C.T.D., no. IMM-6048-98), Cullen, September 8, 1999, the Court held that, in light of the total loss of the claimant's credibility, it was not necessary for the panel to address the general situation for Shia Muslims in Pakistan; there was no real foundation left to make her case out on the second issue. In *Djouadjou, Mohand El Bachir v. M.C.I.* (F.C.T.D., no. IMM-6358-98), Pinard, October 8, 1999, the Court held that the CRDD did not need to consider the documentary evidence concerning Algeria insofar as the claimant's testimony was found not to be credible. In *Ali, Mohamad Hussein v. M.C.I.* (F.C.T.D., no. IMM-4548-00), Blais, May 29, 2001, 2001 FCT 547, where the claimant alleged that he deserted the army for reasons of conscience, the Court held that if the CRDD finds a claimant lacking in credibility, the documentary evidence alone is not sufficient to establish a claimant's fear since there is no evidence supporting the subjective basis for this fear. In *Ghribi, Abdelkarim Ben v. M.C.I.* (F.C., no. IMM-2580-02), Blanchard, October 14, 2003, 2003 FC 1191, the Court held that the Board is not required to address arguments concerning refugee *sur place* where the claimant has been judged not to have presented any credible evidence substantiating the claim.

<sup>48</sup> In *Ngoyi, Badibanga v. M.C.I.* (F.C.T.D., no. IMM-95-01), Pinard, October 10, 2001, 2001 FCT 1099, following a Court-ordered hearing *de novo*, the CRDD concluded that the claimant's allegations were not credible because he had chosen not to testify. The Court held that the panel should have at least commented on the documentary evidence (PIF, exhibits, transcript of the claimant's testimony at the first hearing), and the claimant was available to answer the members' questions.

It is possible to make a finding that overall a claimant's testimony is not credible. The Court of Appeal stated in *Sheikh*:<sup>49</sup>

even without disbelieving every word [a claimant] has uttered, a...panel may reasonably find him so lacking in credibility that it concludes there is no credible evidence relevant to his claim... In other words, a general finding of a lack of credibility on the part of the [claimant] may conceivably extend to all relevant evidence emanating from his testimony.

In some cases, the claimant's contradictory testimony can cast doubt upon the totality of his oral evidence.<sup>50</sup> But this is not always so, especially when the panel's findings of lack of credibility and implausibility are not clearly tied with the ultimate issues to be determined in the claim.<sup>51</sup>

Where a finding of a total lack of credibility cannot be made, the remaining credible or trustworthy evidence must be considered to determine whether it supports a finding of a well-founded fear of persecution.

#### 2.1.4. Lack of Subjective Fear

Where a claimant is found to be lacking in credibility, the RPD can legitimately find that there is no subjective basis for the claim. In such cases, it is very difficult, if not impossible, to find credible evidence of a claimant's subjective fear, notwithstanding the existence of evidence of human rights violations in the claimant's country.<sup>52</sup>

In *Yusuf*,<sup>53</sup> the Federal Court stated that it is difficult to see in what circumstances it could be said that a person could be right in having an objective fear of persecution and still be rejected because it

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<sup>49</sup> *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (C.A.), at 244, per MacGuigan, J.A.

<sup>50</sup> In *Dan-Ash v. Canada (Minister of Employment and Immigration)* (1988), 93 N.R. 33 (F.C.A.), at 35, Justice Hugessen stated: "unless one is prepared to postulate (and accept) unlimited credulity on the part of the Board, there must come a point at which a witness's contradictions will move even the most generous trier of fact to reject his evidence."

<sup>51</sup> See, for example, *Ferdosi, Jahan v. M.C.I.* (F.C.T.D., no. IMM-2626-00), MacKay, November 5, 2001, 2001 FCT 1203.

<sup>52</sup> *Amaniampong, Kofi v. M.E.I.* (F.C.A., no. A-1326-87), Heald (dissenting), Hugessen, Mahoney, May 19, 1989; *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, at 664. In *Sinora, Frensel v. M.E.I.* (F.C.T.D., no. 93-A-334), Noël, July 13, 1993, the Court pointed out that the documentary evidence may satisfy the objective requirement, but cannot provide proof of a subjective fear, which must come from the claimant.

<sup>53</sup> *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629 (C.A.). See also *Shanmugarajah, Appiah v. M.E.I.* (F.C.A., no. A-609-91), Stone, MacGuigan, Henry, June 22, 1992, and *Lai*

is considered that fear does not actually exist in the person's conscience. However, that case was decided before the Supreme Court of Canada decision in *Ward*,<sup>54</sup> which made it clear that both components of the test are required to establish fear of persecution: the claimant must subjectively fear persecution, and this fear must be well-founded in an objective sense. Thus, a lack of evidence going to the subjective element of the claim is in itself sufficient for the claim to fail.<sup>55</sup> This appears to be so even when there is evidence that an objective basis for the fear exists.<sup>56</sup>

Despite the existence of a bipartite test, some Federal Court decisions have held that evidence of lack of subjective fear or credibility based on the claimant's behaviour does not relieve the Board from its responsibility to deal with personal documentary evidence, specific to the claimant, that corroborates the claimant's testimony.<sup>57</sup>

### 2.1.5. Joined and Related Claims

Where a claim has been *joined* to another claim, a finding of 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 one is dependent on the other.<sup>58</sup> A finding that one of the

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*v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 245 (F.C.A.), where the Court said at 246: "The double question put to the Board was whether the [claimant] had a genuine fear to return to his country and whether that fear was reasonable, i.e. founded on good grounds. In answering that question, the Board has to assess *all* the evidence put before it."

<sup>54</sup> As pointed out in *Maqdassy, Joyce Ruth v. M.C.I.* (F.C.T.D., no. IMM-2992-00), Tremblay-Lamer, February 19, 2002, 2002 FCT 182, the Supreme Court iterated in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at 723, that the test for establishing fear of persecution is bipartite.

<sup>55</sup> *Kamana, Jimmy v. M.C.I.* (F.C.T.D., no. IMM-5998-98), Tremblay-Lamer, September 24, 1999; *Tabet-Zatla, Mohamed v. M.C.I.* (F.C.T.D., no. IMM-6291-98), Tremblay-Lamer, November 2, 1999; *Fernando, Josph Premkumar v. M.C.I.* (F.C.T.D., no. IMM-4601-00), Nadon, July 5, 2001, 2001 FCT 759; *Vallipuram, Anandasivam v. M.C.I.* (F.C.T.D., no. IMM-4748-00), Lemieux, October 10, 2001, 2001 FCT 1106; *Kanyai, Mugwagwa Brian v. M.C.I.* (F.C.T.D., no. IMM-315-02), Martineau, August 9, 2002, 2002 FCT 850.

<sup>56</sup> *Sinora, Frensel v. M.E.I.* (F.C.T.D., no. 93-A-334), Noël, July 13, 1993; *Maqdassy, Joyce Ruth v. M.C.I.* (F.C.T.D., no. IMM-2992-00), Tremblay-Lamer, February 19, 2002, 2002 FCT 182.

<sup>57</sup> *Sinko, Jozsef v. M.C.I.* (F.C.T.D., no. IMM-569-01), Blanchard, August 23, 2002, 2002 FCT 903; *Ahmed, Rafat Mohamed v. M.C.I.* (F.C., no. IMM-6333-02), Tremblay-Lamer, October 1, 2003, 2003 FC 1135.

<sup>58</sup> *Colorado, Jesus Enrique Cornejo v. M.C.I.* (F.C.T.D., no. IMM-2629-99), Nadon, April 20, 2000 (failing to mention an important event in the PIF). In *Lubeya, Siula v. M.C.I.* (F.C.T.D., no. IMM-512-00), Pinard, December 6, 2000, the Court held that, since the wife's claim was dependent on that of her husband's (she had adopted totally her husband's statements which were found not to be credible), the CRDD could reasonably have concluded that she was no more credible, even though she relied on her own imputed political opinion and membership in a particular social group, the family. In *Kabulo, Buye v. M.C.I.* (F.C.T.D., no. IMM-5015-97), Décary, July 7, 1998, Reported: *Kabulo v. Canada (Minister of Citizenship*

claimants is credible would generally impact on another claimant whose claim is based on the same fact situation.<sup>59</sup> Where one of the claimants presents his or her own allegations of persecution or the joined claims have distinctive elements, those aspects will require separate analysis.<sup>60</sup>

In general, the Board has no obligation to refer to or follow the decisions of other panels, even when it is dealing with members of the same family.<sup>61</sup> Where there is relevant evidence put before the panel regarding a *related* claim (that was heard separately) which can link the claimant to the persecution alleged,<sup>62</sup> or which casts doubt on the claimant's credibility,<sup>63</sup> the

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*and Immigration*) (1998), 45 Imm.L.R. (2d) 207 (F.C.T.D.), the Court held that it was not an error for the CRDD not to consider the wife's cursory testimony, where the testimony of the husband, the principal claimant, was not believed. For a similar result, see also *Tofan, Ioan v. M.C.I.* (F.C.T.D., no. IMM-3167-00), Nadon, September 11, 2001, 2001 FCT 1011, where the wife's testimony was dependent on that of husband's "to a considerable extent".

<sup>59</sup> In *Radoslavov, Radoslav Itzov v. M.C.I.* (F.C.T.D., no. IMM-6344-99), Campbell, July 13, 2000, the Court held that it is not possible for the evidence that was accepted for three successful claimants, not to be accepted for the fourth claimant, who based his claim on the same fact situation which was apparently accepted as true for all four claimants, despite the inconsistencies in his evidence.

<sup>60</sup> In *Khan, Himmotur Rahman v. M.C.I.* (F.C.T.D., no. IMM-3428-97), Denault, August 21, 1998, the Court found that the CRDD erred by rejecting the claim of the husband in a summary way on the basis that his wife, the principal claimant, was not credible, when he had his own allegations of persecution. In *Csonka, Miklos v. M.C.I.* (F.C.T.D., no. IMM-6268-99), Lemieux, August 17, 2001, 2001 FCT 915, the Court held that the CRDD erred by tarnishing the principal claimant's mother and older son with the reasons they found the principal claimant not credible, when the former had distinctive elements to their claims which the panel failed to analyze.

<sup>61</sup> See *Rahmatizadeh, Ali v. M.E.I.* (F.C.T.D., no. IMM-2696-93), Nadon, April 6, 1994, where the Court held that the granting of Convention refugee status for one family member is not determinative for another, since the determination of Convention refugee status is performed on a case-by-case basis.

<sup>62</sup> See, for example, *Vettivelu, Yogasothy v. M.E.I.* (F.C.T.D., no. IMM-2091-93), Rothstein, July 6, 1994, where the Court held that the onus is on the claimant to show that she is similarly situated to her children, who were accepted as Convention refugees. In *Del Chavero, Veronica v. M.C.I.* (F.C.T.D., no. IMM-2912-02), Lutfy, April 25, 2003, 2003 FCT 513, the Court overturned the CRDD decision because it did not mention the testimony, given at the hearing, of the claimant's sister, who successfully claimed refugee status based on the same fact situation. In *Dudar, Igor v. M.C.I.* (F.C.T.D., no. IMM-61-02), Snider, December 9, 2002, 2002 FCT 1277, the Court held that the CRDD was correct in giving little or no weight to the PIFs of other refugee claimants. There was no evidence presented that explained the context in which these refugee claims were granted; nor was the claimant personally connected with or aware of the persons named in those PIFs. In *Botros, Fadwa v. M.C.I.* (F.C.T.D., no. IMM-267-02), Noël, December 13, 2002, 2002 FCT 1298, where the claimant submitted the PIF of her brother, a successful refugee claimant, the Court held that the brother's story does not constitute corroboration because, as he did not appear as a witness at the claimant's hearing, the CRDD could not test his story. In *Sellathurai, Sinnappu v. M.C.I.* (F.C.T.D., no. IMM-2829-02), O'Keefe, November 5, 2003, 2003 FC 1235, the Court held that the CRDD did not err in addressing the issue that three of the claimant's children were previously accepted as Convention refugee in Canada, as the claimant did not lead any evidence as to why they were accepted.

Board will have to consider it. However, the RPD is not bound by a decision rendered by another panel of the same Division,<sup>64</sup> nor is it entitled to rely on another panel's overall conclusions on the previous claim, which was found not to be credible, as evidence in support of its conclusion that the present claimant's story is not credible.<sup>65</sup>

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<sup>63</sup> In *Wei, Yulai v. M.C.I.* (F.C.T.D., no. IMM-6169-99), Simpson, December 20, 2000, the Court held that it was open to the CRDD to conclude that the claim was bogus because the claimant was part of a delegation whose members all made refugee claims. In *Gao, Zhen v. M.C.I.* (F.C.T.D., no. IMM-5989-00), Nadon, August 31, 2001, 2001 FCT 978, the Court held that, in light of all the other credibility concerns, the CRDD did not err in drawing a negative inference from the fact that the claimant's colleague, the source of the claimant's fear of persecution, had failed to pursue her refugee claim.

<sup>64</sup> *Kocab, Teresa v. M.E.I.* (F.C.A., no. A-83-91), Marceau, Hugessen, MacGuigan, October 15, 1991. In *Londono, Javier v. M.C.I.* (F.C.T.D., no. IMM-2413-02), Rouleau, May 9, 2003, 2003 FCT 569, the Court iterated that the Board must consider each case independently and grant little weight to the results of previous refugee claims by members of the same family. In *Matlija, Gezim v. M.C.I.* (F.C.T.D., no. IMM-1431-02), O'Reilly, May 29, 2003, 2003 FCT 704, the Court stated that, while the Board has no obligation to refer to or follow the decisions of other panels, even when dealing with members of the same family, in this case the Board specifically asked for written information about the successful refugee claims of the family members, and thus should have at least referred to that evidence.

<sup>65</sup> In *Dinehroodi, Sharareh Mohseni v. M.C.I.* (F.C.T.D., no. IMM-5198-02), Rouleau, June 19, 2003, 2003 FCT 758, in finding that it did not believe the claimant's story, the Board took into account that a previous panel had not believed her husband's story based on the same fact situation, but with new developments. The Board did not base its credibility finding solely on the previous CRDD decision. The Court held that while the Board was entitled to rely on the previous panel's decision to some extent; the Board was not entitled to rely on the previous panel's overall conclusions as proof that the claimant's husband's claim and, in turn, the claimant's own claim, was fabricated. That was a finding which is clearly determinative of the Board's conclusion with respect to the claimant's credibility and which is clearly an important part of the Board's decision. However, in *Molina, Hector Hugo Quiroz v. M.E.I.* (F.C.T.D., no. IMM-577-93), Nadon, June 10, 1994, the Court held that the CRDD's finding that the claimant's brother's testimony was not credible, and having noted that his claim had been dismissed as lacking in credibility, did not vitiate the panel's own assessment of the witness's credibility.

## 2.2. MAKING CLEAR FINDINGS ON CREDIBILITY AND PROVIDING ADEQUATE REASONS

### 2.2.1. 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 appear not to be credible must be clearly identified and the reasons for such conclusions must be clearly articulated.<sup>66</sup>

The Court of Appeal stated in *Addo* that, where there is no clear adverse finding of credibility, a recitation in the reasons of the claimant's testimony will be deemed to be the Board's findings of the relevant facts.<sup>67</sup>

### 2.2.2. Adequacy of Reasons

The Board is required to make clear findings as to what evidence is believed or disbelieved,<sup>68</sup> and should go on to assess any evidence found to be credible.<sup>69</sup> Ambiguous statements that do not

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<sup>66</sup> In *Armson v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm.L.R. (2d) 150 (F.C.A.), Justice Heald stated at 157-158: "the Board owed a duty...to give the reasons for rejecting the...refugee claim on the ground of credibility, in clear and unmistakable terms." In *Mehterian, Pierre Antoine v. M.E.I.* (F.C.A., no. A-717-90), Hugessen, MacGuigan, Desjardins, June 17, 1992, the Court stated: "the reasons must be sufficiently clear, precise and intelligible that the claimant may know why his claim has failed and decide whether to seek leave to appeal, where necessary." See also *Ababio, Richard v. M.E.I.* (F.C.A., no. A-390-87), Marceau, Teitelbaum, Walsh, March 9, 1988, Reported: *Ababio v. Canada (Minister of Employment and Immigration)* (1988), 5 Imm.L.R. (2d) 174 (F.C.A.); *Sebaratnam, Amuthakumar v. M.E.I.* (F.C.A., no. A-555-89), MacGuigan, Décary, Hugessen (dissenting), April 15, 1991, Reported: *Sebaratnam v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm.L.R. (2d) 264 (F.C.A.); *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.); *Ponniiah v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm.L.R. (2d) 241 (F.C.A.); *Rahman v. Canada (Minister of Employment and Immigration)* (1988), 8 Imm.L.R. (2d) 170 (F.C.A.); *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 199 (F.C.A.); *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.); *Pour, Akbar Behzadi v. M.E.I.* (F.C.A., no. A-655-90), Marceau, Desjardins, Décary, December 5, 1991; *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.).

<sup>67</sup> *Addo, Samuel v. M.E.I.* (F.C.A., no. A-614-89), Mahoney, Hugessen, Gray, May 7, 1992. With respect to PIFs, in *Efremov, Serguei Volodimirovich v. M.C.I.* (F.C.T.D., no. IMM-834-94), Reed, February 2, 1995, the Court stated that "[t]he fact that the Board accepted the claimant's PIF into evidence, as though the written material therein had been given orally before the Board, does not mean that the Board accepted that evidence as truthful or credible. No such conclusion should be drawn from the acceptance of evidence as part of the record. The weight and credibility to be given to that evidence are still matters to be assessed by the Board."

<sup>68</sup> *Rahman v. Canada (Minister of Employment and Immigration)* (1988), 8 Imm.L.R. (2d) 170 (F.C.A.); *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.).



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.<sup>70</sup>

Absent a conclusion impeaching the credibility of the claimant as a whole, the Board cannot, by reference to a finding expressly limited to one incident or one aspect of the claimant's story, ignore other incidents or aspects of the claim.<sup>71</sup>

As noted by the Court of Appeal in *Hilo*, the Board should be consistent in the treatment of various aspects of the claimant's testimony. For example, the panel should not use evidence which was disbelieved as a premise (factual basis) to undermine other aspects of the claimant's testimony.<sup>72</sup>

The Federal Court has called some panel's reasons regarding credibility "regrettably sparse" or even "vague" and stated that 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."<sup>73</sup> If the RPD believes only some of the claimant's story, it is obliged to say what parts it rejected and why.<sup>74</sup> It is not enough to say that the evidence is not believed,<sup>75</sup> since this creates an appearance of arbitrariness.

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<sup>69</sup> *Mensah, George Akohene v. M.E.I.* (F.C.A., no. A-1173-88), Pratte, Hugessen, Desjardins, November 23, 1989; *Okyere-Akosah, Kwame v. M.E.I.* (F.C.A., no. A-92-91), Marceau, Desjardins, Décary, May 6, 1992.

<sup>70</sup> *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 199 (F.C.A.), at 200, per Heald J.A. In *Shahiraj, Narender Singh v. M.C.I.* (F.C.T.D., no. IMM-3427-00), McKeown, May 9, 2001, 2001 FCT 453, the Court held that the CRDD's statements to the effect that the discrepancies between the claimant's statements at the port of entry and in his PIF narrative "compromise the credibility of his claim," and that his attempts to explain these discrepancies "rob of credibility his story of persecution", did not go far enough to dispose of the claim on credibility: The CRDD did not specifically state that it disbelieved the claimant's version of events. In *Muniandy, Shasikala v. M.C.I.* (F.C.T.D., no. IMM-3584-01), Tremblay-Lamer, May 15, 2002, 2002 FCT 557, the Court found that "the Board did not say whether its finding that the claimant was not credible led it to reject completely the claimant's assertions as to the genuineness of his fear, let alone, it would appear, how it led to this overall rejection of his testimony."

<sup>71</sup> *Ariff, Mohamed Faiz Mohamed v. M.C.I.* (F.C.T.D., no. IMM-1142-96), Noël, January 15, 1997.

<sup>72</sup> *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 199 (F.C.A.). See also *Munyakayanza, Devote v. M.C.I.* (F.C.T.D., no. IMM-4359-99) Blais, August 16, 2000, where the CRDD relied on letters which it dismissed as a basis for attacking the claimant's credibility.

<sup>73</sup> *Armson v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm.L.R. (2d) 150 (F.C.A.), at 157-58, per Heald J.A. In *Stadtmuller, Otto Istvan v. M.C.I.* (F.C., no. IMM-618-03), Shore, January 23, 2004, 2004 FC 102, the Court stated: "The salient or key points of the evidence must be discussed in the reasons, in a more revelatory fashion."

<sup>74</sup> *Ramirez, Ana Gabriela Espriella v. M.C.I.* (F.C.T.D., no. IMM-2540-98), McKeown, April 20, 1999.

<sup>75</sup> *Guzman, Luis Martinez v. M.C.I.* (F.C.T.D., no. IMM-472-97), Nadon, December 22, 1997.

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 inconsistencies, implausibilities), and to explain how and why they impacted on the claimant's credibility.<sup>76</sup>

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<sup>76</sup> *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.); *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 199 (F.C.A.); *Gonzalez, Everth Francisco Fletes v. M.E.I.* (F.C.T.D., no. 92-T-1229), Simpson, November 18, 1993; *Yukselir, Bektas v. M.C.I.* (F.C.T.D., no. IMM-1306-97), Gibson, February 11, 1998. In *Castro, Alejandro Enrique v. M.E.I.* (F.C.T.D., no. T-2349-92), McKeown, August 5, 1993, however, the Court pointed out that the panel is not required to list each and every inconsistency provided specific examples are given. In *Isse, Kadija Ahmed v. M.C.I.* (F.C.T.D., no. IMM-2991-97), MacKay, July 7, 1998, where the CRDD's reasons were found to be deficient, the only specific examples of inconsistencies set out were in comparing the evidence of the claimant with that of her children, to which latter evidence the panel stated it gave no weight. In *Diaz, Juan Rodrigo Penailillo v. M.C.I.* (F.C.T.D., no. IMM-4586-98), Pinard, August 12, 1999, the Court held that a conclusion of implausibility must be supported by reference to specific and relevant elements of the evidence, and cannot merely be a summary of the testimony of the claimant.

## 2.3. BASING A DECISION ON SIGNIFICANT AND RELEVANT EVIDENCE AND ASPECTS OF THE CLAIM

### 2.3.1. Relevancy Considerations

The Federal Court has held that a finding that testimony is not credible must be based on relevant considerations.<sup>77</sup> It is possible, however, to use evidence that is not directly relevant to a ground for claiming refugee status in deciding that the claimant lacks credibility, where that evidence undermines the claimant's identity<sup>78</sup> or reveals a pattern of fabrication that gives rise to doubts generally about the claimant's veracity.<sup>79</sup>

### 2.3.2. Contradictions, Inconsistencies and Omissions<sup>80</sup>

The existence of contradictions or inconsistencies in the evidence of a claimant or witness is a well-accepted basis for a finding of lack of credibility.<sup>81</sup> As discussed later (see 2.3.4. *Materiality*), the discrepancies must be sufficiently serious and must concern matters that are relevant to the issues being adjudicated to warrant the adverse finding.

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<sup>77</sup> *Salamat v. Canada (Immigration Appeal Board)* (1989), 8 Imm.L.R. (2d) 58 (F.C.A.); *Siddique, Ashadur Rahman v. M.E.I.* (F.C.A., no. A-1137-88), Pratte, Hugessen, Desjardins, November 23, 1989.

<sup>78</sup> For example, in *Muhammed, Jamal v. M.E.I.* (F.C.T.D., no. A-714-92), MacKay, August 12, 1993, the Court upheld the CRDD's conclusion disbelieving that the claimant was a native of Sudan, based on his lack of knowledge of basic information about his country (flag, national holiday, population of his city). See also *Katambala, Adric v. M.C.I.* (F.C.T.D., no. IMM-5827-98), Reed, July 19, 1999.

<sup>79</sup> *Dan-Ash v. Canada (Minister of Employment and Immigration)* (1988), 93 N.R. 33 (F.C.A.). In *Tofan, Ioan v. M.C.I.* (F.C.T.D., no. IMM-3167-00), Nadon, September 11, 2001, 2001 FCT 1011, the Court stated: "In seeking to assess the validity of the [claimants'] refugee claim, the Board members were certainly entitled to question the [claimants] in a broad and general way, so as to determine whether the story put forward by them was credible." See also 2.3.8. *Criminal and Fraudulent Activities in Canada*.

<sup>80</sup> The definitions that follow are from *The Concise Oxford Dictionary* and are "working" definitions. Other broader or narrower interpretations are possible, but these are given here as a guide.

- ❑ *Contradictory* is used to refer to "facts", propositions or ideas that are mutually opposed or inconsistent so that one and only one of them must be true.
- ❑ *Inconsistent* means not in keeping, discordant or incompatible.
- ❑ *Implausible* is the opposite of plausible which means seeming reasonable or probable.

<sup>81</sup> *Dan-Ash v. Canada (Minister of Employment and Immigration)* (1988), 93 N.R. 33 (F.C.A.); *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.). In *Epane, Florent v. M.C.I.* (F.C.T.D., no. IMM-974-98), Rouleau, June 17, 1999, the CRDD erred by not taking into account the fact that the claimant, who was nervous during the hearing, corrected her error (as to the date of the elections) on her own initiative.

These considerations apply as well to omissions in the claimant's previous statements, whether made to Canadian immigration officials (at the port of entry or inland);<sup>82</sup> in a previous examination (such as an examination under oath)<sup>83</sup> or hearing<sup>84</sup> on the claim; in the claimant's Personal Information

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<sup>82</sup> In *Dehghani v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 587 (C.A.), the Federal Court held, in relation to the now defunct first level ("credible basis") hearing, the tribunal could refer to inconsistencies (for example, omissions) between prior statements made by the claimant, without counsel, at a port of entry examination, and on the claimant's later affidavit evidence and testimony at the hearing, to make an adverse finding of credibility. This decision was upheld by the Supreme Court of Canada, reported in [1993] 1 S.C.R. 1053, where it ruled that routine inquiries at secondary examination on the issues of identity, admissibility and a refugee claim do not amount to detention and thus the right to counsel is not invoked. See also *Dalawi, Abala Mohamed Al v. M.C.I.* (F.C.T.D., no. IMM-6394-98), Denault, August 5, 1999. But see, however, *Sow, Mamadou Yaya v. M.C.I.* (F.C.T.D., no. IMM-1662-98), Tremblay-Lamer, March 8, 1999, where the claimant was detained after reporting to claim refugee status and questioned by immigration officers without being advised of his right to counsel. Although the CRDD accepted the notes into evidence, it gave no weight to them. The Court held that the panel exercised due diligence in refusing to take the notes into account, given the questionable way in which they had been obtained. Moreover, the panel was not obliged to recuse itself because it had read the notes. See also *Zhu, Rui Rong v. M.C.I.* (F.C.T.D., no. IMM-5964-00), Campbell, November 21, 2001, 2001 FCT 1275. In *Huang, Wen Zhen v. M.C.I.* (F.C.T.D., no. IMM-5816-00), MacKay, February 8, 2002, 2002 FCT 149, the claimant was detained for three days on arrival in Canada and interviewed by immigration authorities before being given access to counsel. Normally such evidence obtained in violation of s. 10(b) of the *Charter of Rights and Freedoms* would be excluded, however, in this case the CRDD did not base its finding on those notes so the Court did not overturn the negative decision on the claim.

<sup>83</sup> *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 106 (F.C.A.); *Kassa v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm.L.R. (2d) 1 (F.C.A.); *Boakye, Comfort Duodo v. M.E.I.* (F.C.A., no. A-562-91), Mahoney, Robertson, Gray, January 26, 1993; *Guevara, Melida de Jesus Valle v. M.E.I.* (F.C.T.D., no. A-58-93), Nadon, December 17, 1993.

<sup>84</sup> Transcripts of previous hearings are generally admissible: *Rahnema, Massoud v. S.G.C.* (F.C.T.D., no. IMM-1740-93), Gibson, October 15, 1993, Reported: *Rahnema v. Canada (Solicitor General)* (1993), 22 Imm.L.R. (2d) 127 (F.C.T.D.) (transcript of previously aborted CRDD hearing); *Addai, Akua v. M.E.I.* (F.C.T.D., no. IMM-761-93), McGillis, February 16, 1994 (transcript of credible basis hearing); *Sitsabeshan, Ashadevi Balasingham v. S.S.C.* (F.C.T.D., no. IMM-1014-93), Gibson, June 22, 1994, Reported: *Sitsabeshan v. Canada (Secretary of State)* (1994), 27 Imm.L.R. (2d) 294 (F.C.T.D.) (transcript of overturned CRDD hearing at subsequent *de novo* hearing ordered by Federal Court); *Diamanama, Nsimba v. M.C.I.* (F.C.T.D., no. IMM-1808-95), Reed, January 30, 1996 (transcript of overturned CRDD hearing); *Agranovski, Vladislav v. M.C.I.* (F.C.T.D., no. IMM-243-97), Pinard, November 25, 1997 (transcript of overturned CRDD hearing filed with claimant's express consent; the panel questioned the claimant about each implausibility noted in its second decision); *Quazi, Enamul Huque v. M.C.I.* (F.C.T.D., no. IMM-6518-00), Pinard, October 10, 2001, 2001 FCT 1098.

A panel may also admit in evidence and read the written reasons of a previous panel dealing with the same claimant, though it would clearly be inappropriate for the second panel simply to adopt the reasons of the first. See *Lahai, Morie B. v. M.C.I.* (F.C.A., no. A-532-00), Rothstein, Sexton, Evans, March 25, 2002, 2002 FCA 119. It must be clear that the Board considered the matter afresh. See *Marques, Francisco Carlos v. M.C.I.* (F.C.T.D., no. IMM-3137-95), Rouleau, August 23, 1996, Reported: *Marques v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm.L.R. (2d) 81 (F.C.T.D.). In *Badal, Benjamin v. M.C.I.* (F.C.T.D., no. IMM-1105-02), O'Reilly, March 14, 2003, 2003 FCT 311, the claimant did not testify at the

Form (PIF)<sup>85</sup> or the PIFs of family members;<sup>86</sup> or during an interview at the Board.<sup>87</sup> It appears, however, that little can be made of the claimant's failure to advise Canadian officials abroad of his or her fear of persecution when applying for a visa to come to Canada,<sup>88</sup> or perhaps with respect to omission of information in the eligibility interview notes.<sup>89</sup>

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rehearing, however, the Court held that that did not relieve the panel of the obligation to assess all of the evidence. It was open to the panel to consider the transcript of a previous hearing and make a finding of a lack of credibility based on it, provided its reasons make the basis for those findings clear. The Board relied on the analysis carried out by the previous panel. While a panel can rely on the fact-finding of another panel, to a certain extent, it would appear that the second panel simply relied on the first panel's assessment of the claimant's testimony instead of conducting its own assessment, and this constituted a breach of fairness. A mere reference to the observations of a previous panel does not satisfy the obligation to explain a negative credibility finding.

<sup>85</sup> *Bakare, Abeni v. M.E.I.* (F.C.T.D., no. IMM-1603-93), Reed, January 19, 1994; *He, Feng Kui v. M.E.I.* (F.C.A., no. A-1194-91), Heald, Desjardins, Linden, July 20, 1994.

<sup>86</sup> *Gandour, Fatema Hoteit v. M.E.I.* (F.C.T.D., no. A-1426-92), Dubé, October 18, 1993; *Kaur, Jaswinder v. M.C.I.* (F.C.T.D., no. IMM-1944-96), Jerome, July 24, 1997. Some of the pitfalls of using PIFs of related claimants have been highlighted in the following cases: In *Wimalachandran, Nadarajah v. M.C.I.* (F.C.T.D., no. IMM-2321-95), Reed, April 1, 1996, the Court faulted the Refugee Division for drawing adverse findings from omissions in the claimant's PIF without taking up counsel's offer to produce the original Tamil version of the PIF which, it was contended, had gone through an editing process. In *Chellaiyah, Arulthas v. M.C.I.* (IMM-3308-98), Lutfy, July 19, 1999, the Court held that the CRDD could not assume that the information in the claimant's sister's PIF was correct, nor did the claimant bear the burden of explaining the alleged discrepancies; that could only be properly done upon an assessment of the sister's credibility and the circumstances surrounding the disclosure of information at the time her PIF was prepared. In *Bayrami, Javad Jamali v. M.C.I.* (F.C.T.D., no. IMM-3904-98), McKeown, July 22, 1999, the Court faulted the CRDD for not ruling on the appropriateness of entering the PIF of one daughter where the second daughter's PIF was unavailable. In *Bebondas, Frankline Hohn v. M.C.I.* (F.C.T.D., no. IMM-428-99), Campbell, October 20, 1999, the Court faulted the CRDD for concluding that the claimant fabricated his answer to question 37 of his PIF, primarily because portions of his PIF were the same as the PIFs of three other claimants, in view of the claimant's explanation that it was his counsel who drew up his PIF (thus the claimant could not properly be made to account for it).

<sup>87</sup> *Arunachalam, Sivashanker v. M.C.I.* (F.C.T.D., no. IMM-2982-99), MacKay, September 6, 2001, 2001 FCT 997. After an interview in the "expedited process," the Refugee Protection Officer prepares a report; the interview is also recorded and the recording may be placed in evidence at the hearing if the accuracy of the report is contested.

<sup>88</sup> In *Fajardo, Mercedes v. M.E.I.* (F.C.A., no. A-1238-91), Mahoney, Robertson, McDonald, September 15, 1993, Reported: *Fajardo v. Canada (Minister of Employment and Immigration)* (1994), 21 Imm.L.R. (2d) 113 (F.C.A.), the Court commented that only the most naïve applicant for a visitor's visa would indicate to the visa officer that her purpose for going to Canada was not to visit but to seek asylum. See also *Leitch, Roger Rodney v. M.C.I.* (F.C.T.D., no. IMM-2910-94), Gibson, February 6, 1995; *Quinteros, Carolina Elizabeth Lovato v. M.C.I.* (F.C.T.D., no. IMM-4030-97), Campbell, September 22, 1998; *Bhatia, Varinder Pal Singh v. M.C.I.* (F.C.T.D., no. IMM-4959-01), Layden-Stevenson, November 25, 2002, 2002 FCT 1010. In *Dhillon, Lakhwinder Singh v. M.C.I.* (F.C.T.D., no. IMM-120-01), McKeown, November 2, 2001, 2001 FCT 1194, the Court stated that it is questionable whether the claimant has any onus to refer to a previous immigration application under question 37 (narrative) of the PIF.

