



Immigration and  
Refugee Board of Canada

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

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# **Interpretation of the Convention Refugee Definition in the Case Law**

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**Including case law up to March 31, 2019**

**Prepared by: IRB Legal Services**

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# CHAPTER 1

## 1. INTRODUCTION

### 1.1. FOREWORD

This paper discusses the definition of Convention refugee,<sup>1</sup> which is incorporated into Canadian law by section 96, 108 and 98 of the *Immigration and Refugee Protection Act* (IRPA).<sup>2</sup>

The interpretation of the Convention refugee definition is an ongoing process of which the Refugee Protection Division (RPD),<sup>3</sup> formerly the Convention Refugee Determination Division (CRDD) and the Refugee Appeal Division (RAD)<sup>4</sup> of the Immigration and Refugee Board of Canada (IRB), are major players. Some issues have been settled by the Courts, others remain unanswered. One of the difficulties in summarizing the basic principles in this area of the law is that many of the Court decisions are fact specific and do not establish general principles of law. In the paper we have described those areas in which the case law is conflicting or unsettled.

The paper identifies those principles of law which are settled and indicates how the Courts have applied those principles to some particular situations. In reading the cases themselves, we caution keeping in mind the need to distinguish between a case that sets out a legal principle and a case that applies the law to particular facts.

Reference will be made to the decisions of the RAD, the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada which interpret the Convention refugee definition. Foreign case law and CRDD/RPD decisions are not generally included in this paper. Where applicable, reference is also made to IRB Chairperson's Guidelines, IRB Jurisprudential Guides, the UNHCR Handbook,<sup>5</sup> and to the relevant IRB Legal Services papers.

Case law on credibility and evidence can be found in the IRB Legal Services papers "*Assessment of Credibility in Claims for Refugee Protections*", dated January 31, 2004, and "*Weighing Evidence*", dated December 31, 2003, available from the IRB's web site <https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/index.aspx>.

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<sup>1</sup> 1951 *Convention Relating to the Status of Refugees*, 189 U.N.T.S. 2545, entered into force on April 22, 1954 and the 1967 *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 8791, entered into force on October 4, 1967. The paper does not deal with cases relating to section 97 of IRPA, that being the section dealing with risk to life, risk of cruel and unusual punishment or treatment, and danger of torture.

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

<sup>3</sup> The RPD is the body in Canada which adjudicates claims in the first instance.

<sup>4</sup> The RAD came into existence on December 15, 2012.

<sup>5</sup> Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, January 1992.

## EXPLANATORY NOTES

- (1) References to “the Court of Appeal” are references to the Federal Court of Appeal. Similarly, references to “the Trial Division” are references to the Federal Court - Trial Division (replaced by the Federal Court).
- (2) Each chapter includes a list, in alphabetical order, of all the cases referred to in the chapter, with appropriate page references.
- (3) In terms of references to the case law, we have adopted the following practice.
  - a) Most cases are identified by their unreported citation (which includes the names of the parties, the court case number, the name of the judge(s) and the date of judgment and, if available, by their neutral citation. For example: *Neri, Juan Carlos Herrera v. M.C.I.* (F.C., no. IMM-9988-12), Strickland, October 23, 2013; 2013 FC 1087.
  - b) Some cases are identified by their official reported citation. For example: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.
  - c) Some of the older cases are also identified by their unofficial reported citation but these citations are not as useful now that cases are generally available in electronic form. For example, *Ward*, in addition to the official reported citation noted above, is also identified as follows: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85.

## 1.2. CONVENTION REFUGEE DEFINITION

### 1.2.1. *Immigration and Refugee Protection Act, s. 96 - meaning of “Convention refugee”*

96. A Convention refugee is a person who by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, is unwilling to avail themselves of the protection of each of those countries, or

(ii) not having a country of nationality, is outside their country of former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

### 1.2.2. *Immigration and Refugee Protection Act, Section 108(1) and (4)- rejection and cessation*

108(1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances;

(a) the person has voluntarily reavailed themselves of the protection of their country of nationality;

(b) the person has voluntarily reacquires their nationality;

(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;

(d) the person has voluntarily become re-established in the country that the person left, or remained outside of and in respect of which the person claimed refugee protection in Canada; or

(e) the reasons for which the person sought refugee protection have ceased to exist.

108(4) Paragraph 1(e) does not apply to a person who establishes that there are compelling reasons arising out of any previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

### 1.2.3. Immigration and Refugee Protection Act, s. 98 – exclusion clauses

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

### 1.2.4. Schedule to the *Immigration and Refugee Protection Act* - exclusion clauses

Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

### 1.2.5. What the Paper Covers

This paper deals with the case law relating to s.96 (sometimes referred to as the inclusion section) and s. 98 (sometimes referred to as the exclusion section). Each chapter deals with a different element of the definition of Convention refugee and there are separate chapters for the exclusion clauses. A chapter on applications to cease refugee status as well as a chapter on applications to vacate a refugee decision are also included.

## 1.3. GENERAL RULES OF INTERPRETATION

The Supreme Court of Canada has dealt with few refugee cases however, a case which raised a number of important issues and provided the Court with the opportunity to offer its unanimous interpretation of the definition of Convention refugee was *Canada (Attorney General) v. Ward*.<sup>6</sup> While the Court did not deal with every aspect of the definition (for example, it did not deal with the exclusion clauses<sup>7</sup>), it did provide us with a general framework of interpretation of the major inclusion components. The Court also commented extensively on the context in which refugee determination takes place and on the nature of Canada's international obligations in this respect.

The following are the general principles enunciated in *Ward*.<sup>8</sup>

### 1.3.1. Surrogate Protection

The rationale underlying the international refugee protection system is that national protection takes precedence over international protection. This "surrogate" or "substitute" protection will only come into play in certain situations where national protection is unavailable.<sup>9</sup> The burden is on the claimant to establish a well-founded fear of persecution in all countries of which the claimant is a citizen.<sup>10</sup>

### 1.3.2. Fear of Persecution for a Convention Reason

Inability of a state to protect its citizens will not be sufficient to engage international protection obligations. There must also be a fear of persecution for a Convention ground.

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<sup>6</sup> *Ward: Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85.

<sup>7</sup> The Supreme Court of Canada has dealt with the issue of exclusion under Article 1 F in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; (1998), 43 Imm. L.R. (2d) 117 (S.C.C.) ; *R. v. Finta*, [1994] 1 S.C.R. 701; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100; 2005 SCC 40; *Ezokola v. Canada (Citizenship and Immigration)*, [2013] 2 S.C.R. 678; and *Febles v. Canada (Minister of Citizenship and Immigration)* 2014 SCC 68. For a discussion of all exclusion issues see Chapters 10 and 11.

<sup>8</sup> Each principle will be discussed in more detail in later chapters of the paper.

<sup>9</sup> *Ward, supra*, footnote 6, at 709.

<sup>10</sup> *Ward, supra*, footnote 6, at 751.

...the international role was qualified by built-in limitations. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals. The need for “persecution” in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants, i.e., individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance, although both of these cases might seem deserving of international sanctuary.<sup>11</sup>

### 1.3.3. Two Presumptions at Play in Refugee Determination

**Presumption 1:** If the fear of persecution is credible (the Court uses the word “legitimate”) and there is an absence of state protection, it is not a great leap “... to presume that persecution will be likely, and the fear well-founded.”<sup>12</sup>

Having established the existence of a fear and a state’s inability to assuage those fears, it is not assuming too much to say that the fear is well-founded. Of course, the persecution must be real - the presumption cannot be built on fictional events - but the well-foundedness of the fear can be established through the use of such a presumption.<sup>13</sup>

**Presumption 2:** Except in situations where the state is in a state of complete breakdown, states must be presumed capable of protecting their citizens. This presumption can be rebutted by “clear and convincing” evidence of the state’s inability to protect.<sup>14</sup>

The danger that [presumption one] will operate too broadly is tempered by a requirement that clear and convincing proof of a state’s inability to protect must be advanced.<sup>15</sup>

### 1.3.4. State Complicity Not Required

“Whether the claimant is ‘unwilling’ or ‘unable’ to avail him- or herself of the protection of a country of nationality,<sup>16</sup> state complicity in the persecution is irrelevant.”<sup>17</sup>

As long as [the] persecution is directed at the claimant on the basis of one of the enumerated grounds, I do not think the identity of the feared perpetrator of

<sup>11</sup> *Ward, supra*, footnote 6, at 731-732.

<sup>12</sup> *Ward, supra*, footnote 6, at 722.

<sup>13</sup> *Ward, supra*, footnote 6, at 722.

<sup>14</sup> *Ward, supra*, footnote 6, at 725-726.

<sup>15</sup> *Ward, supra*, footnote 6, at 726.

<sup>16</sup> With respect to the meaning of the terms “unable”, “unwilling” and “protection”, the Supreme Court of Canada adopts an interpretation of the Convention refugee definition that is consistent with paragraphs 98, 99 and 100 of the UNHCR *Handbook*. See *Ward, supra*, footnote 6 at 718.

<sup>17</sup> *Ward, supra*, footnote 6, at 720.



the persecution removes these cases from the scope of Canada's international obligations in this area.<sup>18</sup>

### **1.3.5. Existence of Fear of Persecution**

State involvement in the persecution, however, "... is relevant ... in the determination of whether a fear of persecution exists."<sup>19</sup> As the Court explains:

It is clear that the lynch-pin of the analysis is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded, and thereby the objective reasonableness of his or her unwillingness to seek the protection of his or her state of nationality.<sup>20</sup>

### **1.3.6. Use of Underlying Anti-Discrimination Law in Interpreting Particular Social Group**

The Supreme Court of Canada, discussing the meaning of "particular social group" makes reference to the fact that "[u]nderlying the Convention is the international commitment to the assurance of basic human rights without discrimination."<sup>21</sup> The Court then quotes with approval from Professors Goodwin-Gill<sup>22</sup> and Hathaway<sup>23</sup> and adopts the approach taken in international anti-discrimination law as an inspiration to interpreting the scope of the Convention grounds.<sup>24</sup>

Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination ...

This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates ...

... the enumeration of specific foundations upon which the fear of persecution may be based to qualify for international protection parallels the approach adopted in international anti-discrimination law...

The manner in which groups are distinguished for the purposes of discrimination law can thus appropriately be imported into this area of refugee law.<sup>25</sup>

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<sup>18</sup> *Ward, supra*, footnote 6, at 726.

<sup>19</sup> *Ward, supra*, footnote 6, at 721.

<sup>20</sup> *Ward, supra*, footnote 6, at 722.

<sup>21</sup> *Ward, supra*, footnote 6, at 733.

<sup>22</sup> Goodwin-Gill, Guy S., *The Refugee in International Law*, (Oxford: Clarendon Press, 1983), p.38.

<sup>23</sup> Hathaway, James C., *The Law of Refugee Status*, (Toronto: Butterworths, 1991), pp. 104-105.

<sup>24</sup> *Ward, supra*, footnote 6, at 734.

<sup>25</sup> *Ward, supra*, footnote 6, at 733-5.

### **1.3.7. Broad and General Interpretation of Political Opinion and Perception of Persecutor**

With respect to the ground “political opinion”, the Court endorses the definition suggested by Professor Goodwin-Gill, i.e., “any opinion on any matter in which the machinery of the state, government, and policy may be engaged” and adds two refinements:

- a) “... the political opinion at issue need not have been expressed outright,” it can be imputed to the claimant;<sup>26</sup>
- b) “the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant’s true beliefs”. The issue must be approached from the perspective of the persecutor.<sup>27</sup>

### **1.3.8. Examiner to Consider the Relevant Grounds**

The Court refers with approval to paragraph 66 of the UNHCR *Handbook*, which states that it is not the duty of the claimant to identify the reasons for the persecution but for the examiner to decide whether the Convention definition is met, having regard to all the grounds set out therein.<sup>28</sup>

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The following are general principles established by cases other than *Ward* and by the *Immigration and Refugee Protection Act*.

### **1.3.9. Section 7 of the Charter**

Given the seriousness of the consequences of a decision rendered by the Refugee Division and the nature of the rights conferred when Convention refugee status is granted, the principles of fundamental justice, as enshrined in section 7 of the *Canadian Charter of Rights and Freedoms*,<sup>29</sup> must be duly respected.<sup>30</sup>

Given the potential consequences for the [claimants] of a denial of [Convention refugee] status if they are in fact persons with a “well-founded fear of

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<sup>26</sup> *Ward, supra*, footnote 6, at 746.

<sup>27</sup> *Ward, supra*, footnote 6, at 747.

<sup>28</sup> *Ward, supra*, footnote 6, at 745.

<sup>29</sup> Section 7 provides that

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

<sup>30</sup> *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, 58 N.R. 1.

persecution”, it seems to me unthinkable that the *Charter* would not apply to entitle them to fundamental justice in the adjudication of their status.<sup>31</sup>

Since the Supreme Court of Canada decision in *Singh*, however, more recent jurisprudence suggests that section 7 of the *Charter* is not engaged at the RPD when the *Charter* argument is based on the consequences of return to the person’s country of nationality, as there are other recourses prior to removal of the claimant.<sup>32</sup>

#### **1.3.10. All Elements of The Definition Must be Met**

To be determined a Convention refugee, a claimant must establish that he or she meets all the elements of the definition. Some aspects of the definition have not received judicial interpretation. Where several interpretations are possible, in choosing the most appropriate one, the Refugee Protection Division should take into account section 3(2) of the *Immigration and Refugee Protection Act*, which lists the objectives of the Act with respect to refugees and section 3(3) which sets out how the Act is to be construed and applied.

#### **1.3.11. Personal Targeting Not Required**

The claimant does not have to establish personal targeting or persecution or that he or she was persecuted in the past or will be persecuted in the future.<sup>33</sup>

#### **1.3.12. Applicable test is “Reasonable or Serious Possibility”**

The applicable test in refugee claims is a “reasonable” or “serious possibility” that the claimant would be persecuted if he or she returned to the country of origin.<sup>34</sup>

#### **1.3.13. Exclusion Clauses**

While Article 1E deals with situations of persons not considered to be in need of refugee protection, Article 1F deals with persons considered not to be deserving of international protection.

#### **1.3.14. International Human Rights Instruments**

Section 3(3)(f) of the *Immigration and Refugee Protection Act* states that the Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory.

<sup>31</sup> *Singh, ibid.*, at 210, per Wilson J.

<sup>32</sup> See, for example, *Laidlow, Roderic v. M.C.I.* (F.C.A. no. A-77-12), Noël, Dawson, Stratas, October 10, 2012; 2012 FCA 256 and *Norouzi, Afshin v. M.C.I.* (F.C. no. IMM-3253-16), Bell; April 18, 2017; 2017 FC 368.

<sup>33</sup> *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (C.A.) at 258.

<sup>34</sup> *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.) at 683.

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## CHAPTER 2

### 2. COUNTRY OF PERSECUTION

#### 2.1. COUNTRY OF NATIONALITY

A claimant must establish that he or she is a Convention refugee from the country of their nationality. In this context, nationality means citizenship of a particular country.<sup>1</sup> If the claimant has a country of nationality, the claim should be assessed only against that country and not against some other country where the claimant may have residency status.<sup>2</sup>

##### 2.1.1. Multiple Nationalities

If a claimant is a national of more than one country, the claimant must show that he or she is a Convention refugee with respect to all such countries. Section 96(a) of the *Immigration and Refugee Protection Act (IRPA)* specifically provides:

96. A Convention refugee is a person who ...

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries.<sup>3</sup>

A refugee claimant must therefore demonstrate that he or she has a well-founded fear of persecution in all countries of nationality before he or she can be conferred refugee protection in Canada.<sup>4</sup> Consequently, the RPD is not required to consider the fear of persecution or availability of

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<sup>1</sup> *Hanukashvili, Valeri v. M.C.I.* (F.C.T.D., no. IMM-1732-96), Pinard, March 27, 1997. The Supreme Court of Canada pointed out in *R. v. Cook*, [1998] 2 S.C.R. 597, at paragraph 42, that, although the terms “nationality” and “citizenship” are often used as if they were synonymous, the principle of nationality is much broader in scope than the legal status of citizenship.

<sup>2</sup> *Hurt v. Canada (Minister of Manpower and Immigration)*, [1978] 2 F.C. 340 (C.A.); *Mensah-Bonsu, Mike Kwaku v. M.E.I.* (F.C.T.D., no. IMM-919-93), Denault, May 5, 1994; *Adereti, Adebayo Adayinka v. M.C.I.* (F.C., no. IMM-9162-04), Dawson, September 14, 2005; 2005 FC 1263. This is subject to a possible exclusion issue arising under Article 1E of the Refugee Convention (see Chapter 10, section 10.1.). In *Sayar, Ahmad Shah v. M.C.I.* (F.C.T.D., no. IMM-2178-98), Sharlow, April 6, 1999, the Court held that since the CRDD found that the claimant was excluded under Article 1E, it did not need to determine whether he had a well-founded fear of persecution in his country of citizenship. In *Liu, Qi v. M.C.I.* (F.C., no. IMM-6390-09), Zinn, August 13, 2010; 2010 FC 819, the Court held that the living arrangements of refugee claimants are not relevant considerations, absent evidence of persecution. The RPD found that there was no evidence that, if the principal claimant returned to China without his daughter, who was a citizen of Argentina, he would experience any difficulty there.

<sup>3</sup> *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. This provision is consistent with the interpretation of the Refugee Convention endorsed by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; 20 Imm. L.R. (2d) 85. The former *Immigration Act*, S.C. 1992, c. 49, s.1, was amended in 1993 to add s. 2(1.1), a provision dealing specifically with “multiple nationalities”.

<sup>4</sup> *Dawlatly, George Elias George v. M.C.I.* (F.C.T.D., no. IMM-3607-97), Tremblay-Lamer, June 16, 1998. In *Soto, Dora Agudin v. M.C.I.* (F.C., no. IMM-3072-10), Beaudry, January 31, 2011; 2011 FC 98, the elderly and mentally infirm claimant was a national of Cuba and Spain. The fact that her mental state made it difficult for

protection in the second country of citizenship, once it has been determined that the claimant does not have a well-founded fear of persecution in the first.<sup>5</sup>

Where the claimant has more than one country of nationality, the Board should not consider the cumulative effects of incidents that occurred in other countries of nationality, except where the events which occur in a country other than in respect of which a claimant seeks refugee status are relevant to the determination of whether the country where a claimant seeks refugee status can protect him or her from persecution.<sup>6</sup>

## 2.1.2. Establishing Nationality

Each state determines under its own laws who are its nationals.<sup>7</sup> Determining nationality is a question of fact.<sup>8</sup> Nationality can be established by examining the relevant laws (constitution, citizenship legislation) and their interpretation (most authoritatively, by officials of the relevant government), and the state practice of the country in question.<sup>9</sup> Possession of a national passport<sup>10</sup>

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her to apply for state protection in Spain did not relieve her of her obligation to seek such protection. Analogous to a minor, she could apply with the assistance of a representative.

<sup>5</sup> *Harris, Dorca v. M.C.I.* (F.C.T.D., no. IMM-1652-97), Teitelbaum, October 31, 1997.

<sup>6</sup> *M.C.I. v. Munderere, Bagambake Eugene* (F.C.A., no. A-211-07), Décary, Létourneau, Nadon, March 5, 2008; 2008 FCA 84.

<sup>7</sup> Article 1 of the *Hague Convention* of 1930 states:

It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.

<sup>8</sup> *Hanukashvili, supra*, footnote 1. See, however, *Nur, Khadra Okiye v. M.C.I.* (F.C., no. IMM-6207-04), De Montigny, May 6, 2005; 2005 FC 636, where the Court stated that it is a matter of law. The Court also stated that since nationality is determined in accordance with the law of the country, it cannot be the subject of specialized knowledge.

<sup>9</sup> *Tit, Victor v. M.E.I.* (F.C.T.D., no. 93-A-17), Noël, June 3, 1993; *Bouianova, Tatiana v. M.E.I.* (F.C.T.D., no. 92-T-1437), Rothstein, June 11, 1993; *Schekotikhin, Valeri v. M.E.I.* (F.C.T.D., no. A-1178-92), McGillis, November 8, 1993; *Kochergo, Sergio Calcines v. M.E.I.* (F.C.T.D., no. IMM-2475-93), Noël, March 18, 1994; *Chavarria, Eduardo Hernandez v. M.C.I.* (F.C.T.D., no. IMM-2192-94), Teitelbaum, January 3, 1995; *Bady-Badila, Bruno v. M.C.I.* (F.C.T.D., no. IMM-5510-01), Noël, April 3, 2003; 2003 FCT 399 (re Guinea); and *Gadeliya, Konstantin Alek v. M.C.I.* (F.C., no. IMM-5905-03), Beaudry, September 7, 2004; 2004 FC 1219 (re Georgia). In *Muhammed Atia, Samir Mamood v. M.C.I.* (F.C., no. IMM-4900-07), Frenette, May 26, 2008; 2008 FC 662, the Court noted the evidence that Palestinians, even if born in Iraq, are not recognized as Iraqi citizens.

<sup>10</sup> *Radic, Marija v. M.C.I.* (F.C.T.D., no. IMM-6805-93), McKeown, September 20, 1994; *Aguero, Mirtha Marina Galdo v. M.C.I.* (F.C.T.D., no. IMM-4216-93), Richard, October 28, 1994. In *Adar, Mohamoud Omar v. M.C.I.* (F.C.T.D., no. IMM-3623-96), Cullen, May 26, 1997, the Court held that, unless its validity is contested, a passport is evidence of citizenship. Thus the onus shifts to the claimant to prove that he or she is of a different citizenship than that indicated in the passport. See also *Yah Abedalaziz, Rami Bahjat v. M.C.I.* (F.C., no. IMM-7531-10), Shore, September 9, 2011; 2011 FC 1066, a case involving a Palestinian claimant who was born in Jordan and had a Jordanian passport. The Court noted that paragraph 93 of the UNHCR Handbook recognizes the existence of a *prima facie* presumption that a passport holder is a national of the country of issue and reiterated the principle that the mere assertion by a passport holder that it was issued as a matter of convenience for travel purposes is not sufficient to rebut the presumption of nationality. In *Lolua, Georgi v. M.C.I.* (F.C., no. IMM-9674-04), Blanchard, November 7, 2005; 2005 FC 1506, the Court discussed the applicability of this presumption in a case where the claimant's passport stated that he was a citizen of the now defunct USSR; there was no evidence on the record to

as well as birth in a country<sup>11</sup> can create a rebuttable presumption that the claimant is a national of that country. However, the claimant can adduce evidence that the passport is one of convenience<sup>12</sup> or that he or she is not otherwise entitled to that country's nationality.<sup>13</sup> Recourse to paragraph 89 of the UNHCR *Handbook*<sup>14</sup> is necessary only when a person's nationality cannot be clearly established.<sup>15</sup>

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establish that since the dissolution of that country, citizens of the USSR are *de facto* citizens of Russia. *Mijatovic, Mira v. M.C.I.* (F.C., no. IMM-4607-05), Russell, June 2, 2006; 2006 FC 685, involved a case where the claimant, born in the former Socialist Republic of Bosnia and Herzegovina, was issued a passport by the Federal Republic of Yugoslavia. The Board concluded that the passport was evidence that the claimant was a citizen of Serbia and Montenegro but the Court held that the Board had misinterpreted the evidence.

Having regard to paragraph 93 of the UNHCR *Handbook*, the Court held in *Mathews, Marie Beatrice v. M.C.I.* (F.C., no. IMM-5338-02), O'Reilly, November 26, 2003; 2003 FC 1387, that a holder of a country's passport is presumed to be a citizen of that country. In *Chowdhury, Farzana v. M.C.I.* (F.C., no. IMM-1730-05), Teitelbaum, September 14, 2005; 2005 FC 1242, the Court held that it was an error to rely on paragraph 93 of the UNHCR *Handbook* to find that the applicant's passport was genuine, despite her statement that it was fake. This provision deals with the presumption of the claimant's nationality once a passport is deemed valid. It then goes on to discuss how to approach a situation where a claimant has a passport that they are claiming is valid but cannot be proven to be so.

It appears that, even if a passport may have been obtained irregularly, effective nationality can be established, provided that the country in question confers on the holder national status and all its attendant rights. See *Zheng, Yan-Ying v. M.C.I.* (F.C.T.D., no. IMM-332-96), Gibson, October 17, 1996. However, that case was distinguished in *Hassan, Ali Abdi v. M.C.I.* (F.C.T.D., no. IMM-5440-98), Evans, September 7, 1999, where the Court noted that the Kenyan Immigration Department only stated that, on the basis of the official's perusal of the file, the claimant appeared to be a citizen; accordingly, if the Kenyan authorities subsequently determine the claimant had not been entitled to a Kenyan passport because he was not a national (as he alleged), he could be deported from that country

<sup>11</sup> *Sviridov, Timur v. M.C.I.* (F.C.T.D., no. IMM-2414-94), Dubé, January 11, 1995. In *Sahal, Shukri Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2722-98), Evans, April 21, 1999, the Court held that while the claimant did not have documents proving her place of birth in Ethiopia and might face some difficulty in satisfying the authorities of her citizenship, she had the obligation to make efforts to obtain documentation to assert her Ethiopian citizenship. In *Chouljenko, Vladimir v. M.C.I.* (F.C.T.D., no. IMM-3879-98), Denault, August 9, 1999, the Court found that the CRDD did not have reasonable grounds, in light of the claimant's and his mother's unequivocal testimony, to require that he make "every possible effort" to obtain documents proving his Armenian citizenship (the claimant was advancing a claim against Armenia).

<sup>12</sup> *Radic, supra*, footnote 10; *Zidarevic, Branko v. M.C.I.* (F.C.T.D., no. IMM-1572-94), Dubé, January 16, 1995. Reported: *Zidarevic v. Canada (Minister of Citizenship and Immigration)* (1995), 27 Imm. L.R. (2d) 190 (T.D.).

<sup>13</sup> *Schekotikhin, supra*, footnote 9. See also *Hassan, supra*, footnote 10 and *Diawara, Aicha Sandra v. M.C.I.* (F.C., no. IMM-2624-17), Brown, December 5, 2017; 2017 FC 1106. If a claimant asserts that they lost or renounced their citizenship, the claimant must produce evidence to establish that. See *Lagunda, Lillian v. M.C.I.* (F.C., no. IMM-3651-04), von Finckenstein, April 7, 2005; 2005 FC 467.

<sup>14</sup> Paragraph 89 of the *Handbook* states in part:

There may, however, be uncertainty as to whether a person has a nationality. ... Where his nationality cannot be clearly established, his refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account.

<sup>15</sup> *Kochergo, supra*, footnote 9.



### 2.1.3. Right to Citizenship

The term “countries of nationality”, in section 96(a) of *IRPA*, includes potential countries of nationality. Where citizenship in another country is available, a claimant is expected to make attempts to acquire it and will be denied refugee status if it is shown that it is within his or her power to acquire that other citizenship. Consequently, a person who is able to obtain citizenship in another country by complying with mere formalities is not entitled to avail themselves of protection in Canada.<sup>16</sup>

In view of its importance and complexity, normally notice should be given before the hearing if multiple nationality is an issue, so as to avoid taking claimants by surprise and allow them an opportunity to obtain evidence relating to that matter.<sup>17</sup>

In the case of *Bouianova*, in the context of the break-up of the former Soviet Union, Justice Rothstein of the Trial Division stated:

In my view, the decision in *Akl*,<sup>18</sup> is wide enough to encompass the situation of [a claimant] who, by reason of her place of birth, is entitled to be a citizen of a particular country, upon compliance with requirements that are mere formalities.

In my view the status of statelessness is not one that is optional for [a claimant]. The condition of not having a country of nationality must be one that is beyond the power of the [claimant] to control. Otherwise, a person could claim statelessness merely by renouncing his or her former citizenship.

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<sup>16</sup> The following approach was recommended in *Nationality and Statelessness: A Handbook for Parliamentarians*, a 2005 publication of the Inter-Parliamentary Union and the United Nations High Commissioner for Refugees (at 10-11):

To be considered a national by operation of law means that an individual is automatically considered to be a citizen under the terms outlined in the State’s enacted legal instruments related to nationality or that the individual has been granted nationality through a decision made by the relevant authorities. Those instruments can be a Constitution, a Presidential decree, or a citizenship act. ...

Whenever an administrative procedure allows for discretion in granting citizenship, applicants for citizenship cannot be considered nationals until their applications have been completed and approved and the citizenship of that State is granted in accordance with the law. Individuals who have to apply for citizenship, and those the law outlines as being eligible to apply, but whose applications are rejected, are not citizens of that State by operation of that State’s law.

In *Lhazom, Tsering v. M.C.I.* (F.C., no. IMM-5457-14), Boswell, July 21, 2015; 2015 FC 886, the Court cautioned against making findings about the content of foreign laws on nothing more than a questionable, literal interpretation of a translated statute.

<sup>17</sup> *El Rafih, Sleiman v. M.C.I.* (F.C., no. IMM-9634-04), Harrington, June 10, 2005; 2005 FC 831; *Sumair, Ghani Abdul v. M.C.I.* (F.C., no. IMM-341-05), Kelen, November 29, 2005; 2005 FC 1607. But see *De Barros, Carlos Roberto v. M.C.I.* (F.C., no. IMM-1095-04), Kelen, February 2, 2005; 2005 FC 283, where the Court found that claimant was not taken by surprise or prejudiced in the circumstances of that case.

<sup>18</sup> *M.E.I. v. Akl, Adnan Omar* (F.C.A., no. A-527-89), Urie, Mahoney, Desjardins, March 6, 1990. In *Akl*, the Court cited *Ward, supra*, footnote 3, and reiterated that a claimant must establish that he or she is unable or unwilling to avail him- or herself of all of his or her countries of nationality.

In a series of decisions, the Trial Division has held that a claimant can be considered to be a national of a successor state<sup>19</sup> (to the country of his or her former nationality), even if he or she does not reside in that successor state, where the evidence establishes that application for citizenship is a mere formality and the authorities of the successor state do not have any discretion to refuse the application.<sup>20</sup>

The Trial Division has also held, in non-successor state contexts, that a legal entitlement to citizenship by birth in a place (*jus soli*),<sup>21</sup> through one's parents or by descent (*jus sanguinis*),<sup>22</sup>

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<sup>19</sup> The dissolution of the USSR resulted in the emergence of 15 new states. The Russian Soviet Federative Socialist Republic (RSFSR) is the “continuing state”, having continued to respect all international treaties of the former state (USSR), and the remaining states are “successor states”. For the purpose of this paper, both the continuing state and the successor states will be referred to as “successor states”.

<sup>20</sup> *Tit*, *supra*, footnote 9 (re Ukraine); *Bouianova*, *supra*, footnote 9 (re Russia); *Zdanov, Igor v. M.E.I.* (F.C.T.D., no. IMM-643-93), Rouleau, July 18, 1994 (re Russia, regardless of the fact that the claimant had not applied for Russian citizenship and had no desire to do so); *Igumnov, Sergei v. M.C.I.* (F.C.T.D., no. IMM-6993-93), Rouleau, December 16, 1994 (re Russia, notwithstanding the existence of the *propiska* system, which the Court found not to be persecutory); *Chipounov, Mikhail v. M.C.I.* (F.C.T.D., no. IMM-1704-94), Simpson, June 16, 1995 (re Russia); *Avakova, Fatjama (Tatiana) v. M.C.I.* (F.C.T.D., no. A-30-93), Reed, November 9, 1995 (re Russia); *Kuznecova, Svetlana v. M.C.I.* (F.C.T.D., no. IMM-2750-99), Pinard, May 17, 2000 (re Russia). Some CRDD decisions have been set aside on judicial review because the evidence did not support the conclusion that citizenship would be granted automatically or as of right, e.g., *Schekotikhin*, *supra*, footnote 9 (re Israel and Ukraine); *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 (T.D.) (re Ukraine); *Solodjankin, Alexander v. M.C.I.* (F.C.T.D., no. IMM-523-94), McGillis, January 12, 1995 (re Russia).

<sup>21</sup> *Kochergo*, *supra*, footnote 9; *Freij, Samir Hanna v. M.E.I.* (F.C.T.D., no. A-1690-92), Jerome, November 3, 1994; *Chavarria*, *supra*, footnote 9; and *De Rojas, Teresa Rodriguez v. M.C.I.* (F.C.T.D., no. IMM-1460-96), Gibson, January 31, 1997.

<sup>22</sup> *Desai, Abdul Samad v. M.C.I.* (F.C.T.D., no. IMM-5020-93), Muldoon, December 13, 1994 (in *obiter*); *Martinez, Oscar v. M.C.I.* (F.C.T.D., no. IMM-462-96), Gibson, June 6, 1996. In *Canales, Katia Guillen v. M.C.I.* (F.C.T.D., no. IMM-1520-98), Cullen, June 11, 1999, the CRDD determined that the claimant had a right to citizenship in Honduras, over the claimant's objections that she had no connection or physical link to Honduras, the country of her mother's birth, and which she had never visited. The Court overturned the CRDD decision because it failed to consider whether the claimant had a well-founded fear of persecution with reference to Honduras.

through marriage,<sup>23</sup> or even through ancestry<sup>24</sup> may also confer effective nationality. One cannot “choose” to be stateless in these circumstances.

Where the country of putative citizenship does not have the discretion to refuse the application for citizenship, the fact that some administrative formalities are required does not preclude the application of the principle that a claimant can be considered to be a national of that country, even if he or she does not reside there.<sup>25</sup> However, the fact that a claimant does not reside in the country of putative citizenship may raise issues regarding residency requirements.<sup>26</sup>

The issue of right to citizenship was explored by the Federal Court of Appeal in *Williams*,<sup>27</sup> where the Court considered the following certified question:

Does the expression “countries of nationality” of section 96 of the *Immigration and Refugee Protection Act* include a country where the claimant can obtain citizenship if, in order to obtain it, he must first renounce the citizenship of another country and he is not prepared to do so?

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<sup>23</sup> *Chavarria, supra*, footnote 9, where the wife’s entitlement to Honduran citizenship, though dependent on her husband’s application for citizenship, only required a *pro forma* application like her husband’s. This is contrasted with *Beliakov, Alexandr v. M.C.I.* (F.C.T.D., no. IMM-2191-94), MacKay, February 8, 1996, where the wife had to do more than simply apply for Russian citizenship; a precondition was that her husband apply for and be granted citizenship which, *semble*, was not automatic in his case. In *Zayatte, Genet Yousef v. M.C.I.* (F.C.T.D., no. IMM-2769-97), McGillis, May 14, 1998. Reported: *Zayatte v. Canada (Minister of Citizenship and Immigration)* (1998), 47 Imm. L.R. (2d) 152 (T.D.), an Ethiopian citizen had married a diplomat from Guinea and thus acquired a diplomatic passport from that country. By the time she made her refugee claim in Canada, she was divorced. Letters from the Guinean embassy indicated that she had lost her diplomatic passport but could retain Guinean nationality if she so wished. However, the embassy had failed to consider that under Guinean law, there was a two-year residency requirement in order to become a naturalized national, and the claimant had never resided in Guinea. The CRDD decision finding her to be a Guinean citizen was therefore overturned.

<sup>24</sup> *Grygorian, Antonina v. M.C.I.* (F.C.T.D., no. IMM-5158-94), Joyal, November 23, 1995. Reported: *Grygorian v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 52 (T.D.).

<sup>25</sup> *Roncagliolo, Carlos Gonzalo Gil v. M.C.I.* (F.C., no. IMM-8667-04), Blanchard, July 25, 2005; 2005 FC 1024.

<sup>26</sup> In *Crast, Adriana Santamaria v. M.C.I.* (F.C., no. IMM-1353-06), Hughes, February 7, 2007; 2007 FC 146, the Court held that the RPD erred by not addressing the issue of what constituted evidence of the residency requirement in an application for reinstatement of Argentine citizenship. The claimant was first required to reside in Argentina, and then make an application to a federal court judge to regain the Argentine citizenship. See also the discussion of *Fabiano* in 2.1.4. *Effectiveness of Nationality*; and *Alvarez, Xiomara v. M.C.I.* (F.C., no. IMM-2388-06), Phelan, March 20, 2007; 2007 FC 296, where the RPD received conflicting evidence on Venezuelan citizenship laws which it had to resolve. Also see *Diawara, supra*, footnote 13 where the Court could not determine how the RPD reached the conclusion that the claimant was able to re-acquire Guinean citizenship given the complexities and variables, including a residency requirement and investigation.

<sup>27</sup> *Williams v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 429 (F.C.A.); 2005 FCA 126. The Federal Court of Appeal overturned *Manzi, Williams v. M.C.I.* (F.C., no. IMM-4181-03), Pinard, April 6, 2004; 2004 FC 511, where the Federal Court had held that, since the claimant had to renounce his Rwandan citizenship in order to regain Ugandan citizenship, Uganda was not a country of nationality. In *Manzi*, the Court did not consider *Chavarria, supra*, footnote 9. In that case, the Federal Court found the claimant had a right to citizenship in Honduras, the country of his birth, notwithstanding the requirement to become domiciled in Honduras, state his intention to recover his Honduran nationality, and renounce his Salvadoran citizenship.

In answering the certified question in the affirmative, the Federal Court of Appeal approved the principle set out in *Bouianova*<sup>28</sup> that refugee protection will be denied where the evidence shows, at the time of the hearing, that it is within the control of the claimant to acquire the citizenship of a particular country with respect to which the claimant has no well-founded fear of persecution.<sup>29</sup> Justice Décarry then elaborated on the appropriate test for determining whether there was a right to citizenship:

[22] I fully endorse the reasons for judgment of Rothstein J. [in *Bouianova*], and in particular the following passage at page 77:

The condition of not having a country of nationality must be one that is beyond the power of the applicant to control.

The true test, in my view, is the following: if it is within the control of the applicant to acquire the citizenship of a country with respect to which he has no well-founded fear of persecution, the claim for refugee status will be denied. While words such as “acquisition of citizenship in a non-discretionary manner” or “by mere formalities” have been used, the test is better phrased in terms of “power within the control of the applicant” for it encompasses all sorts of situations, it prevents the introduction of a practice of “country shopping” which is incompatible with the “surrogate” dimension of international refugee protection recognized in *Ward* and it is not restricted, contrary to what counsel for the respondent has suggested, to mere technicalities such as filing appropriate documents. This “control” test also reflects the notion which is transparent in the definition of a refugee that the “unwillingness” of an applicant to take steps required from him to gain state protection is fatal to his refugee claim unless that unwillingness results from the very fear of persecution itself. Paragraph 106 of the *Handbook on Procedures and Criteria for Determining Refugee Status* emphasizes the point that whenever “available, national protection takes precedence over international protection,” and the Supreme Court of Canada, in *Ward*, observed, at p. 752, that “[w]hen available, home state protection is a claimant’s sole option.”

[23] The principle enunciated by Rothstein J. in *Bouianova* was followed and applied ever since in Canada. Whether the citizenship of another country was obtained at birth, by naturalization or by State succession is of no consequence provided it is within the control of an applicant to obtain it.

The Court also noted that the claimant was not someone who, should he renounce his citizenship, would become stateless. The “control” test was reaffirmed as the correct approach by the Court of Appeal in *Tretsetsang*.<sup>30</sup>

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<sup>28</sup> *Bouianova*, *supra*, footnote 9.

<sup>29</sup> In *Umuhoza, Julienne v. M.C.I.* (F.C., no. IMM-8792-11), Shore, June 5, 2012; 2012 FC 689, the Court agreed with the RPD’s finding that the claimant could automatically regain her citizenship in the DRC, thus following the approach set out in *Williams*, but found that the RPD failed to deal with the further requirement to analyze the protection that the DRC could offer the claimant.

<sup>30</sup> *Tretsetsang, Chime v. M.C.I.* (F.C.A, no. A-260-15), Ryer, Webb, Rennie (dissenting), June 9, 2016; 2016 FCA 175.

Thus, the Board must address whether the claimant has the requisite degree of control over the outcome,<sup>31</sup> and that it is not subject to administrative discretion. If obtaining citizenship is a matter of formalities, then the control should be certain.<sup>32</sup> The Federal Court stated in *Kim*<sup>33</sup>:

[18] The Board member erred in assuming that the question was whether North Koreans could “automatically” obtain South Korean citizenship and that she was required to give a yes or no answer to that question. The proper question is whether or not, on the evidence before the Board, there is sufficient doubt as to the law, practice, jurisprudence and politics of South Korea such that citizenship cannot be considered as automatic or fully within the control of these particular [claimants].

The Court found that there was no certainty as to the outcome. The Court noted that the evidence was not clear that the claimants would automatically be given South Korean citizenship or that the acquisition of such citizenship is entirely within their control. There were considerations as to the “will and desire” to live in South Korea that must be assessed by some official and perhaps the courts, as well as consideration given to the length of time that the claimants resided in China and Canada.

The Refugee Appeal Division (RAD) in a decision<sup>34</sup> that was designated as a Jurisprudential Guide by the IRB Chairperson on December 5, 2016 dealt with the issue of whether North Korean citizens are recognized as citizens by South Korea and concluded that “[A] plain reading of South Korean legislation leads the RAD to conclude the following. First, South Korea’s constitution defines that country’s territory as including the entire Korean peninsula. Second, South Korea’s *Nationality Act* provides that an individual is a national of South Korea if that person’s father or mother is a national of the Republic of Korea at the time of the person’s birth. Read together, these provisions make it clear that an individual born in North Korea to a national of North Korea is deemed a citizen of South Korea as well. Third, the *Protection Act* does not grant or deny citizenship; it clearly considers “protection” as settlement assistance.” (paragraph 74). The RAD found that it was not bound by the Federal Court decision in *Kim* because the RAD had updated information on the issue of nationality and this information makes it clear that the “will and desire” issue was based on an incorrect link between protection under the *Protection Act* and citizenship under the *Nationality Act*.

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<sup>31</sup> In *Dolker, Pema v. M.C.I.* (F.C., no. IMM-6969-13), Hughes, February 2, 2015; 2015 FC 124, the Court agreed with the applicant’s submission that no Canadian authority requires that an applicant must first seek and then be refused citizenship in a safe country where they are entitled to do so before claiming refugee status. However, in *obiter*, it added that although *Williams* speaks to whether it is within the control of a person to acquire citizenship, nothing in that case encourages claimants not to make reasonable efforts to secure such citizenship.

<sup>32</sup> *Craat, supra*, footnote 26.

<sup>33</sup> *Kim, Min Jung v. M.C.I.* (F.C., no. IMM-5625-09), Hughes, June 30, 2010; 2010 FC 720. The Court found that there was no certainty as to the outcome. The Court noted that the evidence was not clear that the claimants would automatically be given South Korean citizenship or that the acquisition of such citizenship is entirely within their control. There were considerations as to the “will and desire” to live in South Korea that must be assessed by some official and perhaps the courts, as well as consideration given to the length of time that the claimants resided in China and Canada.

<sup>34</sup> RAD TB4-05778, Bosveld, June 27, 2016.

If the circumstances are not within a claimant's control, and the authorities are not compelled to grant citizenship, the Board should not consider how the authorities might exercise their discretion.<sup>35</sup> A claimant is not required to demonstrate that it was more likely than not, if they applied, they would not be granted citizenship.<sup>36</sup>

A number of cases have dealt with the situation of claimants who are of Tibetan origin, fear harm in China and have ties (which may or may not amount to nationality) with India. In *Tretsetsang*,<sup>37</sup> the Federal Court of Appeal set out the following approach.

A claimant who alleges the existence of an impediment to exercising his or her rights of citizenship in a particular country must establish, on a balance of probabilities:

- (i) the existence of a significant impediment that may reasonably be considered capable of preventing the claimant from exercising his or her citizenship rights of state protection in that country of nationality; and
- (ii) that the claimant has made reasonable efforts to overcome such impediment and that such efforts were unsuccessful such that the claimant was unable to obtain the protection of that state.

The Court reformulated the certified question as follows. "Is any impediment that a refugee claimant may face in accessing state protection in a country, in which that claimant is a citizen

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<sup>35</sup> *Khan, Deachon Tsering v. M.C.I.* (F.C., no. IMM-4202-07), Lemieux, May 8, 2008; 2008 FC 583, where the Court held that because acquisition of citizenship by marriage was the basis of the applicant's claim to citizenship in Guyana, this negated the existence of control. The Court stated: "The determining error the tribunal made was to trespass upon forbidden territory when, after recognizing the authorities in Guyana were not compelled on her application to grant Mrs. Khan citizenship, it (the tribunal) could opine how the Minister in Guyana might exercise the discretion conferred upon him. Such circumstances are not within her control." *Khan* was distinguished in *Ashby* where the Court held that the applicant was a Guyanese citizen by birth and had never officially renounced it. The Court also stated that even if she had lost it due to acquiring another nationality, it was within her control to reacquire it by obtaining "remigrant status." See *Ashby, Tomeika v. M.C.I.* (F.C. no. IMM-3169-10), Near, March 9, 2011; 2011 FC 277.

<sup>36</sup> *M.C.I. v. Hua Ma, Shirley Wu Cai* (F.C., no. IMM-4223-08), Russell, July 29, 2009; 2009 FC 779. In a case involving a Somali claimant who was born in Somalia, the RPD found him to be a citizen of Ethiopia by virtue of the *Ethiopian Constitution* which provides that if the parents are born in Ethiopia, the offspring are considered to be citizens. The RPD found he was not a citizen of Somalia even though the Somali *Citizenship Act* would consider his parents, who were born in the Ogaden region, to be Somali. The Court found that the RPD failed to consider whether the possibility that the claimant could acquire Ethiopian citizenship was realistic in the circumstances (the parents were born in the desert and the claimant had no supporting documentation about where they were born). See *Hogjeh, Samir Nur v. M.C.I.* (F.C., no. IMM-6550-10), O'Reilly, June 9, 2011; 2011 FC 665.

<sup>37</sup> *Tretsetsang, supra*, footnote 30. Also see *Dakar, Tenzin v. M.C.I.* (F.C., no. IMM-3062-16), Gleeson, April 7, 2017; 2017 FC 353 where the Court found the fact the claimant, a Tibetan, obtained a legal opinion regarding his inability to be granted citizenship in India did not constitute a reasonable effort in the context of that case. In *Khando, Tenzin v. M.C.I.* (F.C. no. IMM-1130-18), Fothergill, December 6, 2018; 2018 FC 1223, the Court found the RPD's conclusion that the claimant, a Tibetan, had not made reasonable efforts to acquire Indian citizenship to be reasonable. Her attempts to obtain citizenship were limited to making enquiries of the Consulate General of India in Toronto shortly before the PRD hearing and asking her father whether he could produce her Indian birth certificate.

sufficient to exclude that country from the scope of the expressions “countries of nationality” and “country of nationality” in s. 96 of the IRPA?” and answered it in the negative.

What will constitute reasonable efforts to overcome a significant impediment can only be determined on a case-by-case basis. A claimant will not be obligated to make any effort to overcome such impediment if the claimant establishes that it would not be reasonable to require such efforts.