The Federal Court has identified the following general factors as relevant to the assessment of inconsistencies or discrepancies:<sup>90</sup>

[23] The discrepancies relied on by the Refugee Division [CRDD] must be real [*Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.)]. The Refugee Division must not display a zeal “to find instances of contradiction in the [claimant’s] testimony ... it should not be over-vigilant in its microscopic examination of the evidence” [*Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.)]. The alleged discrepancy or inconsistency must be rationally related to the [claimant’s] credibility [*Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 106 (F.C.A.)]. Explanations which are not obviously implausible must be taken into account [*Owusu-Ansah, supra*].

[24] Moreover, another line of cases establishes the proposition that the inconsistencies found by the Refugee Division must be significant and be central to the claim [*Mahathmasseelan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 29 (F.C.A.)] and must not be exaggerated [*Djama, Idris Mohamed v. M.E.I.* (F.C.A., no. A-738-90), Marceau, MacGuigan, Décary, June 5, 1992].

### 2.3.3. PIFs and Statements Made to Immigration Officials

Port of entry notes or documents prepared by Canadian immigration officials are admissible at an RPD hearing, without any further participation by the Minister at the hearing.<sup>91</sup> They are

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<sup>89</sup> In *Asfaw, Sebsibe Haile v. M.C.I.* (F.C.T.D., no. IMM-2786-98), Sharlow, March 25, 1999, the Court noted the limited function of the eligibility interview and that, in any event, the claimant was not told that the information provided would be considered by the CRDD. The Court held that the CRDD erred in not giving notice to the claimant that his explanation for not mentioning important information during the interview was not satisfactory.

<sup>90</sup> As summarized in *Sheikh, Asad Javed v. M.C.I.* (F.C.T.D., no. IMM-315-99), Lemieux, April 25, 2000.

<sup>91</sup> *Parnian, Saeid v. M.C.I.* (F.C.T.D., no. IMM-2351-94), Wetston, May 19, 1995. According to *Rahman, Saidur v. M.E.I.* (F.C.T.D., no. IMM-2078), Denault, June 10, 1994, the admission of such documents did not contravene the *Privacy Act* as they were used for a use consistent with the purpose for which the information was obtained. According to *Johnpillai, Christian Joy Rajkumar v. S.S.C.* (F.C.T.D., no. IMM-3651-94), Reed, January 31, 1995, it is not a breach of natural justice for a decision-maker to be provided with such documents, even if they contain prejudicial information, prior to the hearing, as long as the claimant has an adequate opportunity to respond. All that is required is timely disclosure that is meaningful for the claimant in the circumstances. See *Gandour, Fatema Hoteit v. M.E.I.* (F.C.T.D., no. A-1426-92), Dubé, October 18, 1993, where the Court held that the port of entry notes should not have been admitted without timely advance disclosure. Disclosure effected only during the course of cross-examination may not be sufficient, and this deficiency may not always be curable by offering an adjournment. See *Tetteh-Louis, Seth v. S.S.C.* (F.C.T.D., no. IMM-4218-93), Pinard, July 8, 1994. (See also *Instructions for the Acquisition and Disclosure of Information for Proceedings in the Refugee Division*, CRDD Instructions: 96-01.)

admissible even though they may be unsigned and undated,<sup>92</sup> and even though their author is not called or is not available to testify.<sup>93</sup> Port of entry notes are admissible even though there is no evidence that the form in question has been established by ministerial order,<sup>94</sup> and even though the notes are in a non-official language.<sup>95</sup>

In a number of cases, the Federal Court pointed out some of the pitfalls in using port of entry notes<sup>96</sup> and PIFs,<sup>97</sup> and relying unduly on contradictions or omissions as a reason for a finding of

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<sup>92</sup> *M.E.I. v. Boamong, Sheikh Jedges* (F.C.A., no. A-1219-91), Isaac, Marceau, McDonald, August 6, 1993. Once admitted, however, it is up to the tribunal to assess the probative value of the port of entry notes, that is., their weight and reliability. See *Karikari, Kwame v. M.E.I.* (F.C.A., no. A-275-92), Heald, Stone, McDonald April 25, 1994, Reported: *Karikari v. Canada (Minister of Employment and Immigration)* (1994), 169 N.R. 131 (F.C.A.).

<sup>93</sup> *Mongu, E-Beele v. S.G.C.* (F.C.T.D., no. IMM-5060-93), Richard, October 12, 1994; *Abdoli, Siamak v. M.C.I.* (F.C.T.D., no. IMM-3769-94), Muldoon, March 13, 1995; *Nowa, Alain Eric v. M.C.I.* (F.C.T.D., no. IMM-430-99), Pelletier, February 1, 2000 (the immigration officer failed to appear). There is no duty on the Board to summon the immigration officer who authored the POE notes. It is up to the claimant to call the officer as a witness. See *Lin, Guo Qing v. M.C.I.* (F.C.T.D., no. IMM-4864-94), Gibson, September 28, 1995; *Zaloshnja, Ylles v. M.C.I.* (F.C.T.D., no. IMM-755-02), Tremblay-Lamer, February 20, 2003, 2003 FCT 206. The case of *Cheung v. Canada (Minister of Employment and Immigration)*, [1981] 2 F.C. 764 (C.A.) suggests that the right “to cross examine” the deponent of an affidavit can be denied only where there are proper grounds to do so. As pointed out in *Dipchand, Neeranjana v. M.E.I.* (F.C.A., no. A-619-91), Mahoney, MacGuigan, Holland, February 10, 1993, there is a duty on the part of the decision-makers, in the exercise of their discretion to issue a subpoena, to consider all the relevant factors including the likelihood of the potential witness giving material evidence. In *Kusi, Kwame v. M.C.I.* (F.C.T.D., no. 92-T-1429), Reed, June 1, 1993, Reported: *Kusi v. Canada (Minister of Employment and Immigration)* (1993), 19 Imm.L.R. (2d) 281 (F.C.T.D.), the Court ruled that it was a breach of natural justice and fundamental justice not to call the immigration officer who authored the notes of a port of entry examination for cross-examination where the claimant contested the accuracy of those notes. See also *Jaupi, Skender v. M.C.I.* (F.C.T.D., no. IMM-2086-01), Kelen, June 11, 2002, 2002 FCT 658, where the claimant wanted to have the immigration officer and interpreter cross-examined with regard to inconsistencies in the immigration officer’s notes—evidence that was central to the case against the claimant. In *Nadarajah, Kumaramoorthy v. M.C.I.* (F.C.T.D., no. IMM-4123-98), Blais, June 15, 1999, where the immigration officer’s hand-written notes could not be located, the Court held that the CRDD was justified in denying a request to reopen the hearing for cross-examination of all immigration officers who had handled the file.

<sup>94</sup> *Nowa, Alain Eric v. M.C.I.* (F.C.T.D., no. IMM-430-99), Pelletier, February 1, 2000.

<sup>95</sup> *Ramirez, Fredy Danilo Herrera v. M.C.I.* (F.C.T.D., no. IMM-3794-99), Dubé, June 1, 2000.

<sup>96</sup> In *Singh, Amrik v. M.C.I.* (F.C.T.D., no. IMM-2835-95), Campbell, July 16, 1996, the Court cautioned that it is “poor practice” for the Board to find the notes to be accurate on “pure faith”. The Board should inquire into such matters as the context of the interview and the degree to which the person understood the questions being put. In *Kanapathipillai, Bagawathy v. M.C.I.* (F.C.T.D., no. IMM-5186-97), Campbell, July 31, 1998, the Court found that the 68-year-old female claimant, speaking through an interpreter after arriving in a strange country, and being asked to account before an authority figure, had offered a reasonable explanation for not telling a full story during the twenty-minute interview at the port of entry, namely, she only answered the questions asked of her. The Court held that for the CRDD to say, without reasons, that the claimant’s

lack of credibility, as these are not always indicative of a lack of credibility. While the omission of

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explanation is “not satisfactory”, is capricious. In *Thambirasa, Sakuntala v. M.C.I.* (F.C.T.D., no. IMM-1224-98), Reed, February 3, 1999, the Court found that: (1) The panel had failed to consider the reasons a (Tamil) woman would be reluctant to disclose a sexual assault to a stranger, a male, who speaks a different language and is in a country with a culture different from her own; (2) the port of entry notes completely fill the space provided for them; (3) what is written there is chosen by the officer, not the claimant; (4) there is no expectation that the brief few lines of notes are meant to tell the whole story. In *Ali, Abbas v. M.C.I.* (F.C.T.D., no. IMM-4565-99), Reed, June 28, 2000, the Court found that the claimant gave seemingly credible explanations for why the port of entry notes differed from the true story: it was clear that the notes were filled in by someone with limited knowledge of English. In *Nowa, Alain Eric v. M.C.I.* (F.C.T.D., no. IMM-430-99), Pelletier, February 1, 2000, the Court held that the immigration officer’s opinion about the substance of the claim and the claimant’s credibility was not relevant, and that the CRDD erred in law in relying on this opinion in its deliberations. In *Neame, Nora Cathia v. M.C.I.* (F.C.T.D., no. IMM-847-99), Lemieux, March 23, 2000, the Court upheld a CRDD decision that found that the claimant was lacking in credibility *solely* on the basis of a contradiction between her PIF and the port of entry notes. In *Mushtaq, Tasaddaq v. M.C.I.* (F.C., no. IMM-4324-02), Pinard, September 23, 2003, 2003 FC 1066, the Court held that the Board dwelt on minor details and not on the substance of the claim when it questioned the claimant’s credibility based on the inconsistencies between the port of entry notes and the claimant’s testimony.

<sup>97</sup> In *Anthonipillai, Jeyaratnam v. M.C.I.* (F.C.T.D., no. IMM-1709-95), Simpson, March 5, 1996, the Court held that the CRDD could accept at a second CRDD hearing, the PIF from the first hearing (the decision therein had been quashed on judicial review), which differed in some respects from the second PIF tendered by the claimant at the rehearing of the claim; the preferred procedure in such a case is for the first PIF to be entered as a CRDD exhibit (if tendered by the Board). See also *Aquino, Jose Felix Paniagua v. M.E.I.* (F.C.A., no. A-344-89), Mahoney, MacGuigan, Linden, June 4, 1992, where the Court held that in order for the Board to rely on inconsistencies between the PIF and the claimant’s oral testimony, the PIF must be entered in evidence at the hearing. Note, however, that this case was distinguished in *Barrera, Mario Moises Guzman v. M.E.I.* (F.C.T.D., no. A-1552-92), McGillis, November 10, 1993, where the Court held that the fact the PIF was not filed as an exhibit was only a matter of form, and this did not preclude the CRDD from referring to the document.

In *Vallejo, Juan Ernesto v. M.E.I.* (F.C.A., no. A-799-90), Mahoney, Stone, Linden, March 26, 1993, the Court commented adversely on the fact that there was no evidence that the (revised) PIF had been translated to the claimant. In *Boshnakov, Valeri v. M.C.I.* (F.C.T.D., no. A-418-91), Pratte, Hugessen, Desjardins, November 23, 1993, the Court held that where the CRDD states at the hearing that it accepts the facts in the revised PIF as true, it cannot, in its reasons, reject that evidence because of discrepancies between the original and revised PIFs. In *Castroman (Vezzani), Carlos Adrian v. S.S.C.* (F.C.T.D., no. IMM-1302-92), McKeown, June 20, 1994, Reported: *Castroman v. Canada (Secretary of State)* (1994), 27 Imm.L.R. (2d) 129 (F.C.T.D.), the Court stated at 132: “In my view, it is not proper for a lawyer to interfere with the RHO’s or a member’s questioning of the claimant with respect to his or her PIF. The lawyer cannot attempt to shield the client from questioning as to why certain matters were omitted from the PIF, on the basis of solicitor-client privilege. If the lawyer seeks to do this, then the Board would be entitled to give very little weight to the client’s credibility.” In *Bitumba, Bikoka v. M.E.I.* (F.C.T.D., no. IMM-1023-93), Noël, February 25, 1994, the Court held that the panel had raised a reasonable apprehension of bias by calling for production of (privileged) notes the claimant gave to his counsel for the purpose of preparing the PIF, and indicating that in the absence of same it would draw an adverse inference (claimant alleged that matters omitted from his PIF had been set forth in the notes). However, in *Molina, Hector Hugo Quiroz v. M.E.I.* (F.C.T.D., no. IMM-577-93), Nadon, June 10, 1994, the Court held that it was not an error for the panel to examine the claimant’s file where counsel consented to same.



a significant fact from a claimant's PIF can be the basis for an adverse credibility finding,<sup>98</sup> the Board should in each case consider the nature of the contradiction or omission, as well as the timing of any amendment to the PIF (for example, a significant last-minute amendment as opposed to merely adding further detail at the hearing), and take into account any explanation offered by the claimant.<sup>99</sup>

With respect to the content and level of detail of the PIF narrative, the Federal Court stated 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 [a claimant] 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.<sup>100</sup>

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<sup>98</sup> *Bakare, Abeni v. M.E.I.* (F.C.T.D., no. IMM-1603-93), Reed, January 19, 1994; *He, Feng Kui v. M.E.I.* (F.C.A., no. A-1194-91), Heald, Desjardins, Linden, July 20, 1994.

<sup>99</sup> In *Osman, Abdirizak Said v. M.E.I.* (F.C.T.D., no. IMM-261-93), Nadon, December 22, 1993, the Court cautioned the CRDD not to discount the claimant's testimony in its entirety by simply carrying out a comparison of two different PIFs submitted by the claimant which contain discrepancies; the CRDD should go on to determine whether the claimant has any credible evidence to offer, especially where there is independent corroboration of part of the claimant's story. In *Kutuk, Aydin v. M.C.I.* (F.C.T.D., no. IMM-2484-94), Simpson, April 18, 1995, the Court stated: "the Board was entitled to consider the contents of the PIF before and after its amendment. It was also entitled to draw negative inferences about credibility, if matters it considered important were only added to the PIF by amendments made at the hearing." In *Taleb, Ali v. M.C.I.* (F.C.T.D., no. IMM-1449-98), Tremblay-Lamer, May 18, 1999, the Court held that the CRDD was entitled to find the claimant's first PIF as more credible than the revised one, especially since the former was corroborated by the documentary evidence. In *Nishanthan, Ramachandran v. M.C.I.* (F.C.T.D., no. IMM-1940-98), Lemieux, November 2, 1999, the Court found it unreasonable to conclude that the claimant had not made out his identity based on his failure to mention a document in his PIF. In *Neame, Nora Cathia v. M.C.I.* (F.C.T.D., no. IMM-847-99), Lemieux, March 23, 2000, the Court upheld a CRDD decision that found that the claimant was lacking in credibility *solely* on the basis of a contradiction between her PIF and the port of entry notes. In *Bastos, Neusa Margarida Ferrao v. M.C.I.* (F.C.T.D., no. IMM-4255-00), O'Keefe, June 15, 2001, 2001 FCT 662, the Court held that, in the circumstances, the CRDD erred in finding a lack of credibility because there was more detail in the PIF than in oral testimony. In *Akhigbe, Kingsley v. M.C.I.* (F.C.T.D., no. IMM-5222-00), Dawson, March 6, 2002, 2002 FCT 249, the Court held that the CRDD is not entitled to draw a negative inference on the basis of a claimant's omission of minor or elaborative details in the PIF. In *Manoharan, Indrani Thabita v. M.C.I.* (F.C., no. IMM-4526-02), Simpson, July 14, 2003, 2003 FC 871, the Court held that, although the discrepancies between the PIF and port of entry notes did not concern the claimant's problems in Sri Lanka (but her period abroad and itinerary), the Board could still consider them in making a general finding of lack of credibility. In *Jaber, Amar v. M.C.I.* (F.C., no. IMM-2099-02), Pinard, September 23, 2003, 2003 FC 1065, the Court held that, even though the discrepancies between the PIF and the claimant's testimony are not enough to justify a finding of no credibility, they did allow the panel to arrive at such a finding when it also considered the claimant's demeanour and the implausibility of his story.

<sup>100</sup> *Basseghi, Kourosh v. M.C.I.* (F.C.T.D., no. IMM-2227-94), Teitelbaum, December 6, 1994. This case expanded on a previous statement in *Singh, Gurmeet v. M.E.I.* (F.C.T.D., no. IMM-888-93), Reed, October 8, 1993, where the Court stated: "The PIF is supposed to be a brief recitation of [a claimant's] claim, not a

In assessing discrepancies, the RPD should consider factors such as the claimant's psychological condition<sup>101</sup> or young age,<sup>102</sup> and the vulnerable circumstances of abused women.<sup>103</sup>

The similarity between the claimant's PIF and the PIFs of other claimants may be an appropriate basis for questioning the credibility of a claim.<sup>104</sup>

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documentation of his whole case." In *Castroman (Vezzani), Carlos Adrian v. S.S.C.* (F.C.T.D., no. IMM-1302-92), McKeown, June 20, 1994, Reported: *Castroman v. Canada (Secretary of State)* (1994), 27 Imm.L.R. (2d) 129 (F.C.T.D.), the Court stated at 131-32: "One of the primary ways that the board tests a claimant's credibility is by comparing the PIF with the claimant's oral testimony. It is intended that all questions concerning the PIF, directed to the claimant, should be answered fully." In *Grinevich, Vladimir v. M.C.I.* (F.C.T.D., no. IMM-1773-96), Pinard, April 11, 1997, the Court stated: "Where a refugee claimant fails to mention important facts in his or her PIF, this may legitimately be considered by the Board to be an omission that goes to lack of credibility." See also *Sanchez, Armand Milian v. M.C.I.* (F.C.T.D., no. IMM-2631-99), Nadon, April 20, 2000, to the same effect. In *Uppal, Rajesh Kumar v. S.G.C.* (F.C.T.D., no. IMM-552-94), Reed, January 24, 1995, Reported: *Uppal v. Canada (Solicitor General)* (1995), 27 Imm.L.R. (2d) 232 (F.C.T.D.), the Court held that the alleged five-day detention, the event that allegedly triggered the claimant's flight, should have been mentioned in the PIF. In *Bains, Pritam Singh v. M.C.I.* (F.C.T.D., no. IMM-5366-97), Reed, August 10, 1998, the Court noted that the PIF directs claimants to recount only the significant incidents of their claim in that document, and that it was therefore not unreasonable for the claimant to have omitted "very ordinary problems" (incidents of police harassment and detention), when the focus of his claim was on more serious events that occurred before and after that time frame.

<sup>101</sup> In *Khawaja, Mohammad Rehan v. M.C.I.* (F.C.T.D., no. IMM-5385-98), Denault, July 28, 1999, the Court held that the CRDD erred in not considering, in relation to an omission in the PIF, a psychological report which found severe post-traumatic stress disorder and noted that the claimant had difficulties relating the traumatizing events he had experienced. In *Ogbebor, Macauley Jesse v. M.C.I.* (F.C.T.D., no. IMM-275-00), Lemieux, May 16, 2001, 2001 FCT 490, the Court held that the CRDD erred in criticizing the claimant for not mentioning in his PIF that he was raped while in detention, thus ignoring the psychologist's comment that the claimant felt extremely ashamed, and thus reluctant to speak, about this event.

<sup>102</sup> The fact that the claimant is a minor, however, will not generally account for significant omissions in the PIF. See *Huang, Lin v. M.C.I.* (F.C.T.D., no. IMM-6300-99), Pelletier, November 14, 2001, 2001 FCT 1239.

<sup>103</sup> In *Dhar, Kabita v. M.C.I.* (F.C.T.D., no. IMM-6226-99), Denault, August 22, 2000, the CRDD ignored evidence that the claimant suffered from a psychological syndrome originating from the sexual aggression she was a victim of and which affects her capacity to talk and give details about what happened to her. In *Chiebuka, Ayondu v. M.C.I.* (F.C.T.D., no. IMM-4571-99), Pinard, October 27, 2000, the Court found sexist, and unacceptably lacking in sensitivity and compassion, the member's comment that the claimant's testimony about her rape had not been emotional and the expression of surprise that she could have forgotten to mention in her PIF that she had been raped twice. In *Simba, Ayonda v. M.C.I.* (F.C.T.D., no. IMM-102-99), Lemieux, January 24, 2001, the Court urged caution and an open mind when assessing the testimony of a young female claimant who alleged being sexually assaulted while in prison (the description of the assault varied significantly from that in the PIF). See also *Kaur, Ravinder v. M.C.I.* (F.C.T.D., no. IMM-4869-00), Pinard, September 19, 2001, 2001 FCT 875.

<sup>104</sup> *Shi, Gui Lan v. M.C.I.* (F.C., no. IMM-3197-02), Dawson, September 23, 2003, 2003 FC 1088. The use of related PIFs in these circumstances gives rise to issues under s. 17 of the *RPD Rules* and the *Privacy Act*.

There is no special requirement for the RPD to notify the claimant at the hearing that changes to the PIF or omissions are of significant importance: the PIF form advises the claimant of the importance of the answers in the PIF.<sup>105</sup>

If a claimant alleges that the interpreter used to translate the PIF is responsible for its shortcomings, it is up to the claimant to decide whether to call the interpreter as a witness.<sup>106</sup>

### 2.3.4. Materiality

It is clear from a long line of cases that an adverse finding of credibility based on contradictions in a claimant's or witness's testimony must be based on real contradictions or discrepancies<sup>107</sup> that are of a significant or serious nature. Minor or peripheral inconsistencies in the claimant's evidence should not lead to a finding of a general lack of credibility where documentary evidence supports the plausibility of the claimant's story.<sup>108</sup>

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<sup>105</sup> *Arunasalam, Sivakumar v. M.C.I.* (F.C.T.D., no. IMM-6620-00), Blais, September 28, 2001, 2001 FCT 997.

<sup>106</sup> *Lara, Nilda Guadalupe v. M.C.I.* (F.C.T.D., no. IMM-919-01), Simpson, December 17, 2001, 2001 FCT 1391. In that case the claimant was represented by counsel, and it was counsel's responsibility to adduce the claimant's evidence.

<sup>107</sup> *Lai v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 245 (F.C.A.); *Ahmed v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm.L.R. (2d) 212 (F.C.A.); *Batra, Gurmeet Singh v. M.E.I.* (F.C.A., no. A-564-89), Hugessen, Desjardins, Décary, September 9, 1991; *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.); *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.); *Membreno-Garcia v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 306 (T.D.); *Fuentes-Valoy, Ruben Dario v. M.E.I.* (F.C.A., no. A-709-90), Mahoney, MacGuigan, Holland, February 9, 1993; *Mohamed, Haweya Abdi v. M.E.I.* (F.C.A., no. A-43-91), Mahoney, MacGuigan, Linden, February 11, 1993; *Fahiye, Mohamed Osman v. M.E.I.* (F.C.A., no. A-1321-91), Heald, MacGuigan, Linden, March 17, 1993.

<sup>108</sup> *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Frimpong v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 183 (F.C.A.); *Lai v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 245 (F.C.A.); *Siddique, Ashadur Rahman v. M.E.I.* (F.C.A., no. A-1137-88), Pratte, Hugessen, Desjardins, November 23, 1989; *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.); *Grewal, Kala Singh v. M.E.I.* (F.C.A., no. A-532-91), Mahoney, Robertson, Gray, January 27, 1993; *Fuentes-Valoy, Ruben Dario v. M.E.I.* (F.C.A., no. A-709-90), Mahoney, MacGuigan, Holland, February 9, 1993; *Fahiye, Mohamed Osman v. M.E.I.* (F.C.A., no. A-1321-91), Heald, MacGuigan, Linden, March 17, 1993; *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.); *Guevara, Melida de Jesus Valle v. M.E.I.* (F.C.T.D., no. A-58-93), Nadon, December 17, 1993.

Inconsistency, misrepresentation or concealment should not lead to a rejection of the claim where these are not material to the claim. Where a claimant is found to be lying, and the lie is material to the claim, the panel must, nevertheless, look at all of the evidence and arrive at a conclusion based on the entire body of evidence before it.

A number of decisions of the Federal Court indicate that if the claimant's story is being rejected outright, the contradictions must relate to central elements or critical points, that is, the foundation of the claim.<sup>109</sup> Accordingly, when the testimony appears to be consistent as a whole, the panel must point out contradictions or implausibilities that relate to central aspects of the claim to support a finding that the claimant is not credible.<sup>110</sup>

Thus it has been held that rejecting a claim based solely on the non-credibility of secondary<sup>111</sup> or peripheral<sup>112</sup> issues, without evaluating the credibility of the evidence concerning the substance of the claim, constitutes a reviewable error.

It has also been recognized in some cases, however, that, while the discrepancies and contradictions considered individually might have seemed insignificant, when taken together and considered in context, they may support a finding of lack of credibility.<sup>113</sup> (See also 2.1.3. *General Finding of Lack of Credibility.*)

### 2.3.5. Implausibilities

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<sup>109</sup> *Mahathmasseelan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 29 (F.C.A.); *Serrano, Jose Antonio Rodriguez v. M.E.I.* (F.C.A., no. A-646-91), Hugessen, Pratte, Desjardins, January 30, 1992. See also *Virk v. Canada (Minister of Employment and Immigration)* (1992), 140 N.R. 290 (F.C.A.); *Vallejo, Juan Ernesto v. M.E.I.* (F.C.A., no. A-799-90), Mahoney, Stone, Linden, March 26, 1993.

<sup>110</sup> *Amaniampong, Kofi v. M.E.I.* (F.C.A., no. A-1326-87), Heald (dissenting), Mahoney, Hugessen, May 19, 1989; *Aden, Ibrahim Ali v. M.E.I.* (F.C.A., no. A-813-91), Hugessen, MacGuigan, Décarý, April 28, 1993.

<sup>111</sup> *Simba, Ayonda v. M.C.I.* (F.C.T.D., no. IMM-102-99), Lemieux, January 24, 2001 (the central element was claimant's imprisonment because of her father's activities and not the sexual assault while in prison).

<sup>112</sup> *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 106 (F.C.A.) (escape from detention and destruction of false travel documents); *Armson v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm.L.R. (2d) 150 (F.C.A.) (details of escape from jail and one's country and travel itinerary abroad were not consequential given the uncontradicted evidence of arrest, detention and mistreatment); *Ahangaran, Behzad v. M.C.I.* (F.C.T.D., no. IMM-301-98), McGillis, May 19, 1999 (the credibility findings were based solely on matters pertaining to travel following his departure from his country, including use of false documents and identities). But see *Farah, Kalthoum Abdirahman v. M.E.I.* (F.C.T.D., no. 92-A-6032), Reed, May 26, 1993, where the alleged destruction of a false passport was part of a larger identity concern.

<sup>113</sup> *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.); *Njeme, Ali v. M.C.I.* (F.C.T.D., no. A-1614-92), Pinard, November 28, 1994.

The RPD does not necessarily have to accept a witness's testimony simply because it was not contradicted at the hearing. The RPD is entitled to make reasonable findings based on implausibilities, common sense and rationality, and may reject evidence if it is not consistent with the probabilities affecting the case as a whole.<sup>114</sup>

In this respect, the British Columbia Court of Appeal stated in *Faryna v. Chorny*:<sup>115</sup>

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

It is not sufficient simply to indicate that the claimant's story is "implausible" without explaining further the reasoning behind that finding.<sup>116</sup> Adverse findings of credibility must be based on reasonably drawn inferences and not conjecture or mere speculation.<sup>117</sup> Where the RPD finds a lack of credibility based on inferences concerning the plausibility of the evidence, there must be a basis in the evidence to support the inferences.<sup>118</sup>

The panel should therefore articulate why the testimony that is being rejected is clearly out of line with what could be reasonably expected in the circumstances,<sup>119</sup> and should ensure that any such

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<sup>114</sup> *Alizadeh, Satar v. M.E.I.* (F.C.A., no. A-26-90), Stone, Desjardins, Décary, January 11, 1993; *Aguebor, Clement v. M.E.I.* (F.C.A., no. A-1116-11), Marceau, Desjardins, Décary, July 16, 1993, Reported: *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.); and *Shahamati, Hasan v. M.E.I.* (F.C.A., no. A-388-92), Pratte, Hugessen, McDonald, March 24, 1994, where the Court stated that "the Board is entitled, in assessing credibility, to rely on criteria such as rationality and common sense." See also *Oduro, Prince v. M.E.I.* (F.C.T.D., no. 92-A-7171), Noël, June 2, 1993 (claimant escaped from prison with the assistance of a guard and did not encounter any checkpoints when leaving the country); *Chand, Saroop v. M.E.I.* (F.C.T.D., no. 92-T-2035), Gibson, January 26, 1994.

<sup>115</sup> *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C. C.A.), at 357, per O'Halloran J.A.

<sup>116</sup> *Arumugam, Kandasamy v. M.E.I.* (F.C.T.D., no. IMM-1406-93), Reed, January 20, 1994.

<sup>117</sup> *Kong, Win Kee v. M.E.I.* (F.C.T.D., no. IMM-471-93), Reed, January 27, 1994, Reported: *Kong v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm.L.R. (2d) 179 (F.C.T.D.)

<sup>118</sup> *Miral, Stefnie Dinisha v. M.C.I.* (F.C.T.D., no. IMM-3392-97), Muldoon, February 12, 1999.

<sup>119</sup> The formulation found in *Faryna v. Chorny*—that "a practical and informed person would readily recognize as reasonable in that place and in those conditions"—seems to suggest that, in order to find something to be implausible, it must be clearly out of line with known facts or norms of behaviour. In *Valtchev, Rousko v. M.C.I.* (F.C.T.D., no. IMM-4497-99), Muldoon, July 6, 2001, 2001 FCT 776, the Court held that plausibility

conclusion is supported by the evidence, including references to the relevant documentary evidence.<sup>120</sup>

A claimant's testimony ought not to be lightly or readily dismissed. It is not sufficient for the decision-maker merely to indicate that he or she prefers to accept what is considered to be a more reasonable explanation of the events, nor is it appropriate to go on to construct one's own hypothesis as to how events actually unfolded.<sup>121</sup>

The Federal Court has indicated that considerable caution is required when assessing the norms and patterns of different cultures and the practices and procedures of different police, political, and social systems.<sup>122</sup> Actions which might appear implausible if judged by Canadian standards might be plausible when considered within the context of the claimant's social and cultural background.<sup>123</sup>

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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. In *Ye, Xue Bi v. M.C.I.* (F.C.T.D., no. IMM-5860-00), Blanchard, November 2, 2001, 2001 FCT 1196, the Court upheld the CRDD's conclusion that while certain events are possible (though they occur rarely), they are not probable and therefore implausible. In *Valère, Nixon v. M.C.I.* (F.C.T.D., no. IMM-3747-00), Hansen, November 2, 2001, 2001 FCT 1200, the Court held:

Although harm stems from opportunity and motive, it does not necessarily follow that an absence of harm in circumstances where opportunity exists equates to an absence of motive. While a lack of motive in these circumstances may be plausible, the fact the [claimant] remained unharmed for a period of three weeks is insufficient by itself to take the finding beyond mere conjecture.

<sup>120</sup> *Badri, Soudabeh Varasteh v. M.C.I.* (F.C.T.D., no. IMM-4971-99), Gibson, November 30, 2000.

<sup>121</sup> *Dumitru, Nicolae v. M.E.I.* (F.C.T.D., no. IMM-911-93), Noël, February 25, 1994, Reported: *Dumitru v. Canada (Minister of Employment and Immigration)* (1994), 27 Imm.L.R. (2d) 62 (F.C.T.D.).

<sup>122</sup> *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.); *Ye, Zhi Bing v. M.E.I.* (F.C.A., no. A-711-90), Stone, MacGuigan, Henry, June 24, 1992; *Xu, Zhe Ru v. M.E.I.* (F.C.A., no. A-666-90), Mahoney, Stone, Robertson, September 8, 1992; *Ankrah, Bismark v. M.E.I.* (F.C.T.D., no. T-1986-92), Noël, March 16, 1993; *Ibrahim, Mohamed Abdissalam Hagi v. M.E.I.* (F.C.A., no. A-382-91), Heald, MacGuigan, Linden, March 17, 1993; *Aden, Ibrahim Ali v. M.E.I.* (F.C.A., no. A-813-91), Hugessen, MacGuigan, Décary, April 28, 1993; *Pathmanathan, Ambika v. M.E.I.* (F.C.T.D., no. 93-A-67), McKeown, June 24, 1993; *Karikari, Kwame v. M.E.I.* (F.C.A., no. A-275-92), Heald, Stone, McDonald, April 25, 1994, Reported: *Karikari v. Canada (Minister of Employment and Immigration)* (1994), 169 N.R. 131 (F.C.A.); *Gyimah, Joycelyn v. M.C.I.* (F.C.T.D., no. IMM-1011-93), Gibson, November 10, 1995. In *Singh, Narinder v. M.C.I.* (F.C.T.D., no. IMM-3882-00), Blanchard, May 14, 2001, the Court found that the CRDD did not base its decision on the behaviour of the agent of persecution in finding that the claimant's testimony was not plausible, but rather on the credibility of the testimony and the facts relied on to support the claimant's story.