In *Shaheen*,<sup>38</sup> the RPD applied the test in *Tretsetsang* to a claim where the claimant was a Palestinian born in Kuwait, but his mother was an Egyptian citizen. Egyptian laws allowed citizenship for Palestinians with Egyptian mothers, but the claimant alleged he did not enjoy “effective citizenship” due to his inability to secure a passport. The RPD rejected his claim, finding he had not made reasonable efforts to overcome the impediments, including not attempting to make written appeals to the Egyptian government and not attending the Kuwaiti embassy in Canada to obtain a birth certificate. The Court quashed the decision, noting that the claimant had asked Egyptian officials on different occasions for assistance and had made attempts to obtain an updated birth certificate.

### 2.1.3.1. Israel’s Law of Return

In *Grygorian*,<sup>39</sup> the Trial Division found reasonable the CRDD’s decision holding that Israel’s Law of Return conferred a right to citizenship on a Russian-born claimant of Jewish origin who had never expressed an intention to immigrate to Israel and who had never resided there. The Court viewed this as an application of the principle in *Bouianova*.

The *Grygorian* decision was found not to be a binding precedent and was not followed in *Katkova*,<sup>40</sup> where the Court again considered Israel’s Law of Return in the context of a Jewish citizen of Ukraine who did not wish to go to Israel. This factor was considered to be crucial given that the Law of Return stated that the desire to settle in Israel was a prerequisite to immigration. The Court also drew a distinction between potential rights and pre-existing status as a national of a particular country—that is, between potential as opposed to actual nationality, and stated that *Ward* (SCC) did not deal with potential nationality. Moreover, the Court was of the view that there had to be a genuine connection or link with the home state.<sup>41</sup> Finally, the Court held that the Law

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<sup>38</sup> *Shaheen, Imadeddin A.M. v. M.C.I.* (F.C. no. IMM-5241-17), Favel, August 24, 2018; 2018 FC 858.

<sup>39</sup> *Grygorian, supra*, footnote 24, at 55.

<sup>40</sup> *Katkova, Lioudmila v. M.C.I.* (F.C.T.D., no. IMM-3886-96), McKeown, May 2, 1997. Reported: *Katkova v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 216 (T.D.).

<sup>41</sup> The requirement of showing a “genuine link” is not addressed extensively in Canadian jurisprudence, although the principle was quoted with approval in *Crast, supra*, footnote 26. The term “genuine and effective link” was first enunciated in the *Nottebohm* case (International Court of Justice Reports, 1955, at 23), in the context of opposability between states, as a means of characterizing citizenship attribution which should be recognized at the international level. The concept, as extrapolated from that case and the nationality practice of states in general, has since been molded and shaped into a broader principle in international law. The concept of an ascertainable tie between the individual and a state is an important doctrine in the area of nationality law. This doctrine is based upon principles embodied in state practice, treaties, case law and general principles of law. The genuine and effective link between an individual and a state manifested by factors such as birth and/or

of Return conferred a discretionary power on the Israeli Minister of the Interior to deny citizenship. The CRDD's decision that Israel was a country of nationality for the claimant was overturned.

#### **2.1.4. Effectiveness of Nationality**

In *Ward*, the Supreme Court of Canada held that a valid claim against one country of nationality will not fail if the claimant is denied protection (e.g., by being denied admission) by another country of which he or she is a national.<sup>42</sup> After citing *Ward* and James C. Hathaway's *The Law of Refugee Status*,<sup>43</sup> the Trial Division in *Martinez*,<sup>44</sup> appeared to accept that there is a need to ensure that a state of citizenship accords effective, rather than merely formal nationality, as well as to assess any evidence impeaching that state's protection against return to the country of persecution.

In *Fabiano*,<sup>45</sup> the RPD did not consider the merits of the claim of an Argentinean national in relation to Argentina, because they determined he was entitled to Italian citizenship since his parents had emigrated to Argentina from Italy. There was no evidence to support a finding that the claimant could go to Italy and stay there long enough to make a citizenship claim. The claimant feared that, if he went back to Argentina, he would be killed long before he could obtain Italian citizenship, a process that was complex and would take a long time. The Federal Court remitted the matter back to the Board to consider what will happen to the claimant if he applies for Italian citizenship.

#### **2.1.5. Failure to Access Possible Protection in a Third Country**

There is some confusion in the case law of the Federal Court as to whether or not an adverse inference can be drawn from the failure to access possible protection or status in a third country, in cases where there is no automatic right to citizenship.

In *Basmenji*,<sup>46</sup> 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 before making a refugee claim in Canada. A similar position was taken in *Priadkina*,<sup>47</sup> 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.

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descent, and often including habitual residence, is reflected to some degree in a majority of domestic nationality legislation.

<sup>42</sup> *Ward, supra*, footnote 3, at 754.

<sup>43</sup> Toronto: Butterworths, 1991, page 59.

<sup>44</sup> *Martinez, supra*, footnote 22, at 5-6.

<sup>45</sup> *Fabiano, Miguel v. M.C.I.* (F.C., no. IMM-7659-04), Russell, September 14, 2005; 2005 FC 1260.

<sup>46</sup> *Basmenji, Aiyoub Choubdari v. M.C.I.* (F.C.T.D., no. IMM-4811-96), Wetston, January 16, 1998.

<sup>47</sup> *Priadkina, Yioubov v. M.C.I.* (F.C.T.D., no. IMM-2034-96), Nadon, December 16, 1997.



However, in *Moudrak*,<sup>48</sup> the Court held that the CRDD did not err in taking into account the failure of the claimant, a national of Ukraine of Polish descent, to investigate the possibility of acquiring 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*,<sup>49</sup> 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*,<sup>50</sup> 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 a refugee from Somalia, had married a Kenyan citizen and had two Kenyan children.

On the other hand, in *Pavlov*,<sup>51</sup> the Court held that the CRDD’s conclusion about the lack of credibility of the Russian Jewish claimants (who, according to the CRDD, “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*, but did not refer to *Moudrak* and *Osman*.

## 2.2. FORMER HABITUAL RESIDENCE – STATELESS PERSONS

A consideration of former habitual residence is only relevant where the claimant is stateless.<sup>52</sup> A stateless person is someone who is not recognized by any country as a citizen.<sup>53</sup> Section 96(b) of *IRPA* states:

96. A Convention refugee is a person who ...

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

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<sup>48</sup> *Moudrak, Vanda v. M.C.I.* (F.C.T.D., no. IMM-1480-97), Teitelbaum, April 1, 1998.

<sup>49</sup> *Osman, Abdalla Abdelkarim v. M.C.I.* (F.C.T.D., no. IMM-527-00), Blanchard, March 22, 2001; 2001 FCT 229.

<sup>50</sup> *Kombo, Muhammad Ali v. M.C.I.* (F.C.T.D., no. IMM-4181-00), McKeown, May 7, 2001; 2001 FCT 439.

<sup>51</sup> *Pavlov, Igor v. M.C.I.* (F.C.T.D., no. IMM-4401-00), Heneghan, June 7, 2001; 2001 FCT 602.

<sup>52</sup> A case where the RPD erred in considering the claim against Greece (where the claimant had resided without status) instead of Bangladesh, where he would be considered a citizen because he was Bihari (Urdu speaker), is *Choudry, Robin v. M.C.I.* (F.C., no. IMM-2353-11), Russell, December 2, 2011, 2011 FC 1406.

<sup>53</sup> *Lin, Yu Hong v. M.C.I.* (F.C.T.D., no. IMM-1855-94), Reed, December 12, 1994. The definition of “stateless person”, found in the 1954 United Nations *Convention Relating to the Status of Stateless Persons*, in Article 1, states:

For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its laws.

Note that residency in a country may also be a relevant factor when considering exclusion under Article 1E of the Convention (see Chapter 10, section 10.1.).

If the claimant is a citizen of the country in which he or she resided, the claim is properly assessed on the basis that the claimant has a country of nationality.<sup>54</sup>

### 2.2.1. Principles and Criteria for Establishing Country of Former Habitual Residence

In the *Maarouf*<sup>55</sup> decision, Justice Cullen of the Trial Division, after an extensive review of the legal principles and authorities, endorsed the following propositions:

In my view, the concept of “former habitual residence” seeks to establish a relationship to a state which is broadly comparable to that between a citizen and his or her country of nationality. Thus the term implies a situation where a stateless person was admitted to a given country with a view to continuing residence of some duration, without necessitating a minimum period of residence.

... a “country of former habitual residence” should not be limited to a country where the claimant initially feared persecution. Finally, the claimant does not have to be legally able to return to a country of former habitual residence as a denial of a right of return may in itself constitute an act of persecution by the state. The claimant must, however, have established a significant period of *de facto* residence in the country in question.<sup>56</sup>

The phrase “significant period of *de facto* residence” was recently considered in *Al-Khateeb*.<sup>57</sup> The Court stated that “significant” can mean something other than a substantial period of time and that a short period can be significant.

The Trial Division has held, in a number of decisions, that a country may be a country of former habitual residence even if the claimant is not legally able to return to that country.<sup>58</sup>

A country can be a country of former habitual residence even though it is a successor state to a larger country which the claimant left.<sup>59</sup>

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<sup>54</sup> *Gadeliya, supra*, footnote 9.

<sup>55</sup> *Maarouf v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 723 (T.D.); (1993), 23 Imm. L.R. (2d) 163 (F.C.T.D.).

<sup>56</sup> *Maarouf, ibid.*, at 739-740.

<sup>57</sup> *Al-Khateeb, Mahmoud Issa Ahmad v. M.C.I.* (F.C. no., IMM-2962-16), Simpson, January 11, 2017; 2017 FC 31.

<sup>58</sup> *Maarouf, supra*, footnote 55; *Bohaisy, Ahmad v. M.E.I.* (F.C.T.D., no. IMM-3397-93), McKeown, June 9, 1994; *Ibrahim, Ali Ibrahim Khalil v. S.S.C.* (F.C.T.D., no. IMM-4190-93), Pinard, July 8, 1994. Reported: *Ibrahim v. Canada (Secretary of State)* (1994), 26 Imm. L.R. (2d) 157 (F.C.T.D.); *Zdanov, supra*, footnote 20; *Shaat, Rana v. M.E.I.* (F.C.T.D., no. A-539-92), McGillis, August 4, 1994. Reported: *Shaat v. Canada (Minister of Employment and Immigration)* (1994), 28 Imm. L.R. (2d) 41 (T.D.); *El Khatib, Naif v. M.C.I.* (F.C.T.D., no. IMM-5182-93), McKeown, September 27, 1994; and *Desai, supra*, footnote 22.

<sup>59</sup> *Lenyk, Ostap v. M.C.I.* (F.C.T.D., no. IMM-7098-93), Tremblay-Lamer, October 14, 1994. Reported: *Lenyk v. Canada (Minister of Citizenship and Immigration)* (1994), 30 Imm. L.R. (2d) 151 (T.D.), where the claimants had left Ukraine when it was part of the USSR. Justice Tremblay-Lamer stated at 152: “The change of name of

## 2.2.2. Multiple Countries of Former Habitual Residence

The Federal Court of Appeal in *Thabet*<sup>60</sup> clarified the conflicting case law emanating from the Trial Division<sup>61</sup> regarding the country of reference in claims made by stateless persons who have habitually resided in more than one country. The Court of Appeal answered the certified question put to it as follows:

In order to be found to be a Convention refugee, a stateless person must show that, on a balance of probabilities he or she would suffer persecution in any country of former habitual residence, and that he or she cannot return to any of his or her other countries of former habitual residence. (At 40.)

The Court of Appeal considered four options—the first country, the last one, all the countries, or any of the countries—but rejected all of them. Instead it adopted as a test what it termed “any country plus the *Ward* factor” as being consistent with the language of the Convention refugee definition and the teachings of the Supreme Court of Canada in *Ward*. Justice Linden expressed the Court’s ruling in another way in the reasons for judgment:

If it is likely that a person would be able to return to a country of former habitual residence where he or she would be safe from persecution, that person is not a refugee. This means that the claimant would bear the burden ... of showing on a balance of probabilities that he or she is unable or unwilling to return to any country of former habitual residence. (At 39.)

In effect, this means that if a stateless person has multiple countries of former habitual residence, the claim may be established by reference to any such country. However, if the claimant is able to return to any other country of former habitual residence, the claimant must, in order to establish the claim, also demonstrate a well-founded fear of persecution there.

The Trial Division applied the principles of the *Thabet* decision in *Elbarbari*.<sup>62</sup> Since the claimant could not return to any of the three countries in which he had formerly resided, the CRDD erred by not considering his fear of persecution in Iraq, after finding that the claimant did not have a well-founded fear of persecution in Egypt and the United States.

It is an error to apply the reasoning in *Zeng*,<sup>63</sup> a case dealing with exclusion under Article 1 E (see chapter 10), to a determination about multiple countries of former habitual residence under

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the country does not change the fact that it was the place where the [claimants] always resided prior to coming to Canada, and therefore it is their country of former habitual residence.”

<sup>60</sup> *Thabet v. Canada (Minister of Employment and Immigration)*, [1998] 4 F.C. 21 (C.A.); 48 Imm. L.R. (2d) 195 (F.C.A.).

<sup>61</sup> *Maarouf, supra*, footnote 55; *Martchenko, Tatiana v. M.C.I.* (F.C.T.D., no. IMM-3454-94), Jerome, November 27, 1995 (any country); *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1996] 1 F.C. 685 (T.D.) (the last country).

<sup>62</sup> *Elbarbari, Sohayl Farouk S. v. M.C.I.* (F.C.T.D., no. IMM-4444-97), Rothstein, September 9, 1998.

<sup>63</sup> *M.C.I. v. Zeng, Guanqiu* (F.C.A., no. A-275 09). Noël, Layden-Stevenson, Stratas, May 10, 2010; 2010 FCA 118.

*Thabet* (CA). In *Alsha'bi*,<sup>64</sup> in response to the Minister's argument that the Respondents had deliberately allowed their status to expire and that *Zeng* should apply when the RPD is considering the loss of status in countries of former habitual residence, the Court found that *Thabet*, not *Zeng*, is the applicable case law. Unlike *Zeng*, *Thabet* simply requires that the tribunal ask why the claimant cannot return to the country of their former habitual residence.

### 2.2.3. Nature of Ties to the Country

The Federal Court has not yet treated comprehensively the nature of the ties required for a country to constitute a country of former habitual residence in cases where there are two or more countries in which the claimant has resided. However, it is suggested that, at a minimum, the assessment include the factors mentioned in *Maarouf*, namely, whether the person was admitted into the country for the purpose of continuing residence of some duration (without necessitating a minimum period of residence), and whether there was a significant period of *de facto* residence. On the other hand, there is no requirement that the claimant be legally able to return.

In *Al-Khateeb*,<sup>65</sup> a case involving a stateless Palestinian who was born in Gaza and had lived there for 6 months before the family moved to Qatar, the Court allowed the judicial review application on the basis that the Board should have considered Gaza as a potential country of former habitual residence. The Court noted that “a period of residence can acquire significance for reasons other than longevity.”<sup>66</sup>

A country cannot qualify as a country of former habitual residence if the claimant never resided there.<sup>67</sup>

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<sup>64</sup> *M.C.I. v. Alsha'bi, Hanan* (F.C., no. IMM-2032-15), Strickland, December 14, 2015; 2015 FC 1381.

<sup>65</sup> *Al-Khateeb, supra*, footnote 57. *Al-Khateeb* was distinguished in *Qassim, Wasam F Y Sheikh v. M.C.I.* (F.C., no. IMM-2311-17), Kane, February 28, 2018; 2018 FC 226, where the Court rejected the argument that family ties are more important than the duration of residence. In that case, the Court found that, unlike in *Al-Khateeb*, where the claimant had been born in and had resided in Gaza for a brief time, in *Qassim* the claimants' two visits to Iraq totaling 13 weeks for vacation and to visit family did not amount to *de facto* residence.

<sup>66</sup> The Court found that the RAD had failed to consider the following factors:

- there can be more than one CFHR (country of former habitual residence);
- the Applicant's birth in Gaza gives him status akin to nationality;
- his rights of return and residence are also akin to the rights associated with citizenship;
- there is no minimum period for residence to establish a CFHR;
- CFHR's are “former”. The fact that he was a habitual resident of Gaza many years ago is not a bar to it being a CFHR; and
- he has family in Gaza and he is Palestinian.

<sup>67</sup> *Kadoura, Mahmoud v. M.C.I.* (F.C., no. IMM-4835-02), Martineau, September 10, 2003; 2003 FC 1057. This was so even though the claimant, a stateless Palestinian born in the United Arab Emirates, had a travel and other documents issued by the Lebanese authorities. Although he had a right to reside in Lebanon, the claimant had never resided there. In similar circumstances in *Cehade, Ahmad v. M.C.I.* (F.C., no. IMM-2617-16), Strickland, March 16, 2017; 2017 FC 282 the Court held that the claimants had only visited Lebanon for vacation and to see family and, as such, had not established a *de facto* residence there. See also *Salah, Mohammad v. M.C.I.* (F.C., no. IMM-6910-04), Snider, July 6, 2005; 2005 FC 944.

In *Kruchkov*,<sup>68</sup> the Trial Division held that the determination of one's country of former habitual residence is a question of fact, not of law.

#### 2.2.4. Subsisting Well-Founded Fear of Persecution

Statelessness *per se* does not give rise to a claim to refugee status: the claimant must demonstrate a well-founded fear of persecution based on a Convention ground.<sup>69</sup> Alternatively, the claimant must be outside his or her country of former habitual residence for a Convention reason.<sup>70</sup>

#### 2.2.5. Evidence of Persecution for a Convention Reason

A denial of a right to return may, in appropriate circumstances, in itself constitute an act of persecution by the state.<sup>71</sup> However, for it to be the basis of a claim, the refusal must be based on

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<sup>68</sup> *Kruchkov, Valeri v. S.G.C.* (F.C.T.D., no. IMM-5490-93), Tremblay-Lamer, August 29, 1994. This decision was followed in *Tarakhan, Ali v. M.C.I.* (F.C.T.D., no. IMM-1506-95), Denault, November 10, 1995. Reported: *Tarakhan v. Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm. L.R. (2d) 83 (F.C.T.D.), at 86. In that case, the Court upheld the CRDD's decision that the only relevant country was Jordan, where the claimant, a stateless Palestinian, was born and resided until age 23; he then moved to different posts as directed by his employer, the PLO (1 year in Lebanon, 2 years in Yemen, and 5 years in Cyprus), before leaving for Holland where he made an unsuccessful refugee claim. In *Thabet* (T.D.), *supra*, footnote 61, the Trial Division upheld the CRDD's decision that the claimant was a former habitual resident of the United States, since he had resided there for 11 years, first as a student, and then as a visitor and refugee claimant; while there, he married twice, held a social security card, and filed income tax returns (The Court of Appeal overturned this decision on other grounds). In *Absee, Mrwan Mohamed v. M.E.I.* (F.C.T.D., no. A-1423-92), Rouleau, March 17, 1994, the claimant, a stateless Palestinian, was born in the Occupied Territories, moved to Jordan at age 6, and resided for short periods in Kuwait (on a temporary basis) and in the United States (illegally). The CRDD's decision to assess the claim only against Jordan was upheld. In *Alusta, Khahil v. M.E.I.* (F.C.T.D., no. A-779-92), Denault, May 16, 1995, the stateless Palestinian-born claimant lived in Germany for 20 years, and then in Morocco for 14 years, with his Moroccan wife and 4 children, on the basis of a residence permit renewable annually on proof of employment. The Court upheld the CRDD's decision that Morocco was a country of former habitual residence.

In *Marchoud, Bilal v. M.C.I.* (F.C., no. IMM-10120-03), Tremblay-Lamer, October 22, 2004; 2004 FC 1471, the claimant was a stateless Palestinian, who was born and lived in Lebanon until age four. He spent the majority of his life until age 23 in the United Arab Emirates (1980-1998), before becoming a university student in the United States (1998-2001), having returned to Lebanon only for a period of one week. The Court upheld the RPD's decision that the only country of former habitual residence was the UAE, and that Lebanon was not such a country notwithstanding the fact that the claimant had travel documents issued by the Lebanese authorities and could reside there. Since the panel had concluded that the claimant could return to the UAE, it was not obligated to analyze the possibility of *refoulement* to Lebanon by the UAE. In *Daoud, Senan v. M.C.I.* (F.C., no. IMM-6450-04), Mosley, June 9, 2005; 2005 FC 828, the Court did not fault the RPD by referring to Jordan as a place to which the stateless claimant could return, as he travelled with a Jordanian passport and had transited Jordan to reach the United States and Canada. Should he be removed from Canada, presumably it would be first to the United States, and from there to Jordan. It was, therefore, appropriate to consider whether he had any real fear of persecution in Jordan, even though the passport gives him no rights as a national and no right to live there.

<sup>69</sup> *Arafa, Mohammed v. M.E.I.* (F.C.T.D., no. A-663-92), Gibson, November 3, 1993, at 4; *Lenyk, supra*, footnote 59, at 152; *Thabet, supra* footnote 60. See also UNHCR *Handbook*, paragraph 102.

<sup>70</sup> *Maarouf, supra*, footnote 55, at 737.

<sup>71</sup> *Maarouf, supra*, footnote 55, at 739-740; *Abdel-Khalik, Fadya Mahmoud v. M.E.I.* (F.C.T.D., no. IMM-883-93), Reed, January 31, 1994. Reported: *Abdel-Khalik v. Canada (Minister of Employment and Immigration)*

a Refugee Convention ground, and not be related simply to immigration laws of general application.<sup>72</sup>

In *Thabet*,<sup>73</sup> the Court of Appeal held that the CRDD had addressed that question adequately when it found that the claimant could not return to Kuwait because he lacked a valid residency permit. In *Wahgmo*,<sup>74</sup> the Court found that the evidence supported the RAD's conclusion that the applicant had not demonstrated she could not likely return to India and because she could likely return, it was unnecessary to consider whether her inability to return constitutes persecution. A recent application to return to one's country of former habitual residence is not a requirement: a claimant can rely on earlier unsuccessful attempts by family members as well as on documentary evidence.<sup>75</sup>

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(1994), 23 Imm. L.R. (2d) 262 (T.D.), at 263-264; *Thabet* (T.D.), *supra*, footnote 61 at 693; *Thabet* (C.A.), *supra*, footnote 60 at 41; *Chehade*, *supra*, footnote 67 at 29.

<sup>72</sup> In *Arafa*, *supra*, footnote 69, the claimant's continued permission to remain in the United Arab Emirates, once he turned 18, was dependent upon the continuation of his education or obtaining a work permit and employment there; his last one-year authorization became invalidated when he resided outside the UAE for more than 6 months. For a similar fact situation, see also *Kadoura*, *supra*, footnote 67, where the Court noted that the United Arab Emirate's cancellation of, or failure to issue, a residence permit was not an act of persecution, but a direct consequence of the decision of the claimant, who chose to leave the UAE to come to Canada to study. Furthermore, the conditions imposed by the UAE (that the person have a work permit or be enrolled in full-time studies) had no nexus to any of the grounds set out in the Convention. The denial of a right of return was not for a Convention reason.