<sup>123</sup> In a number of cases, the Court has alerted the CRDD not to impose "Western concepts", "Canadian paradigms" or "North American logic and experience", without regard to the socio-political and cultural context before it and the particular circumstances of the claimant. See, respectively: *Ye, Zhi Bing v. M.E.I.*

Similar concerns arise when the Board applies Canadian standards of conduct to persons fleeing persecution,<sup>124</sup> or draws inferences about the likelihood of the claimant being perceived as a political activist based on his or her “minor” role or on his or her ability to obtain a passport, without regard to relevant country conditions.<sup>125</sup>

The Federal Court has cautioned about the perils of drawing inferences from cultural generalizations<sup>126</sup> and relying on stereotypical profiles,<sup>127</sup> as well as assessing ethnicity based on the panel’s perception of the claimant’s physical appearance (unless this is plainly apparent or acknowledged by the claimant), without regard to how the claimant would be perceived in his or her home country. The panel’s “common sense” is not sufficient to ground a conclusion about ethnicity based on appearance; rather, it must be able to offer other evidence to support its conclusion.<sup>128</sup>

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(F.C.A., no. A-711-90), Stone, MacGuigan, Henry, June 24, 1992; *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.); and *Rahnema, Massoud v. S.G.C.* (F.C.T.D., no. IMM-1740-93), Gibson, October 15, 1993, Reported: *Rahnema v. Canada (Solicitor General)* (1993), 22 Imm.L.R. (2d) 127 (F.C.T.D.). In *Rahnema*, the Iranian claimant had explained that on the advice of a smuggling agent, he destroyed a false Iranian passport after passing through Philippine emigration controls on his way to Japan for his trip to Canada. The Court found that the panel’s conclusion that the claimant’s explanation was implausible amounted to an error of law because the panel had applied its own standard of analysis and judgment “rather than a reasonable standard of one similarly situated” to the claimant. See also *Sun, Yun Yau v. M.E.I.* (F.C.T.D., no. IMM-604-93), Gibson, August 5, 1993, Reported: *Sun v. Canada (Minister of Employment and Immigration)* (1993), 24 Imm.L.R. (2d) 226 (F.C.T.D.).

<sup>124</sup> *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.); *Callejas v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm.L.R. (2d) 253 (F.C.T.D.). In *Samani, Hassan v. M.C.I.* (F.C.T.D., no. IMM-4271-97), Hugessen, August 19, 1998, the Court commented that a finding of implausibility is rarely convincing when it is based on behaviour the CRDD finds dangerous: politically committed persons often take risks. See also *Bukaka-Mabiala, Aime v. M.C.I.* (F.C.T.D., no. IMM-4296-98), Rouleau, June 18, 1999, to that effect.

<sup>125</sup> *Ponce-Yon, Carlos Roberto v. M.E.I.* (F.C.T.D., no. A-770-92), Jerome, February 17, 1994.

<sup>126</sup> In *Najeebdeen, Mohamed Saly v. M.C.I.* (F.C.T.D., no. IMM-5438-98), Lutfy, July 30, 1999, the Court held that it was wrong to extrapolate that a specific incident alleged by a claimant is implausible because it runs counter to the general political relationship between groups (the Tamil Muslim community and the Sri Lankan government). See also *Ponniah, Ganeshalingam v. M.C.I.* (F.C., no. IMM-4620-02), Russell, September 2, 2003, 2003 FC 1016; *Ali, Ahmed v. M.C.I.* (F.C.T.D., no. IMM-3981-02), Russell, September 2, 2003, 2003 FC 982.

<sup>127</sup> *Tubacos, Zoltan v. M.C.I.* (F.C.T.D., no. IMM-1373-01), Kelen, February 28, 2002, 2002 FCT 225; *Cazak, Liliana v. M.C.I.* (F.C.T.D., no. IMM-1110-01), Blanchard, April 9, 2002, 2002 FCT 390; *Trembliuk, Yuriy v. M.C.I.* (F.C., no. IMM-5873-02), Gibson, October 30, 2003, 2003 FC 1264.

<sup>128</sup> In *Pluhar, Lubomir v. M.C.I.* (F.C.T.D., no. IMM-5334-98), Evans, August 27, 1999, and in *Mitac, Josef v. M.C.I.* (F.C.T.D., no. IMM-5988-98), Lutfy, September 13, 1999, the Court stated that reliance on a tribunal member’s observations concerning a claimant’s “physical appearance” is, in the absence of expert evidence, “inherently dangerous.” But see *Bartonik, Daniel v. M.C.I.* (F.C.T.D., no. IMM-304-00), Muldoon, July 26, 2000, where the Court upheld the CRDD’s finding that the claimant was not a Roma and would not be

Gender considerations are also relevant to assessing the plausibility of a claimant's account (see the discussion in 2.6.2. *Special Circumstances of the Claimant*).

The Federal Court has stressed the importance of clearly articulated reasons in cases where the non-credibility finding is based on perceived implausibilities.<sup>129</sup> When making an assessment involving implausibility, reference must also be made to relevant evidence and explanations offered by the claimant which could potentially refute the conclusion of an adverse finding on implausibility.<sup>130</sup>

While the panel is entitled to weigh the evidence and assess its credibility, it cannot reach a conclusion that is so inconsistent with the preponderance of the relevant evidence so as to be unreasonable.<sup>131</sup>

Decisions based on findings of implausibility are vulnerable on a review by a superior court or tribunal. The Federal Court has indicated that it will not extend undue deference to the Board's assessment of plausibility, as such assessments are based on the drawing of inferences and are

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perceived as one after considering factors such as appearance, language, cultural practices and friends. See also, to the same effect, *Tugambayev, Azamat v. M.C.I.* (F.C.T.D., no. IMM-3806-99), Reed, June 30, 2000. In *Mikhailov, Alexandr v. M.C.I.* (F.C.T.D., no. IMM-4265-99), Denault, August 24, 2000, the CRDD disbelieved the attacks suffered by the claimant were of an anti-Semitic nature because, as confirmed by the claimant himself, he "does not have a Jewish name, is not a practising Jew, and his physical appearance does not lead you to believe he is Jewish." On the other hand, in *Szostak, Pawel v. M.C.I.* (F.C.T.D., no. IMM-3161-00), Lemieux, August 23, 2001, 2001 FCT 938, the CRDD's finding, based on the claimant's appearance, education and friends and a language test, was held to constitute stereotyping for which there was no evidentiary foundation.

<sup>129</sup> See *Leung, Shuk-Shuen v. M.E.I.* (F.C.T.D., no. A-1162-92), Jerome, May 20, 1994, where the Court pointed out that 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 its conclusions. In *Alza, Julian Ulises v. M.C.I.* (F.C.T.D., no. IMM-3657-94), MacKay, March 26, 1996, the Court noted that while findings based on implausibilities may not be readily documented by specific reasons, the general factors in the claimant's evidence or the surrounding circumstances which make the allegations implausible should be referred to in the CRDD's decision. In *Shoka, Sabri v. M.C.I.* (F.C.T.D., no. IMM-5055-01), Campbell, June 26, 2002, 2002 FCT 720, the Court suggests that the knowledge that is required to make plausibility findings must be known to the claimant and must be on the record to determine if the plausibility conclusions can be justified. See, however, *Zakaria, Mirza v. M.C.I.* (F.C.T.D., no. IMM-3363-98), Pinard, August 13, 1999, which suggests that the duty to state in clear and unmistakable terms why the panel disbelieves the claimant does not apply when the claimant's evidence is implausible ("inherently suspect or improbable").

<sup>130</sup> *Xu, Zhe Ru v. M.E.I.* (F.C.A., no. A-666-90), Mahoney, Stone, Robertson, September 8, 1992; *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.).

<sup>131</sup> *Leung, Shuk-Shuen v. M.E.I.* (F.C.T.D., no. A-1162-92), Jerome, May 20, 1994; *Rodriguez, Maria Angelica Magan v. M.C.I.* (F.C.T.D., no. IMM-4790-94), MacKay, March 1, 1996.



subject to challenge, especially when they are based on extrinsic criteria such as “rationality” or “common sense”.<sup>132</sup>

On the other hand, when the inferences drawn that lead to a finding of lack of credibility are not so unreasonable as to warrant the intervention of the Court, the findings will be allowed to stand. Put another way, the Federal Court will not substitute its discretion for that of the panel if it was open to the panel to find as they did, even if the Court might have drawn different inferences or found the evidence to be plausible.<sup>133</sup>

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<sup>132</sup> In *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.), the Court stated at 239:

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 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.

See also *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Ansong v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm.L.R. (2d) 94 (F.C.A.); *Salamat v. Canada (Immigration Appeal Board)* (1989), 8 Imm.L.R. (2d) 58 (F.C.A.); *Ye, Zhi Bing v. M.E.I.* (F.C.A., no. A-711-90), Stone, MacGuigan, Henry, June 24, 1992; *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.); *Ayimadu-Antwi, Yaw v. M.E.I.* (F.C.T.D., no. A-1086-92), McKeown, October 29, 1993.

<sup>133</sup> The Court clarified the case law on this point in *Aguebor, Clement v. M.E.I.* (F.C.A., no. A-1116-11), Marceau, Desjardins, Décar, July 16, 1993, Reported: *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.), at 316-17:

It is correct, as the court said in *Giron*, that it may be easier to have a finding of implausibility review[ed] where it results from inferences than to have a finding of non-credibility review[ed] 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”.

There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony... 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.

Subsequent decisions have held this to mean that the same standard of judicial deference that applies to findings of credibility also applies to findings of implausibility. See *Babchine, Igor v. M.C.I.* (F.C.T.D., no. IMM-768-95), Cullen, February 15, 1996; and *Ayodele, Abiodun v. M.C.I.* (F.C.T.D., no. IMM-4812-96), Gibson, December 30, 1997, which reaffirmed *Aguebor* as the central authority on the review of implausibility findings.

### 2.3.6. Incoherent Testimony and Lack of Knowledge or Detail

A claim may be rejected as lacking in credibility if the claimant's testimony is found to be incoherent or vague,<sup>134</sup> or lacking in sufficient knowledge or detail reasonably expected of a person in the claimant's position and from that social and cultural background.<sup>135</sup> However, the RPD should be cautious about imposing too high a standard on the claimant's knowledge about matters such as politics, religion and the like.<sup>136</sup>

### 2.3.7. Demeanour

In assessing the credibility of the evidence, the RPD can evaluate the general demeanour of a witness as he or she is testifying. This involves assessing the manner in which the witness replies to questions, his or her facial expressions, tone of voice, physical movements, general integrity and

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<sup>134</sup> In *Chen, Xing Kang v. M.C.I.* (F.C.T.D., no. IMM-808-00), Gibson, November 29, 2000, the claimant was unable to describe coherently the sterilization process he allegedly underwent. In *Akindele, James Olanusi v. M.C.I.* (F.C.T.D., no. IMM-6617-00), Pinard, January 18, 2002, 2002 FCT 37, the Court upheld the CRDD's finding that the claimant's oral testimony was vague and confusing and that his written testimony lacked coherence.

<sup>135</sup> *Rokni, Mohammad Mehdi v. M.C.I.* (F.C.T.D., no. IMM-6068-93), Muldoon, January 27, 1995. In *Rahmaty, Parviz v. M.C.I.* (F.C.T.D., no. IMM-1221-95), Jerome, May 13, 1996, in upholding the CRDD's decision the Court noted: "The essence of the Board's decision was that it was implausible for a person in [the claimant's] position to be able to supply only the vague and general responses which he provided at the hearing." In *Hidri, Ylber v. M.C.I.* (F.C.T.D., no. IMM-554-00), MacKay, August 24, 2001, 2001 FCT 949, the Court upheld the CRDD's finding of lack of credibility based, in part, on the claimant's lack of knowledge regarding basic information on which the claim was based. See also *He, Lian Sai v. M.C.I.* (F.C.T.D., no. IMM-5957-00), Blanchard, November 15, 2001, 2001 FCT 1256. In *Baines, Manjit Kaur v. M.C.I.* (F.C.T.D., no. IMM-1146-01), Nadon, May 28, 2002, 2002 FCT 603, the Court held that knowing little about a very close friend of the family or any other piece of information that should be in a claimant's knowledge has nothing to do with cultural differences, and that proof of alleged cultural differences should be presented.

<sup>136</sup> *Ullah, Khan Asad v. M.C.I.* (F.C.T.D., no. IMM-5639-99), Heneghan, November 22, 2000, where the Court had the impression that the CRDD member erroneously expected the claimant's answers about his religion to be equivalent to the member's own knowledge of that religion. In *Yilmaz, Metin v. M.C.I.* (F.C., no. IMM-3952-02), Pinard, July 11, 2003, 2003 FC 2004, the Court found that the RPD required a level of political knowledge usually demanded of an active member rather than a party supporter and inappropriately compared the claimant to a well-informed person in the free world. See also *Mushtaq, Tasaddaq v. M.C.I.* (F.C., no. IMM-4324-02), Pinard, September 23, 2003, 2003 FC 1066. One line of cases holds that it is incumbent on the Board to state the expectation of knowledge and evidentiary basis against which the claimant and his or her evidence is compared. See *Yu, Xiao Ling v. M.C.I.* (F.C.T.D., no. IMM-5531-01), Campbell, October 23, 2002, 2002 FCT 1107; *Shah, Syed Fayyaz Ahmed v. M.C.I.* (F.C.T.D., no. IMM-2015-02), Campbell, February 7, 2003, 2003 FCT 137.

intelligence, and powers of recollection.<sup>137</sup> However, relying on demeanour to find a claimant not credible must be approached with a great deal of caution.

The Federal Court has recognized that every judge's assessment of credibility is influenced by a witness's demeanour. The Court cautioned that, although the reasons for reaching a conclusion on this issue may be partly subjective, they must also be founded on objective considerations.<sup>138</sup>

In assessing demeanour, the decision-maker ought not to form impressions based on the physical appearance or political profile of a witness,<sup>139</sup> but on objective considerations that flow from the witness's testimony, such as the witness's frankness and spontaneity, whether the witness is hesitant or reticent in providing information, and the witness's attitude and comportment (behaviour) before the tribunal.<sup>140</sup>

Moreover, there must be a rational connection between the claimant's demeanour and the conclusions drawn from it. Individual personality traits and cultural background should be taken into account as these could cause the witness to leave a misleading impression.<sup>141</sup>

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<sup>137</sup> *Leung, Tak On v. M.E.I.* (F.C.A., no. A-756-91), Stone, Linden, McDonald, July 8, 1993; *Wen, Li Xia v. M.E.I.* (F.C.A., no. A-397-91), Stone, Linden, McDonald, June 10, 1994; *Mostajelin, Mohammad v. M.E.I.* (F.C.A., no. A-122-90), Stone, Desjardins, Décaray, January 15, 1993.

<sup>138</sup> *King-Adjei, Augustine v. M.E.I.* (F.C.T.D., no. T-1584-91), Jerome, March 16, 1992.

<sup>139</sup> In *Liu, Zhi Gan v. M.C.I.* (F.C.T.D., no. IMM-3143-96), Gibson, August 29, 1997, Reported: *Liu v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm.L.R. (2d) 168 (F.C.T.D.), the Court questioned how, without further explanation, the claimant's occupation (as a fisherman) could be determined from his demeanour. In *Chowdhury, Wahid v. M.C.I.* (F.C.T.D., no. IMM-2896-02), Blanchard, April 9, 2003, 2003 FCT 416, the Court pointed out that there is no universal standard for the demeanour of a political activist.

<sup>140</sup> See *Paré v. Goulet*, [1959] Que.S.C. 348, at 354, per Marquis J. In *Sun, Yuerong v. M.E.I.* (F.C.T.D., no. 92-A-7176), Noël, June 23, 1993, the claimant's testimony "went from being crystal clear to nebulous when confronted with questions by the members." In *Arumugam, Kandasamy v. M.E.I.* (F.C.T.D., no. IMM-1406-93), Reed, January 20, 1994, the claimant's demeanour when reciting answers concerning facts set out in the PIF differed from that when giving evidence about matters outside his narrative. In *Sandhu, Jasbir Singh v. M.E.I.* (F.C.T.D., no. 93-T-46), MacKay, March 3, 1994, the claimant was found not to be spontaneous, answered with hesitation and evasiveness, and did not answer in some areas in a direct and precise manner. In *Gao, Zhen v. M.C.I.* (F.C.T.D., no. IMM-5989-00), Nadon, August 31, 2001, 2001 FCT 978, the claimant's testimony "sounded wooden and rehearsed."

<sup>141</sup> *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.), at 298-299. In *Ankrah, Bismark v. M.E.I.* (F.C.T.D., no. T-1986-92), Noël, March 16, 1993, the claimant's testimony was found to be "totally devoid of any emotion or personal involvement" to be believed. However, the appropriateness of drawing adverse conclusions from the claimant's lack of emotion when recalling traumatic events, without further elaboration, has been questioned. In *Shaker, Tahereh v. M.C.I.* (F.C.T.D., no. IMM-3449-98), Reed, June 30, 1999, the Court commented that, in the circumstances, it was not apparent why one should have expected the claimant to become emotional when describing a beating, so long after the event. See also *London, Luz Dary Aguedo v. M.C.I.* (F.C.T.D., no. IMM-1830-02), Blanchard, March 31, 2003, 2003

A claimant's psychological condition arising out of traumatic past experiences may have an impact on his or her ability to testify.<sup>142</sup> Accordingly, failure to address this factor in its reasons could be a reviewable error where the RPD has found the claimant not to be credible.

The demeanour of a witness is not an infallible guide as to whether the truth is being told, nor is it determinative of credibility. It would be a rare case where demeanour alone would be sufficiently material to the claim to undermine the entire testimony in support of a claim. Generally, demeanour is one of several indicators of a lack of credibility. In general, the courts have attempted to diminish the role of demeanour in the final assessment of credibility.<sup>143</sup>

Assessments of credibility based on demeanour are open to scrutiny on judicial review. Accordingly, clear and cogent reasons must be given for such findings.<sup>144</sup>

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FCT 376; *Kathirkamu, Saththiyathan v. M.C.I.* (F.C.T.D., no. IMM-3430-02), Russell, April 8, 2003, 2003 FCT 409; *Ahmad, Nawaz v. M.C.I.* (F.C.T.D., no. IMM-944-02), Rouleau, April 23, 2003, 2003 FCT 471. In *Mitac, Josef v. M.C.I.* (F.C.T.D., no. IMM-5988-98), Lutfy, September 13, 1999, the Court held that there was no rational connection, in this case, between the claimants' comportment ("smiling and laughing" and "facial expressions") and the panel's conclusion that they were not Roma.

<sup>142</sup> *Khawaja, Mohammad Rehan v. M.C.I.* (F.C.T.D., no. IMM-5385-98), Denault, July 28, 1999. See also 2.4.10. *Medical Reports.*

<sup>143</sup> In *Plumb v. W.C. MacDonald Regd.; Latimer v. Foster Tobacco Co.*, [1926] 1 D.L.R. 899 (Ont. C.A.) (reversed on other grounds *sub nom. W.C. MacDonald Regd. v. Latimer; Jasperson v. Plumb*, [1928] 3 D.L.R. 870 (P.C.)), Smith J. stated at 918-19:

There are fortunately few cases in which the credibility of witnesses has to be determined by a trial Judge on conclusions drawn alone from the appearance and demeanour of these witnesses in the box. This may be an element of more or less weight according to circumstances, but at best it is a very uncertain guide... Conduct and demeanour are at all events of minor importance where the whole evidence and surrounding circumstances furnish guides of a more reliable nature.

<sup>144</sup> In *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.), the Court stated at 299:

The respondent suggested that the [claimant] was...evasive in answering questions. However, the only suggested evasiveness occurred when the [claimant] clearly did not understand the question and when that was straightened out he answered the question. In my view, it is not evasion to misunderstand a question and grope for answers.

In *Aden, Ibrahim Ali v. M.E.I.* (F.C.A., no. A-813-91), Hugessen, MacGuigan, Décarý, April 28, 1993, the Court noted:

The Refugee Division gave three reasons why they said they did not believe the [claimant]. ... The second reason given was that the [claimant] had been "vague" because he could not specify whether the attacking forces had used bombs or artillery in the raid on Hargeisa in

### 2.3.8. Criminal and Fraudulent Activities in Canada

In *Fouladi*,<sup>145</sup> the Federal Court stated that it was permissible to take account of an offence committed in Canada that involves deceit as a factor in assessing the claimant's credibility. However, in another case, the Federal Court categorized as "questionable" a panel's drawing of a negative inference as to the existence of a subjective fear of persecution, because of the claimant's criminal behaviour in Canada.<sup>146</sup>

The Federal Court has held that the making of multiple applications for Convention refugee status under different identities was a proper basis for reaching a negative assessment of the overall credibility of a claimant.<sup>147</sup>

### 2.3.9. Delay in Claiming Refugee Status and Other Related Factors

Delay in seeking and applying for refugee protection is not an automatic bar to a claim for protection. Refugee claimants are not obliged under the *Convention Relating to the Status of Refugees* to seek asylum in the first country which they reach after flight, or in the country nearest to their home state.<sup>148</sup>

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May 1988: that, in our view, was both unfair and unreasonable. The victims of military attacks on civilian populations cannot be expected to appreciate the niceties of the various systems employed to deliver explosive charges against them.

In *Shakir, Hani Thabit v. M.C.I.* (F.C.T.D., no. IMM-2671-95), Reed, April 3, 1996, the Court recognized that a transcript "does not show pauses between questions and answers, or within an answer. It does not show...[a claimant's] 'body language'."

<sup>145</sup> In *Fouladi, Esmail v. M.C.I.* (F.C.T.D., no. IMM-1405-94), Reed, December 9, 1994, the claimant had been convicted of a fairly serious charge of fraud committed in Canada. The Court stated that the CRDD "may discount much of the [claimant's] story if they conclude that he is not a person who concerns himself about whether or not he tells the truth."

<sup>146</sup> *Tvauri, Omar v. M.C.I.* (F.C.T.D., no. IMM-4873-99), Dawson, July 20, 2000.

<sup>147</sup> *James, Olabisi v. M.C.I.* (F.C.T.D., no. IMM-5480-99), Heneghan, April 25, 2001, 2001 FCT 385. The Court distinguished the case of *Olutu, Charles v. M.C.I.* (F.C.T.D., no. IMM-834-99), Dubé, December 31, 1996, where the claimant had used three different names to obtain welfare assistance and had been charged in that connection. The Court held that such misrepresentations in other matters do not constitute misrepresentations for the purposes of Convention refugee status under s. 69.2(2) of the *Immigration Act* (now s. 109(1) of *IRPA*). Both these cases were decided in the context of vacation applications.

<sup>148</sup> In *Gavryushenko, Petr v. M.C.I.* (F.C.T.D., no. IMM-5912-99), Lutfy, July 26, 2000, the Court pointed out that while the fact that a person does not seize the first opportunity of claiming refugee status in a signatory country may be a relevant factor in assessing credibility, it does not thereby constitute a waiver of his or her right to claim that status in another country. The Court cited James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), at page 46: "There is no requirement in the Convention that a refugee seek

Nonetheless, the Federal Court of Appeal has held that delay in claiming refugee status “is an important factor which the Board is entitled to consider in weighing a claim for refugee status.”<sup>149</sup> Ultimately, the Board must decide, based on the evidence before it, the significance of a delay to a particular case.<sup>150</sup>

Delay points to a lack of subjective fear of persecution,<sup>151</sup> the reasoning being that someone who was truly fearful would claim refugee status at the first opportunity.<sup>152</sup> The Federal Court has also held that delay could be a consideration in finding a claimant not to be credible.<sup>153</sup>

The Court of Appeal has stated that the credibility of a claimant’s fear cannot be disputed solely on the basis that the claim for refugee status was late in coming.<sup>154</sup> In *Huerta*, Mr. Justice Létourneau wrote:

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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.”

<sup>149</sup> *Heer, Karnail Singh v. M.E.I.* (F.C.A., no. A-474-87), Heald, Marceau, Lacombe, April 13, 1988.

<sup>150</sup> *M.C.I. v. Sivalingam-Yogarajah, Subajiny* (F.C.T.D., no. IMM-2649-00), Pelletier, September 13, 2001, 2001 FCT 1018.

<sup>151</sup> See *Castillejos, Joaquin Torres v. M.C.I.* (F.C.T.D., no. IMM-1950-94), Cullen, December 20, 1994, where the Court stated that delay points to a lack of subjective fear and does not relate to the objective basis of the claim.

<sup>152</sup> See, for example, *Espinosa, Roberto Pablo Hernandez v. M.C.I.* (F.C., no. IMM-5667-02), Rouleau, November 12, 2003, 2003 FC 1324. As pointed out in James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), at page 53, “the Convention establishes [in Article 31(1)] an obligation on refugees to ‘present themselves without delay to the authorities and show good cause for their illegal entry or presence.’ It seems right, therefore, to inquire into the circumstances of any protracted postponement of a refugee claim as a means of evaluating the sincerity of the claimant’s need for protection. ... Where there is no reasonable excuse for the delay, an inference of evasion going to credibility is often warranted.”

<sup>153</sup> There are numerous cases where the Federal Court has upheld Board decisions that considered the issue of delay as a factor in assessing a claimant’s overall credibility. In *Bello, Salihou v. M.C.I.* (F.C.T.D., no. IMM-1771-96), Pinard, April 11, 1997, noted below, the Court found the Board’s finding of subjective fear was integrally related to the credibility of a claimant’s evidence. In *Molnar, Elekne v. M.C.I.* (F.C.T.D., no. IMM-1736-01), Nadon, March 26, 2002, 2002 FCT 343, the Court questioned whether the Board could conclude there was no subjective fear and at the same time draw no conclusion as to the claimants’ credibility. However, in *Ibrahimov, Fikrat v. M.C.I.* (F.C., no. IMM-4258-02), Heneghan, October 10, 2003, 2003 FC 1185, the Court found that, in the circumstances of that case, where the claim was based on the cumulative effect of incidents of discrimination, reliance on delay to doubt credibility did not seem logical.

<sup>154</sup> *Hue, Marcel Simon Chang Tak v. M.E.I.* (F.C.A., no. A-196-87), Marceau, Teitelbaum, Walsh, March 18, 1988; *Huerta v. Canada and Immigration* (1993), 157 N.R. 225 (F.C.A.). In *Papsouev, Vitali v. M.C.I.* (F.C.T.D., no. IMM-4619-97), Rouleau, May 19, 1999, Reported: *Papsouev v. Canada (Minister of*

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.<sup>155</sup>

Thus, despite the bipartite test for fear of persecution which requires both an objective element and a subjective fear, some Federal Court decisions have held that evidence of lack of subjective fear or credibility based on the claimant's behaviour does not relieve the Board from its responsibility to deal with the risk associated with the claimant's profile or personal documentary evidence, specific to the claimant, that corroborates the claimant's testimony.<sup>156</sup>

Exceptionally, in cases involving long delays in making a claim or returns to the country of alleged persecution, where no satisfactory explanation is provided, the Trial Division has upheld decisions finding that the delay or return itself was incompatible with a subjective fear of persecution,<sup>157</sup> or negated a well-founded fear of persecution.<sup>158</sup>

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*Citizenship and Immigration*) (1999), 49 Imm.L.R. (2d) 48 (F.C.T.D.), the Court commented that delay "is usually a corollary reason to what is considered to be more central for refusing a claimant." See also *Dcruze, Jacob Ranjit v. M.C.I.* (F.C.T.D., no. IMM-2910-98), Rouleau, June 17, 1999, where the Court held that "[e]ven if the explanations for the delay lack credibility, such a finding is generally not determinative of the claim."

<sup>155</sup> *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.), at 227.

<sup>156</sup> *Papsouev, Vitali v. M.C.I.* (F.C.T.D., no. IMM-4619-97), Rouleau, May 19, 1999, Reported: *Papsouev v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm.L.R. (2d) 48 (F.C.T.D.) (claimants were Jews from Russia); *Sinko, Jozsef v. M.C.I.* (F.C.T.D., no. IMM-569-01), Blanchard, August 23, 2002, 2002 FCT 903; *Dink, Bekir Adnan v. M.C.I.* (F.C.T.D., no. IMM-2051-02), Heneghan, March 20, 2003, 2003 FCT 334 (psychological report stated the claimant's disorder was as a result of his fear of returning to his country); *Ahmed, Rafat Mohamed v. M.C.I.* (F.C., no. IMM-6333-02), Tremblay-Lamer, October 1, 2003, 2003 FC 1135 (letters stating that the claimant's family has been the target of pressure and threats from the Djibouti government).

<sup>157</sup> In *Cruz, Fernando Rodriguez v. M.C.I.* (F.C.T.D., no. IMM-3848-93), Simpson, June 16, 1994, the claimant did not make his claim until 7 years after his departure from his native Colombia, and more than 2 years after arriving in Canada. See also *Nimour, Zoubida Bougherara v. M.C.I.* (F.C.T.D., no. IMM-6254-98), Denault, September 7, 1999; *Kamana, Jimmy v. M.C.I.* (F.C.T.D., no. IMM-5998-98), Tremblay-Lamer, September 24, 1999; *Gamassi, Hichem v. M.C.I.* (F.C.T.D., no. IMM-5488-99), Pinard, November 10, 2000; *Riadinskaia, Ekaterina v. M.C.I.* (F.C.T.D., no. IMM-4881-99), Nadon, January 12, 2001. In *Bello, Salihou v. M.C.I.* (F.C.T.D., no. IMM-1771-96), Pinard, April 11, 1997, where the claimant had returned to his native Cameroon on two occasions and had failed to claim refugee status in the 7½ years preceding his claim in Canada, the Court found it was not unreasonable for the CRDD to conclude that the claimant's actions were not consistent with those of a person with a subjective fear of persecution and to make the further finding that the claimant's evidence was not credible.

<sup>158</sup> In *Ilie, Lucian Ioan v. M.C.I.* (F.C.T.D., no. IMM-462-94), MacKay, November 22, 1994, a decision rendered without reference to *Huerta*, the Court upheld the CRDD's conclusion that the claimant's failure to make a claim in any of the countries through which he travelled for six months before arriving in Canada negated a

In a series of recent decisions, a number of Federal Court judges have taken the view that *Huerta* enunciated a general principle, and that, although the presence of delay does not mandate the rejection of a claim as the claimant may have a reasonable explanation for the delay, nonetheless, delay may, in the right circumstances, constitute sufficient grounds upon which to reject a claim. That decision will ultimately depend on the facts of each claim.<sup>159</sup>

Therefore, the RPD should inquire into<sup>160</sup> and examine the 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.<sup>161</sup>

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well-founded fear of persecution in his native Romania. See also *Hankali, Levent v. M.C.I.* (F.C.T.D., no. IMM-2575-94), MacKay, March 14, 1996; *Al-Kahtani, Naser Shafi Mohammad v. M.C.I.* (F.C.T.D., no. IMM-2879-94), MacKay, March 13, 1996 (claimant's leaving and returning to Saudi Arabia several times indicated he was not at risk and was inconsistent with his alleged difficulties with the government).

<sup>159</sup> The following Federal Court decisions, among others, have upheld RPD decisions rejecting claims under both s. 96 and 97 of *IRPA* because of inordinate delays in claiming refugee protection or return to the country of alleged persecution such as to negate a subjective fear: *Duarte, Augustina Castelanos v. M.C.I.* (F.C.T.D., no. IMM-6616-02), Kelen, August 21, 2003, 2003 FCT 988; *Rivera, Jesus Vargas v. M.C.I.* (F.C., no. IMM-5826-02), Beaudry, November 5, 2003, 2003 FC 1292; *Espinosa, Roberto Pablo Hernandez v. M.C.I.* (F.C., no. IMM-5667-02), Rouleau, November 12, 2003, 2003 FC 1324 (14-month delay in claiming in Canada; the Board stated that the importance one gives to the element of delay depends on the circumstances of each case, and the more inexplicable the delay, the greater the probability that subjective fear is absent); *Sangha, Ajit Singh v. M.C.I.* (F.C., no. IMM-1597-03), Pinard, December 19, 2003, 2003 FC 1488; *Akacha, Kamel v. M.C.I.* (F.C., no. IMM-548-03), Pinard, December 19, 2003, 2003 FC 1489; *Emerance, Pembe Yodi v. M.C.I.* (F.C., no. IMM-5546-02), Beaudry, January 19, 2004, 2004 FC 36. However, some judges of the Federal Court have held that the Board cannot dismiss a claim under s. 97 based on a lack of subjective fear or behaviour inconsistent with a well-founded fear of persecution, as evidenced by a delay in leaving the country of alleged persecution or a delay in claiming protection abroad, because the test under s. 97 does not require a determination of subjective fear of persecution. See *Shah, Mahmood Ali v. M.C.I.* (F.C., no. IMM-4425-02), Blanchard, September 30, 2003, 2003 FC 1121; *Ghasemian, Marjan v. M.C.I.* (F.C., no. IMM-5462-02), Gauthier, October 30, 2003, 2003 FC 1266 (the Court accepted that the absence of a subjective fear, as evidenced by the claimant's delay in claiming protection, is fatal to a claim under s. 96).

<sup>160</sup> In *Singh, Ajay v. M.C.I.* (F.C.T.D., no. IMM-1997-00), Nadon, March 21, 2001, 2001 FCT 215, the Court held that the CRDD ought to have questioned the claimant in order to determine whether there were reasons which justified the delay in leaving two regions in India.

<sup>161</sup> In *Mejia, Maria Esperanza Martinez v. M.C.I.* (F.C.T.D., no. IMM-1040-95), Simpson, July 29, 1996, the Court held that the CRDD erred by not squarely addressing whether it doubted the claimant's subjective fear (and by not mentioning that the claimant had been in hiding). In *Beltran, Luis Fernando Berrio v. M.C.I.* (F.C.T.D., no. IMM-829-96), Dubé, October 29, 1996, the Court held that since the CRDD did not question the claimant's credibility and had accepted as truthful his allegations regarding his problems in Colombia, it should explain why it did not accept the reasons he provided for not seeking police assistance and for the delay in presenting his claim in Canada. In *Lelo, Emmanuel Bernard v. M.C.I.* (F.C.T.D., no. IMM-865-98), Teitelbaum, December 22, 1998, the Court held that it was not sufficient to simply say, after noting a delay of four months, "That is not the attitude of someone who fears persecution." However, failure to determine the reason for the delay in leaving was not a sufficient basis to overturn the CRDD decision in *Ahmed, Leaquat v.*



Where the circumstances are such that a claimant does not have to seek protection when outside the country of persecution because the claimant is safe from being forced to return, not making a refugee claim at the first opportunity should not generally be held against the claimant.<sup>162</sup>

The RPD should also bear in mind the special circumstances and pressures which refugees may face in assessing delay, such as a psychological condition or the vulnerable circumstances of abused women.<sup>163</sup>

The following circumstances could be seen as negating the claimant's fear, but only if reasonable explanations are not provided by the claimant:

- Failure to flee one's country of origin at the first opportunity after the occurrence of a persecutory nature.<sup>164</sup>

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*M.C.I.* (F.C.T.D., no. IMM-3912-96), Richard, May 8, 1997, where the CRDD's remaining five conclusions relating to credibility were reasonably open to it and were central to the claim. In *Gnana-Easwary, Rudrasigamany v. M.C.I.* (F.C.T.D., no. IMM-3823-97), Gibson, September 8, 1998, the Court took the CRDD to task for its circular conclusions regarding credibility and lack of a well-founded fear: "It is an error of law to conclude that the applicant's evidence is not credible because she has not established a well-founded fear by reason of reavilment and delay and at the same time to conclude that her explanations for reavilment and delay are to be rejected because her evidence is not to be believed."

<sup>162</sup> *Hue, Marcel Simon Chang Tak v. M.E.I.* (F.C.A., no. A-196-87), Marceau, Teitelbaum, Walsh, March 18, 1988; *Yoganathan, Kandasamy v. M.C.I.* (F.C.T.D., no. IMM-3588-97), Gibson, April 20, 1998; *Gyawali, Nirmal v. M.C.I.* (F.C., no. IMM-926-03), Tremblay-Lamer, September 24, 2003, 2003 FC 1099.

<sup>163</sup> In *Diluna v. Canada (Minister of Employment and Immigration)* (1995), 29 Imm.L.R. (2d) 156 (F.C.T.D.), the Court held, *in obiter*, that the CRDD should have considered a psychiatric assessment that supported the claimant's assertion that she delayed seeking refugee status due to post-traumatic stress syndrome. In *Griffith, Marion v. M.C.I.* (F.C.T.D., no. IMM-4543-98), Campbell, July 14, 1999, the Court held that in assessing the claimant's delay, being a victim of domestic violence, in leaving her country and making a claim in Canada, the CRDD should not have used the "objective" standard of the "reasonable man". See also *Begum, Sultana Nur Niger v. M.C.I.* (F.C.T.D., no. IMM-1774-00), Blais, February 13, 2001, 2001 FCT 59; *Ignatova, Anna (Ganna) v. M.C.I.* (F.C.T.D., no. IMM-5771-01), Kelen, December 11, 2002, 2002 FCT 1287 ("refugee claims based on spousal abuse are often delayed due to the nature of spousal abuse, i.e. the embarrassment for the victim which the victim will suppress"). In *Stoica, Valentin v. M.C.I.* (F.C.T.D., no. IMM-1388-99), Pelletier, September 12, 2000, where the CRDD rejected the possibility of a subjective fear stemming from the claimant's mental illness, the Court held: "The assumption that an individual with a genuine fear of persecution would take the first opportunity to claim refugee status does not depend on the validity or source of the fear."

<sup>164</sup> In the following cases, the CRDD concerns were upheld: *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.), where the claimant continued to work and attend classes; *Radulescu, Petrisor v. M.E.I.* (F.C.T.D., no. 92-A-7164), McKeown, June 16, 1993, where there was a two-year delay in leaving Romania after police beatings and telephone threats; *Rosales v. Canada (Minister of Employment and Immigration)* (1993), 23 Imm.L.R. (2d) 100 (F.C.T.D.), where the claimant delayed leaving for 9 months despite the disappearance of a political colleague; *De Beltran v. Canada (Secretary of State)*

- ❑ Failure to go into hiding immediately after learning that one may be in danger.<sup>165</sup>
- ❑ Failure to claim (or to await the outcome of a claim) to Convention refugee status in countries where the claimant resided or sojourned, or through which the claimant travelled before coming to Canada.<sup>166</sup> For this factor to be relevant the country in question must be a signatory to the *Convention Relating to the Status of Refugees*.<sup>167</sup>

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(1994), 28 Imm.L.R. (2d) 157 (F.C.T.D.), where there was a five-month delay in leaving El Salvador after receiving a threat; *Hristov, Hristo v. M.E.I.* (F.C.T.D., no. IMM-2090-94), Cullen, January 5, 1995, where the claimants delayed leaving Bulgaria, despite earlier opportunities to do so, even though they experienced physical attacks, break-ins at their home, and a fire-bombing of their car.

But see *Ezi-Ashi, James Chike v. S.S.C.* (F.C.T.D., no. IMM-1257-93), Wetston, February 28, 1994; *Zuniga, Alexis Ramon Garcia v. S.G.C.* (F.C.T.D., no. IMM-118-94), Teitelbaum, July 4, 1994. In *Farahmandpour, Tahereh v. M.C.I.* (F.C.T.D., no. IMM-92-97), Dubé, December 15, 1997, the CRDD erred in not considering the tragic situation the 78-year-old claimant found herself after the death of her husband and that the delays (en route and in Canada) were explained by illness. In *Lakicevic, Predrag v. M.C.I.* (F.C.T.D., no. IMM-6231-99), Hansen, September 7, 2001, 2001 FCT 1003, the CRDD erred in failing to address the claimant's explanation that he would go into hiding, moving from town to town, to avoid arrest. The Federal Court has held that, when a claim is based on a number of discriminatory or harassing incidents which culminate in an event which forces a person to leave his country, the issue of delay cannot be used as a significant factor to doubt that person's subjective fear of persecution. See *Shah, Mahmood Ali v. M.C.I.* (F.C., no. IMM-4425-02), Blanchard, September 30, 2003, 2003 FC 1121; *Ibrahimov, Fikrat v. M.C.I.* (F.C., no. IMM-4258-02), Heneghan, October 10, 2003, 2003 FC 1185.

<sup>165</sup> The Board's decisions were upheld in the following cases: *Ramirez, Jose v. M.E.I.* (F.C.T.D., no. 92-A-7114), Noël, June 2, 1993, where the CRDD did not find it credible that the claimant would have returned to the family farm after two alleged death threats; *Tao, Zhen v. M.E.I.* (F.C.T.D., no. 92-A-7164), Noël, June 22, 1993, where the CRDD did not believe the claimant spent a year in hiding while, at the same time, procuring official government documents. But see, however, *Wong, Siu Ying v. M.E.I.* (F.C.A., no. A-804-90), Heald, Marceau, Linden, April 8, 1992, Reported: *Wong v. Canada (Minister of Employment and Immigration)* (1992), 141 N.R. 236 (F.C.A.), where the CRDD erroneously concluded that the claim lacked the required subjective component because the claimant had not gone into hiding immediately after hearing she was under surveillance; *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.), where the CRDD erroneously drew an adverse inference from the fact that the claimant did not go into hiding, though testifying that he withdrew from some activities for a time and took precautions in public (the Court found these actions to be reasonable in the circumstances). In *Sabaratnam, Thavakaran v. M.E.I.* (F.C.A., no. A-536-90), Mahoney, Stone, Robertson, October 2, 1992, the Court commented that a person "successfully hiding from his persecutor can scarcely be said to be experiencing no problems," and went on to say that "[s]uch a finding is perverse." In a similar vein, in *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.), at 393, the Court held that the CRDD's finding that the claimant was able to remain in China for about a month following the abandonment of his job "without any adverse incident," ignored "totally the [claimant's] testimony that he was in hiding for a large part of this period."

<sup>166</sup> See, for example: *Saez, Maritza Elizabeth Lagos v. M.E.I.* (F.C.T.D., no. 92-A-6908), Dubé, June 23, 1993; *Bogus, Mehmet v. M.E.I.* (F.C.T.D., no. T-153-93), Rothstein, November 26, 1993; *Thandi, Ajaib Singh v. S.S.C.* (F.C.T.D., no. IMM-4547-93), Nadon, May 27, 1994; *Lameen, Ibrahim v. S.S.C.* (F.C.T.D., no. A-1626-92), Cullen, June 7, 1994; *Ilie, Lucian Ioan v. M.C.I.* (F.C.T.D., no. IMM-462-94), MacKay, November

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22, 1994; *Wey, Edward Kolawole v. S.S.C.* (F.C.T.D., no. IMM-2758-94), Gibson, February 21, 1995; *Memarpour, Mahdi v. M.C.I.* (F.C.T.D., no. IMM-3113-94), Simpson, May 25, 1995; *Hristov, Hristo v. M.E.I.* (F.C.T.D., no. IMM-2090-94), Cullen, January 5, 1995; *Hankali, Levent v. M.C.I.* (F.C.T.D., no. IMM-2575-94), MacKay, March 14, 1996; *Ali, Salah Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2402-95), Tremblay-Lamer, April 25, 1996. In *Sabapathy, Thevi v. M.C.I.* (F.C.T.D., no. IMM-1507-96), Campbell, March 27, 1997, the claimant abandoned protection in the U.K. and delayed making a claim in Canada. In *Madoui, Nidhal Abderrah v. M.C.I.* (F.C.T.D., no. IMM-660-96), Denault, October 25, 1996, the claimant relied, unsuccessfully, on statistics showing that the country where he had sojourned (Italy) rarely granted refugee status to claimants like him, to argue that he had no obligation to seek refugee status there. In *Bains, Gurmukh Singh v. M.C.I.* (F.C.T.D., no. IMM-3698-98), Blais, April 21, 1999, the claimant relied, unsuccessfully, on the fact that he had been waiting five to six years for a decision on his claim in England before deciding to come to Canada. In the context of repeat claims, in *Vairamuthu, Rajanayagam v. M.C.I.* (F.C.T.D., no. IMM-5407-97), Nadon, December 1, 1998, the Court held that, if the claimants had feared for their lives, they would have made claims in the U.S. where they stayed for four months after their claims were rejected in Canada. See also, to the same effect, *Sellathamby, Saroginidevi v. M.C.I.* (F.C.T.D., no. IMM-1854-99), Dawson, June 8, 2000. In *Gilbert, Jean-Baptiste v. M.C.I.* (F.C.T.D., no. IMM-3033-01), Lemieux, June 26, 2002, 2002 FCT 709, the Court upheld the Board's finding that country-shopping undermined the claimants' credibility, having attempted to enter the U.S. illegally but opting to return to Canada and apply for refugee status.

But note the following cases where the Court found 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 *Hue, Marcel Simon Chang Tak v. M.E.I.* (F.C.A., no. A-196-87), Marceau, Teitelbaum, Walsh, March 8, 1988, the Court held that the IAB erred by overlooking that the claimant did not need to seek protection as long as he was a sailor on a ship. In *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 106 (F.C.A.), the Ghanaian claimant provided reasons why he could not have safely stayed in neighbouring Togo or Nigeria. In *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.), the claimant, who was at all times in transit, provided reasons which led him to select Canada as a safe haven over other countries he had considered with the assistance of his agent. In *Ahani, Roozbeh v. M.C.I.* (F.C.T.D., no. IMM-4985-93), MacKay, January 4, 1995, the claimant was in transit only for 9 days. In *El-Naem, Faisal v. M.C.I.* (F.C.T.D., no. IMM-1723-98), Gibson, February 17, 1997, Reported: *El-Naem v. Canada (Minister of Citizenship and Immigration)* (1997), 37 Imm.L.R. (2d) 304 (F.C.T.D.), the Court held that the claimant's one-year sojourn in Greece without claiming refugee status there was reasonable given his age (19), his lack of funds and family support there, and his desire to come to Canada where his brother had made a successful refugee claim, and the fact that refugee protection in Greece was problematic. In *Soueidan, Mohamad Abdallah v. M.C.I.* (F.C.T.D., no. IMM-5770-00), Blais, August 28, 2001, 2001 FCT 956, the Court considered the panel's having raised the failure of the claimants to make claims in the U.S. was to be somewhat exaggerated given their 8-day stay and their explanation that the family had always intended to go to Canada because the principal claimant could speak French. In *Raveendran, Premela v. M.C.I.* (F.C.T.D., no. IMM-657-02), Beaudry, January 21, 2002, 2003 FCT 49, where the claimant resided in the U.S. between repeat claims made in Canada, the Court faulted the CRDD for not taking into account the claimant's fear of being sent back to Sri Lanka if he made a claim for asylum in the U.S. In *Molay, Boimu Felly v. M.C.I.* (F.C.T.D., no. IMM-2406-02), Pinard, September 24, 2003, 2003 FC 1069, the Court held that the CRDD erred when it stated that the claimant should have claimed refugee status in Belgium or France since the claimant was just in transit and had no duty to do so. See also, to the same effect, *Musharraf, Suhaib Rao v. M.C.I.* (F.C.T.D., no. IMM-3149-02), Lemieux, May 28, 2003, 2003 FCT 662. However, in *Kapinga-Mukenia, Bernadette v. M.C.I.* (F.C.T.D., no. IMM-6391-00), Nadon, January 24, 2002, 2002 FCT 83, the Court held that, while the failure to claim in the U.S., and waiting 3 days before claiming in Canada, could not in themselves justify a negative finding regarding the claimant's credibility, these facts, when examined in

- Returning voluntarily to one's country of origin,<sup>168</sup> obtaining or renewing a passport or travel document,<sup>169</sup> or leaving or emigrating through lawful channels.<sup>170</sup> Some factors to consider in

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light of all the evidence, could be considered by the panel in its assessment of credibility. Similarly, in *Breucop, Victor Manuel Duran v. M.C.I.* (F.C., no. IMM-2713-03), Rouleau, January 27, 2004, 2004 FC 117, the Court upheld the Board's adverse inference from a failure to claim in the U.S. despite a stay of only two days where one of the claimant had a brother already living there.

In *Basmenji, Aiyoub Choubdari v. M.C.I.* (F.C.T.D., no. IMM-4811-96), Wetston, January 16, 1998, the Court rejected the proposition that the claimant, an Iranian married to a Japanese national, should have attempted to claim some form of status while in Japan, prior to making a claim for refugee status in Canada. A similar position was taken in *Priadkina, Yiubov v. M.C.I.* (F.C.T.D., no. IMM-2034-96), Nadon, December 16, 1997, where the Court stated that the claimants (Russian Jews from Kazakhstan) had no duty to seek refugee status in Russia or Israel before claiming in Canada. However, in *Moudrak, Vanda v. M.C.I.* (F.C.T.D., no. IMM-1480-97), Teitelbaum, April 1, 1998, the Court held that the CRDD did not err by taking into account the failure of the claimants, nationals of Ukraine, to investigate the possibility of Polish citizenship (which was not guaranteed) when she travelled to Poland: "the Board was perfectly entitled to find that this was inconsistent with a well-founded fear of persecution." In *Osman, Abdalla Abdelkarim v. M.C.I.* (F.C.T.D., no. IMM-527-00), Blanchard, March 22, 2001, 2001 FCT 229, the Court found that the CRDD's emphasis on the claimant's failure to return to the Philippines, where he had married and had two children, was in the context of his subjective fear and credibility and was not unreasonable. A similar finding was made in *Kombo, Muhammad Ali v. M.C.I.* (F.C.T.D., no. IMM-4181-00), McKeown, May 7, 2001, 2001 FCT 439, where the CRDD challenged the claimant's credibility and subjective fear because he had taken no action to secure international protection by registering with the UNHCR in Kenya, where he had resided for eleven years as refugee from Somalia and had married a Kenyan citizen and had two Kenyan children. On the other hand, in *Pavlov, Igor v. M.C.I.* (F.C.T.D., no. IMM-4401-00), Heneghan, June 7, 2001, 2001 FCT 602, the Court held that the CRDD's conclusion about the lack of credibility of the Russian Jewish claimants, who "could have gone to Israel as full citizens... In the panel's view, their failure to take advantage of this option is indicative of a lack of subjective fear," was related to a misapprehension of the law: the CRDD mistakenly assumed that the claimants were required to seek protection in Israel, which was not as of right and which the claimants did not wish to do, before applying for Convention refugee status in Canada. The Court cited *Basmenji, supra*, but did not refer to *Moudrak* and *Osman, supra*.

<sup>167</sup> In *Ilie, Lucian Ioan v. M.C.I.* (F.C.T.D., no. IMM-462-94), MacKay, November 22, 1994, the Court stated that the CRDD is entitled to take notice of the status of countries that are signatories to the Convention and may also assume that such countries will meet their obligation to implement the Convention within their own territory, unless evidence to the contrary is adduced. For a list of signatories to the Refugee Convention and Protocol see Annex IV of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*; for a more up-to-date list see: <http://www.unhcr.ch/html/menu3/b/treaty2ref.htm>. But see *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.), at 394, where Justice Stone noted: "There is no evidence that any of these countries in question had ratified the 1951 *U.N. Convention* and the 1967 *Protocol* or that they had adopted laws implementing those instruments."

<sup>168</sup> See for example: *Caballero, Fausto Ramon Reyes v. M.E.I.* (F.C.A., no. A-266-91), Marceau (dissenting), Desjardins, Létourneau, May 13, 1993; *Larue, Jacqueline Anne v. M.E.I.* (F.C.T.D., no. 92-A-6666), Noël, May 13, 1993; *Tejani, Abdulkarim v. M.E.I.* (F.C.T.D., no. 92-T-1306), Reed, June 2, 1993; *Abou El Joud, Mohamad Ali v. M.E.I.* (F.C.T.D., no. A-21-93), Nadon, January 19, 1994; *Bogus, Mehmet v. M.E.I.* (F.C.T.D., no. T-153-93), Rothstein, November 26, 1993; *Zergani, Ahmad Jassemi v. M.E.I.* (F.C.A., no. A-311-92), Heald, Stone, McDonald, April 12, 1994; *Galdamez, Santo Peraza v. M.E.I.* (F.C.T.D., no. IMM-

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1544-94), McKeown, December 9, 1994; *Hoballah, Hassane v. M.E.I.* (F.C.T.D., no. IMM-3670-93), Joyal, January 10, 1995; *Gabeyehu, Bruck v. M.C.I.* (F.C.T.D., no. IMM-863-95), Reed, November 8, 1995; *Al-Kahtani, Naser Shafi Mohammad v. M.C.I.* (F.C.T.D., no. IMM-2879-94), MacKay, March 13, 1996; *Ali, Salah Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2402-95), Tremblay-Lamer, April 25, 1996. In *Rodriguez, Carlos Alberto Servillon v. M.C.I.* (F.C.T.D., no. IMM-2815-01), Beaudry, March 20, 2002, 2002 FCT 292, the Court stated that, while a person who fears for his life may return to his country for pressing reasons, this was not the case here, where the claimant had done so because he wanted to live with his family.

But see *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.), where the Court pointed out that the former Immigration Appeal Board (IAB) ignored evidence that the claimant's brief return to his homeland was prompted by considerations for the safety of his family and he had obtained exit papers there enabling him to leave; *Aragon, Luis Roberto v. M.E.I.* (F.C.T.D., no. IMM-4632-93), Nadon, August 12, 1994, where the Court held that CRDD had not properly considered the circumstances surrounding the claimant's visit to his country (he went to see his mother); *Parada, Felix Balmore v. M.C.I.* (F.C.T.D., no. A-38-92), Cullen, March 6, 1995, where the claimant alleged he had to return to obtain funds and his passport and remained in hiding until he left (CRDD made no adverse finding of credibility). In *Kanji, Mumtaz Badurali v. M.C.I.* (F.C.T.D., no. IMM-2451-96), Campbell, April 4, 1997, the Court held that since the CRDD did not make an adverse finding of credibility, it erred in finding, on the basis of the purely circumstantial evidence of returns to India, that the claimant had reavailed herself of protection and did not have a subjective fear. In *Yoganathan, Kandasamy v. M.C.I.* (F.C.T.D., no. IMM-3588-97), Gibson, April 20, 1998, the Court noted that as long as the claimant had his "sailor's papers" and a "ship to sail on," he was safe from persecution in Sri Lanka (to which he returned from time to time) and did not have to seek protection elsewhere; at the first opportunity following notification that his employment contract would not be renewed, he made his claim to refugee status. In *Camargo, Camillo Ponce v. M.C.I.* (F.C., no. IMM-3361-02), O'Keefe, December 9, 2003, 2003 FC 1434, where the claimant had returned to his native Colombia for 4 days prior to his departure to the U.S., during which time he testified he was in hiding, the Court cited paragraph 134 of the UNHCR *Handbook*, namely, that a temporary visit, without an intention to permanently reside in the country of alleged persecution, should not result in the loss of refugee status. The Federal Court has held that the Board erred in finding a lack of subjective fear when the claimant was removed to his or her country, and thus did not return voluntarily: *Kurtkapan, Osman v. M.C.I.* (F.C.T.D., no. IMM-5290-01), October 25, 2002, 2002 FCT 1114 (claimant was deported to Turkey from the U.K. and Holland); *Milaskics, Eva v. M.C.I.* (F.C.T.D., no. IMM-623-02), Campbell, January 23, 2003, 2003 FCT 71 (claimant was sent to Hungary from Canada under a deemed departure order).

<sup>169</sup> *Tsafack, David v. M.C.I.* (F.C.T.D., no. IMM-1979-95), Pinard, April 10, 1996; *Panta, Paul Acuna v. M.C.I.; Choque, Juan Jose Orozco v. M.C.I.* (F.C.T.D., no. IMM-1076-96), Jerome, July 24, 1997. See, however, *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.), where the Court pointed out that the IAB ignored the fact that the claimant was able to obtain his passport (and exit papers) through his brother's contacts with the government; *Jbel, Bouazza v. M.E.I.* (F.C.T.D., no. A-1058-92), Gibson, September 10, 1993, where the fact that claimant already had obtained a passport before the occurrence that motivated him to leave his country was found not to be inconsistent with his decision to leave for the reason he stated; *Yada, Rosa Emilia Cardoza v. M.C.I.* (F.C.T.D., no. IMM-4912-96), MacKay, January 16, 1998, where the claimant applied for a new El Salvadoran passport after coming to Canada on the instruction of a Canadian Immigration officer. In *Chandrakumar, Thurairajah v. M.E.I.* (F.C.T.D., no. A-1649-92), Pinard, May 16, 1997, the Court held that the CRDD erred in assuming that the simple action of renewing one's passport outside the country of nationality, without more, was sufficient to establish re-availment of protection.

assessing a return to one's country include: the purpose of the return; the manner in which the claimant effected the return; how the claimant passed the time on return (for example, whether the claimant was in hiding); whether the evidence indicates that the claimant put him- or herself at risk by returning; whether any difficulties were experienced on return; the claimant's explanation for the return; and whether the explanation is reasonable.

- Delay in making a refugee claim in Canada.<sup>171</sup> However, a claim may be credible even though it was not made at the earliest possible opportunity. A genuine refugee may well wait until he or she is safely in the country before making a claim and cannot be expected, in every case, to claim refugee status at the port of entry.<sup>172</sup> A claim cannot be disallowed because of the mere fact that the claimant entered or remained in Canada illegally.<sup>173</sup>

A genuine refugee may not know of the entitlement to refugee status and may have remained for some time before becoming aware of the Canadian refugee determination procedure.<sup>174</sup> A delay may be explained by reliance on other means of securing the right to remain in Canada.<sup>175</sup>

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<sup>170</sup> *Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 592 (C.A.); *Choque, Juan Jose Orozco v. M.C.I.* (F.C.T.D., no. IMM-1076-96), Jerome, July 24, 1997; *Mejia, Erdulfo v. M.C.I.* (F.C.T.D., no. IMM-4548-96), Heald, September 26, 1997.

<sup>171</sup> *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.); *Hanna, Nwora Kiriakos v. M.E.I.* (F.C.T.D., no. IMM-220-93), Cullen, February 3, 1994; *Ezi-Ashi, James Chike v. S.S.C.* (F.C.T.D., no. IMM-1257-93), Wetston, February 28, 1994; *Thandi, Ajaib Singh v. S.S.C.* (F.C.T.D., no. IMM-4547-93), Nadon, May 27, 1994; *Marquez, Ricardo v. M.E.I.* (F.C.T.D., no. IMM-3166-93), Simpson, June 1, 1994; *Lameen, Ibrahim v. S.S.C.* (F.C.T.D., no. A-1626-92), Cullen, June 7, 1994; *Carranza-Gonzalez, Salomon Osmar v. M.C.I.* (F.C.T.D., no. IMM-6078-93), Teitelbaum, November 1, 1994, Reported: *Carranza-Gonzalez v. Canada (Minister of Employment and Immigration)* (1994), 26 Imm.L.R. (2d) 118 (F.C.T.D.); *Kaur, Harbans v. M.C.I.* (F.C.T.D., no. IMM-1990-94), MacKay, April 6, 1995; *Hankali, Levent v. M.C.I.* (F.C.T.D., no. IMM-2575-94), MacKay, March 14, 1996; *Panta, Paul Acuna v. M.C.I.* (F.C.T.D., no. T-2217-93), Simpson, July 26, 1996.

<sup>172</sup> In *Singh, Ajay v. M.C.I.* (F.C.T.D., no. IMM-1997-00), Nadon, March 21, 2001, 2001 FCT 215, the Court found that the three-day delay in filing the refugee claim appears to be "insignificant."

<sup>173</sup> *Surujpal v. Canada (Minister of Employment and Immigration)* (1985), 60 N.R. 73 (F.C.A.).

<sup>174</sup> In *Williams, Debby v. S.S.C.* (F.C.T.D., no. IMM-4244-94), Reed, June 30, 1995, the Court accepted as "entirely credible" at that time (i.e., shortly after the introduction of the Gender Guidelines), the claimant's explanation that she did not know she was entitled to claim refugee status on the ground of spousal abuse until after she had contacted a lawyer.

<sup>175</sup> In *M.C.I. v. Sivalingam-Yogarajah, Subajiny* (F.C.T.D., no. IMM-2649-00), Pelletier, September 13, 2001, 2001 FCT 1018, the claim was made only after a fiancée sponsorship broke down.

Therefore, the fact that a claim was made only when the claimant's temporary status was expiring,<sup>176</sup> or only after receiving the advice of a lawyer, does not preclude a genuine claim.<sup>177</sup>

A claimant would not normally be expected to claim until such time as he or she actually begins to fear persecution.<sup>178</sup> For *sur place* claims, the relevant date as of which the claimant became aware that he would allegedly face persecution on return to the country of nationality is the relevant date, and not the date of arrival in Canada.<sup>179</sup>

- The Federal Court has held that an adverse inference cannot be drawn from the fact that a claimant has not disclosed his or her fear of persecution at a visa office abroad.<sup>180</sup>

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<sup>176</sup> *De La Torre, Mario Guillermo Fernandez v. M.C.I.* (F.C.T.D., no. IMM-3787-00), McKeown, May 9, 2001, 2001 FCT 452; *Gyawali, Nirmal v. M.C.I.* (F.C., no. IMM-926-03), Tremblay-Lamer, September 24, 2003, 2003 FC 1099 (claimant had a student visa and had applied for permanent residency). Note, however, that in *Ahmad, Mahmood v. M.C.I.* (F.C.T.D., no. IMM-1012-01), Tremblay-Lamer, February 14, 2002, 2002 FCT 171, the Court upheld the Board's rejection of a claim based largely on a 2-year delay in claiming refugee status, while the claimant was on a student visa in Canada and then applied for permanent residency.

<sup>177</sup> In *Papsouev, Vitali v. M.C.I.* (F.C.T.D., no. IMM-4619-97), Rouleau, May 19, 1999, Reported: *Papsouev v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm.L.R. (2d) 48 (F.C.T.D.), the Court noted: "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."

<sup>178</sup> *Gabeyehu, Bruck v. M.C.I.* (F.C.T.D., no. IMM-863-95), Reed, November 8, 1995.

<sup>179</sup> *Tang, Xiaoming v. M.C.I.* (F.C.T.D., no. IMM-3650-99), Reed, June 21, 2000.

<sup>180</sup> *Fajardo, Mercedes v. M.E.I.* (F.C.A., no. A-1238-91), Mahoney, Robertson, McDonald, September 15, 1993, Reported: *Fajardo v. Canada (Minister of Employment and Immigration)* (1994), 21 Imm.L.R. (2d) 113 (F.C.A.); *Leitch, Roger Rodney v. M.C.I.* (F.C.T.D., no. IMM-2910-94), Gibson, February 6, 1995; *Quinteros, Carolina Elizabeth Lovato v. M.C.I.* (F.C.T.D., no. IMM-4030-97), Campbell, September 22, 1998.

## 2.4. RELYING ON TRUSTWORTHY EVIDENCE TO MAKE ADVERSE FINDINGS OF CREDIBILITY

### 2.4.1. Trustworthy Evidence on Which to Base Findings

The Federal Court has emphasized that an adverse finding of credibility must be supported by trustworthy evidence.<sup>181</sup> When part of the testimony raises questions, the decision-maker must have trustworthy evidence to the contrary,<sup>182</sup> or must find this part of the testimony inconsistent or inherently suspect or improbable,<sup>183</sup> if it is to be rejected.

In determining whether the evidence that contradicts the claimant's testimony is trustworthy, factors such as the source of the information, the objective of the person in providing it and the methods used to gather the information should be considered. In addition, the decision-maker must also determine the weight or probative value to be assigned to such contradictory evidence.<sup>184</sup> In this regard, the decision-maker must be satisfied that the evidence relied on is probably so, not just possibly so.<sup>185</sup>

### 2.4.2. Presumption of Truthfulness

The Court of Appeal, in *Maldonado*<sup>186</sup> and on several other occasions,<sup>187</sup> set out the important principle that when a claimant swears that certain facts are true, this creates a presumption that they

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<sup>181</sup> *Salamat v. Canada (Immigration Appeal Board)* (1989), 8 Imm.L.R. (2d) 58 (F.C.A.); *Siddique, Ashadur Rahman v. M.E.I.* (F.C.A., no. A-1137-88), Pratte, Hugessen, Desjardins, November 23, 1989; *Boucher v. Canada (Minister of Employment and Immigration)* (1989), 105 N.R. 66 (F.C.A.); *Frimpong v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 183 (F.C.A.); *Sathanandan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 310 (F.C.A.).

<sup>182</sup> *Ansong v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm.L.R. (2d) 94 (F.C.A.).

<sup>183</sup> *Armson v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm.L.R. (2d) 150 (F.C.A.); *Leung v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm.L.R. (2d) 43 (F.C.A.).

<sup>184</sup> *Okyere-Akosah, Kwame v. M.E.I.* (F.C.A., no. A-92-91), Marceau, Desjardins, Décary, May 6, 1992.

<sup>185</sup> *Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 592 (C.A.), at 605.

<sup>186</sup> *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.), at 305, where the Court said: "When [a claimant] swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness."

<sup>187</sup> *Thind, Ranjit Singh v. M.E.I.* (F.C.A., no. A-538-83), Heald, Mahoney, Lalonde, October 27, 1983; *Villarroel v. Canada (Minister of Employment and Immigration)* (1979), 31 N.R. 50 (F.C.A.), also reported as *Re Salvatierra and Canada (Minister of Employment and Immigration)* (1979), 99 D.L.R. (3d) 525 (F.C.A.); *Permaul v. Canada (Minister of Employment and Immigration)* (1983), 53 N.R. 323 (F.C.A.); *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Sathanandan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 310 (F.C.A.); *Okyere-Akosah, Kwame*



are true, unless there is valid reason to doubt their truthfulness. Hence, as a corollary, there is no legal requirement for a claimant to corroborate sworn testimony that is uncontradicted and otherwise credible. (See 2.4.2. *Corroborative Evidence*.)

In *Hernandez*,<sup>188</sup> the Federal Court pointed that this presumption does not extend to the inferences that the claimant draws from the facts 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.

This proposition was elaborated in *Derbas*,<sup>189</sup> where the Federal Court stated:

By accepting the [claimant's] version of the events as fact, the Board was certainly not bound to accept the interpretation he puts 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.

Thus, the Board is entitled to reject some or all of the inferences drawn by the claimant, especially if they are speculative in nature, even in the absence of an adverse finding of credibility.<sup>190</sup>

If a panel puts questions to the claimant which he or she could not reasonably be expected to know (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 explanation.<sup>191</sup>

### 2.4.3. Corroborative Evidence

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*v. M.E.I.* (F.C.A., no. A-92-91), Marceau, Desjardins, Décary, May 6, 1992; *Lachowski v. Canada (Minister of Employment and Immigration)* (1992), 18 Imm.L.R. (2d) 134 (F.C.T.D.); *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.); *Owusu, Anthony v. M.C.I.* (F.C.T.D., no. IMM-2422-94), Wetston, May 4, 1995. This principle appears to apply also to statutory declarations by the claimant. See *Liang, Xiao Dong v. M.C.I.* (F.C.T.D., no. IMM-3668-00), Pinard, April 19, 2001, 2001 FCT 341.

<sup>188</sup> *Hernandez, Ileana Araceli v. M.E.I.* (F.C.T.D., no. IMM-1511-93), Denault, May 9, 1994.

<sup>189</sup> *Derbas, Ahmad Issa v. S.G.C.* (F.C.T.D., no. A-1128-92), Pinard, August 18, 1993.

<sup>190</sup> *Prasad, Mahendra v. S.S.C.* (F.C.T.D., no. A-1109-92), Jerome, October 13, 1994. In *Hercules, Pedro Monge v. M.C.I.* (F.C.T.D., no. IMM-1196-93), Gibson, August 25, 1993, the Court stated: "I find that there did not exist an obligation on the part of the CRDD in this case to accept sworn allegations as true, even though credibility is not in question, where those allegations are in the nature of a speculative conclusion, and whether or not that speculation is well-founded."

<sup>191</sup> *Kong, Win Kee v. M.E.I.* (F.C.T.D., no. IMM-471-93), Reed, January 27, 1994, Reported: *Kong v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm.L.R. (2d) 179 (F.C.T.D.); *Matharu, Maninder Singh v. M.C.I.* (F.C.T.D., no. IMM-868-00), Pelletier, January 9, 2002, 2002 FCT 19.