In *Alusta*, *supra*, footnote 68, the condition for obtaining a Moroccan residence permit, namely proof of employment, was found to be unrelated to a Convention ground. In *Altawil, Anwar Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2365-95), Simpson, July 25, 1996, the claimant lost his residence status in Qatar, which was renewable every 6 months, because he failed to return in 1986 because of the war in Afghanistan where he was a student; the Court upheld the CRDD's determination that he was not outside the country, nor had Qatar denied him reentry, because of a Convention reason. Simpson J. stated at 5-6: "it seems to me that there must be something in the real circumstances which suggests persecutorial intent or conduct. Absent such evidence, I am not prepared to conclude that the Law, which is one of general application, is persecutorial in effect". In *Daghmash, Mohamed Hussein Moustapha v. M.C.I.* (F.C.T.D., no. IMM-4302-97), Lutfy, June 19, 1998, the Court upheld the CRDD's conclusion that the claimant's inability to return to Saudi Arabia was due to his not being able to obtain an employment sponsor, and not to his Palestinian background; the requirement of an employment contract to maintain one's residency status is unrelated to the grounds in the definition of a Convention refugee. In *Elastal, Mousa Hamed v. M.C.I.* (F.C.T.D., no. IMM-3425-97), Muldoon, March 10, 1999, the Court cited with approval the CRDD's finding that the claimant's lack of a right to return to the United States was not persecutory because, as an illegal resident, he never had the right to return there. In *Salah*, *supra*, footnote 67, the RPD had considered the claimant's reasons for leaving Egypt, and the fact that he had allowed his residency permit to lapse, and reasonably concluded that the claimant had not left or been denied re-entry into Egypt on a Convention ground. The claimant provided no evidence to support his conclusion that his inability to work in Egypt legally (he had worked there illegally for at least 3 years) amounted to persecution. See also *Karsoua, Bahaedien Abdalla v. M.C.I.* (F.C., no. IMM-2931-06), Blanchard, January 22, 2007; 2007 FC 58, where the Court upheld the RPD's finding that the denial of right of return to the UAE did not constitute persecution.

<sup>73</sup> *Thabet* (C.A.), *supra*, footnote, 60, at 41.

<sup>74</sup> *Wahgmo, Kalsang v. M.C.I.* (F.C., no. IMM-6321-13), Locke, September 29, 2014; 2014 FC 923.

<sup>75</sup> *Shahin, Jamil Mohammad v. S.S.C.* (F.C.A., no. A-263-92), Stone, Linden, Robertson, February 7, 1994 at 2.

Having regard to paragraph 143 of the UNHCR *Handbook*, an UNWRA document issued to a Palestinian refugee was found to be cogent, though not determinative evidence of refugeehood.<sup>76</sup> It is a reviewable error not to specifically consider a claimant's UNWRA registration document when assessing a claim for refugee protection.<sup>77</sup> It is a highly relevant document, provided the conditions that originally enabled qualification are shown to persist.<sup>78</sup>

Finally, in *Qassim*,<sup>79</sup> a case where the RPD found that the only country of former habitual residence was the UAE, the Court held that it was not necessary to consider whether the UAE would attempt to remove the claimant to Iraq, or whether he would face persecution there.

### 2.2.6. State Protection

As a general proposition, claimants are only required to seek the protection of countries in which they can claim citizenship, prior to making a refugee claim in Canada.<sup>80</sup> However, as a practical matter, some decisions of the Board and Federal Court have considered what protection is available to the stateless person in the country where they allege persecution, in order to properly assess the well-foundedness of the alleged fear of persecution and that person's need for surrogate protection.

The jurisprudence is not consistent on whether or not stateless claimants need to avail themselves of state protection. The UNHCR *Handbook*, in paragraph 101, states that "... [i]n the case of a stateless refugee, the question of 'availment of protection' of the country of his former habitual residence does not, of course, arise."

In *El Khatib*,<sup>81</sup> Justice McKeown agreed with this approach. However, other decisions have taken into account state protection that might be available to the claimant in their country of former

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<sup>76</sup> *El-Bahisi, Abdelhady v. M.E.I.* (F.C.T.D., no. A-1209-92), Denault, January 4, 1994, at 2-3. Paragraph 143 of the UNHCR *Handbook* provides, in part:

It should normally be sufficient to establish that the circumstances which originally made him qualify for protection or assistance from UNWRA still persist and that he has neither ceased to be a refugee under one of the cessation clauses nor is excluded from the application of the Convention under one of the exclusion clauses.

<sup>77</sup> *El-Bahisi, supra*, footnote 76; *Kukhon, Yousef v. M.C.I.* (F.C.T.D., no. IMM-1044-02), Beaudry, January 23, 2003; 2003 FCT 69; *Abu-Farha, Mohammad v. M.C.I.* (F.C., no. IMM-4515-02), Gibson, July 10, 2003; 2003 FC 860.

<sup>78</sup> In *Mohammadi, Seyed Ata v. M.C.I.* (F.C.T.D., no. IMM-1432-00), Lutfy, February 13, 2001; 2001 FCT 61, the Court found that a certificate issued by the UNHCR in 1994, which was valid for six months, recognizing the Iranian claimant as a refugee, was of little, if any, significance, to the determination of refugee status in 2000. In *Castillo, Wilson Medina v. M.C.I.* (F.C., no. IMM-4982-03), Kelen, March 17, 2004; 2004 FC 410, the Court found that the RPD did not err by dismissing the relevance of the UNHCR recognition, in 1982, of the claimant as a Convention refugee based on his father's recognition a year earlier. The RPD took into account the changed circumstances since that time, including the fact that the claimant returned to Colombia, his country of nationality, in 1995, without any problem.

<sup>79</sup> *Qassim, supra*, footnote 65 at 2. See also *Cehade, supra*, footnote 67 at 24.

<sup>80</sup> *Basmenji, supra*, footnote 46; *Adereti, supra*, footnote 2.

<sup>81</sup> *El Khatib, supra*, footnote 58, at 2. The Court agreed to certify the following question:

habitual residence.<sup>82</sup> For example, in *Nizar*,<sup>83</sup> the Court was of the view that, even though states owe no duty of protection to non-nationals, “it is relevant for a stateless person, who has a country of former habitual residence, to demonstrate that *de facto* (sic) protection within that state, as a result of being resident there, is not likely to exist.” The Court reasoned that this matter was relevant to the well-foundedness of the claimant’s fear.

The Court of Appeal in *Thabet*,<sup>84</sup> in the context of discussing whether a stateless claimant who has more than one country of former habitual residence must establish the claim with respect to one, some or all of the countries, had this to say about the issue of state protection:

... The definition takes into account the inherent difference between those persons who are nationals of a state, and therefore are owed protection, and those persons who are stateless and without recourse to state protection. Because of this distinction one cannot treat the two groups identically, even though one should seek to be as consistent as possible. (At 33.)

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On a claim to Convention refugee status by a stateless person, is the “well-foundedness” analysis set out by the Supreme Court of Canada in [*Ward*] applicable, based as it is on the availability of state protection, or is it only applicable if the claimant is a citizen of the country in which he or she fears persecution?

The Court of Appeal, in dismissing the appeal in *El Khatib*, declined to deal with the certified question because it was not determinative of the appeal. See *M.C.I. v. El Khatib, Naif-El* (F.C.A., no. A-592-94), Strayer, Robertson, McDonald, June 20, 1996.

In *Tarakhan*, *supra*, footnote 68, at 89, the Trial Division also held that where the claim is that of a stateless person, the claimant need only show that he or she is unable, or by reason of a well-founded fear of persecution, is unwilling to return to the country of former habitual residence. The claimant does not have to prove that the authorities of that country are unable or unwilling to protect him or her. One aspect the Court did not address is the requirement in *Ward*, *supra*, footnote 3, at 712, that the analysis of whether a well-founded fear of persecution exists include a consideration of the state’s inability to protect. In *Pachkov, Stanislav v. M.C.I.* (F.C.T.D., no. IMM-2340-98), Teitelbaum, January 8, 1999. Reported: *Pachkov v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 55 (T.D.), the Court held that the CRDD erred in imposing on the claimant, who was a stateless person, a duty to refute the presumption of state protection. See also *Elastal*, *supra*, footnote 72, to the same effect, which cited the Court of Appeal decision in *Thabet* (C.A.), *supra*, footnote 60, though that decision did not specifically rule on the issue.

<sup>82</sup> *Giatch, Stanislav v. M.E.I.* (F.C.T.D., no. IMM-3438-93), Gibson, March 22, 1994; *Zaidan, Bilal v. S.S.C.* (F.C.T.D., no. A-1147-92), Noël, June 16, 1994; *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 (T.D.); *Falberg, Victor v. M.C.I.* (F.C.T.D., no. IMM-328-94), Richard, April 19, 1995. This issue was further confused by *M.C.I. v. Vickneswaramoorthy, Pologam* (F.C.T.D., no. IMM-2634-96), Jerome, October 2, 1997, where the Court suggested that the same standard of proof to demonstrate the state’s inability to protect persecuted individuals applies to stateless persons as to those with a country of nationality. See also *Popov, Alexander v. M.C.I.* (F.C., no. IMM-841-09), Beaudry, September 10, 2009; 2009 FC 898, where the Court upheld the RPD’s determination that the stateless claimants had not rebutted the presumption of protection in relation to the USA, a country of former habitual residence. Both *Falberg* and *Popov* were quoted with approval in *Vetcel, Maksims v. M.C.I.* (F.C., no. IMM-7952-12), Hughes, June 14, 2013; 2013 FC 653. The RPD’s conclusions regarding state protection and persecution were found to be reasonable. In *Khattr, Amani Khzaee v. M.C.I.* (F.C. no. IMM-3249-15), Zinn, March 22, 2016; 2016 FC 341, the Court again affirmed the principle from *Popov* that the presumption of state protection applies when determining whether a stateless person has a well-founded fear of persecution in their country of former habitual residence.

<sup>83</sup> *Nizar v. M.C.I.* (F.C.T.D., no. A-1-92), Reed, January 10, 1996, at 5.

<sup>84</sup> *Thabet* (C.A.), *supra*, footnote 60, at 33 and 39.



... If it is likely that a person would be able to return to a country of former habitual residence where he or she would be safe from persecution, that person is not a refugee. This means that the claimant would bear the burden ... of showing on the balance of probabilities that he or she is unable or unwilling to return to any country of former habitual residence. (At 39.)

## CHAPTER 2 - COUNTRY OF PERSECUTION

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## CHAPTER 3

### 3. PERSECUTION

#### 3.1. GENERALLY

##### 3.1.1. Definition and general principles

Like other terms in the Convention refugee definition, “persecution” is a word whose meaning is neither self-evident nor defined in the *Immigration and Refugee Protection Act* (IRPA). Therefore, it has fallen to the courts to identify the boundaries of the word. Case-law has not only labelled specific behaviours as instances of persecution, but also has gone some distance toward identifying general hallmarks that must be present, or criteria that must be met, in order for actions or omissions to constitute persecution.

In determining the meaning of persecution, it is useful to remember that Section 3(3)(f) of the *Immigration and Refugee Protection Act* states that the Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory.<sup>1</sup>

Claimants cannot be asked to renounce their deeply held beliefs or refrain from exercising their fundamental rights to avoid persecution and as a price to live in security. It is precisely to avoid this result that state parties have agreed to the *United Nations Convention Relating to the Status of Refugees*.<sup>2</sup>

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<sup>1</sup> For example, the Court has noted that one of the relevant international human rights instruments is the *Convention on the Rights of the Child* (CRC) and that when determining whether a child claiming refugee status fits the definition of Convention refugee, decision-makers must inform themselves of the distinctive rights recognized in the CRC. It is the denial of these rights which may determine whether or not a child has a well-founded fear of persecution. See *Kim, Jae Wook v. M.C.I.* (F.C., no. IMM-4200-09), Shore, February 12, 2010; 2010 FC 149. See also the IRB *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues*, which states at footnote 8 that: “In determining the child’s fear of persecution, the international human rights instruments, such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child*, should be considered in determining whether the harm which the child fears amounts to persecution.” See also the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* which in Part B sets out the relevant international human rights instruments applicable to the determination of gender-specific forms of persecution.

<sup>2</sup> *Gur, Irem v. M.C.I.* (F.C., no. IMM-6294-11), de Montigny, August 14, 2012; 2012 FC 992. See also *Antoine, Belinda v. M.C.I.* (F.C., no. IMM-4967-14), Fothergill, June 26, 2015; 2015 FC 795, where the PRRA Officer had held that in order to avoid persecution, the applicant must continue to avoid an overtly lesbian lifestyle. The Court held that the expectation that an individual should practice discretion with respect to her sexual orientation is perverse, as it requires the individual to repress an immutable characteristic. See also *Akpojiovwi, Evelyn Oboaguonona v. M.C.I.* (F.C. no. IMM-200-18), Roussel, July 17, 2018; 2018 FC 745 at paragraph 9. Also, in *A.B. v M.C.I.* (F.C. no. IMM-3251-17), Mactavish, April 6, 2018; 2018 FC 373 at paragraph 11, although the Court did not come to a conclusion, it questioned whether it would be reasonable to expect an individual to remain single and childless in order to avoid the risk of pregnancy, childbirth, and reinfibulation, or whether that would constitute a serious interference with basic human rights.



### 3.1.1.1. Serious Harm

First, to be considered persecution, the mistreatment suffered or anticipated must be serious.<sup>3</sup> And in order to determine whether particular mistreatment would qualify as “serious”, one must examine:

1. what interest of the claimant might be harmed; and
2. to what extent the subsistence, enjoyment, expression or exercise of that interest might be compromised.

This approach has been approved by the courts, which have equated the notion of a serious compromising of interest with a key denial of a core human right. Thus, in *Ward*,<sup>4</sup> the Supreme Court said as follows:

Underlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination. This is indicated in the preamble to the treaty as follows:

CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights ... have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

This theme ... provides an inherent limit to the cases embraced by the Convention. Hathaway, ... at p. 108, thus explains the impact of this general tone on the treaty on refugee law:

The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard.

This theme sets the boundaries for many of the elements of the definition of Convention “refugee”. “Persecution”, for example, undefined in the Convention, has been ascribed the meaning of “sustained or systemic violation of basic human rights demonstrative of a failure of state protection”; see Hathaway, ... at pp. 104-105. So too Goodwin-Gill, ... at p. 38 observes that “comprehensive analysis requires the general notion [of persecution] to be related to developments within the broad field of human rights”. This has recently been recognized by the Federal Court of Appeal in the *Cheung* case.<sup>5</sup>

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<sup>3</sup> *Sagharichi, Mojgan v. M.E.I.* (F.C.A., no. A-169-91), Isaac, Marceau, MacDonald, August 5, 1993, at 2. Reported: *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993), 182 N.R. 398 (F.C.A.); Leave to appeal to the Supreme Court of Canada was denied without reasons on February 17, 1994 [1993] S.C.C.A. No. 461 (QL); *Saddouh (Kaddouh), Sabah v. M.E.I.* (F.C.T.D., no. IMM-2200-93), Denault, February 2, 1994, where the Court dealt with threats and acts of extortion.

<sup>4</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 20 Imm. L.R. (2d) 85.

<sup>5</sup> *Ward, ibid.*, at 733-734. See also *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.), at 324-325.

In *Chan*,<sup>6</sup> La Forest J. (in dissent) reiterated that “[t]he essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way.” Mr. Justice La Forest also said:

These basic human rights are not to be considered from the subjective perspective of one country ... By very definition, such rights transcend subjective and parochial perspectives and extend beyond national boundaries. This does not mean, however, that recourse to the municipal law [i.e. domestic or internal law] of the admitting nation may not be made. For such municipal law may well animate a consideration of whether the alleged feared conduct fundamentally violates basic human rights.<sup>7</sup>

If the conduct does amount to persecution, there is no further requirement that the persecution be dramatic or appalling or horrendous,<sup>8</sup> unless the issue in the case involves the application of section 108(4) of the IRPA (section 2(3) of the former *Immigration Act*) (see Chapter 7, section 7.2). The requirement that the harm be serious has led to a distinction between persecution on the one hand, and discrimination or harassment on the other, with persecution being characterized by the greater seriousness of the mistreatment which it involves.<sup>9</sup> Discrimination and harassment are sometimes conceived of as being distinct from persecution; alternatively, some references to persecution and discrimination imply that persecution is a subset of discrimination; but in either case, what distinguishes persecution - whether from discrimination or non-persecutory discrimination - is the degree of seriousness of the harm. The Court of Appeal has observed that “the dividing line between persecution and discrimination or harassment is difficult to establish.”<sup>10</sup> As to the particular susceptibilities of a given claimant, the Court in *Nejad*<sup>11</sup> said the following:

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<sup>6</sup> *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, at 635.

<sup>7</sup> *Chan, ibid.*, at 635. The majority of the Court decided the case on other grounds and did not rule explicitly on this issue. For a more detailed discussion of the *Chan* judgment, see Chapter 9, section 9.3.7. With respect to considering Canadian standards or laws see *Antonio, Pacato Joao v. M.E.I.* (F.C.T.D., no. IMM-1072-93), Nadon, September 27, 1994, at 11-12. See also the UNHCR *Handbook*, paragraph 60.

<sup>8</sup> *El Khatib, Naif v. M.C.I.* (F.C.T.D., no. IMM-5182-93), McKeown, September 27, 1994, at 4. The appeal was dismissed by the Federal Court of Appeal: *M.C.I. v. El Khatib, Naif* (F.C.A., no. A-592-94), Strayer, Robertson, McDonald, June 20, 1996.

<sup>9</sup> *Sagharichi, supra*, footnote 3, at 2 (unreported); *Saddouh, supra*, footnote 3. See also *Kwiatkowsky v. Canada (Minister of Employment and Immigration)*, [1982] 2 S.C.R. 856, at 862 and 863. The Trial Division has also distinguished between persecution and mere unfairness: *Chen, Yo Long v. M.C.I.* (F.C.T.D., no. IMM-487-94), Richard, January 30, 1995, at 4.

<sup>10</sup> *Sagharichi, supra*, footnote 3, at 2, per Marceau J.A. Even though the claimant may not be able to point to an individual episode of mistreatment which could be characterized as persecution, the claimant may still have experienced persecution or have good grounds for fearing persecution: see the discussion of cumulative acts in section 3.1.2. of this chapter, and the discussion of well-founded fear in Chapter 5.

<sup>11</sup> *Nejad, Hossein Hamedi v. M.C.I.* (F.C.T.D., no. IMM-2687-96), Muldoon, July 29, 1997, at 2. In the typescript of the Court’s reasons, the first portion of this passage is presented as though it were part of a quotation from *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629 (C.A.); however, the statements in question do not actually appear in that case, and seem instead to have been the words of Muldoon J. himself. On this same theme, see paragraphs 40 and 52 of the UNHCR *Handbook*. The Court noted in *Bayrak, Ibrahim v. M.C.I.* (F.C., no. IMM-11458-12), Shore, October 21, 2013; 2013 FC 1056 that certain risks and dangers are even more serious when taking into account the claimants’ age and their vulnerability as a result of the inherent weaknesses associated with being elderly.

The CRDD did recognize and the Court agrees that there may be certain circumstances in which the particular characteristics or circumstances of a claimant ... might affect the assessment of whether certain acts or treatments are persecutory. [To] ... the extent that an agent of persecution intentionally plays upon or exploits the fact that a person suffers from a particular frailty or condition in order to cause harm, an act not normally or inherently persecutorial, may be transformed into an act of persecution.

That is beautiful in theory, but who knows what is the intention of the persecutor? Who knows what is the particular knowledge of the persecutor? One must look at the act and the effect.<sup>12</sup> And in this case, in particular, because of the old age of the applicants, it should have been more obvious to the CRDD panel that the effect upon them was that of persecution.

For additional material on the distinction between persecution and discrimination, see paragraph 54 of the UNHCR *Handbook*.

### 3.1.1.2. Repetition and Persistence

A second criterion of persecution is that the inflicting of harm occurs with repetition or persistence, or in a systematic way. This requirement has been approved in *Ward* (quoting Hathaway).<sup>13</sup> It also derives from the Court of Appeal decision in *Rajudeen*,<sup>14</sup> which is much-cited on this point:

The definition of Convention refugee in the *Immigration Act* does not include a definition of “persecution”. Accordingly, ordinary dictionary definitions may be considered. *The Living Webster Encyclopedic Dictionary* defines “persecute” as:

“To harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently, to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship.”

The *Shorter Oxford English Dictionary* contains, *inter alia*, the following definitions of “persecution”:

“A particular course or period of systematic infliction of punishment directed against those holding a particular (religious belief); persistent injury or annoyance from any source.”

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<sup>12</sup> Compare these lines with the affirmation in *Ward*, *supra*, footnote 4, at 747, that “[t]he examination of the circumstances should be approached from the perspective of the persecutor”, and with the emphasis placed upon the intent of a law (which may be equated with the intent of the agent of persecution) by *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (C.A.), at 552, quoted in Chapter 9, section 9.3.2. (proposition 1). Compare also *Zolfagharkhani*’s assertion, at 552, that the neutrality of a law is to be judged objectively: see Chapter 9, section 9.3.2. (proposition 2).

<sup>13</sup> *Ward*, *supra*, footnote 4, at 733-734. See excerpt reproduced at pages 1-2 of this chapter.

<sup>14</sup> *Rajudeen, Zahirdeen v. M.E.I.* (F.C.A., no. A-1779-83), Heald, Hugessen, Stone (concurring), July 4, 1984. Reported: *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129 (F.C.A.).

...[the evidence] establishes beyond doubt a lengthy period of systematic infliction of threats and of personal injury. The applicant was not mistreated because of civil unrest in Sri Lanka but because he was a Tamil and a Muslim.<sup>15</sup>

The Court of Appeal later provided something of an elaboration in *Valentin*<sup>16</sup>:

...it seems to me ... that an isolated sentence can only in very exceptional cases satisfy the element of repetition and relentlessness found at the heart of persecution (cf. *Rajudeen*...) ...<sup>17</sup>

Jurisprudence also recognizes that some sentences and forms of punishment of undue proportion by the state may be considered as persecution, such as in certain cases involving military evaders.<sup>18</sup>

These authorities notwithstanding, it would seem that persistence or repetition should not be regarded as a necessary element in all cases. Some forms of harm are unlikely to be inflicted repeatedly (e.g., female genital mutilation), or are simply incapable of being repeated (e.g., the killing of the claimant's family as a form of retribution against the claimant); nevertheless, they are so severe that their characterization as persecution seems beyond dispute.<sup>19</sup>

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<sup>15</sup> *Rajudeen, ibid.*, at 133-134, per Heald J.A.

<sup>16</sup> *Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390 (C.A.), at 396, per Marceau J.A.

<sup>17</sup> See also *Kadenko, Ninal v. S.G.C.* (F.C.T.D., no. IMM-809-94), Tremblay-Lamer, June 9, 1995. Reported: *Kadenko v. Canada (Solicitor General)* (1995), 32 Imm. L.R. (2d) 275 (F.C.T.D.), rev'd *M.C.I. v. Kadenko, Ninal* (F.C.A., no. A-388-95), Décary, Hugessen, Chevalier, October 15, 1996, where the Trial Division, at 6, considered a dictionary definition of "isolated", and concluded that, where repeated incidents of harassment, together with physical attacks, had occurred over the course of a year and a half, it was unreasonable to speak of "isolated" acts. (The Court of Appeal reversed the decision on the issue of state protection and did not deal with the persecution findings. Leave to appeal to the Supreme Court of Canada was denied without reasons on May 8, 1997, [1996] C.S.C.R. No. 612 (QL). In *Ahmad, Rizwan v. S.G.C.* (F.C.T.D., no. IMM-7180-93), Teitelbaum, March 14, 1995, at paragraph 23, the Court distinguished between systematic events and ones that were only periodic.

<sup>18</sup> *Abramov, Andrei v. M.C.I.* (F.C.T.D., no. IMM-3576-97), Tremblay-Lamer, June 15, 1998.

<sup>19</sup> In two decisions, the Trial Division certified questions regarding the need for persistence, the questions being almost identical in the two cases: *Murugiah, Rahjendran v. M.E.I.* (F.C.T.D., no. 92-A-6788), Noël, May 18, 1993, at 6; and *Rajah, Jeyadevan v. M.E.I.* (F.C.T.D., no. 92-A-7341), Joyal, September 27, 1993, at 5-6. In *Rajah*, the question was phrased thus: "Whether 'persecution' within the meaning of the Convention Refugee definition requires systematic and persistent acts or whether one or two violations of basic and inalienable rights such as forced labour or beatings while in police detention is enough to constitute 'persecution'." However, neither case was heard on appeal. The Federal Court of Appeal granted a motion to dismiss the appeal in *Murugiah* on April 4, 1997, on the grounds that the appeal was moot (F.C.A., no. A-326-93). In *Rajah*, the Federal Court of Appeal dismissed an application for an extension of time to file a notice of appeal (February 1, 1995).

Essentially the same question was proposed for certification in *Muthuthevar, Muthiah v. M.C.I.* (F.C.T.D., no. IMM-2095-95), Cullen, February 15, 1996. Cullen J., declining to certify, said at 5: "I think it is settled law that, in some instances, even a single transgression of the applicant's human rights would amount to persecution." See also *Gutkovski, Alexander v. S.S.C.* (F.C.T.D., no. IMM-746-94), Teitelbaum, April 6, 1995, where at 9, the Court noted: "...the events must be sufficiently serious or systematic to amount to a reasonable

In the case of *Ranjha*,<sup>20</sup> the Court has further commented that there should not be an “exaggerated emphasis” on the need for repetition and persistence. Rather, the RPD should analyze the quality of incidents in terms of whether they constitute “a fundamental violation of human dignity”.

While the experiences of persons with similar profiles must be taken into account when considering whether ill treatment is systemic, each case must be determined on its own facts.<sup>21</sup>

### 3.1.1.3. Nexus

For a claim to succeed, the definition of Convention refugee requires that the persecution be linked to a Convention ground. The Supreme Court of Canada noted in *Ward* that:

... the international community did not intend to offer a haven for all suffering individuals. The need for “persecution” in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants, i.e. individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance. ...<sup>22</sup>

In *Suvorova*, the Court commented that in determining whether a nexus exists the claimant’s narrative should be considered from the perspective of all Convention grounds. The Court noted that there is an obligation to consider all possible grounds for protection raised by the facts, even if they are not raised by a claimant.<sup>23</sup>

Indirect persecution (see Chapter 9, section 9.4) does not constitute persecution within the meaning of the definition of Convention refugee as there is no personal nexus between the

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fear of persecution.” (emphasis in original). However, note the discussion in Chapter 9, section 9.3.3. regarding “Policing Methods, National Security and Preservation of Social Order”.

<sup>20</sup> *Ranjha, Muhammad Zulfiq v. M.C.I.* (F.C.T.D., no. IMM-5566-01), Lemieux, May 21, 2003; 2003 FCT 637, at paragraph 42.

<sup>21</sup> *Sztojka, Andras v. M.C.I.* (F.C., no. IMM-2005-11), Mosley, October 20, 2011; 2011 FC 1202.

<sup>22</sup> *Ward, supra*, footnote 4, at 732. See also the excerpt from *Rajudeen, supra*, footnote 14, reproduced in section 3.1.1.2. of this chapter. And see *Karaseva, Tatiana v. M.C.I.* (F.C.T.D., no. IMM-4683-96), Teitelbaum, November 26, 1997, at paragraphs 10, 14-15, and 17-22. In *Molaei, Farzam v. M.C.I.* (F.C.T.D., no. IMM-1611-97), Muldoon, January 28, 1998, the Court noted that there must be a nexus between the personal situation of the claimant and the general situation of the country of nationality in which the claimant fears persecution. And in *Cetinkaya, Lukman v. M.C.I.* (F.C.T.D., no. IMM-2559-97), Muldoon, July 31, 1998, the Court noted that while certain members of the PKK in Turkey may face persecution, it is for the claimant to demonstrate that she falls within that class of individuals who face persecution, as well as to provide the necessary link between her actions and the persecution feared. See also *Li, Qing Bing v. M.C.I.* (F.C.T.D., no. IMM-5095-98), Reed, August 27, 1999, where the claimant stated, among other things, that the government of China does not provide basic medical services, nor does it allow him an adequate opportunity to earn a living. The Court agreed with the CRDD that there was no nexus between the claimant's hardships and a Convention ground.

<sup>23</sup> *Suvorova, Galina v. M.C.I.* (F.C., no. IMM-3447-08), Russell, April 14, 2009; 2009 FC 373.

claimant's alleged fear and a Convention ground. Accordingly, the Federal Court of Appeal in *Pour-Shariati* held, overruling *Bhatti*,<sup>24</sup> a case recognizing the concept of indirect persecution, that:

We accordingly overrule *Bhatti*'s recognition of the concept of indirect persecution as a principle of our refugee law. In the words of Nadon, J. in *Casettlanos v. Canada (Solicitor General)* (1994), 89 F.T.R. 1, 11, "since indirect persecution does not constitute persecution within the meaning of Convention refugee, a claim based on it should not be allowed." It seems to us that the concept of indirect persecution goes directly against the decision of this Court in *Rizkallah v. Canada*, A-606-90, decided 6 May 1992, [1992] F.C.J. No. 412, where it was held that there had to be a personal nexus between the claimant and the alleged persecution on one of the Convention grounds. One of these grounds is, of course, a "membership in a particular social group," a ground which allows for family concerns in on [sic] appropriate case.<sup>25</sup>

In *Granada*<sup>26</sup>, the Court set out the only circumstances in which the family can be considered a particular social group as follows:

[16] The family can only be considered to be a social group in cases where there is evidence that the persecution is taking place against the family members as a social group: [citations omitted]. However, membership in the social group formed by the family is not without limits, it requires some proof that the family in question is itself, as a group, the subject of reprisals and vengeance...<sup>27</sup>.

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<sup>24</sup> *Bhatti, Naushaba v. S.S.C.* (F.C.T.D., no. A-89-93), Jerome, September 14, 1994. Reported: *Bhatti v. Canada (Secretary of State)* (1994), 25 Imm. L.R. (2d) 275 (F.C.T.D.).

<sup>25</sup> *Pour-Shariati, Dolat v. M.E.I.* (F.C.A., no. A-721-94), MacGuigan, Robertson, McDonald, June 10, 1997, at 4. Reported: *Pour-Shariati v. Canada (Minister of Employment and Immigration)* (1997), 39 Imm. L.R. (2d) 103 (F.C.A.). Followed in *Kanagalingam, Uthayakumari v. M.C.I.* (F.C.T.D., no IMM-566-98), Blais, February 10, 1999, where the Court held that the loss of the claimant's father, brother and fiancé at the time when the IPKF governed the security situation in the north of Sri Lanka, was indirect persecution and, therefore, not persecution within the meaning of the definition. The Trial Division certified the following question in *Gonzalez, Brenda Yojana v. M.C.I.* (F.C.T.D., no. IMM-1092-01), Dawson, March 27, 2002; 2002 FCT 345: "Can a refugee claim succeed on the basis of a well-founded fear of persecution for reason of membership in a particular social group that is a family, if the family member who is the principal target of the persecution is not subject to persecution for a Convention reason?" The appeal to the Federal Court of Appeal [in *Gonzalez*] was discontinued on February 7, 2003 (F.C.A., no. A-198-02). The concept of "indirect persecution" was considered in *Shen, Zhi Ming v. M.C.I.* (F.C., no. IMM-313-03), Kelen, August 15, 2003; 2003 FC 983, at paragraph 14, where the Court held that "any persecution which the second child Canadian-born infant will experience in China is directly experienced by the parents, and is not 'indirect persecution'." For a more detailed discussion of the concept of "indirect persecution", see Chapter 9, section 9.4.

<sup>26</sup> *Granada, Armando Ramirez v. M.C.I.* (F.C., no. IMM-83-04), Martineau, December 21, 2004; 2004 FC 1766.

<sup>27</sup> This concept of the family as a particular social group was further considered in *Ndegwa, Joshua Kamau v. M.C.I.* (F.C., no. IMM-6058-05), Mosley, July 5, 2006; 2006 FC 847 at paragraph 11, where the Court held that the claimant was "not just an 'unwilling spectator of violence' against other members of his family" (his wife and daughter), as described in *Granada*, and that the RPD should have considered whether the claimant "himself may be at risk due to the relationship with his wife."

### 3.1.1.4. Common Crime or Persecution?

Persecution has been distinguished from random and arbitrary violence<sup>28</sup> and from suffering as a result of a criminal act or a personal vendetta.<sup>29</sup> In a few of the cases where the claimant has been victimized by what might be characterized as a “common” crime, there has been some discussion of whether the mistreatment in question might qualify as “persecution”. The Trial Division has said that most acts of persecution can be characterized as criminal, but that in an individual case the Refugee Division (now Refugee Protection Division - RPD) may nevertheless distinguish between criminal acts and persecution.<sup>30</sup> In the case of *Alifanova*,<sup>31</sup> the Court has further commented that while most acts of persecution are criminal in nature, not all criminal acts can be considered acts of persecution. It continues to give the following example: “Extortion is a criminal act. Threats of bodily harm is a criminal act. Because these criminal acts are made by Kazakhs against Russians does not make the act one of persecution.” Some of the cases in this area involve personal vendettas, or the misuse of official position, or the witnessing of criminal acts.

With respect to cases involving domestic abuse, the Court of Appeal in *Mayers*,<sup>32</sup> said that the Refugee Division might find domestic violence to be persecution, but in the circumstances of the case, the Court was not required to make that finding.<sup>33</sup> The Trial Division, in a number of cases has regarded domestic abuse as persecution.<sup>34</sup> The cases often intertwine the discussion of whether domestic violence constitutes persecution with the question of whether victims of domestic violence constitute a particular social group. For example, in *Resulaj*,<sup>35</sup> the Court made the following observation:

Nothing prevents a woman from being both a victim of domestic violence and a victim of crime. It is well established that a women [sic] subject to domestic

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<sup>28</sup> *Abrego, Apolonio Paz v. M.E.I.* (F.C.A., no. A-348-91), Hugessen, Linden, Holland, February 18, 1993.

<sup>29</sup> See Chapter 4, section 4.7. See also *Atwal, Mohinder Singh v. M.C.I.* (F.C.T.D., no. IMM-6769-98), Nadon, November 17, 1999, where the Court agreed with the CRDD that there was no nexus between the applicant's claim and a Convention ground as the alleged acts of persecution were the result of personal vengeance and not the result of the claimant's political opinions.

<sup>30</sup> *Cortez, Delmy Isabel v. S.S.C.* (F.C.T.D., no. IMM-2482-93), McKeown, December 15, 1993, at 2. See also *Pierre-Louis, Edy v. M.E.I.* (F.C.A., no. A-1264-91), Hugessen, MacGuigan, Décary, April 29, 1993, at 2 (personal vengeance); *Sirin, Hidayet v. M.C.I.* (F.C.T.D., no. IMM-5720-93), Pinard, November 28, 1994 (family vendetta); *Balendra, Cheran v. M.C.I.* (F.C.T.D., no. IMM-1653-94), Richard, January 30, 1995, at 3 (police corruption); and *Karaseva, supra*, footnote 22, at 14-15, and 17-22 (crimes allegedly with ethnic motivation).

<sup>31</sup> *Alifanova, Nathalia v. M.C.I.* (F.C.T.D., no. IMM-5501-97), Teitelbaum, December 11, 1998.

<sup>32</sup> *Canada (Minister of Employment and Immigration) v. Mayers*, [1993] 1 F.C. 154 (C.A.).

<sup>33</sup> *Mayers, ibid.*, at 169-170, per Mahoney J.A.

<sup>34</sup> *Diluna, Roselene Edyr Soares v. M.E.I.* (F.C.T.D., no. IMM-3201-94), Gibson, March 14, 1995, at 4. Reported: *Diluna v. Canada (Minister of Employment and Immigration)* (1995), 29 Imm. L.R. (2d) 156 (F.C.T.D.). In an earlier decision, the Trial Division seemed inclined to the view that the abuse involved in the case did constitute persecution: *Narvaez v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 F.C. 55 (T.D.), at 64 and 70-1.

<sup>35</sup> *Resulaj, Blerina v. M.C.I.* (F.C., no. IMM-7205-03), Von Finckenstein, September 14, 2004.

violence constitute a particular social group entitled to convention refugee protection. [*Diluna; Narvaez*]

Another earlier example is *Aros*,<sup>36</sup> where the Court noted:

Accepting that the applicant suffered physical and psychological abuse at the hands of her common law husband ..., the panel made no overriding error in concluding she was not a member of a social group that faced persecution within the definition...

In assessing claims based on criminal acts, it is suggested that members inquire whether the harm is serious,<sup>37</sup> whether there is a serious possibility of the harm's occurring, whether the harm is inflicted for a Convention reason,<sup>38</sup> and whether state protection is available.<sup>39</sup> The finding of state protection must be made on the basis of the evidence before the panel rather than on mere speculation.<sup>40</sup> See also Chapter 4, section 4.7.

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<sup>36</sup> *Aros, Angelica Elizabeth Navarro v. M.C.I.* (F.C.T.D., no. IMM-4480-96), MacKay, February 11, 1998.

<sup>37</sup> See, for example, *Ravji, Shahsultan Meghji v. M.E.I.* (F.C.T.D., no. A-897-92), McGillis, August 4, 1994 (the particular harm in question should have been considered by the Refugee Division in its assessment of cumulative acts).

<sup>38</sup> See, for example: *Gomez-Rejon, Bili v. M.E.I.* (F.C.T.D., no. IMM-470-93), Joyal, November 25, 1994, at 3 and 8; *Chen, supra*, footnote 9, at 5; and *Karpounin, Maxim Nikolajevitsh v. M.E.I.* (F.C.T.D., no. IMM-7368-93), Jerome, March 10, 1995. In *Rawji, Riayz v. M.E.I.* (F.C.T.D., no. IMM-5929-93), Gibson, November 25, 1994, where crime had befallen the claimant and police had refused to investigate unless bribed, the Court indicated, at 2, that neither persecution nor nexus to a Convention ground was involved. See also Chapter 4, section 4.7. In *Kaur, Biba v. M.C.I.* (F.C.T.D., no. IMM-305-96), Jerome, January 17, 1997, the claimant had been raped while in detention. The Refugee Division characterized her as a "random victim of violence", finding no nexus to a Convention ground (and also no well-foundedness), but the Court held that the mistreatment "was a direct consequence of her detention for political reasons" (at 2).

In *Mousavi-Samani, Nasrin v. M.C.I.* (F.C.T.D., no. IMM-4674-96), Heald, September 30, 1997, the claimants had exposed fraud perpetrated by state officials, and feared retaliation and prosecution. As in *Rawji*, the Refugee Division had found both persecution and nexus to be lacking, and the Court upheld these findings.

For other cases where the Court upheld the CRDD's finding of no nexus based on criminality, see: *Montoya, Hernan Dario Calderon v. M.C.I.* (F.C.T.D., no. IMM-5027-00), Hansen, January 18, 2002; 2002 FCT 63 (family targeted for kidnapping because of their wealth); *Bencic, Eva v. M.C.I.* (F.C.T.D., no. IMM-3711-00), Kelen, April 26, 2002; 2002 FCT 476 (persecution directly related to criminals seeking to extort money and automobiles); and *Yoli, Hernan Dario v. M.C.I.* (F.C.T.D., no. IMM-399-02), Rouleau, December 30, 2002; 2002 FCT 1329 (claimant had evidence regarding perpetrators' identity and criminal activities).

In *Zefi, Sheko v. M.C.I.* (F.C.T.D., no. IMM-1089-02), Lemieux, May 21, 2003; 2003 FCT 636, at paragraph 41, the Court held that a family or clan involved in a blood feud is not a particular social group, as such revenge killings have nothing to do with the defence of human rights; to the contrary, they constitute a violation of human rights: "Recognition of a social group on this basis would have the anomalous result of according status to criminal activity, status because of what someone does rather than what someone is."

<sup>39</sup> See, for example, *Dragulin, Constantin Marinescu v. S.G.C.* (F.C.T.D., no. IMM-46-94), Rouleau, December 23, 1994, at 3-5; and *Njoko, Tubila v. M.E.I.* (F.C.T.D., no. A-1698-92), Jerome, January 25, 1995, at 2.

<sup>40</sup> *Ansar, Iqbal v. M.C.I.* (F.C.T.D., no. IMM-4124-97), Campbell, July 22, 1998.



### 3.1.1.5. Agent of Persecution

Serious human rights violations may in fact issue not only from higher authorities of the state, but also from subordinate state authorities, or from persons who are not attached to the government; and whichever is the case, the Convention may apply. In order to be categorized as persecution, the harm need not emanate from the state, and the state need not be involved or be complicit in the perpetration of the harm.<sup>41</sup>

The fact that those who inflict mistreatment are schoolchildren and schoolyard bullies is not relevant to the question of whether the mistreatment amounts to persecution.<sup>42</sup> Similarly, serious mistreatment inflicted by teenagers upon a minor claimant may not reasonably be regarded as mere pranks.<sup>43</sup>

For more regarding the role of the state with respect to mistreatment of a claimant, see Chapter 6.

### 3.1.2. Cumulative Acts of Discrimination and/or Harassment

A given episode of mistreatment may constitute discrimination or harassment, yet not be serious enough to be regarded as persecution.<sup>44</sup> Indeed, a finding of discrimination rather than persecution is within the jurisdiction of the RPD.<sup>45</sup> Even so, acts of harassment, none amounting to persecution individually, may cumulatively constitute persecution.<sup>46</sup>

Therefore, where the claimant has experienced more than one incident of mistreatment, the Refugee Protection Division may err if it only looks at each incident separately.<sup>47</sup> However, “it is

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<sup>41</sup> *Ward, supra*, footnote 4, at 709, 717, 720-1; *Chan, supra*, footnote 6, per La Forest (dissenting) at 630.

<sup>42</sup> *Bougai, Zoia (a.k.a. Bougai, Zoya) v. M.C.I.* (F.C.T.D., no. IMM-4966-94), Gibson, June 15, 1995, at 6.

<sup>43</sup> *Malchikov, Alexander v. M.C.I.* (F.C.T.D., no. IMM-1673-95), Tremblay-Lamer, January 18, 1996, at paragraph 26.

<sup>44</sup> *Moudrak, Vanda v. M.C.I.* (F.C.T.D., no. IMM-1480-97), Teitelbaum, April 1, 1998.

<sup>45</sup> *Valdes, Roberto Manuel Olivares v. M.C.I.* (F.C.T.D., no. IMM-1902-97), Pinard, April 24, 1998. Reported: *Valdes v. Canada (Minister of Citizenship and Immigration)* (1998), 47 Imm. L.R. (2d) 125 (F.C.T.D.).

<sup>46</sup> *Madelat, Firouzeh v. M.E.I., Mirzabeglui, Maryam v. M.E.I.* (F.C.A., nos. A-537-89 and A-538-89), MacGuigan, Mahoney, Linden, January 28, 1991; *Retnem, Rajkumar v. M.E.I.* (F.C.A., no. A-470-89), MacGuigan, Décary, Pratte (dissenting), May 6, 1991. Reported: *Retnem v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 317 (F.C.A.), at 319; *Iossifov, Svetoslav Gueorguiev v. M.E.I.* (F.C.T.D., no. A-854-92), McKeown, December 8, 1993, at 2.

<sup>47</sup> *El Khatib, supra*, footnote 8, at 3; *Nina, Razvan v. M.C.I.* (F.C.T.D., no. A-725-92), Cullen, November 24, 1994, at 9. For an examination of cumulative acts in the context of an internal flight alternative, see Chapter 8, section 8.5.1.

In *Horvath, Karoly v. M.C.I.* (F.C.T.D., no. IMM-4335-99), MacKay, April 27, 2001, referring to *Retnem, supra*, footnote 46, the Court held that it was an error for the Board to fail to consider the cumulative effect of the treatment suffered by the claimants when that treatment was consistently accepted as being discriminatory and as indicative of serious problems facing Roma in Hungary. *Horvath* was cited with approval in *Keninger, Erzsebet v. M.C.I.* (F.C.T.D., no. IMM-3096-00), Gibson, July 6, 2001.

insufficient for the RPD to simply state that it has considered the cumulative nature of the discriminatory acts”, without any further analysis.<sup>48</sup> Similarly, “where the RPD fails to address an incident supporting a claim of persecution in the course of its analysis and comes to a simple conclusion that the cumulative effect of individual incidents of discrimination and violence do not amount to persecution, the RPD opens the door to a reviewing court’s intervention.”<sup>49</sup> The Court has also commented on the need to consider whether the repeated incidents of harassment in the past may lead to a serious possibility of persecution in the future.<sup>50</sup>

In *Mundereve*,<sup>51</sup> the Federal Court of Appeal quoted with approval the following principles set out by the Federal Court in *Mete*:<sup>52</sup>

[4] The following three legal principles are not controversial. First, in *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129, the Federal Court of Appeal defined persecution in terms of: to harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently; to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship; a particular course or period of systematic infliction of punishment directed against those holding a particular belief; and persistent injury or annoyance from any source.

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Furthermore, in *Bursuc, Cristinel v. M.C.I.* (F.C.T.D., no. IMM-5706-01), Dawson, September 11, 2002; 2002 FCT 957, the Court held that, in considering the cumulative effect of incidents, the CRDD must have regard to the whole of the evidence, and not just evidence after the culminating incident.

In *Kamran, Mohsin Ali v. M.C.I.* (F.C., no. IMM-4760-10), Russell, March 29, 2011; 2011 FC 380, a case involving an Ahmadi from Pakistan, the Court noted that the RPD erred in dealing with incidents sequentially and by compartmentalizing them.

<sup>48</sup> *Mete, Dursun Ali v. M.C.I.* (F.C., no. IMM-2509-04), Dawson, June 17, 2005; 2005 FC 840, at paragraph 9. Furthermore, in *Devi, Nalita v. M.C.I.* (F.C., no. IMM-3994-06), Layden-Stevenson, February 8, 2007; 2007 FC 149, the Court stated, at paragraph 16, that “where the cumulative effect of a number of discriminating acts has the potential to result in a finding of persecution, it is not open to the RPD to place some acts [on] one side of the line [common criminality] and other acts on the other side of the line [harassment/discrimination], without providing some rationale for having done so.” In contrast, in *Abdalqader, Haneen N.M. v. M.C.I.* (F.C. no. IMM-3536-17), Gleeson, April 13, 2018; 2018 FC 405, the Court upheld the RPD decision and found that the RPD had engaged in a detailed assessment of the various forms of discrimination and addressed the claimants’ particular circumstances. This case involved stateless Palestinians from Jordan. The RPD considered that non-citizens did not have the same access to state schools, were excluded from health insurance, and were prohibited from owning property, but found that when considered together it did not amount to persecution. The RPD noted that despite the restrictions, the claimants obtained a university education and had access to health care, even though they had to pay for it. A similar conclusion was reached in *El Assadi Kamal, Bilal v. M.C.I.* (F.C. no. IMM-4984-17), Roussel, May 25, 2018; 2018 FC 543, a case involving a stateless Palestinian from Lebanon. The Court upheld the RPD’s conclusion that although Palestinian refugees in Lebanon face widespread and systematic discrimination in regards to employment, education, medical care and social services, these restrictions would not lead to consequences of a substantially prejudicial nature.

<sup>49</sup> *Ban, Istvan Gyorgy v. M.C.I.* (F.C. no. IMM-1198-18), Gleeson, October 3, 2018; 2018 FC 987 at paragraph 23.

<sup>50</sup> *Kadhm, Suhad Mohamed v. M.C.I.* (F.C.T.D., no. IMM-652-97), Muldoon, January 8, 1998.

<sup>51</sup> *M.C.I. v. Munderere, Bagambake Eugene* (F.C.A., no. A-211-07), Nadon, Décary, Létourneau, March 5, 2008; 2008 FCA 84.