Unless there are valid reasons to question a claimant's credibility, it is an error for the RPD to require documentary evidence corroborating the claimant's allegations. In other words, the RPD cannot disbelieve a claimant merely because the claimant presents no documentary or other evidence to confirm his or her testimony.<sup>192</sup> Thus, generally, a failure to offer documentation cannot be linked to the claimant's credibility where there is no evidence to contradict the claimant's allegations.<sup>193</sup>

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<sup>192</sup> *Ovakimoglu v. Canada (Minister of Employment and Immigration)* (1983), 52 N.R. 67 (F.C.A.); *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.) (claimant did not provide a medical report to substantiate his claim of injury); *Lachowski v. Canada (Minister of Employment and Immigration)* (1992), 18 Imm.L.R. (2d) 134 (F.C.T.D.); *Ahortor v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm.L.R. (2d) 39 (F.C.T.D.) (claimant failed to offer documentation of his arrest).

The rationale for this general principle appears to be found in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, which states:

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. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. ...

197. The requirement of evidence should not thus be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. ...

However, paragraph 197 of the *Handbook* adds that

Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

<sup>193</sup> *Selvarajah, Rajkumar v. M.E.I.* (F.C.A., no. A-342-91), Heald, Stone, McDonald, April 14, 1994; *Oblitas, Jorge v. M.C.I.* (F.C.T.D., no. IMM-2489-94), Muldoon, February 2, 1995. In *Miral, Stefnie Dinisha v. M.C.I.* (F.C.T.D., no. IMM-3392-97), Muldoon, February 12, 1999, the Court commented that it is unrealistic to require a refugee claimant to have with her paperwork and documents detailing her arrest history in the country from which she just fled. However, in *Syed, Naqeeb-Ur-Rehman v. M.C.I.* (F.C.T.D., no. IMM-1613-97), MacKay, March 13, 1998, the Court held that, given that the CRDD found the claimant's story to be implausible, the lack of corroboration in the form of newspaper stories or even a letter from his wife (the claimant alleged he had received some) was a valid consideration. In *Herrera, Endigo Guiller Caceres v. M.C.I.* (F.C.T.D., no. IMM-27-37-97), Muldoon, September 28, 1998, the Court found, in the circumstances of that case, that since it was not presented, the CRDD was entitled to conclude the arrest warrant did not exist. In *Sinnathamby, Nageswararajah v. M.C.I.* (F.C.T.D., no. IMM-4086-00), Blanchard, May 14, 2001, 2001 FCT 473, the Court held that given the credibility concerns explicitly put to the claimants, the CRDD did not err in drawing a negative inference by reason of the claimants' failure to adduce corroborating evidence.

In *Kaur*, the Federal Court held 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.<sup>194</sup>

#### 2.4.4. Silence of the Documentary Evidence

The Court of Appeal stated in *Adu*<sup>195</sup> that

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 the claimant's testimony.<sup>196</sup>

Caution should be exercised, however, especially when the documentary evidence before the panel is silent about a particular matter,<sup>197</sup> or less than comprehensive.<sup>198</sup> Moreover, a document

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<sup>194</sup> *Kaur, Diljeet v. M.E.I.* (F.C.T.D., no. 93-A-377), Noël, June 2, 1993, Reported: *Kaur v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm.L.R. (2d) 301 (F.C.T.D.).

<sup>195</sup> *Adu, Peter v. M.E.I.* (F.C.A., no. A-194-92), Hugessen, Strayer, Robertson, January 24, 1995, per Hugessen J.

<sup>196</sup> In *Boateng, Ewurama v. M.E.I.* (F.C.T.D., no. 92-A-6524), McKeown, June 1, 1993, the Court upheld the panel's finding, characterized as one "based on implausibility not lack of corroboration," that the claimant's alleged confrontation with Chairman Rawlings' wife was not credible because the consequent arrest of eight leading executive members of a large and important organization would have been reported on by one of the human rights monitoring agencies. See also *Osei, Gyane Nana v. M.E.I.* (F.C.T.D., no. T-2992-92), Reed, November 17, 1993; *Farahani, Fariborz Jalali v. M.E.I.* (F.C.T.D., no. IMM-3079-93), Simpson, June 1, 1994; *Mama, Salissou v. M.E.I.* (F.C.T.D., A-1454-92), Teitelbaum, October 17, 1994, upheld by the Court of Appeal, (F.C.A., no. A-596-94), Stone, Décary, McDonald, May 26, 1997; *Owusu, Anthony v. M.C.I.* (F.C.T.D., no. IMM-2422-94), Wetston, May 4, 1995 (given the volume of documentary evidence, it was reasonable for the CRDD to expect corroborating reports); *Oppong, Lawrence v. M.C.I.* (F.C.T.D., no. IMM-387-95), Richard, September 6, 1995 (CRDD noted that there was a free and vocal press).

<sup>197</sup> *Gutierrez, Efren Alejandro Martinez v. M.C.I.* (F.C.T.D., no. IMM-3291-99), Campbell, April 6, 2000. But see *Gomez-Carrillo, Alex Fabricio v. M.C.I.* (F.C.T.D., no. IMM-918-97), Teitelbaum, April 10, 1997 (absence of specific reference to the targeting of deserters in El Salvador); *Bodokia, Nikoloz v. M.C.I.* (F.C.T.D., no. IMM-325-00), Blais, March 22, 2001, 2001 FCT 227 (it was reasonable for the CRDD to conclude that the silence of the recent reports monitoring human rights abuses in Georgia was an indication that there were no current serious problems for Abkhazians).

<sup>198</sup> *Ogbomo, Perpertual Aiwanfo v. M.C.I.* (F.C.T.D., no. IMM-5217-93), MacKay, November 22, 1994; *Osarogiagbon, Helen Iyekoletin v. M.C.I.* (F.C.T.D., no. IMM-1326-98), Reed, June 23, 1999.

containing general information may not be always sufficient to refute testimony dealing with a specific, individualized event.<sup>199</sup>

It is doubtful that an adverse inference as to 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.<sup>200</sup>

## 2.4.5. Lack of Identity and Other Personal Documents

### 2.4.5.1. Legislation

Section 106 of *IRPA* incorporates a specific—and *mandatory*—requirement for the RPD to consider a claimant's lack of documents to establish identity in assessing a claim for refugee protection.

106. 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 the documentation.

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<sup>199</sup> *Lachowski v. Canada (Minister of Employment and Immigration)* (1992), 18 Imm.L.R. (2d) 134 (F.C.T.D.); *Ahortor v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm.L.R. (2d) 39 (F.C.T.D.); *Selvarajah, Rajkumar v. M.E.I.* (F.C.A., no. A-342-91), Heald, Stone, McDonald, April 14, 1994 (since the situation in question was of a local nature, it was not reasonable to expect specific mention thereof in the documentary evidence concerning the general situation in Sri Lanka); *Nebea, Idah Kaari v. M.C.I.* (F.C.T.D., no. IMM-5055-97), Strayer, August 17, 1998, Reported: *Nebea v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm.L.R. (2d) 61 (F.C.T.D.) (the fact that some Kenyan newspapers were allowed to publish some articles critical of the government did not lead to the conclusion that the press would probably have published a story on persons persecuted for supplying information about a particular event).

<sup>200</sup> The following decisions of the Trial Division have held that documents such as letters and medical reports must be considered for what they say, and not for what they do not say: *Mahmud, Sultan v. M.C.I.* (IMM-5070-98), Campbell, May 12, 1999; *Bagri, Davinder Singh v. M.C.I.* (F.C.T.D., no. IMM-2908-98), Campbell, May 25, 1999 (medical report); *Solis, Anastacio Roberto Vera v. M.C.I.* (F.C.T.D., no. IMM-1094-98), Evans, March 17, 1999; *Khandaker, Jahangir, Alam v. M.C.I.* (F.C.T.D., no. IMM-1703-01), Pinard, January 10, 2003, 2003 FCT 7. In *Tameh, Ali Farrokhi v. M.C.I.* (F.C., no. IMM-6266-02), Blanchard, December 15, 2003, 2003 FC 1468, the Court distinguished *Mahmud*, because the Board's decision was not merely based on the fact that the letter failed to corroborate the claimant's claims, but on the fact that the substance of the letter was inconsistent with the claimant's explanation of the source of the letter. According to *Tameh*, the case of *Mahmud* stands for the proposition that letters cannot be relied upon to *contradict* a claimant's story merely because they *do not corroborate* his story. See also *Dzey, Oksana Olesy v. M.C.I.* (F.C., no. IMM-1-03), Mactavish, January 30, 2004, 2004 FC 167, where the Court upheld the RPD's decision to give little weight to a hospital report that did not mention that the claimant's husband was the attacker since it did not go far in corroborating the claimant's story. For a different conclusion, see *Ignatova, Anna (Ganna) v. M.C.I.* (F.C.T.D., no. IMM-5771-01), Kelen, December 11, 2002, 2002 FCT 1287.

Subsection 100(4) of *IRPA* provides, in part, that “the claimant must produce all documents and information as required by the rules of the Board.” Rule 7 of the *Refugee Protection Division Rules (RPD Rules)*, in turn, provides that

7. 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. [Emphasis added.]

Thus a lack of acceptable documents without a reasonable explanation for their absence, or the failure to take reasonable steps to obtain them, is a significant factor in assessing the credibility of a claimant. Consequently, the issue of identity documents should be addressed at the hearing of the claim and, where applicable, in the reasons for decision. Failing to deal with this issue in its reasons, when it is raised by the evidence, will constitute an error of law on the part of the RPD and may result in the decision being set aside.

#### **2.4.5.2. Commentary to RPD Rule 7**

The Commentary to RPD Rule 7 contains guidance as to the practice of the RPD relating to the issue of identity documents.

##### **Commentary**

##### ***Claimant’s duty to provide documents establishing identity***

Section 106 of the *Immigration and Refugee Protection Act* imposes a duty on the claimant to provide acceptable documents establishing the claimant’s identity, including documents the claimant does not possess but can reasonably obtain. In assessing the claimant’s credibility, the Division must consider the lack of such documents and any reasonable explanation given for not providing them, as well as the steps taken to obtain them. Documents that are not genuine, that have been altered, or that are otherwise improper are generally not acceptable proof of identity.

##### ***Meaning of “identity”***

“Identity” most commonly refers to the name or names that a claimant uses or has used to identify himself or herself. “Identity” also includes indications of personal status such as country of nationality or former habitual residence, citizenship, race, ethnicity, linguistic background, and political, religious or social affiliation.

##### ***Additional requirements under the Act***

Subsection 100(4) of the *Immigration and Refugee Protection Act* requires the claimant to produce all documents and information as required by the rules of the Board. Subsection 170(d) requires the Division to provide the Minister, on request, with the documents and information referred to in subsection 100(4) of the Act.

##### ***Additional requirements under the rules***

The rules impose the following requirements for providing documents to the Division:

- The claimant must attach to the Personal Information Form three copies of all his or her travel and identity documents, whether or not they are genuine, and three copies of any other documents relevant to the claim (RPD Rules, subsection 6(3)). These documents include not only those that were used but also those intended to be used for travelling or supporting the claim.
- The claimant must provide to the Division without delay three copies of any additional documents obtained after the Personal Information Form was provided (RPD Rules, subsection 6(5)).
- The claimant must also comply with the disclosure requirements under rule 29 of the RPD Rules if the claimant wants to use any document at the hearing of the claim. Translations must be provided for all documents that are not in English or French (RPD Rules, subsection 28(1)).
- The claimant is to present the originals of his or her documents at the beginning of the hearing of the claim or at the interview in the expedited process held under rule 19 of the RPD Rules. The Division may require the claimant to provide the originals earlier by notice in writing (RPD Rules, rule 36).

### ***Personal Information Form***

The requirement to provide acceptable documents establishing identity and other elements of the claim is also set out in the instructions for completing the Personal Information Form. The claimant is further specifically instructed to make every effort to obtain the necessary identity documents immediately, if the claimant does not have them, and to identify other identity documents the claimant has or can obtain.

### ***Supplementary documents***

The Division may instruct the claimant to provide specific documents that have been identified by the Division in the claim-screening process as being necessary for considering the claim.

### ***Record of the steps taken to obtain documents***

The claimant should keep a record of the steps taken, such as copies of letters sent, to obtain identity and other necessary documents.

### ***Presenting evidence on identity at the hearing of the claim***

The claimant is required to establish his or her identity and other elements of the claim. The claimant should therefore be prepared to present evidence on the issue of identity at the beginning of the hearing, unless the Division has notified the claimant or counsel otherwise.

### ***Explanation for lack of documents***

The claimant who is unsuccessful in obtaining documents to establish his or her identity and other elements of the claim should be prepared to provide a reasonable explanation for the lack of documents and show that diligent efforts were made to obtain such documents and

to present proof of the steps taken. The Division may instruct the claimant to make further efforts to obtain necessary documents.

### ***Other independent evidence to establish identity***

The claimant who lacks documents or whose documents are not found acceptable should be prepared to present other independent evidence to establish his or her identity or other elements of the claim, if such evidence is available. Such evidence may include:

- testimony of friends, relatives, community elders or other witnesses; and
- affidavits of individuals who have personal knowledge of the claimant's identity or other elements of the claim.

### **2.4.5.3. Background and Jurisprudence**

While recognizing the difficulty that claimants often encounter in being able to furnish documentation to establish their claim,<sup>201</sup> the UNHCR Handbook nonetheless places responsibility on claimants to provide evidence to support their claims and to attempt to obtain additional evidence if required. Thus a claimant should

205. ... (ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence.

In 1997, the Immigration and Refugee Board issued a *Commentary on Undocumented and Improperly Documented Claimants* (IRB Legal Services, March 11, 1997), and an accompanying Practice Notice, to provide guidance to CRDD members as to how to deal with claimants who lacked proper documentation.<sup>202</sup> These two documents are superseded by the provisions of *IRPA* and Rule 7, which are outlined above.

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<sup>201</sup> Paragraph 196 of the UNHCR Handbook provides as follows:

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. ...

<sup>202</sup> The following key points made in the Commentary continue to be relevant:

Members may expect claimants to be fully prepared to testify as to their identity at the outset of the hearing and to provide a reasonable explanation for their lack of proper documentation. The absence of a reasonable explanation for the lack of proper documentation may lead members to draw a negative inference when assessing a claimant's credibility or when determining the substantive basis of the claim. [Subsection IV. C, lines 353, 409 and 414]

If the evidence presented at the hearing in support of identity and other elements does not demonstrate reasonable diligence before the hearing in trying to overcome or address the

The *Commentary on Undocumented and Improperly Documented Claimants* received scant notice in the Federal Court. While the Commentary is no longer in effect, the one decision of the Federal Court that specifically refers to the accompanying Practice Notice and which reasoning is still relevant is *Nardeep Singh*.<sup>203</sup> In that case the Court held:

The Board referred to a Practice Direction [*Practice Notice on Undocumented and*

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lack of proper documentation, a panel may draw a negative inference from the lack of diligence at the time when it assesses a claimant's credibility. [Subsection IV. B, line 280]

In the absence of proper documents proving identity and other elements of the claim, the claimant must be able to offer sufficient credible or trustworthy evidence regarding these elements, in order to be able to discharge the burden of proving the claim. [Subsection IV. C, line 506]

Where a claimant is able to arrange for independent corroboration of identity or other elements of the claim but fails to do so without reasonable explanation, panels may draw a negative inference from the failure to act when assessing the claimant's credibility. [Subsection IV. C, line 546]

A negative inference as to credibility cannot be drawn from the simple fact of having destroyed or disposed of documents. The fact that a claimant may be able to offer a reasonable explanation for the destruction or disposal of personal documents means that panels may not automatically infer bad faith from the simple fact of having destroyed or disposed of such documents. [Subsection IV. D, lines 431 and 705]

Where, after considering the reasonableness of the explanation offered, members conclude that a claimant has destroyed or disposed of documents in bad faith, members may in most cases correctly draw a negative inference as to the credibility of the claim as a whole, although in some cases members may correctly draw such an inference only with respect to a particular aspect of credibility. [Subsection IV. D, line 711]

The Commentary applies to identity documents and other forms of "personal information documents". The notion of "identity" was interpreted broadly:

"identity" most commonly refers to the name(s) by which the claimant presently identifies, or in the past has identified, himself or herself. "Identity" also includes but is not limited to one or more of the following indications of personal status: country of nationality; country of former habitual residence; citizenship; race; ethnicity; linguistic background; and political, religious, or social affiliation.

<sup>203</sup> *Singh, Nardeep v. M.C.I.* (F.C.T.D., no. IMM-2217-02), O'Reilly, May 6, 2003, 2003 FCT 556. The claimant was notified before the hearing of the requirement to provide identification documents. He asked for an adjournment of his hearing to make efforts to obtain documents he allegedly left in India. The request was denied as he had not been diligent in trying to obtain documentation. The CRDD rejected the claim as there was no documentary evidence to establish his identity. No other credibility concerns were raised in the RPD's decision.



*Improperly Documented Claimants*] of March 11, 1997 in which counsel are notified that the Board may make adverse inferences where there is no reasonable explanation for a lack of documentary evidence or where there has been a lack of reasonable diligence in obtaining that kind of evidence.

It is true, generally speaking, that the Board may not discredit a claimant's testimony simply because of an absence of documentary evidence, particularly in situations where it would not be reasonable to expect the [claimant] to have it at his or her disposal: ... However, the Board did not reject Mr. Singh's testimony solely because of an absence of documentation. It did so because it he had had "ample opportunity to seek documentation in support of his claim" and because it did not accept his explanations for failing to produce that evidence. In the end, the Board concluded that there was insufficient evidence before it to support Mr. Singh's claim.

In subsequent decisions, the Federal Court noted that *IRPA*—particularly sections 100(4) and 106 and section 7 of the *RPD Rules*—places emphasis on identification,<sup>204</sup> and that Federal Court judges have emphasized the importance of a person's identity.<sup>205</sup>

Section 7 of the *RPD Rules* was considered in the case of *Amarapala*,<sup>206</sup> where the Court applied the principles enunciated in *Nardeep Singh*<sup>207</sup> to that provision, which is broader in scope than section 106 of the Act.

Section 7 [of the *RPD Rules*] makes documentation a requirement not only for establishing identity, *but also for other elements of the claim*. However, a reasonable explanation for the failure to provide documents under section 7 means that corroboration documents are not always necessary. ...

In this case, the [claimant] provided documents about his father's and brother's involvement in the UNP [United National Party], and the Board reasonably expected documents would be produced about the [claimant's] involvement with the UNP. The failure to produce

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<sup>204</sup> *M.C.I. v. Gill, Randheer Singh* (F.C., no. IMM-4191-02), Lemieux, November 28, 2003, 2003 FC 1398.

<sup>205</sup> As illustrated in *Elazi, Iseikye Simon v. M.C.I.* (F.C.T.D., no. IMM-1038-99), Nadon, February 17, 2000.

<sup>206</sup> *Amarapala, Priyanga Udayantha v. M.C.I.* (F.C., no. IMM-5034-03), Kelen, January 7, 2004, 2004 FC 12. The RPD rejected the claim on grounds of credibility because the claimant was unable to produce any documentation to corroborate his involvement with the UNP, the alleged agents of persecution. In its decision, the panel took into account s. 7 of the *RPD Rules* and the Commentary to that rule. No other credibility concerns were raised in the RPD's decision.

<sup>207</sup> *Singh, Nardeep v. M.C.I.* (F.C.T.D., no. IMM-2217-02), O'Reilly, May 6, 2003, 2003 FCT 556. The claimant was notified before the hearing of the requirement to provide identification documents. He asked for an adjournment of his hearing to make efforts to obtain documents he allegedly left in India. The request was denied as he had not been diligent in trying to obtain documentation. The CRDD rejected the claim as there was no documentary evidence to establish his identity. No other credibility concerns were raised in the RPD's decision.

documents one would normally expect is a relevant consideration in assessing and rejecting the credibility of the [claimant]. [Emphasis added.]

The application of section 106 of *IRPA* and Rule 7 by the RPD has been upheld by the Federal Court in several cases.<sup>208</sup> In those cases, the Board had requested the claimant to submit corroborating documents; the claimant was made aware of the Board's concerns as to the claimant's identity and/or the genuineness of the documents submitted; the Board provided the claimant with an opportunity to address the Board's concerns about the documents submitted or the lack of documents; and the Board considered the claimant's explanation in assessing the credibility of the claimant.<sup>209</sup> The Federal Court has held that the submission by the claimant of identity documents that were clearly not authentic could properly lead the panel to conclude that the claimant was not a trustworthy person.<sup>210</sup>

The Federal Court has established the following principles relating to the issue of lack of identity documents. Most of this case law was decided under the previous *Immigration Act*, but is still relevant.

- The claimant has the fundamental obligation to establish his or her identity on a balance of probabilities.<sup>211</sup> Thus, the claimant must come to a hearing with all of the evidence that he or she is able to offer and believes is necessary to prove the claim.<sup>212</sup>

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<sup>208</sup> See *Ignacio, Jaime Dela Cruz v. M.C.I.* (F.C., no. IMM-5765-02), Simpson, September 24, 2003 (claimant did not provide documents of business dealings at the heart of the claim); *Matanga, Alice Baygwaka v. M.C.I.* (F.C., no. IMM-6271-02), Pinard, December 4, 2003, 2003 FC 1410 (claimant did not provide any serious explanation for the loss of her false French passport and the lack of official identification establishing her identity); *Kilic, Deniz v. M.C.I.* (F.C., no. IMM-612-03), Mosley, January 21, 2004, 2004 FC 84 (claimant did not have an acceptable explanation for his failure to produce documentary proof of his enrolment at the four universities mentioned in his PIF and requested by the Board before the hearing; RPD did not interpret s. 106 in a manner that only a passport could establish identity). In *Umba, Laetitia Masial v. M.C.I.* (F.C., no. IMM-6318-02), Martineau, January 9, 2004, 2004 FC 25, the Court held that, if on their face, it is apparent that documents contain various irregularities, and are for that reason discounted, the RPD can, in the absence of a satisfactory explanation, make a negative finding as to the credibility of a claimant. The Court stated that this is what is envisaged by s. 106 of *IRPA*.

<sup>209</sup> In *Umba, Laetitia Masial v. M.C.I.* (F.C., no. IMM-6318-02), Martineau, January 9, 2004, 2004 FC 25, the Court noted that the rules of natural justice were respected, as it was clear from the comments made that the panel had serious doubts with respect to the genuineness of the documents submitted and that the claimant's identity was at issue. Moreover, the claimant was given an opportunity to present her story completely and the panel considered and examined it carefully.

<sup>210</sup> See *Ibnmogdad, Moustapha Ould Ould v. M.C.I.* (F.C., no. IMM-332-03), Tremblay-Lamer, February 25, 2004, 2004 FC 321, where the Court held that such a conclusion was consistent with s. 106 of *IRPA*. See also *Umba, Laetitia Masial v. M.C.I.* (F.C., no. IMM-6318-02), Martineau, January 9, 2004, 2004 FC 25.

<sup>211</sup> *Yip, Fu On v. M.E.I.* (F.C.T.D., no. A-921-92), Nadon, October 27, 1993.

<sup>212</sup> *Kante, Abdoulaye v. M.E.I.* (F.C.T.D., no. IMM-2585-93), Nadon, March 23, 1994; *Tchiegang, Charlotte v.*

- Where relevant, the claimant should be advised that identity is an issue, and of the need to provide specific documents or other corroborative evidence.<sup>213</sup>
- The panel should take into account in its decision any explanation given by the claimant for not providing documents or other corroborative evidence and the efforts made to obtain such evidence, and provide reasons for not accepting the explanations offered by the claimant to be reasonable.<sup>214</sup>

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*M.C.I.* (F.C.T.D., no. IMM-1621-02), Snider, February 27, 2003, 2003 FCT 249. In *Matarage, Lal Kumara Chandragupta v. M.C.I.* (F.C.T.D., no. IMM-1987-97), Lutfy, April 9, 1998, the Court upheld the CRDD's finding that the claimant's evidence was also lacking in that he failed to submit supporting evidence that he could have obtained. In *Rajasegaram, Arulmalar v. M.C.I.* (F.C.T.D., no. IMM-2440-99), Reed, June 19, 2000, the Court held that the CRDD was not required to accept uncorroborated evidence of a claimant where objective evidence is usually available. The CRDD rejected the claim of a mother and two young children for whom there was no reliable evidence establishing identity, but accepted the claim of another child for whom there was a birth registration. In *Fuseini, Habiba v. M.C.I.* (F.C.T.D., no. IMM-5747-99), Simpson, November 6, 2000, the Court upheld the CRDD finding that the claimant had not converted to Christianity. The claimant had not provided a letter from the church in Nigeria, had not been baptized and had no plans for baptism, and did not know the meaning of Easter or Christmas. In *Chen, Xing Kang v. M.C.I.* (F.C.T.D., no. IMM-808-00), Gibson, November 29, 2000, the upheld CRDD relied on the following factors: there was no reference to forced sterilization in the notes of two interviews conducted by immigration officers shortly after the claimant's arrival in Canada; the claimant was unable to describe coherently the alleged sterilization process he underwent; the claimant provided no documentation to corroborate his sterilization, such documentation being normally provided to persons who underwent the procedure. In *Francis, David v. M.C.I.* (F.C.T.D., no. IMM-2114-00), Heneghan, February 16, 2001, 2001 FCT 93, among other credibility concerns, the CRDD did not believe that the claimant resided in the northern part of Sri Lanka, having regard to the absence of any formal identification linking him to that part of the country. The Court upheld that decision, as well as the decision in *Balkhi, Sayed v. M.C.I.* (F.C.T.D., no. IMM-3398-00), McKeown, May 1, 2001, 2001 FCT 419, where the CRDD found, in the context of credibility, the claimants not to be nationals of Afghanistan, having regard to the lack of any identity documents or corroborative witnesses.

<sup>213</sup> *Abubakar, Suadh v. M.C.I.* (F.C.T.D., no. IMM-422-98), Campbell, July 31, 1998, Reported: *Abubakar v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm.L.R. (2d) 186 (F.C.T.D.); *Lembagusala, Sungi Chantal v. M.C.I.* (F.C.T.D., no. IMM-3593-99), Campbell, April 20, 2000. In *Olojo, Omolara Abimbola v. M.C.I.* (F.C.T.D., no. IMM-3918-96), Lutfy, November 6, 1997, the Court held that it was speculative for the CRDD to state that the claimant's counsel could have made the claimant aware of the importance of corroborating documentation. In *Tchiegang, Charlotte v. M.C.I.* (F.C.T.D., no. IMM-1621-02), Snider, February 27, 2003, 2003 FCT 249, the Court held the panel did indicate its concern regarding the lack of documentary evidence on the problems of HIV positive persons in Cameroon, thus fulfilling its obligation to inform the claimant of the case she had to meet.

<sup>214</sup> *Thurairajah, Uthayasankar v. M.E.I.* (F.C.T.D., no. IMM-2339-93), Tremblay-Lamer, March 11, 1994; *Veres, Gavril v. M.C.I.* (F.C.T.D., no. IMM-2227-00), Pelletier, November 24, 2000; *Bastos, Neusa Margarida Ferrao v. M.C.I.* (F.C.T.D., no. IMM-4255-00), O'Keefe, June 15, 2001, 2001 FCT 662. See also 2.6.2. *Special Circumstances of the Case*, which underscores the importance of taking into account gender and other considerations that may have an impact on the claimant's ability to obtain documentary evidence.

- What is “reasonable” (“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 abroad over which he or she has no control.<sup>215</sup> It may be unreasonable, or even implausible, for a claimant not to have brought certain documents with him or her or not to have made efforts to obtain the corroborative evidence requested by the RPD.<sup>216</sup> The panel is entitled to draw a negative inference where the claimant fails to provide documents that the claimant undertook to provide at the hearing.<sup>217</sup>
- The Federal Court of Appeal has held that the fact that a claimant has 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 a peripheral matter of limited value to determination of general

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<sup>215</sup> *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 106 (F.C.A.).

<sup>216</sup> In *Takhar, Sukhjeevan Singh v. M.C.I.* (F.C.T.D., no. IMM-1961-98), Evans, February 19, 1999, the Court pointed out that it is not unusual for persons who are fleeing not to have all of their documents. In *Yimal, Mehmet v. M.C.I.* (F.C., no. IMM-5313-02), Russell, December 18, 2003, 2003 FC 1498, the Court stated: “It is clearly not reasonable to expect a refugee claimant from a war-torn country to arrive in Canada with all the requisite documentation needed to confirm every aspect of his or her claim.” In *Farah, Kalthoum Abdirahman v. M.E.I.* (F.C.T.D., no. 92-A-6032), Reed, May 26, 1993, the Court upheld the CRDD’s decision rejecting as not credible the Somali claimant’s explanation as to why she carried a Somali birth certificate but neither her original Somali passport nor the false Ethiopian passport which she used to enter the United States and only destroyed before coming to Canada. In *Balayah, Khadar Yusuf v. M.C.I.* (F.C.T.D., no. A-1395-92), Simpson, July 29, 1996, the Court upheld the CRDD decision that it was implausible for the claimant to have left his only identity documents behind in a country torn by civil war given that he had a week to prepare for his departure. In *Oriakhi, Godwin v. M.C.I.* (F.C.T.D., no. IMM-2497-99), Lemieux, June 16, 2000, among other implausibilities, the CRDD cited the fact that the claimant produced only one newspaper clipping of his alleged activism in Nigeria after testifying that such newspaper reports existed and his associate was still in Nigeria and could have sent them. See also *Osman, Abdirizak Said v. M.E.I.* (F.C.T.D., no. IMM-261-93), Nadon, December 22, 1993; *Achour, Lyes v. M.C.I.* (F.C.T.D., no. IMM-4040-99), Pinard, July 7, 2000; *Kular, Bakhshish Kaur v. M.C.I.* (F.C.T.D., no. IMM-1893-00), Rouleau, November 1, 2000; *Muthiyansa, Siriyalatha Herath v. M.C.I.* (F.C.T.D., no. IMM-3994-99), Hansen, February 2, 2001, 2001 FCT 17; *Kombo, Muhammad Ali v. M.C.I.* (F.C.T.D., no. IMM-4181-00), McKeown, May 7, 2001, 2001 FCT 439. On the other hand, in *Chouljenko, Vladimir v. M.C.I.* (F.C.T.D., no. IMM-3879-98), Denault, August 9, 1999, the Court held that the CRDD did not have reasonable grounds, in light of the evidence on file of the claimant’s nationality, to require him to make “sufficient effort to obtain documents proving” his Armenian nationality. See also *Ourazmetov, Damir v. M.C.I.* (F.C.T.D., no. IMM-3247-99), Denault, May 16, 2000. In *Manoharan, Sharmalee Rajmohan v. M.C.I.* (F.C.T.D., no. IMM-4465-01), Tremblay-Lamer, October 2, 2002, 2002 FCT 1033, the Court held that the Board imposed too onerous a burden on the claimant with regard to the production of documentary evidence, and that if it needed additional documents from more official sources, it should not have refused her request for an extension of time to inquire about such documents.

<sup>217</sup> *D’Rozario, Jerome v. M.C.I.* (F.C.T.D., no. IMM-2189-99), Dawson, May 24, 2000; *Daniel, Sara v. M.C.I.* (F.C.T.D., no. IMM-6100-99), Tremblay-Lamer, August 11, 2000.

credibility.<sup>218</sup> However, more recent Trial Division decisions have held that the Board was correct in attaching importance to this matter.<sup>219</sup> The destruction of *genuine* documents is a relevant consideration.<sup>220</sup>

- Even if the required documents or corroborative evidence are not provided, and the claimant does not offer a satisfactory reason for not doing so or make reasonable efforts to obtain them, the panel should still go on to assess the balance of the evidence, especially if it may corroborate the claimant's story.<sup>221</sup>
- A lack of relevant documents may lead to a finding that a claimant has not discharged the burden with respect to identity and other elements of the claim. This is often done in conjunction with a consideration of other factors relating to credibility.<sup>222</sup> Where a claimant's story has been found

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<sup>218</sup> *Salamat v. Canada (Immigration Appeal Board)* (1989), 8 Imm.L.R. (2d) 58 (F.C.A.) (destruction of a false passport before arriving in Canada was irrelevant to the CRDD's credibility assessment); *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.) (there is nothing inherently incredible in a refugee saying that he has destroyed false travel documents in order to avoid detection and arrest once they have served their purpose). In *Takhar, Sukhjeevan Singh v. M.C.I.* (F.C.T.D., no. IMM-1961-98), Evans, February 19, 1999, the Court stated: "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. ... whether a person has told the truth about her or his travel documents has little direct bearing on whether the person is indeed a refugee. See also *Thurairajah, Uthayasankar v. M.E.I.* (F.C.T.D., no. IMM-2339-93), Tremblay-Lamer, March 11, 1994; *Nishanthan, Ramachandran v. M.C.I.* (F.C.T.D., no. IMM-1940-98), Lemieux, November 2, 1999 (claimant turned over his Sri Lankan passport to his agent).

<sup>219</sup> *Farah, Kalthoum Abdirahman v. M.E.I.* (F.C.T.D., no. 92-A-6032), Reed, May 26, 1993; *Elazi, Iseikeye Simon v. M.C.I.* (F.C.T.D., no. IMM-1038-99), Nadon, February 17, 2000 (the Court stated: "these documents are essential to establish the claimant's identity and his journey to come to Canada. ... it seems unreasonable to me to ignore the loss of these documents without a valid explanation."); *Museghe, Gikotshi Patric v. M.C.I.* (F.C.T.D., no. IMM-1551-01), Blais, October 16, 2001, 2001 FCT 1117; *Alexibich, Mogamed v. M.C.I.* (F.C.T.D., no. IMM-3178-00), Pelletier, January 17, 2002, 2002 FCT 53; *Kandot, Serge Patrick v. M.C.I.* (F.C., no. IMM-5858-02), Beaudry, October 31, 2003, 2003 FC 1275; *Matanga, Alice Baygwaka v. M.C.I.* (F.C., no. IMM-6271-02), Pinard, December 4, 2003, 2003 FC 1410 (referring to s. 106 of IRPA, the Court stated that it was essential for a claimant to be able to submit acceptable documentation to establish his or her identity and journey to come to Canada).

<sup>220</sup> *Farah, Kalthoum Abdirahman v. M.E.I.* (F.C.T.D., no. 92-A-6032), Reed, May 26, 1993; *Mohammad, Abul Hashim v. M.C.I.* (F.C.T.D., no. IMM-3095-96), Gibson, July 30, 1997.