<sup>52</sup> *Mete, supra, footnote 48.*

[5] Second, in cases where the evidence establishes a series of actions characterized to be discriminatory, and not persecutory, there is a requirement to consider the cumulative nature of that conduct. This requirement reflects the fact that prior incidents are capable of forming the foundation of present fear. See: *Retnem v. Canada (Minister of Employment and Immigration)* (1991), 132 N.R. 53 (F.C.A.). This is also expressed in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("Handbook on Refugee Status") in the following terms, at paragraph 53: [Citation omitted]

[6] Third, it is an error of law for the RPD not to consider the cumulative nature of the conduct directed against a claimant. See: *Bobrik v. Canada (Minister of Citizenship and Immigration)* (1994), 85 F.T.R. 13 (T.D.) at paragraph 22, and the authorities there reviewed by my colleague Madam Justice Tremblay-Lamer.

It is appropriate to consider both the actions of the government against the individual claimant and the overall atmosphere created by the state's intolerance.<sup>53</sup>

See also paragraphs 53, 54, 55, 67 and 201 of the UNHCR *Handbook*.

The Federal Court in *Liang*, citing paragraphs 54 and 55 of the UNHCR *Handbook*, affirmed that in the exercise of determining whether cumulative discrimination and harassment constitutes persecution it is necessary to evaluate the claimant's personal circumstances and vulnerabilities including age, health, and finances.<sup>54</sup>

In assessing whether cumulative acts of discrimination amount to persecution it is necessary first to decide whether an individual act constitutes harassment or is discriminatory. The Federal Court in *Hund*<sup>55</sup> concluded that it would be an error to consider acts that are erroneously characterized as discriminatory in assessing whether cumulative acts of discrimination amount to persecution. Such acts could include abandonment by one's own family, general threats made at community meetings, and relocating. Also, the "cumulative effect" should only consider incidents related to a Convention reason.

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<sup>53</sup> *Rodriguez-Hernandez, Severino Carlos v. S.S.C.* (F.C.T.D., no. A-19-93), Wetston, January 10, 1994, at 3.

<sup>54</sup> *Liang, Hanquan v. M.C.I.* (F.C. no. IMM-3342-07), Tremblay-Lamer, April 8, 2008; 2008 FC 450. An example of a case where the young age of the claimant (a 13 year old abandoned child) was considered in assessing the cumulative effect of the various harms they faced is *M.C.I. v. Patel, Dhruv Navichandra* (F.C., no. IMM-2482-07), Lagacé, June 17, 2008; 2008 FC 747. .

<sup>55</sup> In *M.C.I. v. Hund, Matthew*, (IMM-5512-07), Lagacé, February 5, 2009; 2009 FC 121, the Court found that the Board had erred in considering abandonment by the respondents' own family; targets and attacks by a deputy sheriff; threats made at public meetings by members of their community; and several relocations over a span of four years as cumulative acts of discrimination. The Court noted that the incidents did not fall within the definitions of discrimination and persecution. For example, with reference to abandonment the Court noted that, "abandonment by one's own family, though an unpleasant occurrence, remains an unfortunate social and familial dynamic faced in the best families regardless of the religious beliefs and political opinions; as such it does not equate to discrimination."

Where state protection is available for the types of events alleged as discriminatory, the cumulative assessment is not necessary.<sup>56</sup>

In *Munderere*,<sup>57</sup> the Federal Court of Appeal stated that “there is nothing in paragraph 53 of the *UNHCR Handbook* which could justify an expansion of the cumulative effect of incidents doctrine to events that occurred in two different countries.” The Court held that, when analyzing cumulative grounds, “[a]s a matter of principle, events which occur in a country other than that in respect of which a claimant seeks refugee status should not be considered.”<sup>58</sup> However, the Court added the following caveat: “except where the events which occur in a country other than that in respect of which a claimant seeks refugee status are relevant to the determination of whether the country where a claimant seeks refugee status can protect him or her from persecution.”<sup>59</sup>

### 3.1.3. Forms of Persecution

#### 3.1.3.1. Some Judicial Observations

It is impossible to compile an exhaustive catalogue of forms of persecution. Furthermore, whether particular harm constitutes persecution may depend upon the facts of the individual case. Nevertheless, here are some of the more instructive observations that emerge from the case law. (NOTE: The statements which follow should be approached with caution. To obtain context and understand the statements fully, the reader should consult the cases on which they are based.)

- ◆ Torture, beatings and rape are prime examples of persecution.<sup>60</sup>

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<sup>56</sup> *Gebre-Hiwet, Tewodros v. M.C.I.* (F.C., no. IMM-3844-09), Phelan, April 30, 2010; 2010 FC 482.

<sup>57</sup> *M.C.I. v. Munderere, Bagambake Eugene* (F.C.A., no. A-211-07), Nadon, Décary, Létourneau, March 5, 2008; 2008 FCA 84, at paragraph 48. Leave to appeal to the Supreme Court of Canada was dismissed without reasons on August 14, 2008 (S.C.C. File no. 32602).

<sup>58</sup> *Munderere, ibid.* at paragraph 49.

<sup>59</sup> *Munderere, ibid.*, at paragraph 52.

<sup>60</sup> *Chan v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 675; (1993), 20 Imm. L.R. (2d) 181 (C.A.), per Desjardins J.A. at 723, aff'd *Chan* (S.C.C.), *supra*, footnote 6. In *Mendoza, Elizabeth Aurora Hauayek v. M.C.I.* (F.C.T.D., no. IMM-2997-94), Muldoon, January 24, 1996, at 4: the Court said that rape “is a form of brutality especially utilizable for the humiliation and brutalization of women. It is not to be treated lightly”. In *Arguello-Garcia, Jacobo Ignacio v. M.E.I.* (F.C.T.D., no. 92-A-7335), McKeown, June 23, 1993. Reported: *Arguello-Garcia v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 285 (F.C.T.D.), at 287, sexual abuse was part of the persecution suffered by the male claimant. But see *Cortez, supra*, footnote 30, where the rape was found not to constitute persecution. See also Chapter 9, section 9.3.3. for further discussion of measures such as beating.

In *Iruthayanathar, Joseph v. M.C.I.* (F.C.T.D., no. IMM-3619-99), Gibson, June 15, 2000, while following *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.), (discussed in Chapter 9, section 9.3.3.), the Court determined that beatings in detention, alone, can constitute persecution. For a case discussing harmful treatments at checkpoints, see *Thambirajah, Sathan v. M.C.I.* (F.C., no. IMM-382-11), Bédard, October 20, 2011; 2011 FC 1196. The Court noted that being beaten, detained, or made to pay a bribe to a paramilitary group to be released cannot reasonably be characterized as a mere inconvenience or as being vigorously questioned. In *Ismayilov, Anar v. M.C.I.* (F.C., no. IMM-7263-14), Mactavish, August 26, 2015; 2015 FC 1013, the Court found the RPD’s finding that the treatment the claimant received was “routine

- ◆ The term “discrimination” is not adequate to describe behaviour which includes acts of violence and death threats.<sup>61</sup>
- ◆ Death threats may constitute persecution even if the persons making the threats refrain from carrying them out.<sup>62</sup> Whether death threats do amount to acts of persecution depends upon the personal circumstances of the claimant.<sup>63</sup>
- ◆ When imposed for certain offences, the death penalty may not constitute persecution.<sup>64</sup>
- ◆ Forced or strongly coerced sterilization constitutes persecution, whether the victim is a woman<sup>65</sup> or a man.<sup>66</sup> Forced abortion also constitutes persecution,<sup>67</sup> as does the forcible insertion of an IUD.<sup>68</sup>
- ◆ Female circumcision is a “cruel and barbaric practice”, a “horrific torture”, and an “atrocious mutilation”.<sup>69</sup>

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questioning” to be perverse. The claimant had been repeatedly arrested and detained because of his religious faith. He was questioned, insulted, beaten, denied food, water and the ability to pray, and forcibly shaved.

<sup>61</sup> *Porto, Javier Cardozo v. M.E.I.* (F.C.T.D., no. A-1549-92), Noël, September 3, 1993, at 3. In *Warner, Leslie Kervin v. M.C.I.* (F.C., no. IMM-4283-10), Zinn, March 23, 2011; 2011 FC 363, a case involving mistreatment based on the claimant’s homosexuality, the Court found unreasonable the RPD’s conclusion that the many incidents of very serious physical violence directed against the claimant and his partner were, even cumulatively, no more than harassment and discrimination. The fact that laws criminalizing homosexual acts are not enforced is relevant to the issue of state protection and not to the issue of whether acts perpetrated by non-state actors amount to persecution.

<sup>62</sup> *Munoz, Alfonso La Rotta v. M.C.I.* (F.C.T.D., no. IMM-2207-93), Pinard, November 28, 1994, at 3.

<sup>63</sup> *Gidoiu, Ion v. S.S.C.* (F.C.T.D., no. IMM-2907-94), Wetston, April 6, 1995, at 1.

<sup>64</sup> *Antonio, supra*, footnote 7, at 11-12, where the offence in question was treason (in the form of espionage and sabotage); *Chu, Zheng-Hao v. M.C.I.* (F.C.T.D., no. IMM-5159-94), Jerome, January 17, 1996, at 5. See also *Singh, Tejinder Pal v. M.C.I.* (F.C.T.D., no. IMM-5294-97), Muldoon, December 23, 1997 (supplementary reasons), at paragraphs 9-13.

<sup>65</sup> *Cheung, supra*, footnote 5, at 324, per Linden J.A.: “the forced sterilization of women is a fundamental violation of basic human rights. It violates Articles 3 and 5 of the *United Nations Universal Declaration of Human Rights*.” With respect to sterilization and abortion, see Chapter 9, section 9.3.7., where the one-child policy in China is discussed.

<sup>66</sup> *Chan* (S.C.C.), *supra*, footnote 6, per La Forest J. (dissenting) at 636. The majority in the Supreme Court did not expressly comment on the issue, although Mr. Justice Major appeared to assume that forced sterilization would indeed constitute persecution: see, for example, 658 and 672-673. See also *Chan* (F.C.A.), *supra*, footnote 60, per Heald J.A. at 686, and per Mahoney J.A. (dissenting) at 704.

<sup>67</sup> *Lai, Quang v. M.E.I.* (F.C.T.D., no. IMM-307-93), McKeown, May 20, 1994, at 2.

<sup>68</sup> *Zheng, Jin Xia v. M.C.I.* (F.C., no. IMM-3121-08), Barnes, March 30, 2009; 2009 FC 327. The Court noted that the RPD erred in finding that the requirement to use an IUD is not persecutory because it arises from a law of general application. See also *M.C.I. v. Ye, Yanxia* (F.C., no. IMM-8797-12), Pinard, June 13, 2013; 2013 FC 634.

<sup>69</sup> *Annan v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 25 (T.D.).

- ◆ For “persecution” to exist within the meaning of the definition, it is not necessary for the subject to have been deprived of his freedom.<sup>70</sup>
- ◆ There may be persecution even if there is no physical harm or mistreatment.<sup>71</sup>
- ◆ Psychological violence may be an element in persecution.<sup>72</sup>
- ◆ The bringing of a trumped-up charge, and interference in the due process of law, may be aspects of persecutory treatment.<sup>73</sup>
- ◆ The fact that the claimant, along with all of his or her co-nationals, suffers curtailment of freedom of speech, in and of itself does not amount to persecution.<sup>74</sup>
- ◆ Barring one claimant from obtaining citizenship and from taking part in political activities, and barring a second claimant (a citizen) from voting and from otherwise participating in the political process, did not constitute persecution where the claimants enjoyed numerous other rights.<sup>75</sup>
- ◆ Punishment for violation of a law concerning dress may constitute persecution.<sup>76</sup>

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<sup>70</sup> *Oyarzo v. Canada (Minister of Employment and Immigration)*, [1982] 2 F.C. 779 (C.A.), at 782, per Heald J. See also *Amayo v. Canada (Minister of Employment and Immigration)*, [1982] 1 F.C. 520 (C.A.); and *Asadi, Sedigheh v. M.C.I.* (F.C.T.D., no. IMM-1921-96), Lutfy, April 18, 1997, at 3. See also *Herczeg, Zsolt v. M.C.I.* (F.C., no. IMM-5538-06), Mandamin, October 23, 2007; 2007 FC 2000, at paragraph 20.

<sup>71</sup> *Ammery, Poone v. S.S.C.* (F.C.T.D., no. IMM-5405-93), MacKay, May 11, 1994, at 4. *Nejad, supra*, footnote 11. See *Serwaa, Akua v. M.C.I.* (F.C., no. IMM-295-05), Pinard, December 20, 2005; 2005 FC 1653, at paragraph 6, where the Court stated that it seemed that stalking would be included in the definition of persecution, depending on the facts of the case. See also *Herczeg, Zsolt v. M.C.I.* (F.C., no. IMM-5538-06), Mandamin, October 23, 2007; 2007 FC 2000, at paragraph 19.

<sup>72</sup> *Bragagnini-Ore, Gianina Evelyn v. S.S.C.* (F.C.T.D., no. IMM-2243-93), Pinard, February 4, 1994, at 2.

<sup>73</sup> *Kicheva, Zorka v. M.E.I.* (F.C.T.D., no. A-625-92), Denault, December 23, 1993, at 2.

<sup>74</sup> *Ling, Che Keung v. M.E.I.* (F.C.T.D., no. 92-A-6555), Muldoon, May 20, 1993.

<sup>75</sup> *Sulaiman, Hussaine Hassan v. M.C.I.* (F.C.T.D., no. IMM-525-94), MacKay, March 22, 1996, at 6-7 and 11-12.

<sup>76</sup> *Namitabar v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 42 (T.D.), at 47; *Fathi-Rad, Farideh v. S.S.C.* (F.C.T.D., no. IMM-2438-93), McGillis, April 13, 1994, at 4-5. Compare *Hazarat, Ghulam v. S.S.C.* (F.C.T.D., no. IMM-5496-93), MacKay, November 25, 1994, at 3-4. See the discussion of “Restrictions upon Women” in section 9.3.8.1 of Chapter 9. In *S.S.C. v. Namitabar, Parisa* (F.C.A., no. A-709-93), Décar, Hugessen, Desjardins, October 28, 1996, the Court overturned the Trial Division on the basis that the CRDD credibility findings were not ambiguous. With respect to the issue of wearing veils in Iran, the Court was of the view that “the Refugee Division may have expressed itself incorrectly [but] that has no importance in the case at bar since the female [claimant] voluntarily complied with the clothing code and did not even display reluctance to do so.” See also *Rabbani, Farideh v. M.C.I.* (F.C.T.D., no. IMM-2032-96), McGillis, June 3, 1997, at 2.

In two decisions dealing with a Turkish law banning the wearing of headscarves in government places or buildings, the Court distinguished both *Namitabar* (F.C.T.D.), *supra*, and *Fathi-Rad, supra*, as cases dealing with Iranian women who were obliged by Iranian law to wear the Chador: *Kaya, Nurcan v. M.C.I.* (F.C., no. IMM-5565-03), Harrington, January 14, 2004; 2004 FC 45, at paragraph 18; *Aykut, Ibrahim v. M.C.I.* (F.C., no. IMM-5310-02), Gauthier, March 26, 2004; 2004 FC 466, at paragraph 40. In *Daghmarsh, Mohamed Hussein*

- ◆ Denial of a right of return may constitute an act of persecution.<sup>77</sup>
- ◆ Simple statelessness does not make one a Convention refugee.<sup>78</sup>
- ◆ Economic penalties may be an acceptable means of enforcing a state policy,<sup>79</sup> where the claimant is not deprived of his or her right to earn a livelihood.<sup>80</sup>
- ◆ Where the state interferes substantially with the claimant's ability to find work, the possibility of the claimant's finding illegal employment is not an acceptable remedy.<sup>81</sup>
- ◆ Permanently depriving an educated professional of his or her accustomed occupation and limiting the person to farm and factory work constituted persecution.<sup>82</sup> In contrast,

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*Moustapha v. M.C.I.* (F.C.T.D., no. IMM-4302-97), Lutfy, June 19, 1998, the Court referred to the punishment of lashing and found no reviewable error with the tribunal's finding that while abhorrent to Canadian sensibilities, one cannot make the sweeping finding that corporal punishment is automatically persecutory. This case should be read with caution in light of the statement by the Supreme Court of Canada in *R. v. Smith*, [1987] 1 S.C.R. 1045 that: "...some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed..."

<sup>77</sup> *Maarouf v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 723 (T.D.), at 738. See also *Abdel-Khalik, Fadya Mahmoud v. M.E.I.* (F.C.T.D., no. IMM-883-93), Reed, January 31, 1994. Reported: *Abdel-Khalik v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm. L.R. (2d) 262 (F.C.T.D.), at 263. But see *Altawil, Anwar Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2365-95), Simpson, July 25, 1996, where denial of a right to return was found not to be persecutory when related to a law of general application.

<sup>78</sup> *Arafa, Mohammed v. M.E.I.* (F.C.T.D., no. A-663-92), Gibson, November 3, 1993, at 4-5. As to the possibility that harsh policies on the granting of citizenship, or limitations imposed upon permanent residents, might constitute persecution, see *Falberg, Victor v. M.C.I.* (F.C.T.D., no. IMM-328-94), Richard, April 19, 1995, at 4.

<sup>79</sup> *Cheung, supra*, footnote 5, at 323; *Chan* (F.C.A.), *supra*, footnote 60, at 688, per Heald J.A.; *Lai, supra*, footnote 67, at 3.

<sup>80</sup> *Lin, Qu Liang v. M.E.I.* (F.C.A., no. 93-A-142), Rouleau, July 20, 1993. Reported: *Lin v. Canada (Minister of Employment and Immigration)* (1993), 24 Imm. L.R. (2d) 208 (F.C.T.D.), at 211. In *Horvath, Laszlo v. M.C.I.* (F.C., no. IMM-4326-10), Mandamin, November 23, 2011; 2011 FC 1350, the Court noted that the failure to analyze the limitation on the applicant's ability to earn a livelihood constitutes a reviewable error.

<sup>81</sup> *Xie, Sheng v. M.E.I.* (F.C.T.D., no. A-1573-92), Rothstein, March 3, 1994, at 5-6. Similarly, in *Soto, Marie Marcelina Troncoso v. M.C.I.* (F.C.T.D., no. IMM-3734-01), Tremblay-Lamer, July 10, 2002; 2002 FCT 768, the Court held that it is not acceptable to suggest that a visually impaired person, who is trained to use a guide dog, should not bring her guide dog to work in order to find employment.

<sup>82</sup> *He, Shao Mei v. M.E.I.* (F.C.T.D., no. IMM-3024-93), Simpson, June 1, 1994. Reported: *He v. Canada (Minister of Employment and Immigration)* (1994), 25 Imm. L.R. (2d) 128 (F.C.T.D.). In contrast, see *Vaamonde Wulff, Monica Maria v. M.C.I.* (F.C., no. IMM-4292-05), Rouleau, June 9, 2006; 2006 FC 725, at paragraph 23, where the Court held that the claimant's argument "that she would not be able to resume her teaching job is not sufficient to say that she is unemployable, given her training and work history [in a number of other jobs]". Also see *El Assadi, supra* footnote 48 where the Court found that although the claimant could not work as a mechanical engineer in Lebanon, he did not demonstrate that he could not work in other fields. The Court stated "...persecution does not result from the ability to work in the field of one's choosing. Rather, it flows from one's inability to work at all..." [NOTE: The Court likely meant "inability, rather than "ability" in the first sentence]

treatment at work such as being more closely scrutinized, being given low profile jobs and being regularly questioned do not add up to persecution.<sup>83</sup>

- ◆ By itself, confiscation of property is not sufficiently grave to constitute persecution.<sup>84</sup>
- ◆ Serious economic deprivations may be components of persecution.<sup>85</sup>
- ◆ Extortion may be one of the indicia of persecution, depending upon the reason for the extortion and the motivation of the claimant in paying.<sup>86</sup>
- ◆ The fact a child has a different nationality from his or her parents and therefore may be returned to a different country is not a form of persecution.<sup>87</sup>
- ◆ A child who would experience hardships including deprivation of medical care, education opportunities, employment opportunities and food would suffer concerted and severe discrimination, amounting to persecution.<sup>88</sup>
- ◆ A child who is made to witness appalling physical and psychological domestic violence is a victim of abuse and the RPD must assess the child's risk of persecution.<sup>89</sup>
- ◆ Education is a basic human right and a nine-year-old claimant who could have avoided persecution only by refusing to go to school was deemed to be a Convention refugee.<sup>90</sup>

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<sup>83</sup> *Garcia Luzbet, Yunetsy v. M.C.I.* (F.C., no. IMM-57-11), Harrington, July 22, 2011; 2011 FC 923.

<sup>84</sup> *Ramirez, Rosa Etelvina v. S.G.C.* (F.C.T.D., no. IMM-1192-94), Rouleau, December 9, 1994, at 5. See also *Chen, supra*, footnote 9, at 4.

<sup>85</sup> *Lerer, Iakov v. M.C.I.* (F.C.T.D., no. IMM-7438-93), Cullen, January 5, 1995, at 5-6.

<sup>86</sup> *Sinnathamby, Jayasrikanthan v. M.E.I.* (F.C.T.D., no. IMM-179-93), Noël, November 2, 1993. Reported: *Sinnathamby v. Canada (Minister of Employment and Immigration)* (1993), 23 Imm. L.R. (2d) 32 (F.C.T.D.) at 36. See also: *Mortera, Senando Layson v. M.E.I.* (F.C.T.D., no. A-1084-92), McKeown, December 8, 1993; *Vasudevan, Prakash v. S.S.C.* (F.C.T.D., no. IMM-81-94), Gibson, July 11, 1994; *Sivapoosam, Sivakumar v. M.C.I.* (F.C.T.D., no. IMM-2674-95), Reed, June 19, 1996, at 4-5; and *Srithar, Suntharalingam v. M.C.I.* (F.C.T.D., no. IMM-158-97), Tremblay-Lamer, October 10, 1997, at 4-5 (extortion by corrupt military personnel). In *Nyota, Katy v. M.C.I.* (F.C., no. IMM-4289-10), O'Keefe, June 13, 2011; 2011 FC 675, the Court reiterated that extortion may amount to persecution and it is an error to state that it can never form the basis of a refugee claim.

<sup>87</sup> *Douillard, Kerlange v. M.C.I.* (F.C. no. IMM-4443-18), LeBlanc, March 29, 2019; 2019 FC 390. In this case, the claimant pleaded that her child, as an American citizen, would be separated from her if his claim were denied. The Court held that family reunification by itself is not a determinative factor where the criteria of sections 96 or 97 are not met.

<sup>88</sup> *Cheung, supra*, footnote 5, at 325.

<sup>89</sup> *Modeste, Sherisa Shermika Patricia v. M.C.I.* (F.C., no. IMM-9659-12), Russell, December 18, 2013; 2013 FC 1262.

<sup>90</sup> *Ali, Shaysta-Ameer v. M.C.I.* (F.C.T.D., no. IMM-3404-95), McKeown, October 30, 1996. Reported: *Ali v. Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 34 (F.C.T.D.). The Court distinguished *Ali* in *Gonsalves, Stanley Bernard v. M.C.I.* (F.C., no. IMM-3827-10), Zinn, June 7, 2011; 2011 FC 648 when it found that the RPD did not err in finding that the applicant children did not face persecution even though they had to leave school due to discriminatory treatment. While *Ali* stands for the proposition that



- ◆ It is not an act of persecution to ban certain groups of children from attending public schools, if they are permitted to have their own schools.<sup>91</sup>
- ◆ Forcing a woman into a marriage violates one of her basic human rights.<sup>92</sup>
- ◆ An impediment to the claimant's marrying in her homeland did not constitute persecution.<sup>93</sup> However, the RPD should consider whether preventing a claimant from getting married or from having further children by being threatened with forced sterilization might, in and of itself, amount to persecution.<sup>94</sup>
- ◆ Legal restrictions allowing certain categories of people to settle only in certain areas did not constitute persecution.<sup>95</sup>
- ◆ A law which requires a person to forsake the principles or practices of his or her religion is patently persecutory, so long as the principles or practices in question are not unreasonable.<sup>96</sup> Sanctions such as a short detention, fine or re-education term, which might have been imposed upon the claimant for practising his religion or belonging to a particular religious community, were serious measures of discrimination and constituted persecution.<sup>97</sup>

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where the only way a child can avoid persecution is to cease attending school, asking the child to do so violates his or her right to an education and the child should therefore be found to be a refugee, in this case, the RPD reasonably found that the treatment which forced the applicant children to leave school was discrimination not persecution.

<sup>91</sup> *Thathaal, Sabir Hussain v. S.S.C.* (F.C.T.D., no. A-1644-92), McKeown, December 15, 1993, at 2. Appeal to the Federal Court of Appeal dismissed April 16, 1996 (F.C.A., no. A-724-93).

<sup>92</sup> *Vidhani v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 60 (T.D.), at 65.

<sup>93</sup> *Frid, Mickael v. M.C.I.* (F.C.T.D., no. IMM-6694-93), Rothstein, December 15, 1994, at 3.

<sup>94</sup> *Zheng, Jian Hua v. M.C.I.* (F.C., no. IMM-3781-10), Scott, February 15, 2011; 2011 FC 181.

<sup>95</sup> *Igumnov, Sergei v. M.C.I.* (F.C.T.D., no. IMM-6993-93), Rouleau, December 16, 1994, at 3-5. See also *Gutkovski, supra*, footnote 19, at 2 and 4.

<sup>96</sup> *Kassatkine, Serguei v. M.C.I.* (F.C.T.D., no. IMM-978-95), Muldoon, August 20, 1996, at 4. And see *Kazkan, Shahrokh Saeedi v. M.C.I.* (F.C.T.D., no. IMM-1313-96), Rothstein, March 20, 1997.

Similarly, in *BC v. M.C.I.* (F.C., no. IMM-4840-02), Gibson, July 4, 2003; 2003 FC 826, the Court held that the denial to the claimant of the opportunity to secure re-employment as a high school teacher, in the absence of her abandonment of a particular religious practice, could amount to serious discrimination amounting to persecution. However, in two decisions, the Federal Court agreed with the RPD's finding that the Turkish female claimant's loss of employment in a public institution for wearing a headscarf did not constitute persecution. In *Kaya, supra*, footnote 76, at paragraph 13, the Court stated that "[I]aws must be considered in their social context." In this case, the Court found that the Turkish law banning the wearing of any religious dress in government places or buildings was made in furtherance of the government's secular policies. A similar result was reached in *Aykut, supra*, footnote 76. See also the discussion under "Restrictions upon Women" in Chapter 9, section 9.3.8.1

<sup>97</sup> *Chen, Shun Guan v. M.C.I.* (F.C.T.D., no. IMM-1433-96), Lutfy, January 31, 1997, at 2-3, citing the UNHCR *Handbook*, paragraph 72.

- ◆ Injury to pride and political sensibilities did not amount to a violation of security of the person.<sup>98</sup>
- ◆ Lamentable rough treatment, involving detention and interrogation, in a country that is experiencing serious terrorist activity, does not of itself amount to persecution.<sup>99</sup>
- ◆ Minor children who are expected to provide support for other family members, after being smuggled into Canada, are not persecuted by their parents.<sup>100</sup>
- ◆ The act of being illegally trafficked is not in itself persecution simply because the claimant is a minor.<sup>101</sup>
- ◆ Restrictions by a state on a foreign spouse's entry into its territory that are not made on a discriminatory basis do not constitute persecution.<sup>102</sup>

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<sup>98</sup> *Lin, supra*, footnote 80, at 211.

<sup>99</sup> *Abouhalima, Sherif v. M.C.I.* (F.C.T.D., no. IMM-835-97), Gibson, January 30, 1998. However, in *Murugamoorthy, Rajarani v. M.C.I.* (F.C., no. IMM-4706-02), O'Reilly, September 29, 2003; 2003 FC 1114, at paragraph 6, the Court stated that whether short-term arrests for security reasons can be considered persecution depends upon the claimant's particular circumstances, including factors such as the claimant's age and prior experiences, relying upon *Vellupillai, Selvaratnam v. M.C.I.* (F.C.T.D., no. IMM-2043-99), Gibson, March 9, 2000. In *Kularatnam, Suhitha v. M.C.I.* (F.C., no. IMM-3530-03), Phelan, August 12, 2004; 2004 FC 1122, at paragraph 11, the Court set out other factors that could also be relevant, namely, the nature of the location and treatment during detention, and the manner of release from detention.

In *Abu El Hof, Nimber v. M.C.I.* (F.C., no. IMM-1494-05), von Finckenstein, November 8, 2005; 2005 FC 1515, the Court upheld as reasonable the RPD's conclusion that the claimant's two short detentions and interrogation, although humiliating, could be viewed as necessary security measures, given the heightened security in Israel at the time. In *Kuzu, Meral v. M.C.I.* (F.C. no. IMM-496-18), Lafrenière, September 14, 2018; 2018 FC 917, the Court came to a similar conclusion concerning two periods of detention for a total of eight hours. The Court noted that at no point did the police use violence towards the claimant nor interfere with his basic human rights. See also chapter 9, section 9.3.3.

<sup>100</sup> *M.C.I. v. Lin, Chen* (F.C.A., no. A-3-01) Desjardins, Décary, Sexton, October 18, 2001. See also *Zhu, Long Wei v. M.C.I.* (F.C.T.D., no. IMM-2746-00) Muldoon, August 13, 2001.

<sup>101</sup> In *Zheng, Jin Dong v. M.C.I.* (F.C.T.D., no. IMM-2415-01), Martineau, April 19, 2002; 2002 FCT 448, the basis for this argument was that minors could not consent to being trafficked. The Court upheld the CRDD's decision, where the panel assessed the issue of consent with regard to this particular minor claimant, relying upon *Xiao, Mei Feng v. M.C.I.*, (F.C.T.D., no. IMM- 953-00), Muldoon, March 16, 2002; 2001 FCT 195.

<sup>102</sup> Although the Court stated that the issue was not determinative in this case, in *M.C.I. v. Hamdan, Amneh* (F.C., no. IMM-7723-04), Gauthier, March 6, 2006; 2006 FC 290, at paragraphs 22-23, the Court commented that the *Universal Declaration of Human Rights* "is only a declaratory instrument" and that article 16 "deals with the right not to have limitations based on race, nationality or religion imposed on one's right to marry and to found a family". The Court agreed with the applicant Minister that it did not "*per se* create a positive obligation on a State to set up sponsorship processes or to adopt legislation that facilitates the entry of a foreign spouse on its territory."

- ◆ Forcing non-religious or secular persons to adhere to strict Islamic codes will not generally amount to persecution (particularly where there is evidence of significant improvements).<sup>103</sup>
- ◆ Insults and attacks on a conscientious objector while in prison do not constitute persecution.<sup>104</sup>
- ◆ Persecution may exist where services for the mentally ill are abysmal and the population regards them as being possessed by “supernatural evil”.<sup>105</sup>

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<sup>103</sup> *Marshall, Matin v. M.C.I.* (F.C., no. IMM-3638-07), O’Keefe, August 14, 2008; 2008 FC 946.

<sup>104</sup> *Treskiba, Anatoli Benilov v. M.C.I.* (F.C., no. IMM-1999-08), Pinard, January 13, 2009; 2009 FC 15.

<sup>105</sup> *Woldeghebrial, Sela Tesfa v. M.C.I.* (F.C., no. IMM-3514-10), O’Reilly, February 4, 2011; 2011 FC 126.

## CHAPTER 3 - PERSECUTION

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## CHAPTER 4

### 4. GROUNDS OF PERSECUTION - NEXUS

#### 4.1. GENERALLY

The definition of a Convention refugee states that a claimant's fear of persecution must be "by reason of" one of the five enumerated grounds - that is race, religion, nationality, membership in a particular social group and political opinion. There must be a link between the fear of persecution and one of the five grounds.<sup>1</sup>

The motivation for persecution may involve more than just one ground or factor. If at least one of the motives for persecution can be related to a Convention ground, the necessary link is established. What is referred to as "mixed motive doctrine" has been explained as follows:

[...] If one of the motivations of the agent of persecution is race but only in combination with another factor, how could that not be sufficient to meet the requirements of section 96 of the IRPA? After all, section 96 of the IRPA as written, is not to be interpreted in a narrow restrictive fashion: its purpose, as outlined, is to address fear of persecution and to protect any person who suffers from persecution based on race, religion, nationality, membership in a particular social group or political opinion.[...]<sup>2</sup>

In other words, the necessary nexus can be found when one (or more) of the Convention grounds is a contributing factor for persecution. For example, extortionists, whose motive is criminal, may target persons whose race, religion or imputed political opinions make them less likely to be able to access protection.<sup>3</sup>

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<sup>1</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85 at 732; *Chan v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 675; (1993), 20 Imm. L.R. (2d) 181 (C.A.), at 689-690 and 692-693.

<sup>2</sup> *M.C.I. v. B344* (F.C. no., IMM-7817-12), Noël, May 8, 2013; 2013 FC 447, at para. 37. See also paras. 38-41. The Court noted that the mixed motive doctrine was first recognized by the Court of Appeal in *Zhu v. M.E.I.*, (F.C.A. no., A-1017-91), MacGuigan, Linden, Robertson, January 28, 1994 where the Court of Appeal concluded that the CRDD erred in setting up an opposition between friendship and political motivation as the motives of the claimant, who assisted in smuggling two students involved in the Chinese pro-democracy movement to Hong Kong primarily because of friendship. The motives were "mixed" rather than "conflicting". It is sufficient if one of the motives is political. The doctrine has since been applied by the Federal Court in many decisions.

<sup>3</sup> In *Kutaladze, Levane v. M.C.I.* (F.C., no. IMM-7861-11), Shore, May 23, 2012; 2012 FC 627, the Court held that documentary evidence and testimony required the RPD to conduct a more in-depth analysis of the claimant's allegation that the reason he was extorted and accused of being a spy was because of his political opinion.

See also *Shahiraj, Narender Singh v. M.C.I.* (F.C.T.D., no. IMM-3427-00), McKeown, May 9, 2001 where the Court held that the CRDD erred in finding no nexus because, after arresting and torturing the claimant, the police would release him upon payment of a bribe. The evidence showed that police targeted the claimant based at least partially on his imputed political ties to militants.

The relevant questions in analyzing s. 96 and s. 97 of *IRPA* are different. In particular, in *Alhezma*,<sup>4</sup> the Court noted that the comparative analysis that may be done for s. 97 is not part of the analysis for persecution based on a Convention ground:

It is evident [...] that the RPD, in its section 96 analysis, sought a degree of personal risk to the claimant which exceeded the risk to Palestinians in general. Such an approach is appropriate to a section 97 analysis. The question is not whether [the claimant] is more at risk than anyone else, but whether the persecution she would face upon returning to the West Bank is based upon a Convention ground, such that she merits refugee protection.

It is for the Refugee Protection Division to determine the ground, if any, applicable to the claimant's fear of persecution.<sup>5</sup> This is consistent with the overall obligation of the Refugee Division to determine whether the claimant is a Convention refugee. If a claimant identifies the ground(s) which he or she thinks are applicable to the claim, the Refugee Division is not limited to considering only those grounds and must consider the grounds of the definition as raised by the evidence in making their determination.<sup>6</sup> However, once the Refugee Division has found that the claimant's fear of persecution is by reason of one of the grounds it is not necessary to go on to consider all of the other grounds.

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In *Katwaru, Shivanand Kumar v. M.C.I.* (F.C., no. IMM-3368-06), Teitelbaum, June 8, 2007; 2007 FC 612, the Court rejected the argument that the RPD failed to consider whether the agent of persecution, an Afro-Guyanese school yard bully had mixed motives (i.e. criminal and racial) for attacking the Indo-Guyanese claimant. Since the RPD concluded that there was no evidence that the claimant's persecutor was racially-motivated, there was no basis on which to make a determination that there were mixed motives.

<sup>4</sup> *Alhezma, Lotifya K.Q. v. M.C.I.* (F.C., no. IMM-2087-16), Bell, November 24, 2016 (delivered orally on November 17, 2016); 2016 FC 1300, at para. 18.

<sup>5</sup> *Ward, supra*, footnote 1, at 745 cites the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, September 1979, paragraph 67. As explained in *M.C.I. v. A068* (F.C., no. IMM-8485-12), Gleason, November 19, 2013; 2013 FC 1119, at para. 37 “*Ward* establishes that where the facts support a well-founded fear of persecution based on political opinion, a reviewing court is free to consider that ground even if the parties had framed the issue in the context of membership in a particular social group.”

In *Singh, Sarbit v. M.C.I.* (F.C., no. IMM-1157-07), Beaudry, October 1, 2007; 2007 FC 978, the Court overturned the RPD's decision that since the claimant did not originally make his claim under section 96, but only under subsection 97(1), there were no grounds for the claim for refugee protection under section 96. The Court found that the claim was not solely based on a matter of revenge. The aspect of the claimant's story regarding the terrorist organization Babar Khalsa should have been analyzed under section 96.

<sup>6</sup> In *Morenakang Mmono, Ruth v. M.C.I.* (F.C., no. IMM-4015-12), Phelan, March 5, 2013; 2013 FC 219, the Court noted that while the RPD is not required to make a claimant's case or advance grounds for a claim that were not raised, the Court of Appeal does require the Board to consider issues that obviously emerge from the evidence.

As noted by the Court of Appeal in *Guajardo-Espinoza* [1993] F.C.J., no. 797 (FCA) at para. 5:

As this Court recently said in *Pierre-Louis [sic] v. M.E.I.*, [F.C.A., no. A-1264-91, April 29, 1993] the Refugee Division cannot be faulted for not deciding an issue that had not been argued and that did not emerge perceptibly from the evidence presented as a whole.[...] Saying the contrary would lead to a real hide-and-seek or guessing game and oblige the Refugee Division to undertake interminable investigations to eliminate reasons that did not apply in any case, that no one had raised and that the evidence did not support in any way, to say nothing of frivolous and pointless appeals that would certainly follow.

When determining the applicable grounds, the relevant consideration is the perception of the persecutor. The persecutor may perceive that the claimant is a member of a certain race, nationality, religion, or particular social group or holds a certain political opinion and the claimant may face a reasonable chance of persecution because of that perception. This perception may not conform to the real situation.<sup>7</sup>

Reference should be made to the Guidelines on *Women Refugee Claimants Fearing Gender-Related Persecution* issued by the Chairperson pursuant to section 65(3) of the *Immigration Act*, updated November 25, 1996, as continued in effect on June 28, 2002 under the authority found in section 159(1)(h) of the *Immigration and Refugee Protection Act* for an analysis of the grounds as they relate to gender-related persecution.<sup>8</sup>

Claimants cannot be asked to renounce their deeply held beliefs or refrain from exercising their fundamental rights to avoid persecution and as a price to live in security. It is precisely to avoid this result that state parties have agreed to the *United Nations Convention Relating to the Status of Refugees*.<sup>9</sup>

## 4.2. RACE

There is currently no Federal Court jurisprudence that provides a detailed analysis of this ground of persecution. Reference should be made to the UNHCR *Handbook*, at paragraphs 68 to 70, for a description of this ground. According to the *Handbook*, “race ... has to be understood in

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<sup>7</sup> *Ward, supra*, footnote 1, at 747. In *Gholami, Abbas v. M.C.I.* (F.C., no. IMM-1203-14), O’Reilly, December 16, 2014; 2014 FC 1223, while the Board recognized that based on the documentary evidence Arabs face widespread discrimination in Iran, it determined that because the principal claimant is ethnically Persian, he and the rest of the family would be perceived as being Persian and therefore not persecuted. The Court held that the Board failed to recognize that the applicants would likely be regarded as Arabs in Iran, given their language, upbringing, and family history in Kuwait, where they spoke, worked and attended school in Arabic.

<sup>8</sup> In *Narvaez v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 F.C. 55 (T.D.), at 62, the Court stated: “While the guidelines are not law, they are authorized by subsection 65(3) of the *Act*, and intended to be followed unless circumstances are such that a different analysis is appropriate.”

<sup>9</sup> See *Gur, Irem v. M.C.I.* (F.C., no. IMM-6294-11), de Montigny, August 14, 2012; 2012 FC 992, at paragraph 22 where the Court noted that a Kurdish claimant of the Alevi faith cannot be asked to renounce her faith and language in order to live peacefully. A person cannot be asked to renounce his or her deeply held beliefs or to stop exercising his or her fundamental rights in order to avoid persecution and as a price to pay to live in security.

See also *Antoine, Belinda v. M.C.I.* (F.C., no. IMM-4967-14), Fothergill, June 26, 2015; 2015 FC 795, at para. 23 where the PRRA Officer had held that in order to avoid persecution, the applicant must continue to avoid an overtly lesbian lifestyle. The Court held that the expectation that an individual should practice discretion with respect to her sexual orientation is perverse, as it requires the individual to repress an immutable characteristic.

In *V.S. v. M.C.I.* (F.C., no. IMM-7865-14), Barnes, October 7, 2015; 2015 FC 1150, the Court held that the immigration officer erred by assuming that the hardship (i.e. risk) confronting the applicant upon return to her country could be easily managed by suppression of her sexual identity. In the Court’s words, that view is, quite simply, insensitive and wrong.

The same principle applies to political opinion: see *Colmenares, Jimmy Sinohe Pimentel v. M.C.I.* (F.C., no. IMM-5417-05), Barnes, June 14, 2006, 2006 FC 749, at para. 14; and to religion, see: *Mohebbi, Hadi v. M.C.I.* (F.C., no. IMM-3755-13), Harrington, February 26, 2014; 2014 FC 182, at para. 10.

its widest sense to include all kinds of ethnic groups that are referred to as ‘races’ in the common usage.” (paragraph 68)<sup>10</sup>

The Court of Appeal has said that where race is one of the defining elements of a group to which the claimant belongs (and fears persecution on account of) then the ground of persecution is race. It is not necessary to look at other grounds.<sup>11</sup>

It is an error for the Board not to consider the issue of whether a claimant has become a “soft target” for persecution at the hands of criminals because of police racism against the claimant’s group.<sup>12</sup>

### 4.3. NATIONALITY

This ground is discussed in the UNHCR *Handbook* at paragraphs 74 to 76. The *Handbook* points out that “nationality” in this case encompasses not only “citizenship” but it refers also to ethnic or linguistic groups.<sup>13</sup> According to the *Handbook* this ground may overlap with race.

The Court in *Hanukashvili*,<sup>14</sup> citing Lorne Waldman, noted the difference between “nationality” as a ground and “nationality” meaning citizenship. When used as one of the five grounds, “nationality” does not mean the same thing as “citizenship”; however it has the same meaning as citizenship when used in the definition of “Convention refugee” under subsection 2(1) of the *Immigration Act* or section 96 of the *Immigration and Refugee Protection Act*.

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<sup>10</sup> For example, Tamil ethnicity has been recognized as being linked to the ground of race in, among other cases, *M.C.I. v. B377* (F.C. no. IMM-6116-12), Blanchard, May 8, 2013; 2013 FC 320 and *Gunaratnam, Thusheepan v. M.C.I.* (F.C., no. IMM-4854-13), Russell, March 20, 2015; 2015 FC 358.

<sup>11</sup> *Veeravagu, Uthaya Kumar v. M.E.I.* (F.C.A., no. A-630-89), Hugessen, Desjardins, Henry, May 27, 1992, at 2.

<sup>12</sup> *Cao, Jieling v. M.C.I.* (F.C., no. IMM-1050-16), Bell, December 20, 2016; 2016 FC 1393, at para. 17.

<sup>13</sup> The Supreme Court of Canada pointed out in *R. v. Cook* [1998] 2 S.C.R. 597, at para. 42, that, although the terms “nationality” and “citizenship” are often used as if they were synonymous, the principle of nationality is much broader in scope than the legal status of citizenship. In *M.C.I. v. A25* (F.C., no. IMM-11547-12), Phelan, January 6, 2014; 2014 FC 4, the Federal Court upheld as reasonable a decision of the RPD which granted refugee status, in part, on the basis of the claimant’s “nationality” used in the sense of race/ethnicity, as well as the traditional sense of nationality.

<sup>14</sup> *Hanukashvili, Valeri v. M.C.I.* (F.C.T.D., no. IMM-1732-96), Pinard, March 27, 1997. Although Israel did not recognize the claimants as having Jewish nationality, they were citizens of Israel and as such the CRDD had properly considered the claims as being against Israel, the country of nationality pursuant to section 2(1) of the Act. The Court cited *Hanukashvili* in *Abedalaziz, Rami Bahjat Yah v. M.C.I.* (F.C., no. IMM-7531-10), Shore, September 9, 2011; 2011 FC 1066, at para. 29 when it stated that “nationality” as used in the definitions of Convention refugee and person in need of protection (sections 96 and 97 of the *IRPA*), means citizenship in a particular country.

#### 4.4. RELIGION

Persecution by reason of a claimant's religion may take many forms.<sup>15</sup> Freedom of religion includes the right to manifest the religion in public, or private, in teaching, practice, worship and observance.<sup>16</sup> In the context of claims made by Chinese Christians, the Federal Court has rejected the proposition that a claimant's religious needs can be met in a state sanctioned church. It is not up to the panel to determine how and where a claimant should practice his or her faith.<sup>17</sup> Religion itself can take different manifestations.<sup>18</sup> As is the case with the other Convention refugee grounds, it is the perception of the persecutor that is relevant.<sup>19</sup>

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<sup>15</sup> In *Reul, Jose Alonso Najera v. M.C.I.* (F.C.T.D., no. IMM-326-00), Gibson, October 2, 2000, the applicants were a husband and wife and their children. They feared persecution by siblings of the husband, the principal applicant. Both he and his mother were Jehovah's Witnesses when their mother refused a blood transfusion and died, the siblings accused the principal applicant of causing her death and threatened him and his family. The CRDD found that the fear was based on a family dispute, not on a Convention ground. The Court was satisfied that the applicants had established a subjectively and objectively well-founded fear of persecution in Mexico on the ground of religious belief.

<sup>16</sup> *Fosu, Monsieur Kwaku v. M.E.I.* (F.C.T.D., no. A-35-93), Denault, November 16, 1994. Reported: *Fosu v. Canada (Minister of Employment and Immigration)* (1994), 27 Imm. L.R. (2d) 95 (F.C.T.D.), at 97, where the Court adopted the *UNHCR Handbook's* interpretation of freedom of religion.

See also *Chabira, Brahim v. M.E.I.* (F.C.T.D., no. IMM-3165-93), Denault, February 2, 1994. Reported: *Chabira v. Canada (Minister of Employment and Immigration)* (1994), 27 Imm. L.R. (2d) 75 (F.C.T.D.), where the claimant was persecuted for offending against his girlfriend's Islamic mores.

In *Bediako, Isaac v. S.G.C.* (F.C.T.D., no. IMM-2701-94), Gibson, February 22, 1995, the Court refers to articles 18(3) and 19(3) of the Universal Declaration of Human Rights which deal with justified restrictions on religious practices.

In *Mu, Pei Hua v. M.C.I.* (F.C., no. IMM-9408-04), Harrington, November 17, 2004; 2004 FC 1613, the claimant's evidence was that Falun Gong prescribes "group" practice for its practitioners. The Court stated that giving public witness is a fundamental part of many religions and that the decision of the Supreme Court of Canada in *Syndicat Northcrest* (see *infra*, footnote 20), expands the concept of public religious acts, not restricts it. The specific manner in which an individual gives effect to his/her religious beliefs is a valid consideration.