<sup>221</sup> In *Abebe, Hanna v. M.C.I.* (F.C.T.D., no. IMM-2174-96), Teitelbaum, March 25, 1997, the CRDD erred in finding the claimant not to be a citizen of Ethiopia, simply because she had presented no identity documents from Ethiopia; there were other indications, including a witness, that she was from Ethiopia. See also *Chaudhry, Zia Khawar v. M.C.I.* (F.C.T.D., no. IMM-5938-99), MacKay, August 25, 2000.

<sup>222</sup> *Shanmuganathan, Kanagasabai v. M.C.I.* (F.C.T.D., no. IMM-2019-94), Muldoon, May 2, 1995; *Singh, Sajan v. M.C.I.* (F.C.T.D., no. IMM-733-97), Pinard, January 14, 1998; *Matarage, Lal Kumara Chandragupta v. M.C.I.* (F.C.T.D., no. IMM-1987-97), Lutfy, April 9, 1998; *Nallanathan, Lina Radhiha v. M.C.I.*

to be implausible or otherwise lacking in credibility, a lack of documentary corroboration,<sup>223</sup> or a lack of efforts to obtain the documentation,<sup>224</sup> can be a valid consideration for purposes of assessing credibility. The circumstances in which a document is provided<sup>225</sup> or the fact that the claimant provides documents selectively may be a basis for drawing an adverse credibility finding.<sup>226</sup>

The “unanimity provisions” found in paragraph 69.1(10.1)(a) of the *Immigration Act*,<sup>227</sup> which changed the effect of a split decision by a two-member panel on the claim when identity documents were disposed of or destroyed without valid reason, are not part of *IRPA*. However, section 106 of *IRPA* allows the RPD to consider similar factors in applying that provision. Therefore, the Federal Court case law relating to the “unanimity provisions” discussed below is still relevant to the issue of whether the claimant provided a reasonable explanation for the lack of documents.

“Identity documents” include both genuine and false or fraudulent documents.<sup>228</sup> The words “disposed of” connote intention or an act of will; they do not encompass victimization by theft,

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(F.C.T.D., no. IMM-606-00), Lemieux, April 17, 2001, 2001 FCT 326; *Nadarajalingam, Rajah v. M.C.I.* (F.C.T.D., no. IMM-3238-00), Gibson, May 8, 2001, 2001 FC 444.

<sup>223</sup> *Syed, Naqeeb-Ur-Rehman v. M.C.I.* (F.C.T.D., no. IMM-1613-97), MacKay, March 13, 1998; *Herrera, Endigo Guiller Caceres v. M.C.I.* (F.C.T.D., no. IMM-27-37-97), Muldoon, September 28, 1998; *Bin, Qio Jian v. M.C.I.* (F.C.T.D., no. IMM-6307-99), Pelletier, November 14, 2001, 2001 FCT 1246.

<sup>224</sup> *Quichindo, Esperanca Rocha v. M.C.I.* (F.C.T.D., no. IMM-3225-01), Lemieux, March 28, 2002, 2002 FCT 350.

<sup>225</sup> *Tameh, Ali Farrokhi v. M.C.I.* (F.C., no. IMM-6266-02), Blanchard, December 15, 2003, 2003 FC 1468.

<sup>226</sup> *Chowdhury, Shahala v. M.C.I.* (F.C.T.D., no. IMM-2897-02), Tremblay-Lamer, April 8, 2003, 2003 FCT 407; *Amarapala, Priyanga Udayantha v. M.C.I.* (F.C., no. IMM-5034-03), Kelen, January 7, 2004, 2004 FC 12.

<sup>227</sup> Subsection 69(10.1) of the former *Immigration Act* provided:

69.(10.1) Where, with respect to any person who claims to be a Convention refugee, both members of the Refugee Division hearing the claim are satisfied  
(a) that there are reasonable grounds to believe that the person, without valid reason, has destroyed or disposed of identity documents that were in the person’s possession, ...  
then, in the event of a split decision on the claim, the decision not favorable to the person shall be deemed to be the decision of the Refugee Division.

The Trial Division held that notice must be provided to the claimant of the panel’s intention to consider applying this provision: *Sebastiampillai, Mary Jenita v. M.C.I.* (F.C.T.D., no. IMM-866-94), Reed, December 5, 1994.

<sup>228</sup> *Sebastiampillai, Mary Jenita v. M.C.I.* (F.C.T.D., no. IMM-866-94), Reed, December 5, 1994 (in *obiter*); *Gbremariam, Himanot Tefera v. M.C.I.* (F.C.T.D., no. IMM-62-94), Muldoon, March 8, 1995.

robbery, trickery or intimidation.<sup>229</sup>

#### 2.4.6. Self-Serving Evidence

The Federal Court commented, in *Kimbudi*, that it is difficult to conceive what evidence would be available to a claimant in Canada that would not be self-serving.<sup>230</sup> Thus the RPD should have a good reason to dismiss a claimant's evidence as being "self-serving".<sup>231</sup> It would not constitute "clear reasons" for finding evidence not to be credible to simply refer to it as being "self-serving", without providing any further analysis.<sup>232</sup>

In *Vallejo*, the Federal Court held that the absence of "self-serving" evidence that is otherwise accorded little or no weight is "a flimsy basis for doubt."<sup>233</sup>

#### 2.4.7. Preferring Documentary Evidence to the Claimant's Testimony

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<sup>229</sup> In *Gebremariam, Himanot Tefera v. M.C.I.* (F.C.T.D., no. IMM-62-94), Muldoon, March 8, 1995, the 14-year-old Somali claimant handed over her passport (in someone else's name), when requested, to the agent's contact person in the United States. The Court held that "valid reason" demands a much lower standard for someone like the claimant than for a more worldly-wise or self-assured adult. In *Jradj, Khalil Alib v. M.E.I.* (F.C.T.D., no. IMM-1680-94), Gibson, March 16, 1995, the Court upheld the CRDD's application of s. 69.1(10.1) with respect to a Lebanese claimant who left his passport with a friend in Germany, where he had stayed for four months. The claimant was found not credible because of the unsatisfactory explanation for his inability to get his valid passport, other implausibilities and his failure to make a refugee claim in Germany.

<sup>230</sup> *Kimbudi v. Canada (Minister of Employment and Immigration)* (1982), 40 N.R. 566 (F.C.A.).

<sup>231</sup> In *Cardenas, Harry Edward Prael v. M.C.I.* (F.C.T.D., no. IMM-1960-98), Campbell, February 20, 1998, the Court held that the fact that corroborating letters from the claimant's family postdated the claim was not sufficient reason to dismiss them as self-serving. In *Kaburia, Colin Wagombe v. M.C.I.* (F.C.T.D., no. IMM-230-01), Dawson, May 7, 2002, 2002 FCT 516, the Court stated: "solicitation does not *per se* invalidate the contents of the letter, nor does the fact that the letter was written by a relative." In *Razzaq, Abdul v. M.C.I.* (F.C., no. IMM-4139-02), Snider, July 10, 2003, 2003 FC 864, the Court held that the RPD did not err in not giving weight to "self-serving" letters as the Board relied on documentary evidence regarding forgeries in Pakistan and its own adverse credibility findings for its conclusion that these letters were not sufficient to offset its credibility concerns.

<sup>232</sup> *Konadu, Yaa v. M.C.I.* (F.C.T.D., no. A-985-92), Heald, November 20, 1996.

<sup>233</sup> In *Vallejo, Juan Ernesto v. M.E.I.* (F.C.A., no. A-799-90), Mahoney, Stone, Linden, March 26, 1993, the Court rejected the CRDD's implicit finding that the claimant was not a credible witness for the reason, among others, that, in testifying about the content of letters received from home, he stated that they did not mention that the authorities were still looking for him. The Court commented: "That is exactly the sort of evidence that the Board routinely gives little or no weight because it finds it self-serving."

The Board is entitled to rely on documentary evidence in preference to the testimony provided by a claimant,<sup>234</sup> even if it finds the claimant trustworthy and credible.<sup>235</sup> However, RPD members must provide clear and sufficient reasons for accepting documentary evidence over the evidence of the claimant, especially when it is uncontradicted.<sup>236</sup>

The Federal Court has upheld, in a number of decisions, the Board's reliance on documentary evidence originating from a variety of reputable independent sources, none of which can be said to have any vested interest in the claim at hand (and are to that extent free of bias), in preference to the claimant's testimony.<sup>237</sup>

This does not necessarily apply to information obtained from an individual in response to a particular inquiry, as such evidence does not have the same "circumstantial guarantee of

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<sup>234</sup> *Zhou, Ting Yu v. M.E.I.* (F.C.A., no. A-492-91), Heald, Desjardins, Linden, July 18, 1994; *Victorov, Alexey v. M.C.I.* (F.C.T.D., no. IMM-5170-94), Noël, June 14, 1995; *Andrade, Pedro Aleksei Marchant v. M.C.I.* (F.C.T.D., IMM-2361-96), Noël, May 5, 1997.

<sup>235</sup> *Dolinovsky, Yaroslav v. M.C.I.* (F.C.T.D., no. IMM-1559-98), Pinard, November 5, 1999. But note the caution in *Kandasamy, Thirunavukarasu v. M.C.I.* (F.C.T.D., no. IMM-4730-96), Reed, November 5, 1997: "The danger in preferring documentary evidence over [a claimant's] direct evidence, is that documentary evidence is usually general in nature. [A claimant'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." See also *Parada, Felix Balmore v. M.C.I.* (F.C.T.D., no. A-38-92), Cullen, March 6, 1995, where the Court held that if the claimant "testified that he feared for his life and there is evidence to reasonably support those fears, it is improper for the Board to reject that testimony out of hand without making a negative credibility finding." In *Khan, Himmotur Rahman v. M.C.I.* (F.C.T.D., no. IMM-3428-97), Denault, August 21, 1998, the Court held that the CRDD erred by finding that the claimant was not credible about her identity in the face of numerous unchallenged documents such as birth and school certificates, and newspaper articles containing her pen name as well her photograph. In *Singh, Karamjit v. M.C.I.* (F.C.T.D., no. IMM-2613-00), Pinard, April 20, 2001, 2001 FCT 344, the Court had some difficulty accepting that the CRDD should be allowed to discount the claimant's personal account of persecution (in which no contradiction or inconsistency was noted) on the basis of more general documentary evidence.

<sup>236</sup> *Okyere-Akosah, Kwame v. M.E.I.* (F.C.A., no. A-92-91), Marceau, Desjardins, Décary, May 6, 1992. See, for example, *Kandasamy, Thirunavukarasu v. M.C.I.* (F.C.T.D., no. IMM-4730-96), Reed, November 5, 1997, where the CRDD preferred the documentary evidence over the claimant's oral evidence concerning the treatment received at the hands of the police. See also *Levtchenko, Seguei v. M.C.I.* (F.C.T.D., no. IMM-3289-97), Pinard, August 18, 1998.

<sup>237</sup> *Zvonov, Sergei v. M.E.I.* (F.C.T.D., no. IMM-3030-93), Rouleau, July 18, 1994, Reported: *Zvonov v. Canada (Minister of Employment and Immigration)* (1994), 28 Imm.L.R. (2d) 23 (F.C.T.D.); *Villalba, Juan Francisco Massaffero v. M.E.I.* (F.C.T.D., no. IMM-7172-93), Rothstein, October 19, 1994; *Chkliar, Ekaterina v. M.C.I.* (F.C.T.D., no. IMM-2991-94), Wetston, January 21, 1995; *Mihelcic, Nicola v. M.E.I.* (F.C.T.D., no. IMM-1010-94), Gibson, March 16, 1995; *Varga, Sava v. M.E.I.* (F.C.T.D., no. IMM-790-94), Heald, June 8, 1995. In *Munkoh, Frank v. M.E.I.* (F.C.T.D., no. IMM-4056-93), Gibson, June 3, 1994, the Court questioned the foregoing rationale as a sufficient basis for preferring the documentary evidence to the evidence of the claimant.



trustworthiness” as documentary evidence prepared by independent agencies that is published and circulated.<sup>238</sup>

#### 2.4.8. Assessing Documents

The matter of foreign documents is not an area where the Board can claim particular knowledge.<sup>239</sup> There is no general requirement for the RPD, however, to submit an identity or other document for forensic testing.<sup>240</sup>

Where there is sufficient evidence to cast doubt on its authenticity, whether because of an irregularity on its face or the questionable circumstances in which it was obtained or provided, a document may be assigned little (or no) weight, without expert verification or where such verification is inconclusive.<sup>241</sup> When discounting documents in such circumstances, the Board should take into account the explanation, if any, given by the claimant.<sup>242</sup>

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<sup>238</sup> In *Veres, Gavril v. M.C.I.* (F.C.T.D., no. IMM-2227-00), Pelletier, November 24, 2000, the CRDD erred in saying that it had “no reason” to doubt the report of an unidentified party official in Romania referred to in a Response to Information Request from the IRB’s Documentation Centre, when the claimant had adduced an article from a Romanian newspaper that contradicted that information.

<sup>239</sup> *Ramalingam, Govindasamy Sellathurai v. M.C.I.* (F.C.T.D., no. IMM-1298-97), Dubé, January 8, 1998.

<sup>240</sup> In *Owusu, Kweku v. M.E.I.* (F.C.A., no. A-1146-87), Heald, Hugessen, Desjardins, January 31, 1989, the Court held that the CRDD did not err in failing to require expert evidence to support its finding in respect of handwriting. In *Culinescu, Rodica-Luciana v. M.C.I.* (F.C.T.D., no. IMM-3395-96), Joyal, September 17, 1997, the Court held that there was no duty on the Board to have impugned documents (an order to stand trial) authenticated. In *Yogeswaran, Kulamanidevi v. M.C.I.* (F.C.T.D., no. IMM-1291-99), MacKay, February 9, 2001, 2001 FCT 48, the Court agreed that sending out the documents for authentication would not have explained the discrepancies in dates and names. In *Allouche, Sofiane v. M.C.I.* (F.C.T.D., no. IMM-973-99), Pinard, March 17, 2000, the Court held that the CRDD’s refusal to have certain documents assessed by an expert was not unreasonable, especially since the panel had no legal obligation to do so. Note, however, *Pachkov, Stanislav v. M.C.I.* (F.C.T.D., no. IMM-5449-99), Denault, June 28, 2000, where the panel undertook to have the RCO send an information request to the Latvian embassy concerning the status of stateless persons holding a passport of the former USSR, but did not follow through (the request was sent to the IRB Documentation Centre instead) and did not inform the claimant. According to the doctrine of legitimate expectation, an administrative authority must abide by the procedural undertakings it has freely made, provided that this authority is not acting contrary to its legal obligations.

<sup>241</sup> See, for example: *Grozdev, Kostadin Nikolov v. M.C.I.* (F.C.T.D., no. A-1332-91), Richard, July 16, 1996 (letter and summons); *Parvez, Mohammed v. M.C.I.* (F.C.T.D., no. A-1341-92), Gibson, October 18, 1996 (arrest warrant); *Adar, Mohamoud Omar v. M.C.I.* (F.C.T.D., no. IMM-3623-96), Cullen, May 26, 1997 (passports and other identity documents); *Culinescu, Rodica-Luciana v. M.C.I.* (F.C.T.D., no. IMM-3395-96), Joyal, September 17, 1997 (order to stand trial); *Hossain, Md Iqbal v. M.C.I.* (F.C.T.D., no. IMM-1600-99), Tremblay-Lamer, February 4, 2000 (letter); *Islam, Arif v. M.C.I.* (F.C.T.D., no. IMM-5745-99), Tremblay-Lamer, February 2, 2001, 2001 FCT 10 (CRDD compared the content and form of two medical certificates); *Riveros, Maximo Andres Febres v. M.C.I.* (F.C.T.D., no. IMM-6517-00), Blais, September 11, 2001, 2001 FCT 1009 (the photograph in the military service book seemed to be recent, and not one dating from 1972); *Uddin, Nizam v. M.C.I.* (F.C.T.D., no. IMM-895-01), Gibson, April 26, 2002, 2002 FCT 451

Where there is insufficient evidence to call into question the authenticity of a document it is not open to the Board to conclude it is not genuine.<sup>243</sup> The Federal Court has held that documents issued by a

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(CRDD noted discrepancies between the claimant's documents and the general evidence regarding the form and content of such documentation). In *Ahmed, Shakeel v. M.C.I.* (F.C.T.D., no. IMM-1006-97), Nadon, April 9, 1998, the Court upheld the CRDD's finding that the arrest warrant was invalid because it contained handwritten words in English and because the claimant failed to produce the First Information Report listing the actual charges, despite being given time to do so; also the lawyer's letter from Pakistan had the word "legal" misspelled in the letterhead. In *Yakub, Omar Imhammed v. M.C.I.* (F.C.T.D., no. IMM-5361-00), McKeown, October 2, 2001, 2001 FCT 1082, the Court held that the CRDD did not err in refusing the documentation from Executive Committee members of the Libyan League for Human Rights after the Board's Special Information Research Unit (SIRU) wrote to the league to verify the authenticity of the statement and received no response. In *Umba, Laetitia Masial v. M.C.I.* (F.C., no. IMM-6318-02), Martineau, January 9, 2004, 2004 FC 25, the Court stated that it did not believe that the Board must be rigorous to the point that the acceptance of evidence produced by a claimant must depend on North American logic and reasoning. In *Dzey, Oksana Olesy v. M.C.I.* (F.C., no. IMM-1-03), Mactavish, January 30, 2004, 2004 FC 167, the Court upheld the RPD's finding that it was implausible for the claimant to have obtained a police report detailing events, after the fact, given her testimony that the police had refused to record her complaint when she attempted to report the assault and their alleged protection of the assailant in the past. In *Mohanarajan, Sriahilandtharanathan v. M.C.I.* (F.C.T.D., no. IMM-5482-00), Simpson, November 6, 2000, the Court held that given all the problems which were identified in connection with the documents, the CRDD was entitled, given its expertise, to reach conclusions about the reliability of an identity document even though the RCMP could not determine whether it was or was not authentic. See also *Aboubacar, Habib Rashad v. M.C.I.* (F.C.T.D., no. IMM-5925), Dawson, February 13, 2002, 2002 FCT 162, where the claimant's explanation as to how he obtained his birth certificate to be highly dubious. Moreover, while the RCMP forensic report on the Niger identity card was inconclusive regarding authenticity and alteration, it stated that it had the characteristics of a counterfeit document.

<sup>242</sup> In *Mandar, Kashmeer Singh v. M.C.I.* (F.C.T.D., no. IMM-4605-96), Reed, October 3, 1997, the Court cautioned the CRDD to seek and take into account explanations offered by the claimant regarding impugned documents.

<sup>243</sup> *Gyimah, Joycelyn v. M.C.I.* (F.C.T.D., no. IMM-1011-93), Gibson, November 10, 1995; *Kashif, Zakria Mohammed v. M.C.I.* (F.C.T.D., no. IMM-760-02), Pinard, February 18, 2003, 2003 FCT 179. In *Hadjalaran, Zylhan Ismail v. M.C.I.* (F.C.T.D., no. IMM-6134-99), Campbell, July 18, 2000, the Court held that the CRDD should first rule on the authenticity of a summons before deciding on the weight to be given it. In *Ourazmetov, Damir v. M.C.I.* (F.C.T.D., no. IMM-3247-99), Denault, May 16, 2000, the CRDD found that the claimant failed to prove his Jewish origin despite his birth certificate establishing that his father and mother were Jewish. The Court held it was unreasonable not to assign any probative value to this document on the basis that his father had declared in his own internal passport that he was also of Tartar nationality. There being no doubt expressed as to the validity of the birth certificate, this document was proof of its contents and it established, at the very least, that his parents were Jewish. In *Taire, Queen v. M.C.I.* (F.C.T.D., no. IMM-3883-00), Hansen, October 11, 2001, 2001 FCT 1109, the Court held that it was erroneous for the panel to conclude that it was implausible for the claimant's father to sign her application for a birth certificate without questioning the authenticity of the document; however, it was contradictory that the claimant's passport had been issued before her birth certificate.

foreign government are presumed to be authentic,<sup>244</sup> unless evidence (external to the document) is produced to prove otherwise or the Board is able to make a determination based on the contradictory evidence that calls the authenticity of the document into question.<sup>245</sup>

Evidence of widespread availability of fraudulent documents in a country is not, by itself, sufficient to reject foreign documents as forgeries,<sup>246</sup> but may be relevant if there are other reasons to question the documents or a claimant's credibility.<sup>247</sup>

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<sup>244</sup> In *Warsame, Mohamed Dirie v. M.C.I.* (F.C.T.D., no. A-758-92), Nadon, November 15, 1993, the Court stated: "The certificate is either genuine or false, and therefore it is not possible to attach 'little probative value'. It is all or nothing.... At the very least, the Board should have stated why it believed that the document in question was not genuine as, on its face, it does appear to be genuine." See also *Olojo, Omolara Abimbola v. M.C.I.* (F.C.T.D., no. IMM-3918-96), Lutfy, November 6, 1997. In *Kabashi, Sokol v. M.C.I.* (F.C.T.D., no. IMM-3489-97), Gibson, April 20, 1998, the Court held that the CRDD could not conclude that a military call-up notice and a school letter were not genuine in the absence of expert examination. In *Ramalingam, Govindasamy Sellathurai v. M.C.I.* (F.C.T.D., no. IMM-1298-97), Dubé, January 8, 1998, the Court held that an identity document issued by a foreign government is presumed valid unless evidence is produced to prove otherwise. In *Deci, Edmond v. M.C.I.* (F.C.T.D., no. IMM-664-00), Gibson, February 5, 2001, 2001 FCT 21, the Court held that if the claimant's birth certificate, family certificate and certificate from the European Union were originals, it is difficult to understand how the CRDD could justify not giving "much weight" to these documents, despite the fact that they were issued after the claimant left Albania, without impugning the reputation of state authorities in Albania who issued the duplicate originals. In *Nika, Mimoza v. M.C.I.* (F.C.T.D., no. IMM-5209-00), Hansen, June 14, 2001, 2001 FCT 656, the Court held that the CRDD erred in its finding with respect to a family certificate from Albania in the absence of any evidence with respect to this type of document.

<sup>245</sup> *Mpoli, Noellie Ngoya v. M.C.I.* (F.C.T.D., no. IMM-2098-02), Noël, April 3, 2003, 2003 FCT 398. The Court also held that in failing to inform the claimants of its concerns regarding the birth certificates, it did not give them an opportunity to respond to them.

<sup>246</sup> *Ismaylov, Anar Ibrahim v. M.C.I.* (F.C.T.D., no. IMM-1232-01), Gibson, January 11, 2002, 2002 FCT 30; *Papaskiri, George v. M.C.I.* (F.C., no. IMM-6179-02), O'Keefe, January 16, 2004, 2004 FC 69 (RPD made no reference to any particular problem with the documents tendered by the claimant); *Cheema, Munawar Ahmad v. M.C.I.* (F.C.T.D., no. IMM-615-03), von Finckenstein, February 11, 2004, 2004 FC 224 (RPD did not otherwise support its findings of forgery).

<sup>247</sup> *Uddin, Nizam v. M.C.I.* (F.C.T.D., no. IMM-895-01), Gibson, April 26, 2002, 2002 FCT 451. In *Nasim, Babar v. M.C.I.* (F.C.T.D., no. IMM-6455-00), Tremblay-Lamer, November 2, 2001, 2001 FCT 1199, the Court upheld the CRDD's decision where the claimant's lack of credibility combined with the CRDD's knowledge that it is easy to produce forged Pakistani documents led it to give no probative value to the claimant's documents. See also, to the same effect, *Petrova, Olga v. M.C.I.* (F.C.T.D., no. IMM-4743-00), Dawson, March 14, 2002, 2002 FCT 286. In *Gasparyan, Sos v. M.C.I.* (F.C., no. IMM-3496-02), Kelen, July 10, 2003, 2003 FC 863, the CRDD found difficulties with the authenticity of identity documents issued in the former republics of the Soviet Union around 2001, and drew a negative inference from the claimant's failure to produce his original 1972 birth certificate. The Court held that a panel is entitled to rely upon its knowledge regarding the availability of forged documents in a particular region to question their probative value.

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.<sup>248</sup>

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.<sup>249</sup> Conversely, 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),<sup>250</sup> and on the overall credibility of a claimant.<sup>251</sup> Not every discrepancy in a document, however, will necessarily be material to the success of a claim.<sup>252</sup>

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<sup>248</sup> *Ganiyu-Giwa, Abdulfatai v. M.C.I.* (F.C.T.D., no. IMM-3526-94), Wetston, March 28, 1995; *Gnanapragasam, Daniel v. M.C.I.* (F.C.T.D., no. IMM-573-99), Heneghan, May 31, 2000; *Polgari, Imre v. M.C.I.* (F.C.T.D., no. IMM-502-00), Hansen, June 8, 2001, 2001 FCT 626.

<sup>249</sup> *Songue, André Marie v. M.C.I.* (F.C.T.D., no. IMM-3391-95), Rouleau, July 26, 1996. In *Hamid, Iqbal v. M.E.I.* (F.C.T.D., no. IMM-2829-94), Nadon, September 20, 1995, the Court agreed that, while it is correct that, even if the Board finds the claimant to be bereft of credibility, it must analyze the documentation to determine whether it can give support to the claim, nonetheless, the documents will not be assigned much probative value unless they are proven to be genuine: "where the Board is of the view ... that the [claimant] is not credible, it will not be sufficient for the [claimant] to file a document and affirm it is genuine and that the information contained therein is true. Some form of corroboration or independent proof will be required to 'offset' the Board's negative conclusion on credibility." See also *Kanyai, Mugwagwa Brian v. M.C.I.* (F.C.T.D., no. IMM-315-02), Martineau, August 9, 2002, 2002 FCT 850; *Garcha, Jaswant Singh v. M.C.I.* (F.C.T.D., no. IMM-5526-01), Blais, September 27, 2002, 2002 FCT 1012 (CRDD gave no probative value to an affidavit and medical certificate); *Taire, Queen v. M.C.I.* (F.C., no. IMM-2948-02), Blanchard, July 15, 2003, 2003 FC 877. In *Shergill, Gurpeet Singh v. M.C.I.* (F.C.T.D., no. IMM-5942-00), Nadon, October 19, 2001, 2001 FCT 1138, the Court held that the CRDD had not erred in faulting the claimant, who had testified in an evasive manner, for having introduced an incomplete newspaper article and in not attaching probative value to the affidavit of the village sarpanch. In *Ahmad, Jameel v. M.C.I.* (F.C.T.D., no. IMM-5537-01), Blais, August 15, 2002, 2002 FCT 873, the Court held that it was an error to reject all the documentary evidence presented by the claimant given that the finding of a lack of credibility was based on one event.

<sup>250</sup> *Uddin, Nizam v. M.C.I.* (F.C.T.D., no. IMM-895-01), Gibson, April 26, 2002, 2002 FCT 451. In *Bhuiyan, Abdul Bashar v. M.C.I.* (F.C.T.D., no. IMM-53-02), Noël, March 10, 2003, 2003 FCT 290, the Court held that once the CRDD concluded that identity had not been established (after discounting the claimant's birth certificate), it was not necessary for it to analyze the other documentary evidence (medical report and two letters). However, in *Geng, Xin v. M.C.I.* (F.C.T.D., no. IMM-300-00), Blanchard, April 2, 2001, 2001 FCT 257, the Court held the CRDD erred in dismissing all of the documentary evidence simply because it provided good reasons to believe that some of the documents had been fabricated. In *Al-Shammari, Mossed v. M.C.I.* (F.C.T.D., no. IMM-33-01), Blanchard, April 2, 2002, 2002 FCT 364, the Court held that the panel erred in attaching no probative value to the document from Kuwait because the documents from Iraq were forgeries.

<sup>251</sup> *Husein, Anab Ali v. M.C.I.* (F.C.T.D., no. IMM-2044-97), Joyal, May 27, 1998; *Yogeswaran, Kulamanidevi v. M.C.I.* (F.C.T.D., no. IMM-1291-99), MacKay, February 9, 2001, 2001 FCT 48; *Osayande, Maxwell v. M.C.I.* (F.C.T.D., no. IMM-3780-01), Kelen, April 3, 2002, 2002 FCT 368. In *Umba, Laetitia Masial v. M.C.I.* (F.C., no. IMM-6318-02), Martineau, January 9, 2004, 2004 FC 25, the

If the Board wants to premise an adverse credibility finding on the fact that a claimant is lying about her age (or other condition), the relevant medical evidence must be disclosed to the claimant.<sup>253</sup>

#### 2.4.9. Medical Reports

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. Therefore, if a panel does not believe the underlying facts, it may discount a medical report in light of that finding.<sup>254</sup>

While the Board may determine what weight, if any, to give to a psychological report, not being an expert tribunal in the area of psychological assessment it cannot reject a psychologist's diagnosis. In *Zapata*,<sup>255</sup> the Federal Court stated:

The CRDD must give appropriate weight to professional opinion directly related to the [claimant] before it and to the documentary evidence that, read together with the professional opinion, is corroborative of the position of the [claimants] or, put another way, that reflects the impact of the case specific professional opinion.

The Court found, in that case, that a medical report cannot be rejected solely for the reason that the conclusion made therein is based on what was related to the doctor by the claimant, when it is clear from the report that the doctor's own professional observation of the claimant was material to the conclusion reached.<sup>256</sup>

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Court stated that, if on their face it is apparent that documents contain various irregularities, the RPD can, in the absence of a satisfactory explanation, make a negative finding as to the credibility of a claimant. See also *Neethinesan, Parameswary v. M.C.I.* (F.C.T.D., no. IMM-724-03), Kelen, January 29, 2004, 2004 FC 138; *Ibnmogdad, Moustapha Ould Ould v. M.C.I.* (F.C., no. IMM-332-03), Tremblay-Lamer, February 25, 2004, 2004 FC 321.

<sup>252</sup> *Gochez, Julio Cesar v. M.C.I.* (F.C.T.D., no. IMM-3545-99), Dubé, September 7, 2000 (claimant's job description differed from that in his employer's letter; there was an error in the date of an assault mentioned in a medical certificate). In *Ngoyi, Badibanga v. M.C.I.* (F.C.T.D., no. IMM-1827-99), Tremblay-Lamer, February 15, 2000, the Court held that the CRDD gave exaggerated weight to an error of syntax found in a newspaper article submitted by the claimant.

<sup>253</sup> *Khan, Kanak v. M.C.I.* (F.C.T.D., no. IMM-2483-01), Beaudry, April 15, 2002, 2002 FCT 431.

<sup>254</sup> *Danailov (Danailoff), Vasco (Vassil) Vladimirov v. M.E.I.* (F.C.T.D., no. T-273-93), Reed, October 6, 1993; *Al-Kahtani, Naser Shafi Mohammad v. M.C.I.* (F.C.T.D., no. IMM-2879-94), MacKay, March 13, 1996.

<sup>255</sup> *Zapata, Carlos Alberto Ruiz v. M.E.I.* (F.C.T.D., no. IMM-4876-93), Gibson, June 29, 1994.

<sup>256</sup> See also *Attigah, Risch Mirabel v. M.E.I.* (F.C.T.D., no. 92-T-1795), Noël, June 3, 1993, Reported: *Attigah v. Canada (Minister of Employment and Immigration)* (1993), 19 Imm.L.R. (2d) 288 (F.C.T.D.); *Appiah, Charles v. M.C.I.* (F.C.T.D., no. IMM-3009-96), Teitelbaum, August 19, 1997. But note, however, *Sulaiman*,

The Federal Court has also held that, where a professional opinion as to the psychological state of the claimant and whether he was suffering from post-traumatic stress disorder is submitted, it cannot be rejected on the grounds that the doctor could not corroborate specifically the incidents related by the claimant.<sup>257</sup>

A medical report cannot be rejected for the sole reason that it does not indicate that the only possible cause of the injury in question is that related by the claimant. It is sufficient that the report finds that the injury in question is consistent with the cause specified by the claimant.<sup>258</sup>

Where a psychiatric report speaks to a medical condition that may impact on the claimant's behaviour or ability to provide coherent testimony, that factor should be considered by the Board when assessing the claimant's testimony.<sup>259</sup> However, the RPD is not required to defer to the opinion of the author of the report, especially on matters such as the claimant's credibility<sup>260</sup> which

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*Hussaine Hassan v. M.C.I.* (F.C.T.D., no. IMM-525-94), MacKay, March 22, 1996, where the Court upheld the CRDD's conclusion that the claimant's condition, as described in the medical report, did not account for all the inconsistencies and vagueness in her testimony.

<sup>257</sup> *Gill, Ram Singh v. M.E.I.* (F.C.T.D., no. 92-T-1624), Gibson, March 31, 1994.

<sup>258</sup> *Thurairajah, Uthayasankar v. M.E.I.* (F.C.T.D., no. IMM-2339-93), Tremblay-Lamer, March 11, 1994.

<sup>259</sup> In *Sanghera, Bhajan Singh v. M.E.I.* (F.C.T.D., no. T-194-93), Gibson, January 26, 1994, Reported: *Sanghera v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm.L.R. (2d) 194 (F.C.T.D.), the CRDD ignored a psychiatric report stating that the claimant suffered from post-traumatic stress disorder causing him to become forgetful, lost in his train of thought and afraid, especially when the past was discussed. In *Ngombo, Sunda v. M.C.I.* (F.C.T.D., no. IMM-1874-96), Gibson, January 31, 1997, Reported: *Ngombo v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm.L.R. (2d) 321 (F.C.T.D.), the Court held that the CRDD erred in ignoring medical evidence that might explain problems with the claimant's testimony. See also *Chen, Ze Yung v. M.C.I.* (F.C.T.D., no. IMM-4381-94), Cullen, July 19, 1995; *Sanchez, Rosa v. M.C.I.* (F.C.T.D., no. IMM-270-97), Heald, January 18, 1998; *Hassan, Ali Abdi v. M.C.I.* (F.C.T.D., no. IMM-5440-98), Evans, September 7, 1999. In *Vijayarajah, Sasitharan v. M.C.I.* (F.C.T.D., no. IMM-4538-98), Tremblay-Lamer, May 12, 1999, Reported: *Vijayarajah v. Canada (Minister of Citizenship and Immigration)* (1999), 50 Imm.L.R. (2d) 113 (F.C.T.D.), the Court faulted the CRDD's reasoning in finding the claimant not credible due to inconsistencies in his testimony, and then relying on this negative credibility finding to dismiss medical and documentary evidence which explains that torture victims may contradict themselves as a result of the confusion caused by their experiences. In *Yilmaz, Mehmet v. M.C.I.* (F.C., no. IMM-5313-02), Russell, December 18, 2003, 2003 FC 1498, the panel rejected the medical report because it did not believe that the events actually took place, thus closing its mind to the "cognitive difficulties" referred to in the assessment and whether they could account for obvious problems that the claimant had in testifying.

<sup>260</sup> In *Muhammad, Azhar v. M.C.I.* (F.C.T.D., no. IMM-3276-99), Reed, June 30, 2000, the CRDD accepted that the claimant may have had memory problems, as confirmed by a psychologist's report, but it did not accept that he would not recall central and obviously easy-to-remember matters. In *Syed, Najmi v. M.C.I.* (F.C.T.D., no. IMM-2785-99), Blais, May 3, 2000, the CRDD did not find the claimant to be credible based on inconsistencies and implausibilities in his story; hence it gave little weight to a report prepared by a general

the panel must assess independently. The absence of a medical report that diagnoses an alleged cognitive difficulty may be considered by the Board in assessing a claim.<sup>261</sup>

Even if the Board considers a claimant not to be credible, it must still consider the documentary evidence. The need for the panel to refer, in its reasons, to medical and psychiatric reports filed in evidence will depend on the quality of that evidence and the extent to which it is central to the claim.<sup>262</sup> Where the medical report is cogent and 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.<sup>263</sup>

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practitioner attesting to the claimant's veracity. In *Acheampong, Sadic v. M.C.I.* (F.C.T.D., no. IMM-4763-99), Teitelbaum, August 25, 2000, the Court held that the CRDD was entitled to assign little or no weight to opinions expressed in a psychological report regarding the claimant's credibility and fear of persecution: "the CRDD cannot defer its decision-making function to, or allow it to be usurped by, the author of this assessment."

<sup>261</sup> In *Samatar, Asha Ali v. M.C.I.* (F.C.T.D., no. IMM-23-99), Reed, June 8, 2000, the CRDD properly considered the failure to produce, as requested by the panel, a medical/psychological report with respect to the claimant's allegation that she had a poor memory.

<sup>262</sup> In *Gosal, Pardeep Singh v. M.C.I.* (F.C.T.D., no. IMM-2316-97), Reed, March 11, 1998, the Court held that the need for the panel to refer, in its reasons, to medical reports is not "will depend on the quality of that evidence and the extent to which it is central to the...claim. When such reports are nothing more than a recitation of the [claimant's] story, which the Board does not believe, and a conclusion based on symptoms, which the [claimant] has told the psychiatrist are being experienced, then, Boards cannot be faulted for treating such reports with some degree of scepticism. When they are based on independent and objective testing by a psychiatrist, then, they deserve more consideration." In *Kouassi, Agbodoh-Falschau v. M.C.I.* (F.C.T.D., no. IMM-3871-97), Tremblay-Lamer, August 24, 1998, the Board ignored medical evidence that corroborate the claimant's allegation of torture. In *Voytik, Lyudmyla Vasylivna v. M.C.I.* (F.C., no. IMM-5023-02), O'Keefe, January 16, 2004, 2004 FC 66, the Court faulted the RPD for dismissing the medical reports outright without determining whether they enhanced the credibility of the claimant's testimony regarding the alleged beatings or provided independent substantiation of the mistreatment she alleged. In *Singh, Ranjodh v. M.C.I.* (F.C.T.D., no. IMM-2382-94), Simpson, December 14, 1995, the Court held that although the CRDD committed a reviewable error in failing to refer to a psychiatric report, the error was not material. Even had the CRDD specifically referred to the report, it would have dismissed the report on the basis that it did not believe the underlying facts upon which it was based and would not have accepted the doctor's perception over its own on the issue of demeanour. See also, to the same effect, *Hernandez, Maria Trinidad Cortes v. M.C.I.* (F.C.T.D., no. IMM-2248-00), O'Keefe, June 13, 2001, 2001 FCT 643.

<sup>263</sup> In *Javaid, Taher v. M.C.I.* (F.C.T.D., no. IMM-265-98), Rothstein, November 25, 1998, the Court held that, since the psychological report was specific and important to the claimant's case and, *prima facie*, credible and persuasive, it was not sufficient for the panel merely to state that it was considered. The panel had some obligation, even very briefly, to explain why it was not persuaded by that evidence. In *Fidan, Suleyman v. M.C.I.* (F.C., no. IMM-5968-02), von Finckenstein, October 14, 2003, 2003 FC 1190, the Court held that the Board was obliged to do more than merely state that it had "considered" the psychological report. It was obliged to provide some meaningful discussion as to how it had taken account of the claimant's serious medical condition (chronic post-traumatic stress disorder) before it made its negative credibility finding.

## 2.5. ALLOWING THE CLAIMANT TO CLARIFY CONTRADICTIONS OR INCONSISTENCIES IN THE TESTIMONY

### 2.5.1. General Principle

Generally speaking, there is no obligation on the tribunal to signal its conclusions on the general credibility of the evidence.<sup>264</sup> In some cases, however, failure to examine a witness on some material part of his or her evidence has been treated as an acceptance of the truth of that part of the evidence.<sup>265</sup>

### 2.5.2. Confronting the Claimant with Contradictions or Inconsistencies Internal to the Claimant's Testimony

The Federal Court has held, in *Gracielome* and other cases, that the Board should afford the claimant (and any other witness) an opportunity to clarify the evidence and to explain apparent contradictions or inconsistencies within that person's testimony.<sup>266</sup>

The same principle applies to inconsistencies between the claimant's oral testimony and the Personal Information Form (PIF) or port of entry notes, as well as with respect to omissions therein.<sup>267</sup>

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<sup>264</sup> In *Parameshvaran, Appudurai v. M.C.I.* (F.C.T.D., no. IMM-4131-94), Richard, June 26, 1995, the Court held that a tribunal does not have an obligation to point out those aspects of the claimant's testimony that it finds unconvincing. See also *Sarker, Jalal Uddin v. M.C.I.* (F.C.T.D., no. IMM-2597-97), MacKay, July 3, 1998, Reported: *Sarker v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm.L.R. (2d) 209 (F.C.T.D.).

<sup>265</sup> *Browne v. Dunn* (1993), 6 R. 67 (H.L.) holds that, in a civil context, where a tribunal is asked to disbelieve a witness, the witness should be cross-examined. In *Chehar, Kathirgamalingam v. M.C.I.* (F.C.T.D., no. IMM-4540-96), Wetston, October 20, 1997, the Court interpreted *Gracielome, infra*, to stand for the proposition that the Board must afford the claimant an opportunity to address key issues upon which the CRDD intends to rely.

<sup>266</sup> *Gracielome v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm.L.R. (2d) 237 (F.C.A.). See also *Virk v. Canada (Minister of Employment and Immigration)* (1992), 140 N.R. 290 (F.C.A.); *Grewal, Kala Singh v. M.E.I.* (F.C.A., no. A-532-91), Mahoney, Robertson, Gray, January 27, 1993; *Nti, Kofi v. M.E.I.* (F.C.T.D., no. 92-T-1592), McKeown, May 19, 1993; *Vorobieva, Svetlana v. S.G.C.* (F.C.T.D., no. IMM-4863-93), Rouleau, August 15, 1994; *Nadesu, Balaranjani v. M.C.I.* (F.C.T.D., no. IMM-4606-96), Wetston, October 21, 1997. In *Malala, Kalwalwa v. M.C.I.* (F.C.T.D., no. IMM-2461-00), Dubé, February 19, 2001, 2001 FCT 94, the Court certified a question regarding the requirement to put alleged contradictions to the claimant.

<sup>267</sup> *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.). In *Li, Ta Wei v. M.E.I.* (F.C.T.D., no. A-1181-92), Jerome, February 28, 1996, the Court held that the CRDD erred in not confronting the claimant with its doubts about the claimant's credibility arising from the omission in the PIF of any reference to an arrest warrant which was the subject of his testimony. In *Bayrami, Javad Jamali v. M.C.I.* (F.C.T.D., no. IMM-3904-98), McKeown, July 22, 1999, the Court faulted the CRDD for failing to offer the claimants an opportunity to explain discrepancies between their PIF and the port of entry notes.



In a number of more recent decisions, the Federal Court—Trial Division has moved away from a rote application of this principle.<sup>268</sup> In *Tanase*,<sup>269</sup> the Trial Division interpreted *Gracielome* to stand for the proposition that,

where a claimant is not confronted by a panel with alleged contradictions or asked for explanations prior to a decision on credibility being made, the reasons for showing deference to the panel are *severely diminished* as it is no better position to weigh the contradictions than is the Court. This proposition does not imply, however, that the duty of fairness requires a panel to alert a claimant to a potentially adverse credibility finding in every case or in matters of trivial importance.

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<sup>268</sup> In *Parameshvaran, Appudurai v. M.C.I.* (F.C.T.D., no. IMM-4131-94), Richard, June 26, 1995, the Court held that the principles of procedural fairness and natural justice were not offended when the claimant was not confronted with the inconsistencies in his testimony as he was made aware of the credibility issue and had ample opportunity to explain any inconsistencies in his testimony. In *Mendoza, Elizabeth Aurora Huayek v. M.C.I.* (F.C.T.D., no. IMM-2997-94), Muldoon, January 24, 1996, the Court found that the discrepancies within the claimant's own testimony and between her evidence and the documentary evidence were obvious, and the CRDD had no duty to examine the claimant about them. In *Liu, Zhi Gan v. M.C.I.* (F.C.T.D., no. IMM-3143-96), Gibson, August 29, 1997, Reported: *Liu v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm.L.R. (2d) 168 (F.C.T.D.), the Court held that, while it would have been preferable for the CRDD to have drawn to the claimant's attention *all* of the inconsistencies in his testimony, its failure to do so was not, in the circumstances of that case, a breach of the rules of natural justice or an error of law, since the claimant and his counsel had been put on notice that the CRDD was concerned about inconsistencies and the panel had referred specifically to some of them. See also *Kahandani, Masoud v. M.C.I.* (F.C.T.D., no. IMM-2742-98), Pinard, November 17, 1999.

In *Ayodele, Abiodun v. M.C.I.* (F.C.T.D., no. IMM-4812-96), Gibson, December 30, 1997, the Court read the decision in *Gracielome* narrowly to refer to contradictions that were uncovered by a "painstaking analysis of the transcripts of the evidence"; there, the contradictions in the testimony would have been as apparent to counsel as to the CRDD members. In *Matarage, Lal Kumara Chandragupta v. M.C.I.* (F.C.T.D., no. IMM-1987-97), Lutfy, April 9, 1998, the Court revisited the *Gracielome* decision at some length and stated by way of conclusion:

The Court of Appeal decisions relied upon by the [claimant] must be read in the context of the then existing legislative scheme, [which entailed a review of a transcript of the refugee claimant's examination under oath before a senior immigration officer]. While the specific problem being addressed by these decisions may no longer apply, there may still be circumstances, however, where a discrepancy should be brought to the attention of a refugee claimant. In this case, the tribunal's failure to confront the claimant with its concern with a direct response to a specific question is not a reviewable error. The parties were on notice that credibility was in issue.

<sup>269</sup> *Tanase, Florenta v. M.C.I.* (F.C.T.D., no. IMM-2756-99), Muldoon, January 11, 2000.

In *Ngongo*,<sup>270</sup> the Federal Court—Trial Division set out a list of factors to consider in deciding whether the Board is required, in a particular case, to confront the claimant with contradictions in his or her testimony.

In my view, regard should be had in each case to the fact situation, the applicable legislation and the nature of the contradictions noted. The following factors may serve as guidelines:

1. Was the contradiction found after a careful analysis of the transcript or recording of the hearing, or was it obvious?
2. Was it in answer to a direct question from the panel?
3. Was it an actual contradiction or just a slip?
4. Was the [claimant] represented by counsel, in which case counsel could have questioned him on any contradiction?
5. Was the [claimant] communicating through an interpreter? Using an interpreter makes misunderstandings due to interpretation (and thus, contradictions) more likely.
6. Is the panel's decision based on a single contradiction or on a number of contradictions or implausibilities?

In *Veres*,<sup>271</sup> the Federal Court drew a further distinction for omissions in the evidence where the Board, as a time saving measure, proceeds directly to questioning by the Refugee Claim Officer (now Refugee Protection Officer) without having the claimants put their case orally in chief. In such cases, it is unfair to reproach the claimants for having failed to provide some piece of evidence unless they have noticed that they are at risk on the issue. The failure of counsel to object to the procedure chosen by the Board does not affect this result. The circumstances will dictate the extent to which the Board must ask specific questions.

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<sup>270</sup> *Ngongo, Ndjadi Denis v. M.C.I.* (F.C.T.D., no. IMM-6717-98), Tremblay-Lamer, October 25, 1999. In this case the contradiction was significant in nature, readily apparent and provided in response to a direct question of the tribunal. Moreover, the claimant was represented by counsel, who could have questioned his client about that matter. Thus the CRDD did not err by failing to confront the claimant with the alleged contradiction. This case was followed in *Hossain, Iqbal v. M.C.I.* (F.C.T.D., no. IMM-474-99), Tremblay-Lamer, November 19, 1999. See also *Tekin, Arif v. M.C.I.* (F.C.T.D., no. IMM-1656-02), Snider, March 27, 2003, 2003 FCT 357 (PIF); *Yu, Zi Chang v. M.C.I.* (F.C.T.D., no. IMM-3239-02), Snider, June 9, 2003, 2003 FCT 720 (port of entry notes, PIF). In *Estrada, William Dario Tamayo v. M.C.I.* (F.C.T.D., no. IMM-5118-00), Hansen, January 18, 2002, 2002 FCT 60, the Court found that the inconsistency noted there was not one that was so readily apparent that counsel should have been expected to address it, and therefore the panel should have put it to claimant if it intended to rely on it. In *Abdul, Gamel v. M.C.I.* (F.C.T.D., no. IMM-1796-02), Snider, February 28, 2003, 2003 FCT 260, the Court held that, while the Board is not required to put every inconsistency or implausibility to the claimant, when such findings are at the heart of the claim, the claimant must be given an opportunity to explain. See also *Deng, Xing Yi v. M.C.I.* (F.C.T.D., no. IMM-5250-02), Rouleau, May 30, 2003, 2003 FCT 682 (information in visa application).

<sup>271</sup> *Veres, Gavril v. M.C.I.* (F.C.T.D., no. IMM-2227-00), Pelletier, November 24, 2000.

As noted by the Court of Appeal in *Owusu-Ansah*, the Board cannot ignore evidence explaining apparent inconsistencies and then make an adverse credibility finding. Evidence provided by the claimant should be acknowledged in the reasons for decision and the RPD should explain why the evidence was rejected, if that is the case.<sup>272</sup> The explanation provided by the claimant must have been unreasonable or otherwise unsatisfactory to reject the claimant's testimony on the basis of credibility.<sup>273</sup>

### 2.5.3. Confronting the Claimant Where the Testimony is Vague

With respect to a lack of detail in the claimant's account, in *Danquah*,<sup>274</sup> the Federal Court stated:

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.

Similarly, in *Kutuk*,<sup>275</sup> the Federal Court held that the Board is not obliged to confront a claimant with the vagueness of his or her evidence.

### 2.5.4. Confronting the Claimant with Documentary Evidence

The Court of Appeal stated in *Zhou* that

There is no general obligation on the Board to point out specifically any and all items of documentary evidence on which it might rely.<sup>276</sup>

In *Osei*,<sup>277</sup> where the credibility concern was not related to contradictions or inconsistencies internal to the claimant's testimony, but rather to an assessment of the claim in light of the documentary evidence concerning country conditions, the Federal Court stated:

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<sup>272</sup> *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 106 (F.C.A.).

<sup>273</sup> *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 106 (F.C.A.); *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 199 (F.C.A.); *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.).

<sup>274</sup> *Danquah, Ama v. S.S.C.* (F.C.T.D., no. IMM-105-94), MacKay, November 17, 1994.

<sup>275</sup> *Kutuk, Aydin v. M.C.I.* (F.C.T.D., no. IMM-2484-94), Simpson, April 18, 1995.

<sup>276</sup> *M.E.I. v. Zhou, Ting Yu* (F.C.A., no. A-492-91), Heald, Desjardins, Linden, July 18, 1994.

I do not think [the Tribunal] was required to inform the [claimant], before finally rendering its decision, that it doubted the existence of the D.M.L.G. and give the [claimant] an opportunity to respond to that conclusion. I think that this is a different kind of situation from conflicting evidence coming out of the [claimant's] own mouth. In the latter situation, the Tribunal is expected generally to confront the [claimant] with the contradictions.

The Federal Court arrived at a similar conclusion in other cases.<sup>278</sup>

However, where personal or other claimant-specific documents are in issue, the Federal Court has taken diverse approaches and has often required that the claimant be afforded an opportunity to explain concerns raised by the Board.<sup>279</sup>

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<sup>277</sup> *Osei, Gyane Nana v. M.E.I.* (F.C.T.D., no. T-2992-92), Reed, November 17, 1993.

<sup>278</sup> In *Belhadj, Rachid v. M.E.I.* (F.C.T.D., no. A-779-92), Tremblay-Lamer, February 17, 1995, the Court found that there was no duty on the CRDD to confront the claimant with contradictions between his testimony and the documentary evidence. In *Gutkovski, Alexander v. S.S.C.* (F.C.T.D., no. IMM-746-94), Teitelbaum, April 6, 1995, the Court held that the CRDD was not obliged to advise the claimants of its concerns relating to foreign language press articles (which were not translated in their entirety and not accompanied by a translator's certificate or signature). In *Victorov, Alexey v. M.C.I.* (F.C.T.D., no. IMM-5170-94), Noël, June 14, 1995, the Court held that there was no requirement on the CRDD to confront the claimants with the documentary evidence on country conditions used to diminish their credibility. See also *Ortiz, Hector Andres Gonzalez v. M.C.I.* (F.C.T.D., no. IMM-2485-96), Pinard, June 4, 1997. In *Ganagaratnam, Ravedasan v. M.C.I.* (F.C.T.D., no. IMM-3038-99), Dawson, June 26, 2000, the CRDD did not confront the claimant with portions of the documentary evidence which gave rise to two of the panel's most significant concerns. The Court noted that the claimant was represented by counsel and had been advised that credibility was an issue. See also *Tekin, Arif v. M.C.I.* (F.C.T.D., no. IMM-1656-02), Snider, March 27, 2003, 2003 FCT 357. But see *Prapaharan, Sittampalam v. M.C.I.* (F.C.T.D., no. IMM-3667-00), McKeown, March 30, 2001, 2001 FCT 272, where the CRDD's decision was overturned because the panel failed to question the claimant on documentary evidence which did not specifically address the subject of bribery, but which was believed to contradict the claimant's testimony that he obtained his National Identity Card by bribery.

<sup>279</sup> In *Apraku, Cecilia v. M.E.I.* (F.C.T.D., no. 92-T-1373), McKeown, June 23, 1993, the Court held that there was no requirement on the part of the credible basis tribunal to raise the question of the discrepancy between two medical reports filed by the claimant. In *Tshimanga, Pita v. M.C.I.* (F.C.T.D., no. IMM-3915-98), Rouleau, June 10, 1999, the Court held that there was no duty to confront the claimant with its doubts about a letter from his political organization which contradicted his testimony. However, in *Muthusamy, Lingam v. M.E.I.* (F.C.T.D., no. IMM-5801-93), Cullen, September 14, 1994, the Court held that the CRDD erred by failing to give the claimant an opportunity to explain the contents of a videotape viewed by the CRDD outside the hearing, and to answer concerns that arose from its viewing; furthermore, the CRDD had a duty to alert the claimant about its concerns about the accuracy of the translation and the authenticity of identity documents. In *Chaudary, Imran Akram v. M.C.I.* (F.C.T.D., no. IMM-2048-94), Reed, May 4, 1995, the Court held that the Refugee Division erred in finding two letters not authentic without giving the claimant an opportunity to explain certain typography (the Court also raised a concern about imposing Canadian standards of typography). In *Guo, Yu Lan v. M.C.I.* (F.C.T.D., no. A-928-96), Heald, September 16, 1996, the Court held that the CRDD erred in not confronting the claimant regarding inconsistencies between her testimony and her Chinese work unit card and a PSB (Public Security Bureau) list of seized

Where additional documentary evidence is sought or submitted after the hearing has concluded and while the decision is under reserve, the RPD should generally provide the claimant an opportunity to comment on that evidence. Where the evidence goes to a matter that is central to the claim, absent a proper waiver or express consent, the RPD should reconvene the hearing for that purpose before making a negative finding of credibility.<sup>280</sup>

### 2.5.5. Confronting the Claimant Where There Are Implausibilities

Generally speaking, there is no obligation on the Board to put its concerns with respect to plausibility to the claimant. The Federal Court has held that the Board is under no obligation to alert the claimant of its concerns about weaknesses of testimony giving rise to implausibilities,<sup>281</sup> unless perhaps the inconsistency is at the heart of the claim.<sup>282</sup>

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items attached to her PIF. In *Gabor, Vasile v. M.C.I.* (F.C.T.D., no. IMM-1187-97), Muldoon, October 6, 1998, Reported: *Gabor v. Canada (Minister of Citizenship and Immigration)* (1998), 47 Imm.L.R. (2d) 201 (F.C.T.D.), the Court held that the CRDD should have sought clarification from the claimant as to why the military call-up notice referred to at hearing, but submitted post hearing, was dated after the hearing. (The Court certified a question regarding that matter.)

<sup>280</sup> *Canada (Minister of Employment and Immigration) v. Salinas*, [1992] 3 F.C. 247 (C.A.); *Kuslitsky, Igor v. M.C.I.* (F.C.T.D., no. IMM-4253-97), Dubé, June 4, 1998 (a reply from the Israeli consulate); *Iyonmana, Teddyson Osaigbovo v. M.C.I.* (F.C.T.D., no. IMM-3389-99), Campbell, April 5, 2000 (Response to Information Request provided by the CRDD); *Afzal, Amer v. M.C.I.* (F.C.T.D., no. IMM-6423-98), Lemieux, June 19, 2000 (Response to Information Request provided by the CRDD); *Thamothampillai, Kathiresu v. M.C.I.* (F.C.T.D., no. IMM-2131-99), Dawson, July 19, 2000 (register of birth provided on behalf of the claimants). In *Sorogin, Yvacheslav v. M.C.I.* (F.C.T.D., no. IMM-1681-98), Tremblay-Lamer, March 8, 1999, which involved the receipt post-hearing of RCMP lab results regarding the authenticity of a birth certificate provided by the claimant, the Court stated that “While reopening the hearing is always the most appropriate procedure,” a departure from this procedure may be warranted “provided that the [claimant] consents to it and is not prejudiced by it in any way. However, should the [claimant] object to it, the panel should reopen the hearing.” (A question was certified by the Court regarding this issue.)

In *Begum, Sultana Nur Niger v. M.C.I.* (F.C.T.D., no. IMM-1774-00), Blais, February 13, 2001, 2001 FCT 59, the Court dismissed the claimant’s argument that the panel had based its decision on evidence filed after the hearing without her express consent. The information document on divorce procedures in Bangladesh had been discussed at the hearing and had been sent to the claimant’s counsel after the hearing. The panel had not received any comments concerning this document, and the claimant had not objected to the filing of this exhibit or asked to have the inquiry reconvened. In *Orgona, Eva v. M.C.I.* (F.C.T.D., no. IMM-4517-99), MacKay, April 18, 2001, 2001 FCT 346, five months after the hearing, the panel disclosed to counsel information that it had recently received. There Court found there was no breach of natural justice where the claimant was given an opportunity to make submissions in writing, but chose not to. (The claimants submitted that they should have been allowed to respond orally to the evidence.)

<sup>281</sup> *Danquah, Ama v. S.S.C.* (F.C.T.D., no. IMM-105-94), MacKay, November 17, 1994; *Appau, Samuel v. M.E.I.* (F.C.T.D., no. A-623-92), Gibson, February 24, 1995; *Akinremi, Oluwatosin Ololade v. M.C.I.* (F.C.T.D., no. IMM-726-94), Simpson, May 25, 1995; *Akinlolu, Grace Adefunke v. M.C.I.* (F.C.T.D., no. IMM-551-96), MacKay, March 14, 1997; *Tchaynikova, Olga v. M.C.I.* (F.C.T.D., no. IMM-4499-96), Richard, May 8, 1997; *Matarage, Lal Kumara Chandragupta v. M.C.I.* (F.C.T.D., no. IMM-1987-97),

However, the Federal Court stated in *Nkrumah*<sup>283</sup> that

where 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.

Some decisions of the Federal Court also hold that the claimant should have been afforded an opportunity to explain why the claimant or others behaved in a particular way.<sup>284</sup>

In *Arumugam*,<sup>285</sup> 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.

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Lutfy, April 9, 1998; *Sarker, Jalal Uddin v. M.C.I.* (F.C.T.D., no. IMM-2597-97), MacKay, July 3, 1998, Reported: *Sarker v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm.L.R. (2d) 209 (F.C.T.D.); *Zheng, Jian Hui v. M.C.I.* (F.C.T.D., no. IMM-1745-00), Lutfy, December 5, 2000.

<sup>282</sup> *Torres, Alcibiades Marcelino Westres v. M.C.I.* (F.C.T.D., no. IMM-3184-01), Pinard, March 1, 2002, 2002 FCT 212; *Abdul, Gamel v. M.C.I.* (F.C.T.D., no. IMM-1796-02), Snider, February 28, 2003, 2003 FCT 260.

<sup>283</sup> *Nkrumah, Afua v. M.E.I.* (F.C.T.D., no. 92-A-269), MacKay, July 9, 1993, Reported: *Nkrumah v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 246 (F.C.T.D.), at 249.

<sup>284</sup> See *Aden, Ibrahim Ali v. M.E.I.* (F.C.A., no. A-813-91), Hugessen, MacGuigan, Décary, April 28, 1993 (failure to obtain medical treatment); *Chand, Saroop v. M.E.I.* (F.C.T.D., no. 92-T-2035), Gibson, January 26, 1994; *Chehar, Kathirgamalingam v. M.C.I.* (F.C.T.D., no. IMM-4540-96), Wetston, October 20, 1997; *Espino, Cesar Pedro Guerra v. M.C.I.* (F.C.T.D., no. IMM-3958-97), Pinard, May 25, 1998; *Solis, Mario Rene Estrada v. M.C.I.* (F.C.T.D., no. IMM-3627-97), Wetston, September 17, 1998.

<sup>285</sup> *Arumugam, Kandasamy v. M.E.I.* (F.C.T.D., no. IMM-1406-93), Reed, January 20, 1994.

## 2.6. TAKING THE CHARACTERISTICS OF THE PROCESS INTO ACCOUNT

### 2.6.1. Hearing Procedures

The refugee determination process is one that is not like 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 and it may involve the use of the Board members’ “specialized knowledge”. Almost all of the oral evidence is received through the filter of interpreters. The end result of all of these “unusual” characteristics is that the process is fraught with the possibility of misunderstanding, even among people acting in good faith.<sup>286</sup>

### 2.6.2. Special Circumstances of the Claimant

The following factors or circumstances may influence the claimant’s ability to observe and recall events in the course of a hearing: nervousness caused by testifying before a tribunal<sup>287</sup>; the claimant’s psychological condition (such as post-traumatic stress disorder) associated with traumas such as detention or torture<sup>288</sup>; the claimant’s young age;<sup>289</sup> cognitive difficulties and the passage of

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<sup>286</sup> *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 106 (F.C.A.); *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.).

<sup>287</sup> *Vallejo, Juan Ernesto v. M.E.I.* (F.C.A., no. A-799-90), Mahoney, Stone, Linden, March 26, 1993; *Epane, Florent v. M.C.I.* (F.C.T.D., no. IMM-974-98), Rouleau, June 17, 1999.

<sup>288</sup> *Reyes, Hugo Hernan Cruz v. M.E.I.* (F.C.A., no. A-59-91), Mahoney, Stone, Linden, March 23, 1993; *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.). In *Miral, Stefnie Dinisha v. M.C.I.* (F.C.T.D., no. IMM-3392-97), Muldoon, February 12, 1999, the Court commented: “Although it is the function of the CRDD to determine credibility, in this instance the panel appears to have imposed too high a standard regarding the amount of detail he [sic] required from her, forgetting, or perhaps overlooking, the fact that [police] interrogations such as those experienced by the [claimant] are designed to blur and blend together in the minds of those interrogated.”

<sup>289</sup> *Uthayakumar, Sivakumar v. M.C.I.* (F.C.T.D., no. IMM-2949-98), Blais, June 18, 1999; *Assalaarachchi, Sangitha Nadeeshani v. M.C.I.* (F.C.T.D., no. IMM-1924-99), Gibson, February 10, 2000. See also the guidelines on *Child Refugee Claimants: Procedural and Evidentiary Issues*, Guidelines issued by the Chairperson pursuant to section 65(3) of the *Immigration Act*, IRB, Ottawa, September 30, 1996, and continued under paragraph 159(1)(h) of *IRPA*. While there is no requirement to refer specifically to these guidelines in the reasons for decision, the panel should be sensitive to the young age of a claimant when assessing credibility. See *Li, Yi Juan v. M.C.I.* (F.C.T.D., no. IMM-6299-99), Pelletier, November 14, 2001, 2001 FCT 1238, where the 15-year-old claimant could only provide very vague and general details about the meetings he attended. In *Ni, Le v. M.C.I.* (F.C.T.D., no. IMM-6301-99), Pelletier, November 14, 2001, 2001 FCT 1240, where the CRDD found the 15-year-old claimant’s testimony to be “confusing and incoherent” and “appeared to be rehearsed”, the Court noted that “the Guidelines must be thought of as being a continuum. Clearly a twelve-year-old claimant must be given more latitude than 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 *Bin, Qio Jian v. M.C.I.* (F.C.T.D., no. IMM-6307-99), Pelletier, November 14, 2001, 2001 FCT 1246, the Court noted that while the Guidelines admonish the CRDD to be sensitive to the ability of child

time;<sup>290</sup> gender considerations;<sup>291</sup> the claimant's educational background<sup>292</sup> and social position;<sup>293</sup> and cultural factors.<sup>294</sup> The RPD must therefore take into account all of these "unusual" characteristics when assessing the credibility of the claimant's or a witness's evidence.

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claimants to recall and present facts and details, it was not unreasonable for the CRDD to expect a 17-year-old to say how many times the police came to his home prior to his father's arrest. In *Li, Tian Hua v. M.C.I.* (F.C.T.D., no. IMM-6306-99), Pelletier, November 14, 2001, 2001 FCT 1245, the Court noted, with apparent approval, the CRDD's citing of paragraph 215 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* for the proposition that 16-year-olds are usually mature enough to have a well-founded fear of persecution and to have their cases determined as adults. In *Li, Feng Chai v. M.C.I.* (F.C.T.D., no. IMM-6303-99), Pelletier, November 14, 2001, 2001 FCT 1242, the Court observed that while it would be unreasonable to expect a minor to present evidence with same degree of precision as adults with respect to context, timing, importance and details, it is reasonable to expect a 15-year-old to know the difference between two months and two weeks.

<sup>290</sup> In *Navaratnam, Puvaneswary v. M.C.I.* (F.C.T.D., no. IMM-5645-01), O'Keefe, April 25, 2003, 2003 FCT 523, the Court found that the Board did take into consideration the effect of the passage of time and trauma on the memory of the elderly claimant before it. The Court noted that no psychological or psychiatric evidence was presented by the claimant to help put the inconsistencies in the claimant's testimony into context. In *Ozturk, Erkan v. M.C.I.* (F.C., no. IMM-6343-02), Tremblay-Lamer, October 20, 2003, 2003 FC 1219, the Court stated that a claimant's mental health is of utmost importance in evaluating testimony and credibility. Since the transcript confirmed that on many occasions the claimant was unable to understand the questions, it was unreasonable for the panel to refuse an adjournment request for a medical evaluation.

<sup>291</sup> In *Griffith, Marion v. M.C.I.* (F.C.T.D., no. IMM-4543-98), Campbell, July 14, 1999, the Court stated that in the case of credibility findings with respect to women suffering domestic violence, the reasons must be responsive to what is known about women in this condition (Battered Wife Syndrome), and cited with approval the IRB's Gender Guidelines: *Women Refugee Claimants Fearing Gender-Related Persecution: Update*, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the *Immigration Act*, IRB, Ottawa, November 25, 1996, and continued under paragraph 159(1)(h) of *IRPA*. In *Bennis, Fatima Zohra v. M.C.I.* (F.C.T.D., no. IMM-5825-00), Blais, August 29, 2001, 2001 FCT 968, the Court agreed with *Griffith, supra*, that in assessing the credibility of someone who alleges mistreatment by a her spouse, the panel must not rely on the "objective" standard, but rather on the standard of a person who finds herself in the same situation, namely a mistreated person. See also *Begum, Sultana Nur Niger v. M.C.I.* (F.C.T.D., no. IMM-1774-00), Blais, February 13, 2001, 2001 FCT 59. In *Lubana, Rajwant Kaur v. M.C.I.* (F.C.T.D., no. IMM-2936-02), Martineau, February 3, 2003, 2003 FCT 116, the Court found that the panel had misunderstood that by being "insulted" and "humiliated" by the police, the claimant, a woman from rural India, meant that the police used rude language, whereas her use of euphemisms reflected the fact that her native culture discourages an open discussion of rape. In *Elezi, Astrit v. M.C.I.* (F.C.T.D., no. IMM-770-02), Campbell, February 20, 2003, 2003 FCT 210, the Court noted that, in assessing the evidence of a rape victim, the Board should demonstrate an awareness of what to expect from a rape victim generally, such as the symptoms of Rape Trauma Syndrome, as outlined in the Gender Guidelines.

In *Newton, Freda v. M.C.I.* (F.C.T.D., no. IMM-1159-99), Pelletier, May 25, 2000, the Court stated: "The Guidelines are an aid for the CRDD panel in the assessment of the evidence of women who allege that they have been victims of gender-based persecution. The Guidelines do not create new grounds for finding a person to be a victim of persecution. To that extent, the grounds remain the same, but the question becomes whether the panel was sensitive to the factors which may influence the testimony of women who have been the victims of persecution." The Court further cautioned that "the Guidelines cannot be treated as



### 2.6.3. Assessing the Evidence

The Federal Court has cautioned Board members not to display excessive zeal in an attempt to find contradictions in the claimant's testimony.<sup>295</sup> In *Attakora*, the Court of Appeal recognized that, while members have a difficult task when assessing credibility, the Board "should not be over-

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corroborating any evidence of gender-based persecution so that the giving of the evidence becomes proof of the truth." In *Bennis, Fatima Zohra v. M.C.I.* (F.C.T.D., no. IMM-5825-00), Blais, August 29, 2001, 2001 FCT 968, the claimants' allegations of abuse at the hands of their spouse/father, which were not mentioned in the PIF at all, were found not to be credible. The Court held that the CRDD did not err in not taking into account the Gender Guidelines, since the panel had examined the actions of the husband, not those of the claimants, in making its finding of lack of credibility, and thus the guidelines were not relevant.

<sup>292</sup> *Ngombo, Sunda v. M.C.I.* (F.C.T.D., no. IMM-1874-96), Gibson, January 31, 1997, Reported: *Ngombo v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm.L.R. (2d) 321 (F.C.T.D.); *Kabengele, Mwana v. M.C.I.* (F.C.T.D., no. IMM-1422-99), Rouleau, November 16, 2000.

<sup>293</sup> In *Roble, Ubad Ahmed v. M.E.I.* (F.C.T.D., no. IMM-4004-93), McKeown, September 2, 1994, Reported: *Roble v. Canada (Minister of Employment and Immigration)* (1994), 25 Imm.L.R. (2d) 186 (F.C.T.D.), the Court noted that the CRDD 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. Furthermore, the panel's aggressive questions may have contributed to her evasiveness and hesitancy. In *Montenegro, Suleyama v. M.C.I.* (F.C.T.D., no. IMM-3173-94), MacKay, February 29, 1996, the Court faulted the CRDD for ignoring the claimant's explanation that her knowledge of her father'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."

<sup>294</sup> In *Miwa, Geoffrey v. M.C.I.* (F.C.T.D., no. IMM-3457-98), Rouleau, June 10, 1999, the Court believed that cultural differences and the use of an interpreter could colour the interpretation of allegedly conflicting identity documents. See also *Osarogiagbon, Helen Iyekeoretin v. M.C.I.* (F.C.T.D., no. IMM-1326-98), Reed, June 23, 1999; *Kpawirena-Biokeite, Barthel v. M.C.I.* (F.C.T.D., no. IMM-3910-00), Rouleau, May 15, 2001, 2001 FCT 478. However, in *Baines, Manjit Kaur v. M.C.I.* (F.C.T.D., no. IMM-1146-01), Nadon, May 28, 2002, 2002 FCT 603, the Court noted that problems with interpreters or problems of adaptation and understanding of other cultures have nothing to do with whether a claimant is telling the truth about events which occurred in his or her country.

<sup>295</sup> *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Armson v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm.L.R. (2d) 150 (F.C.A.); *Lai v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 245 (F.C.A.); *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.). In *Assalaarachchi, Sangitha Nadeeshani v. M.C.I.* (F.C.T.D., no. IMM-1924-99), Gibson, February 10, 2000, the Court found that the CRDD relied on "remarkably minute discrepancies" between the claimant's testimony, the PIF narrative and the documentary evidence before it, and essentially disregarded documentary evidence capable of lending substantial weight to the claimant's story.

vigilant in its microscopic examination of persons who...testify through an interpreter and tell tales of horror in whose objective reality there is reason to believe.”<sup>296</sup>

In *Mensah*, the Federal Court made it clear that it is important that the claimant not be placed in a “Catch 22” situation by finding that the claimant is not credible if either too many details or not enough details are provided.<sup>297</sup>

In order to avoid factual errors (caused by delay) and the questioning of credibility decisions by the Court for this reason, in *Sasan*, the Federal Court cautioned the Board to ensure that its decisions are issued in a timely manner.<sup>298</sup>

#### **2.6.4. Questioning by the Board Member and Refugee Protection Officer**

RPD members may ask questions in order to clarify the evidence, to request explanations of the claimant, and to disclose their concerns, thus giving the claimant an opportunity to respond to those concerns.<sup>299</sup>

RPD members have a duty to get at the truth concerning the claims they hear.<sup>300</sup> Thus, extensive and even “energetic” questioning of the claimant by the members, especially in the absence of a Refugee

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<sup>296</sup> *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.), at 169, per Hugessen J.A.

<sup>297</sup> *Mensah, George Akohene v. M.E.I.* (F.C.A., no. A-1173-88), Pratte, Hugessen, Desjardins, November 23, 1989.

<sup>298</sup> In *Sasan, Ahmadian v. M.C.I.* (F.C.T.D., no. IMM-1179-97), Rothstein, January 6, 1998, the CRDD heard the claim in October 1995 and August 1996, and issued its decision in March 1997. (The CRDD had made three significant factual errors in stating the evidence.) See also *Bukaka-Mabiala, Aime v. M.C.I.* (F.C.T.D., no. IMM-4296-98), Rouleau, June 18, 1999, where the Court noted that, in view of the six-month delay between the conclusion of the hearing and the issuance of the decision, a finding of “evasiveness” had to be based more on the Board members’ notes than on their immediate impression of the claimant’s demeanour and conduct when testifying, and thus subject to greater scrutiny.

<sup>299</sup> *Paramo-Martinez, Jose Eduardo v. M.C.I.* (F.C.T.D., no. IMM-1321-99), Lutfy, February 28, 2000; *Neame, Nora Cathia v. M.C.I.* (F.C.T.D., no. IMM-847-99), Lemieux, March 23, 2000. Members may put questions to claimants during examination-in-chief on exclusion issues as well as in adversarial proceedings such as a vacation hearing, provided that the questioning is appropriate. See *Hundal, Manmohan Singh v. M.C.I.* (F.C., no. IMM-3914-02), Dawson, July 16, 2003, 2003 FC 884 (IAD hearing).

<sup>300</sup> In *Maksudur, Rahman v. M.C.I.* (F.C.T.D., no. IMM-5784-98), Nadon, September 8, 1999, the Court stated: “In most refugee claims, the prime issue, if not the only issue, is whether the story related by the [claimant] is true. Consequently, Board members have a duty to the [claimant] and to Canada to employ their best endeavours in the pursuit of that goal...to discover the truth.” In this case, the Court found that the Board members and counsel “did not appear to be interested in posing sufficient questions so as to enable them to determine whether, in fact, the [claimant] was telling a true story. The answers given by the [claimant],

Protection Officer, can be proper and does not constitute grounds for a finding of a reasonable apprehension of bias.<sup>301</sup> Members must, however, remain objective, dispassionate and impartial,<sup>302</sup> and not subject the claimant to constant interruptions, animosity or offensive remarks.<sup>303</sup>

In *Yusuf*,<sup>304</sup> the Court of Appeal reaffirmed the following principles:

- (1) Board members have the right to cross-examine the witnesses they hear but there are limits (p. 683);
- (2) Interruptions during examination-in-chief for purposes of clarifying the answers given are permissible (p. 633);
- (3) The tone and content of questions must be judicious (p. 633);
- (4) Harassing comments to the witnesses and unfair questions to a witness are not acceptable; this type of cross-examination would not be permitted in an adversarial proceeding (p. 636).

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throughout his evidence, are vague and unresponsive. The answers provide ‘generalities’, but no specifics. Part of the reason for this is the inability of those questioning to pose proper questions to the [claimant].”

<sup>301</sup> *Mahendran v. Canada (Minister of Employment and Immigration)* (1991), 14 Imm.L.R. (2d) 30 (F.C.A.), leave to appeal to S.C.C. dismissed February 20, 1992; *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.); *Virk v. Canada (Minister of Employment and Immigration)* (1992), 140 N.R. 290 (F.C.A.); *Kanagasekarampillai, Kumaravelu v. S.S.C.* (F.C.A., no. A-171-91), Heald, Stone, McDonald, April 22, 1994 (the CRDD erred, however, in not allowing claimant’s counsel an opportunity to re-examine the claimant with respect to a new issue raised by the panel’s questions); *Singh, Teja v. M.E.I.* (F.C.T.D., no. 92-T-1537), Joyal, January 10, 1994; *Peraza, Hector Manuel Umana v. M.C.I.* (F.C.T.D., no. IMM-145-94), Richard, October 19, 1994; *Carmona, Teresita Zepeda v. M.E.I.* (F.C.T.D., no. A-1333-92), Nadon, March 22, 1995; *Singh, Ranjit v. M.C.I.* (F.C.T.D., no. A-605-92), Reed, July 23, 1996; *Vijayarajah, Sasitharan v. M.C.I.* (F.C.T.D., no. IMM-4538-98), Tremblay-Lamer, May 12, 1999, Reported: *Vijayarajah v. Canada (Minister of Citizenship and Immigration)* (1999), 50 Imm.L.R. (2d) 113 (F.C.T.D.).

<sup>302</sup> In *Toth, Miklos v. M.C.I.* (F.C.T.D., no. IMM-2394-00), Dawson, March 6, 2001, 2001 FCT 149, the Court stated that there is a “duty imposed on each member of the CRDD to conduct themselves according to the highest standards. Patience, respect and restraint are required at all times.”

<sup>303</sup> *Siba, Rosalie v. M.C.I.* (F.C.T.D., no. IMM-6327-00), Tremblay-Lamer, December 13, 2001, 2001 FCT 1380. The Court stressed that the panel’s questioning must not be used to intimidate the claimant; the hearing must allow a calm dialogue between the claimant and the panel, in an atmosphere that encourages the search for the truth. In *Reginald v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 523 (T.D.), the Court chastised the panel for the insensitivity it demonstrated toward the claimant when she testified as to her alleged rape.

<sup>304</sup> *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629 (C.A.), as summarized in *Mohammad, Selim v. M.C.I.* (F.C.T.D., no. IMM-2390-99), Lemieux, March 16, 2000.

What is permissible behaviour, including the scope and manner of questioning by a Board member, depends on the particular facts of each case.<sup>305</sup> Thus, there may be circumstances where the questioning is excessive or overly aggressive or the interventions are improper (for example, making inappropriate comments or demonstrating an unfavourable attitude).<sup>306</sup>

Sometimes, rather than clarifying, questioning by Board members has resulted in considerable confusion.<sup>307</sup> Such interventions may give rise to an apprehension of bias on the part of the tribunal and to a breach of natural justice.

Refugee Protection Officers have the right to question (cross-examine) the claimant<sup>308</sup> and may, if directed by the RPD, question the claimant first.<sup>309</sup> Their questioning must not, however, overstep

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<sup>305</sup> *Mohammad, Selim v. M.C.I.* (F.C.T.D., no. IMM-2390-99), Lemieux, March 16, 2000 (claimant was represented by an immigration consultant who did not ask any questions flowing out of the PIF and there was no RCO).

<sup>306</sup> *Kumar v. Canada (Minister of Employment and Immigration)*, [1988] 2 F.C. 14 (C.A.) (the Court commented on the “intrusive and intimidating character of the Chairman’s interventions” during examination-in-chief and the Chairman’s “gross interference with the orderly presentation” of the claimant’s case); *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629 (C.A.) (a member made “sexist, unwarranted and highly irrelevant observations”); *Membreno-Garcia v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 306 (T.D.) (the Court commented adversely on the “frequent interruptions” by the panel members); *Mark, Lazarus v. M.E.I.* (F.C.T.D., no. 92-T-1993), Reed, January 24, 1994 (both panel members approached the claim “with hostility” and entered into a “vigorous cross-examination of the claimant and his witnesses”); *Castillo, Leonardo Patino del v. M.E.I.* (F.C.T.D., no. IMM-1431-93), Nadon, April 15, 1994; *Zheng, Xuan Chu v. M.E.I.* (F.C.T.D., no. A-701-91), Jerome, July 20, 1994, Reported: *Zheng v. Canada (Minister of Employment and Immigration)* (1994), 28 Imm.L.R. (2d) 191 (F.C.T.D.); *Mena, Roberto Antonio Polanco v. M.C.I.* (F.C.T.D., no. IMM-4506-94), Reed, May 12, 1995; *Ganji, Shalah Namdar v. M.C.I.* (F.C.T.D., no. IMM-3632-96), Gibson, August 29, 1997 (the panel had seized control of the claimant’s case over the thwarted objection of the claimant’s designated representative); *Chanda, Subodh Kumar v. M.C.I.* (F.C.T.D., no. IMM-3441-99), July 21, 2000 (the transcript revealed “an atmosphere of animosity” and thus raised a concern about a lack of objectivity by the panel); *Farkas, Szilvia v. M.C.I.* (F.C.T.D., no. IMM-5890-99), Heneghan, March 12, 2001, 2001 FCT 190 (the persistent and aggressive questioning by the panel member went too far; the member crossed the line from being an impartial adjudicator to becoming a participant in the arena); *Toth, Miklos v. M.C.I.* (F.C.T.D., no. IMM-2394-00), Dawson, March 6, 2001, 2001 FCT 149 (the transcript did not provide any apparent justification for the presiding member’s interjection into what appeared to be an orderly direct examination conducted by counsel).

<sup>307</sup> In *Mohamed, Haweya Abdi v. M.E.I.* (F.C.A., no. A-43-91), Mahoney, MacGuigan, Linden, February 11, 1993, the Court stated: “The transcript of the hearing... is a shambles, largely due to the aggressive intervention of the members of the panel throughout.” In *Alam, Mohd Saeed v. M.C.I.* (F.C.T.D., no. IMM-4362-96), Rouleau, December 5, 1997, the persistent questioning of the claimant in the circumstances of this case could, in the Court’s opinion, lead to confusion. In *Sawadogo, Salamata v. M.C.I.* (F.C.T.D., no. IMM-4162-00), Rouleau, May 17, 2001, 2001 FCT 497, the Court found that the panel cross-examined the claimant in order to confuse her and to cause her to make a mistake in her testimony.

<sup>308</sup> *Neame, Nora Cathia v. M.C.I.* (F.C.T.D., no. IMM-847-99), Lemieux, March 23, 2000.

the bounds of what is appropriate cross-examination.<sup>310</sup> Refugee Protection Officers are entitled to make submissions on the merits of the claim and to alert the Board as to issues of credibility.<sup>311</sup>

The Chairperson's Guideline *Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*<sup>312</sup> provides:

19. In a claim for refugee protection, the standard practice will be for the RPO to start questioning the claimant. If there is no RPO participating in the hearing, the member will begin, followed by counsel for the claimant. Beginning the hearing in this way allows the claimant to quickly understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.

The Guideline also addresses the order of questioning in other situations (where the Minister intervenes on an issue other than exclusion; where the Minister intervenes on the issue of exclusion; in an application to vacate or cease refugee protection), and allows the Member to vary the order of questioning in exceptional circumstances. These provisions are effective (mandatory) as of June 1, 2004, but a change in the order of questioning can be implemented as of December 1, 2003 with the consent of the parties.

While it is permissible in certain circumstances for RPD members to do their own research into the facts of a case,<sup>313</sup> a member should not secretly initiate a search for evidence which it then intends to use as a basis for questioning the claimant.<sup>314</sup>

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<sup>309</sup> *Morante del Morral, Arturo Manuel v. M.C.I.* (F.C.T.D., no. IMM-2062-97), Dubé, June 4, 1998; *Cruz, Alfredo Santiago v. M.C.I.* (F.C.T.D., no. IMM-3522-98), Teitelbaum, August 4, 1999.

<sup>310</sup> In *De Leon, Luis Francisco Estrada v. M.C.I.* (F.C.T.D., no. IMM-6251-98), Pelletier, July 9, 2000, the Court found that the RCO embarked on a cross-examination worthy of a criminal trial: "It is also true that the refugee claims officer and the tribunal are entitled to cross-examine the [claimant] and, if circumstances require, that cross-examination may be hostile: but a search for the truth should not be confused with harassing the [claimant]."

<sup>311</sup> In *Bader, Erno v. M.C.I.* (F.C.T.D., no. IMM-5305-02), Phelan, February 10, 2004, 2004 FC 214, the Court stated: "The Applicant's contention, that the Officer overstepped his role and thereby biased the proceedings, cannot be made out. The Officer pointed out a number of inconsistencies between statements and documents. However, all the comments of the Officer were directed to alerting the Board as to issues of credibility. The Officer is not a decision maker. Whatever the conduct of the Officer, I cannot find that the Officer so influenced the Board that it did not reach its own conclusions or failed to make its own findings of credibility."

<sup>312</sup> Guideline 7: *Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*, Guidelines issued by the Chairperson Pursuant to Section 159(1)(h) of IRPA, IRB, Ottawa, effective December 1, 2003.

<sup>313</sup> Procedures for investigations of information are set out in the *Instructions for the Acquisition and Disclosure of Information for Proceedings in the Refugee Division* (CRDD Instructions: 96-01).

Alleged breaches of natural justice, such as an apprehension of bias arising out of improper questioning or conduct by a Member or RPO, should be raised at the earliest practicable opportunity, that is generally before the Member at the RPD hearing.<sup>315</sup>

### 2.6.5. The Filter of an Interpreter

The Federal Court has addressed the point that Board members must take into account the fact that the claimant is heard and questioned through an interpreter and that innocent misunderstandings are possible.<sup>316</sup>

Therefore caution should be exercised especially when comparing statements made by a claimant while testifying on different occasions through different interpreters. The same considerations apply to a PIF completed by a claimant with poor language skills.<sup>317</sup>

Board members must ensure that the interpreter is competent and provides a complete and accurate rendering of the testimony.<sup>318</sup> Members have the responsibility to ensure that any interpretation or communication problems that arise at the hearing are addressed and cleared up.<sup>319</sup>

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<sup>314</sup> *Sivaguru, Jegathas v. M.E.I.* (F.C.A., no. A-66-91), Heald, Hugessen, Stone, January 27, 1992, Reported: *Sivaguru v. Canada (Minister of Employment and Immigration)* (1992), 16 Imm.L.R. (2d) 85 (F.C.A.).

<sup>315</sup> *Morante del Morral, Arturo Manuel v. M.C.I.* (F.C.T.D., no. IMM-2062-97), Dubé, June 4, 1998.

<sup>316</sup> *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm.L.R. (2d) 106 (F.C.A.); *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.).

<sup>317</sup> *Benaissa, Karim v. M.C.I.* (F.C.T.D., no. IMM-1339-96), Jerome, April 18, 1997. See, however, *Bourouisa, Moussa v. M.C.I.* (F.C.T.D., no. IMM-1809-96), Nadon, May 23, 1997.

<sup>318</sup> *Ming v. Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 336 (C.A.), also reported as *Xie v. Canada (Minister of Employment and Immigration)* (1990), 10 Imm.L.R. (2d) 284 (F.C.A.); *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.). In *Lin, Zhen Shan v. M.C.I.* (F.C.T.D., no. IMM-5261-98), Evans, July 16, 1999, the Court held that the claimant was prejudiced when the Board did not try to obtain an interpreter who could understand the prayers, recited in an antiquated form of his dialect, that the claimant wanted the Board to hear, and which may have persuaded the Board about the claimant's knowledge of religious practice and overcome other credibility concerns.

<sup>319</sup> *Chen, Bao Guo v. M.C.I.* (F.C.T.D., no. IMM-951-00), Lemieux, April 9, 2001, 2001 FCT 308.

### 3. A FINDING OF “NO CREDIBLE BASIS”

#### 3.1 Overview

The “no credible basis” provision is used where RPD members determine not only that the evidence adduced is insufficient to establish the claim, but also that there is *no* credible or trustworthy evidence on which the claim could have been accepted.<sup>320</sup>

In *Rahaman*,<sup>321</sup> the Court of Appeal rejected the argument that the “no credible basis” provision should be interpreted to include only claims that are manifestly unfounded or clearly abusive. The following are examples of when determinations of “no credible basis” are more likely to be made:

- where the claim is frivolous or where fraud or misrepresentation is involved in the claim;
- where the claimant is completely lacking in credibility; and
- in certain circumstances, where the claimant has not adduced any credible evidence with respect to a required element of the Convention refugee definition (for example, nexus to a Convention ground).

#### 3.2. Legislation

The substance of the “no credible basis” provision in subsection 69.1(9.1) of the *Immigration Act* has not changed with the implementation of *IRPA*. Subsection 107(2) of *IRPA* reads:

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.

Previously, subsection 69.1(9.1) of the *Immigration Act* provided:

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<sup>320</sup> In *Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2002] 3 F.C. 537 (C.A.), at 556, the Court stated:

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. 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. However, the claimant’s evidence on this issue was not central to the Board’s rejection of his claim.

<sup>321</sup> *Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2002] 3 F.C. 537 (C.A.). The Court noted, at p. 563, 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. Further, international law has not clearly defined what is a “manifestly unfounded or clearly abusive” application.

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.

### 3.3. Notice to the Claimant Not Required

The Court of Appeal has held that the Board is not required to give the claimant any special notice before it finds that there was “no credible basis” for the claim.<sup>322</sup> The Court noted that there is no express requirement in the legislation that such a notice be given. Furthermore, a claimant is or should be aware of the risk of a “no credible basis” finding even without any additional notice, as a claimant cannot establish a claim without first establishing a credible basis for that claim. Thus all of the available evidence should already have been placed before the panel as part of the claim.

### 3.4. Application of the Provision

In order for this provision to apply, a member of the RPD<sup>323</sup> must find that:

- (1) the claimant is not a Convention refugee or a person in need of protection; and
- (2) there was no credible or trustworthy evidence on which the claimant could have been determined to be a Convention refugee or a person in need of protection.

It appears that a “no credible basis” finding may be made where the Board’s decision is based mostly on documentary evidence and not strictly on the claimant’s personal credibility.<sup>324</sup> The Federal Court has also upheld decisions where the “no credible basis” finding was based on a lack of nexus to a Convention ground,<sup>325</sup> a lack of subjective fear,<sup>326</sup> or a finding of non-credibility with respect to the claimant’s identity.<sup>327</sup>

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<sup>322</sup> *M.C.I. v. Mathiyabaranam, Shiranjan* (F.C.A., no. A-223-95), Stone, Linden, Gray, December 5, 1997, Reported: *Canada (Minister of Citizenship and Immigration) v. Mathiyabaranam* (1997), 41 Imm.L.R. (2d) 197 (F.C.A.); *Manimaran, Gayathiri v. M.C.I.* (F.C.A., no. A-414-95), Létourneau, Rothstein, McDonald, May 22, 1999.

<sup>323</sup> Previously, under the *Immigration Act*, when the claim was heard by a two-member panel of the CRDD, each member hearing the claim had to make a finding of “no credible basis” for the provision to apply.

<sup>324</sup> In *Gonzalez, Raul del Carmen Arredondo v. M.C.I.* (F.C.T.D., no. IMM-2719-97), Dubé, June 25, 1998, the Court expressed surprise that the panel made a finding of “no credible basis” in these circumstances, but did not overturn the CRDD decision and certified a question relating to this issue.

<sup>325</sup> *Gomez, Jose Luis Torres v. M.C.I.* (F.C.T.D., no. IMM-1826-98), Pinard, April 29, 1999; *Manefo, Sidonie Lorince Donkeng v. M.C.I.* (F.C.T.D., no. IMM-3696-00), Teitelbaum, May 29, 2001, 2001 FCT 538.



Some Federal Court decisions, relying on *Baker*<sup>328</sup> and given the serious consequences of the decision, require the Board to give separate reasons for finding “no credible basis”.<sup>329</sup>

Other Federal Court have held that the “no credible basis” provision does not require a separate determination on the matter of lack of credible basis and, thus, no separate reasons for that conclusion are required. It is sufficient that the reasons support both the conclusions on the claim and those pertaining to the lack of credible basis.<sup>330</sup>

In *Kanvathipillai*,<sup>331</sup> Justice Pelletier concluded that adherence to the test set out by the Court of Appeal in *Rahaman* (discussed below), as to the basis upon which the Board may make a finding of “no credible basis”, will obviate the need for distinct reasons justifying such a finding. In *Kouril*,<sup>332</sup>

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<sup>326</sup> In *Stoica, Valentin v. M.C.I.* (F.C.T.D., no. IMM-1388-99), Pelletier, September 12, 2000, after rejecting the claimant’s explanation regarding the failure to claim in a third country, the CRDD concluded that the claimant did not have a subjective fear of persecution and that the claim did not have a credible basis. The Court held that if the claimant had a subjective fear without an objective basis, there would then be an element of credible proof or sufficient reason for supporting his claim. If there was not a subjective fear, the conclusion of an absence of credible basis would be justified.

<sup>327</sup> *Singh, Prem v. M.C.I.* (F.C.T.D., no. IMM-1768-00), Pinard, March 16, 2001, 2001 FCT 184.

<sup>328</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

<sup>329</sup> *Foyet, Éric Kennedy v. M.C.I.* (F.C.T.D., no. IMM-3004-99), Denault, October 3, 2000; *Geng, Xin v. M.C.I.* (F.C.T.D., no. IMM-300-00), Blanchard, April 2, 2001, 2001 FCT 257; *Siba, Rosalie v. M.C.I.* (F.C.T.D., no. IMM-6327-00), Tremblay-Lamer, December 13, 2001, 2001 FCT 1380.

<sup>330</sup> *M.C.I. v. Mathiyabaranam, Shiranjan* (F.C.A., no. A-223-95), Stone, Linden, Gray, December 5, 1997, Reported: *Canada (Minister of Citizenship and Immigration) v. Mathiyabaranam* (1997), 41 Imm.L.R. (2d) 197 (F.C.A.); *Gomez, Jose Luis Torres v. M.C.I.* (F.C.T.D., no. IMM-1826-98), Pinard, April 29, 1999; *Nizeyimana, Yasina v. M.C.I.* (F.C.T.D., no. IMM-1789-00), Pinard, March 30, 2001, 2001 FCT 259.

<sup>331</sup> *Kanvathipillai, Yogaratnam v. M.C.I.* (F.C.T.D., no. IMM-4509-00), Pelletier, August 16, 2002, 2002 FCT 881. The Court noted that the Court of Appeal decision in *Rahaman* did not specifically deal with the issue of whether reasons had to be given for a finding of “no credible basis”. The Court reasoned that the Court of Appeal’s opinion as to the significance of a “no credible basis” decision, as well as its decision as to the basis upon which the Board could come to such a conclusion militate against the provision of distinct reasons justifying a finding of “no credible basis”.

<sup>332</sup> In *Kouril, Zdenek v. M.C.I.* (F.C.T.D., no. IMM-2627-02), Pinard, June 13, 2003, 2003 FCT 728, the Court noted that the Board correctly found a lack of nexus between the claimant’s fear and the Convention grounds, but did not question the claimant’s credibility, except for his assertion that he would be unable to obtain state protection, and seems to have accepted that he was the victim of organized crime. Thus, it was required to explain explicitly its “no credible basis” finding under s. 69.1(9.1) of the *Immigration Act*, apart from the finding of a lack of nexus.

the Court distinguished *Kanvathipillai* on the basis that the Board had found the claimant's testimony not to be credible before concluding there was no credible basis for the claim.

### 3.5 Interrelation between “Credibility” and “Credible Evidence”

Considerable caution should be exercised when assessing whether there is *no* credible or trustworthy evidence. The fact that a panel finds a claimant's testimony not to be credible does not in itself bring the “no credible basis” provision into play.<sup>333</sup> While the concepts of “credibility” and “credible evidence” are interrelated, and a general finding of lack of credibility can be the basis for the application of that provision,<sup>334</sup> they are not identical concepts.

This matter was clarified in *Rahaman*,<sup>335</sup> where the Court of Appeal held that where the only evidence linking the claimant to the persecution emanates from his or her testimony, rejecting the testimony means there is no longer a link to the persecution, and it then becomes impossible to establish a link between the person's claim and the documentary evidence. However, where there is relevant evidence emanating from sources other than the claimant's testimony which can link his claim to the ongoing persecution of individuals in his or her country, clear and definite rejection of this evidence is required to support the panel's conclusion of “no credible basis”.

[16] *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (C.A.) contains the most authoritative exposition of the “no credible basis” test when it performed the function of screening out claims at the preliminary stage of the determination process. Writing for the Court, MacGuigan J.A. concluded (at page 244) that Parliament had intended subsection 46.01(6) [of the *Immigration Act*] to screen out more than clearly “bogus claims”:

The concept of “credible evidence” is not, of course, the same as that of the credibility of the applicant, but it is obvious that where the only evidence before a tribunal linking the applicant to his claim is that of the applicant himself (in addition, perhaps, to “country reports” from which nothing about the applicant's claim can be directly deduced), a tribunal's perception that he is not a credible witness effectively amounts to a finding that there is no credible evidence on which the second-level tribunal could allow his claim.

I would add that in my view, even without disbelieving every word an applicant has uttered, a first-level panel may reasonably find him so lacking in credibility

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<sup>333</sup> *Foyet, Éric Kennedy v. M.C.I.* (F.C.T.D., no. IMM-3004-99), Denault, October 3, 2000.

<sup>334</sup> *Herve, Mwamba v. M.C.I.* (F.C.T.D., no. IMM-1028-98), Tremblay-Lamer, February 5, 1999; *Hernandez, Manuel Rolando Pineda v. M.C.I.* (F.C.T.D., no. IMM-3020-98), Pinard, April 30, 1999.

<sup>335</sup> *Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2002] 3 F.C. 537 (C.A.). Having concluded that the claimant's credibility was lacking and that no documentary evidence existed to support the allegation of his personal situation in Bangladesh, the Trial Division held that CRDD was not unreasonable in determining the claim had no credible basis. See *Rahaman, Minazur v. M.C.I.* (F.C.T.D., no. IMM-1112-99), Teitelbaum, November 2, 2000.

that it concludes there is no credible evidence relevant to his claim on which a second-level panel could uphold that claim. In other words, a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony. Of course, since an applicant has to establish that all the elements of the definition of Convention refugee are verified in his case, a first-level panel's conclusion that there is no credible basis for any element of his claim is sufficient.

[17] Subsequently, the phrase “no credible basis” as it appears in subsection 69.1(9.1) [of the *Immigration Act*] has been interpreted in accordance with *Sheikh, supra*. Thus, in *Mathiyabaranam v. Canada (Minister of Citizenship and Immigration)* (1997), 41 Imm.L.R. (2d) 197, at paragraph 12 (F.C.A.), Linden J.A. cited *Sheikh, supra*, for the proposition that, “[w]hile credible basis and credibility are not identical, they are clearly connected”. At the very least, *Mathiyabaranam, supra*, is an implicit endorsement of the applicability of *Sheikh, supra*, in the context of subsection 69.1(9.1).

[18] Judges of the Trial Division have expressly held that *Sheikh, supra*, is the applicable approach to the words “no credible basis” in subsection 69.1(9.1)...

[19] Some Judges have noted, however, that because of the change in statutory context *Sheikh, supra*, should not be read broadly so as to relieve the Board of the duty to base a “no credible basis” finding on the totality of the evidence before it. This caution was well articulated in *Foyet v. Canada (Minister of Citizenship and Immigration)*<sup>336</sup> (2000), 187 F.T.R. 181... In this case (at paragraph 19), Denault J. summarized his understanding of the law as follows:

In my view, what *Sheikh*, tells us is that when the only evidence linking the applicant to the harm he or she alleges is found in the claimant's own testimony and the claimant is found to be not credible, the Refugee Division may, after examining the documentary evidence make a general finding that there is no credible basis for the claim. In cases where there is independent and credible documentary evidence, however, the panel may not make a no credible basis finding.

In my view, this is an accurate statement of the law as it has been understood to date, subject to one qualification: in order to preclude a “no credible basis” finding, the “independent and credible documentary evidence” to which Denault J. refers must have been capable of supporting a positive determination of the refugee claim.

[20] The case law to date would therefore seem to be solidly against the position taken on behalf of Mr. Rahaman in this appeal, namely that the Board may not make a “no credible basis” finding if a claim is based on a Convention ground and there is evidence that persecution of the kind alleged has in fact occurred in the country in question.

The Court of Appeal further held:

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<sup>336</sup> *Foyet, Éric Kennedy v. M.C.I.* (F.C.T.D., no. IMM-3004-99), Denault, October 3, 2000. See also *Siba, Rosalie v. M.C.I.* (F.C.T.D., no. IMM-6327-00), Tremblay-Lamer, December 13, 2001, 2001 FCT 1380.

[51] ...the Board should not routinely state that a claim has “no credible basis” whenever it concludes that the claimant is not a credible witness. ...subsection 69.1(9.1) requires the Board 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.

[53] ... Accordingly, I would dismiss the appeal and answer the certified question as follows:

Whether a finding that a refugee claimant is not a credible witness triggers the application of subsection 69.1(9.1) depends on the assessment of all the evidence in the case, both oral and documentary. In the absence of any credible or trustworthy evidence on which each Board member could have determined that the claimant was a Convention refugee, a finding that the claimant was not a credible witness will justify the conclusion that the claim lacks any credible basis.

### **3.6. Consequences of a Finding of “No Credible Basis”**

There are serious consequences for the claimant if the RPD determines that there is “no credible basis” for the claim. A claimant whose claim is rejected by the RPD is ordinarily entitled to stay in Canada pending the outcome of a review of that decision by the Federal Court or the Supreme Court of Canada.

However, when the RPD states in its decision, in accordance with subsection 107(2) of *IRPA*, that there is no credible basis for the claim, the claimant is not automatically entitled to that stay of removal. Therefore, the claimant could be removed from Canada 15 days after notification that the claim has been rejected by the RPD, unless the Court grants a judicial stay on a case-by-case basis.<sup>337</sup>

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<sup>337</sup> See s. 49(2)(c) of *IRPA* and s. 231(2) of the *Immigration and Refugee Protection Regulations*.

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