In *Saiedy, Abbas v. M.C.I.* (F.C., no. IMM-9198-04), Gauthier, October 6, 2005; 2005 FC 1367, the applicant, a citizen of Iran, claimed a fear of persecution based on being a Muslim convert to Christianity. The Court upheld the RPD's finding that regardless of whether he genuinely converted, the applicant's evidence was that he would be discreet about his conversion and would therefore be of no interest to the authorities according to the documentary evidence. However, in *Jasim, Fawzi Abdulrahm v. M.C.I.*, (F.C., no. IMM-3838-02), Russell, September 2, 2003; 2003 FC 1017, the Court stated that the officer's suggestion that the applicant "refrain from proselytizing and practice his faith privately" is not tenable. That is not a choice an individual should have to make.

In *Mohebbi, supra*, footnote 9, the Court found that the RPD had essentially concluded that the applicant would have to be discreet in Iran. However, the applicant alleged he was an evangelical Christian whose duty it was to spread the Good News of the Gospel. The Court held it was not for the panel to determine how a person should practice his or her religion.

In *Zhou, Guo Heng v. M.C.I.* (F.C., no. IMM-1674-09), de Montigny, November 25, 2009; 2009 FC 1210, the Court noted that the RPD had erred in equating the possibility of religious persecution with the risk of being raided, arrested or jailed. This understanding was limited and did not take into account the public dimension of religious freedom.

<sup>17</sup> *Zhu, Qiao Ying v. M.C.I.* (F.C., no. IMM-589-08), Zinn, September 23, 2008; 2008 FC 1066. See also *Zhang, Zhi Jun v. M.C.I.* (F.C., no. IMM-369-09), O'Keefe, January 6, 2010; 2010 FC 9, and *Chen, Yu Jing v. M.C.I.*



The Supreme Court of Canada, in the context of a *Charter* case involving freedom of religion, defined religion as follows:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.<sup>20</sup>

The Federal Court Trial Division in *Kassatkine*<sup>21</sup> considered the case of a religion which has public proselytizing as one of its tenets. In this case, proselytizing was contrary to the law. The Court stated:

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(F.C., no. IMM-3627-09), Mosley, March 5, 2010; 2010 FC 258, which illustrate the same principle. However, in *Li, Chun v. M.C.I.* (F.C. no. IMM-984-18), Gleeson, October 2, 2018; 2018 FC 982 the Court upheld an RPD decision rejecting the claim of a Chinese citizen wherein the RPD considered the claimant's stated reason for not wishing to pursue the practice of his faith in a state-sponsored church, but found the evidence was insufficient to support his stated reason.

<sup>18</sup> For example, in *Nosakhare, Brown v. M.C.I.* (F.C.T.D., no. IMM-5023-00), Tremblay-Lamer, July 6, 2001, the claimant, who converted to Christianity, fled Nigeria because he did not want to belong to the Ogboni cult, as his father did. According to the claimant, the cult engages in human sacrifice and cannibalism. The Court concluded that the Board erred in finding there was no nexus. The kidnapping and beating endured by the claimant were acts carried out by a religious group as a result of the religious beliefs of the claimant. However, in *Oloyede, Bolaji v. M.C.I.* (F.C.T.D., no. IMM-2201-00), McKeown, March 28, 2001, the Court concluded that it was open on the evidence for the Board to determine that the claimant had been subjected to cult criminal activity rather than religious persecution. In this case, the claim was on grounds of membership in a particular social group, namely, children of cult groups who refuse to follow in their fathers' footsteps. The claimant claimed that his life was at risk if he did not join the Vampire cult. He also argued, without success, that he was a Christian and that if he returned to Nigeria he would be forced to engage in cult practices because he would not receive any state protection.

In *Ajayi, Olushola Olayin v. M.C.I.* (F.C., no. IMM-5146-06), Martineau, June 5, 2007; 2007 FC 594, the claimant alleged that her stepmother wanted to circumcise her and her father wanted to force her to participate in an initiation ritual. She also claimed a fear of supernatural powers and beings. The Court held that it was not patently unreasonable to conclude that the claimant had no objective fear of persecution. A person's fear of magic or witchcraft can be real on a subjective basis, but objectively speaking, the state cannot provide effective protection against magic or witchcraft or against supernatural forces or beings from beyond. The state could concern itself with the actions of those who participate in such rituals but in this case, the <sup>18</sup> claimant testified she did not fear her stepmother or father.

<sup>19</sup> *Yang, Hui Qing v. M.C.I.* (F.C.T.D., no. IMM-6057-00), Dubé, September 26, 2001. In this case, the claimant feared persecution by the authorities in China due to her adherence to Falun Gong beliefs and practices. The Court held that the CRDD should have found Falun Gong to be partly a religion and partly a particular social group and that political opinion was clearly not a ground in this claim. On the basis of the reasoning in *Ward* which held that it is the perspective of the persecutor that is determinative, because the government of China considered Falun Gong a religion, religion was the applicable ground. Although a question was certified regarding the scope of the term "religion" used in the Convention refugee definition, no appeal was filed.

<sup>20</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551; 2004 SCC 47.

<sup>21</sup> *Kassatkine, Serguei v. M.C.I.* (F.C.T.D., no. IMM-978-95), Muldoon, August 20, 1996, at 4.

A law which requires a minority of citizens to breach the principles of their religion . . . is patently persecutory. One might add, so long as these religious tenets are not unreasonable as, for example, exacting human sacrifice or the taking of prohibited drugs as a sacrament.<sup>22</sup>

There have been cases dealing with the issue of persecution of members of the Ahmadi religion in Pakistan and the application of Ordinance XX. A decision of the RAD on this topic has been identified as a Jurisprudential Guide (JG).<sup>23</sup> For a full discussion of the JG and the jurisprudence on the nature of the enforcement of Ordinance XX see Chapter 9, section 9.3.8.2.

The UNHCR *Handbook* can be referred to at paragraphs 71 to 73.

#### 4.5. PARTICULAR SOCIAL GROUP

The Supreme Court of Canada in *Ward* provided an interpretative foundation for the meaning of the ground of “membership in a particular social group”. Mr. Justice La Forest stated as follows:

The meaning assigned to “particular social group” in the *Act* should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.<sup>24</sup>

The Court further indicated that the tests proposed in *Mayers*,<sup>25</sup> *Cheung*,<sup>26</sup> and *Matter of Acosta*<sup>27</sup> provided a “good working rule” to achieve the above-noted result and identified three possible categories of particular social groups that emerge from these tests:

1. Groups defined by an innate or unchangeable characteristic;
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association;<sup>28</sup> and

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<sup>22</sup> See also *Syndicat Northcrest, supra*, footnote 20, where the Supreme Court of Canada said (at 61) that: “No right, including freedom of religion is absolute.”

<sup>23</sup> RAD TB7-01837, Bosveld, May 8, 2017. The decision was identified by the IRB Chairperson as a Jurisprudential Guide on July 18, 2017.

<sup>24</sup> *Ward, supra*, footnote 1, at 739.

<sup>25</sup> *Canada (Minister of Employment and Immigration) v. Mayers*, [1993] 1 F.C. 154 (C.A.).

<sup>26</sup> *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.).

<sup>27</sup> *Matter of Acosta*, Interim Decision 2986, 1985 WL 56042 (BIA-United States).

<sup>28</sup> In *Yang, supra*, footnote 19, the claimant feared persecution by the authorities in China due to her adherence to Falun Gong beliefs and practices. The Court was of the view that Falun Gong would fall under the second category of “social group” in *Ward*, as members voluntarily associate themselves for reasons so fundamental to their human dignity that they should not be forced to forsake the association. On the other hand, in *Manrique Galvan, Edgar Jacob v. M.C.I.* (F.C.T.D., no. IMM-304-99), Lemieux, April 7, 2000, the claimant alleged to belong to a particular social group, an organization of taxi drivers, whose goal was to protect its members against criminals. The Refugee Division found that the organization did not qualify as a particular social group.

3. groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>29</sup>

The Court went on to state:

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation,<sup>30</sup> while the

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After conducting an exhaustive review of the case law on the subject [including *Matter of Acosta* (Board of Immigration Appeals – United States) and *Islam* (House of Lords – England)], the Court concluded that the Refugee Division had properly assessed the case law in finding that the social group to which the principal applicant belonged did not correspond to any of the categories established in *Ward*, in particular the second category, on the ground that the right to work is fundamental but not necessarily the right to be a taxi driver in Mexico City.

<sup>29</sup> *Ward, supra*, footnote 1, at 739. In *Chekhovskiy, Alexey v. M.C.I.* (F.C., no. IMM-5086-08), de Montigny, September 25, 2009; 2009 FC 970, the Court noted that to say that the claimant, as a member of the building contractors was part of a group associated by a former voluntary, unalterable status, would trivialize the notion of a particularly social group, incompatible with the analogous grounds approach developed in the context of anti-discrimination law, and inimical to the whole purpose of Convention refugee protection.

In *Garcia Vasquez, Fredis Angel v. M.C.I.* (F.C., no. IMM-4341-10), Scott, April 19, 2011; 2011 FC 477, the Court found it was reasonable for the RPD to conclude that the claimant’s temporary membership in the armed forces did not rise to the level of an “immutable characteristic” that would be analogous to an anti-discrimination ground.

In *Alvarez, Luis Carlos Galvin v. M.C.I.* (F.C. no. IMM-8496-14), Gleeson, April 11, 2016; 2016 FC 402, the RPD had concluded that being an engineer did not qualify under the third *Ward* category of particular social group. At para. 11, the Court stated that while it was not prepared to say that a claimant’s status as an engineer could never ground a claim based on particular social group, the RPD’s finding in this case was not unreasonable. Employment and occupation have been identified as not ordinarily raising an issue relating to the themes of human rights and anti-discrimination underpinning international refugee protection.

In *Godoy Cerrato, Dora Miroslava v. M.C.I.* (F.C., no. IMM-7141-13), Shore, February 13, 2015; 2015 FC 179, the Court noted that the claimant’s occupation as a police officer in Honduras did not, in and of itself, amount to membership in a particular social group.

In a number of cases, the Court has noted that “Tamil males from Sri Lanka who were passengers on the MV Sun Sea” (or the Ocean Lady) do not constitute a particular social group. While having travelled on the MV Sun Sea (or Ocean Lady) places them in a group defined by a former, unalterable voluntary status, there must be something about such a group related to discrimination or human rights for it to qualify as a particular social group. See for example *M.C.I. v. B380* (F.C., no. IMM-913-12), Crampton, November 19, 2012; 2012 FC 1334; *M.C.I. v. B399* (F.C., no. IMM-3266-12), O’Reilly, March 12, 2013; 2013 FC 260; and *M.C.I. v. A25* (F.C., no. IMM-11547-12), Phelan, January 6, 2014; 2014 FC 4. Note that the claims, depending on the facts of the case, may be grounded on other Convention reasons, for example, race, nationality or political opinion. See *M.C.I. v. A068* (F.C., no. IMM-8485-12), Gleason, November 19, 2013; 2013 FC 1119 for a thorough review of the case law on this topic.

<sup>30</sup> The question of whether age falls into the first category seems to depend on the interpretation of “unchangeable.” In *Jean, Leonie Laurore v. M.C.I.* (F.C., no. IMM-5860-09), Shore, June 22, 2010; 2010 FC 674, the Court noted that the age of a person is not unchangeable (paragraphs 38-44). However, in *Arteaga Banegas, Cristhian Josue v. M.C.I.*, (F.C., no. IMM-5322-14), Shore, January 13, 2015, 2015 FC 45, at para. 26, Justice Shore cites - with apparent approval - the UNHCR *Guidance Note on Refugee Claims Relating to Victims of Organized Crime* in which paragraph 36 ends with the statement: “The immutable character of “age” or “youth” is in effect, unchangeable at any given point in time.”

See also *M.C.I. v. Patel, Dhruv Navichandra* (F.C., no. IMM-2482-07), Lagacé, June 17, 2008; 2008 FC 474, where the Court upheld a decision of the RPD that found the claimant, “an abandoned child”, to be a member of a particular social group.

second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.<sup>31</sup>

In setting out three possible categories of particular social groups, the Court made it clear that not every group of persons will be within the Convention refugee definition. There are some groups from which the claimant can, and should be expected to, dissociate him- or herself because membership therein is not fundamental to the human dignity of the claimant.<sup>32</sup>

A distinction must be drawn between a claimant who fears persecution because of what he or she does as an individual and a claimant who fears persecution because of his or her membership in a particular social group. It is the membership in the group which must be the cause of the persecution and not the individual activities of the claimant.<sup>33</sup> This is sometimes referred to as the “is versus does” distinction.

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<sup>31</sup> *Ward, supra*, footnote 1, at 739.

<sup>32</sup> *Ward, supra*, footnote 1, at 738. Thus the Court held, at 745, that an association, such as the Irish National Liberation Army (INLA), that is committed to attaining political goals by any means, including violence, does not constitute a particular social group, as requiring its members to abandon this objective “does not amount to an abdication of their human dignity.”

In *Orphée, Jean Patrique v. M.C.I.* (F.C., no. IMM-251-11), Scott, July 29, 2011; 2011 FC 966, the Court concluded that the RPD had not erred in determining that the claimant, a member of an Association of taxi drivers, was not a member of a particular social group and that the job of taxi driver does not constitute a characteristic that is innate or fundamental to human dignity, especially because he had admitted that he would change jobs if he had to return to Haiti.

In *Trujillo Sanchez, Luis Miguel v. M.C.I.* (F.C.A., no. A-310-06), Richard, Sharlow, Malone, March 8, 2007; 2007 FCA 99, the claimant was employed by the government as an engineer. He also ran a side business that reported violations of signage by-laws to the Bogota city authorities. As a result of this business, he was threatened and abducted twice by the FARC which had demanded that he cease reporting violations. The Federal Court of Appeal agreed that the claimant had an alternative that would eliminate future risk of harm; he could choose to cease operating his side business. The Court went on to state that the claimant’s “freedom to profess his religion, give expression to an immutable personal characteristic, express his political views, etc., was not affected by abandoning his side business. Moreover, [he] was not deprived of his general ability to earn a living”.

See also *Losowa Osengosengo, Victorine v. M.C.I.* (F.C., no. IMM-4132-13), Gagné, March 13, 2014; 2014 FC 244, at para. 20. The claimant was a Franciscan nun from the DRC. The RPD held that she would be safe if she moved to Kinshasa where she could earn a living as a teacher and live with her family. The Court held that the RPD erred and that it was legitimate for the claimant, as a nun, to insist upon living among her congregation as her religious duty and that returning to the DRC as a member of this Franciscan congregation exposed her to probable and unnecessary risks to her livelihood.

See also *Antoine, Belinda v. M.C.I.* (F.C., no. IMM-4967-14), Fothergill, June 26, 2015; 2015 FC 795 where the PRRA Officer had held that in order to avoid persecution, the applicant must continue to avoid an overtly lesbian lifestyle. The Court held that the expectation that an individual should practice discretion with respect to her sexual orientation is perverse, as it requires the individual to repress an immutable characteristic.

<sup>33</sup> *Ward, supra*, footnote 1, at 738-739. Thus the Court held, at 745, that although the claimant’s membership in INLA placed him in the circumstances that led to his fear, the fear itself was based on his action, not on his affiliation.

A particular social group cannot be defined solely by the fact that a group of persons are objects of persecution.<sup>34</sup> The rationale for this proposition is that the Convention refugee definition requires that the persecution be “by reason of” one of the grounds, including particular social group.<sup>35</sup>

Subsequent to the *Ward* decision, the Court of Appeal in *Chan*<sup>36</sup> interpreted the three possible categories of particular social groups. The majority of the Court, in concurring judgments, held that the terms “voluntary association” and “voluntary status” referred to in *Ward* categories two and three (above) refer to active or formal association. The dissenting judgment disagreed with this interpretation.

*Chan* was then heard by the Supreme Court of Canada<sup>37</sup> and the majority of the Supreme Court concluded that the claimant had failed to present evidence on the objective element as to the well-foundedness of his fear of persecution (forced sterilization).<sup>38</sup> The majority did not address the issue of particular social group or whether there was an applicable ground in this case.<sup>39</sup> The dissenting judgment by Mr. Justice La Forest, however, dealt extensively with the ground of particular social group. The minority’s comments on this issue carry considerable persuasive authority, inasmuch as they were not contradicted by the majority, and represent the views of a significant number of Supreme Court Justices. Mr. Justice La Forest (who wrote the judgment in *Ward*) clarified some of the issues which were raised in *Ward*:

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<sup>34</sup> *Ward, supra*, footnote 1, at 729-733. In *Mason, Rawlson v. S.S.C.* (F.C.T.D., no. IMM-2503-94), Simpson, May 25, 1995, the claimant feared being killed by drug “thugs” because he opposed the drug trade, and informed and testified against his brother in criminal proceedings; the Court held that “persons of high moral fibre who opposed the drug trade” were not a particular social group as this was not a pre-existing group whose members were subsequently persecuted.

In *Manrique Galvan, supra*, footnote 28, the Court noted that the concept of particular social group requires more than a mere association of individuals who have come together because of their victimization.

<sup>35</sup> In *M.C.I. v. Lin, Chen* (F.C.A., no. A-3-01), Desjardins, Décary, Sexton, October 18, 2001, the Court, in answer to a certified question, held that the CRDD erred in law when it found that the minor claimant had a well-founded fear of persecution on the grounds that he was a member of a particular social group, “minor child of Chinese family who is expected to provide support for other family members”. There was no evidence to support the CRDD’s finding that the named group was targeted for persecution by parents or other agents of persecution. The claimant’s fear of persecution was not because he was under 18 and expected to provide support for his family. His fear was directed at the Chinese authorities and stemmed from the method chosen to leave China.

See also *Xiao, Mei Feng v. M.C.I.* (F.C.T.D., no. IMM-953-00), Muldoon, March 16, 2001 where the claim was based on membership in a particular social group, i.e. children. The alleged persecutors were the snakeheads who smuggled the minor claimant out of China. However, given the evidence showing that snakeheads smuggle any person simply for profit, no nexus could be established between the feared harm and an enumerated ground of persecution.

<sup>36</sup> *Chan* (C.A.), *supra*, footnote 1.

<sup>37</sup> *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593.

<sup>38</sup> *Chan* (S.C.C.), *ibid*, at 672.

<sup>39</sup> *Chan* (S.C.C.), *supra*, footnote 37, at 658 and 672.

1. The *Ward* decision enunciated a working rule and “not an unyielding deterministic approach to resolving whether a refugee claimant could be classified within a particular social group.”<sup>40</sup> The paramount consideration in determining a particular social group is the “general underlying themes of the defence of human rights and anti-discrimination.”<sup>41</sup>

2. The “is versus does” distinction was not intended to replace the *Ward* categories. There must be proper consideration of the context in which the claim arose.<sup>42</sup>

3. With respect to category two of the *Ward* categories and the position taken by the Court of Appeal in *Chan* that this category required an active association between members of the group, Mr. Justice La Forest stated: “In order to avoid any confusion on this point let me state incontrovertibly that a refugee alleging membership in a particular social group does not have to be in voluntary association with other persons similar to him- or herself. [...] the question that must be asked is whether the appellant is voluntarily associated with a particular status for reasons so fundamental to his human dignity that he should not be forced to forsake that association. That association or group exists by virtue of a common attempt made by its members to exercise a fundamental human right.”<sup>43</sup> (The particular group in which Mr. Chan alleged membership was “parents in China with more than one child who disagree with forced sterilization”.)

Some examples of potential particular social groups discussed in the jurisprudence include the following:

1. the family;<sup>44</sup>

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<sup>40</sup> *Chan* (S.C.C.), *supra*, footnote 37, at 642.

<sup>41</sup> *Chan* (S.C.C.), *supra*, footnote 37, at 642.

<sup>42</sup> In *Chan* (S.C.C.), *supra*, footnote 37, at 643-644, Mr. Justice La Forest commented that having children can be classified as what one does rather than who one is. In context, however, having children makes a person a parent which is what one is.

<sup>43</sup> *Chan* (S.C.C.), *supra*, footnote 37, at 644-646.

<sup>44</sup> *Al-Busaidy, Talal Ali Said v. M.E.I.* (F.C.A., no. A-46-91), Heald, Hugessen, Stone, January 17, 1992. Reported: *Al-Busaidy v. Canada (Minister of Employment and Immigration)* (1992), 16 Imm. L.R. (2d) 119 (F.C.A.). The concepts of family unity and indirect persecution though related to family, have been clearly distinguished from family as a particular social group within the meaning of the Refugee Convention. See *Pour-Shariati v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 767 (T.D.), at 774-775; and *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 (T.D.). With respect to the concept of indirect persecution, see also Chapter 9, section 9.4.

The characterization of family as a social group relates to persecution that would be directly suffered by a person simply because of his or her membership in a given family. Members of a family are not necessarily members of a particular social group, as discussed in a case about a family engaged in a dispute over land: *Forbes, Ossel O'Brian v. M.C.I.* (F.C., no. IMM-5035-11), Hughes, February 27, 2012; 2012 FC 270, at para. 4 and 5. In *Musakanda, Tavonga v. M.C.I.* (F.C., no. IMM-6250-06), O'Keefe, December 11, 2007; 2007 FC 1300, the RPD rejected the claims of the adult claimants yet found the minor claimants to be Convention refugees. The claims of the adult claimants were based on perceived political opinion while the minors' claims were on the risk of them being recruited by the youth militia in Zimbabwe. There was no evidence before the Board that the family as a unit was being persecuted.

2. homosexuals (sexual orientation);<sup>45</sup>
3. trade unions;<sup>46</sup>

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In *Granada, Armando Ramirez v. M.C.I.* (F.C., no. IMM-83-04), Martineau, December 21, 2004; 2004 FC 1766, at para. 15 the Court noted that one cannot be deemed to be a refugee only because one has a relative who is being persecuted; that claimants must establish that they are targeted for persecution either personally or collectively. In an earlier case decided by the same judge, *Macias, Laura Mena v. M.C.I.* (F.C., no. IMM-1040-04), Martineau, December 16, 2004; 2004 FC 1749, at para. 13, the Court held that in order to consider immediate family as a particular social group, a claimant must only prove that there is a clear nexus between the persecution being levelled against one member of the family and that which is taking place against the claimant. In *Tomov, Nikolay Haralam v. M.C.I.* (F.C., no. IMM-10058-04), Mosley, November 9, 2005; 2005 FC 1527, the applicant, a citizen of Bulgaria, claimed refugee protection based on his membership in his common-law spouse's Roma family and the assault he faced when he was in her company. The Court noted that family is a valid social group for the purposes of seeking protection. Here, there was a sufficient nexus between the Applicant's claim and his wife's persecution. The Board erred in requiring that the Applicant be personally targeted outside of his relationship.

However, for a derivative claim based on family membership to succeed, the family member who is the principal target of the persecution must be subject to persecution for a Convention reason. See *Rodriguez, Ana Maria v. M.C.I.* (F.C.T.D., no. IMM-4573-96), Heald, September 26, 1997, where the claimant was threatened with harm because her husband was involved in the mafia's drug related business. The Court held that the CRDD did not err in holding that the claimant did not belong to a "particular social group" within the meaning of the Convention definition, as her difficulties were due solely to her connection to her spouse who was targeted for non-Convention reasons.

This rationale was followed in *Klinko, Alexander v. M.C.I.* (F.C.T.D., no. IMM-2511-97), Rothstein, April 30, 1998, where the Court held that when the primary victim of persecution does not come within the Convention refugee definition, any derivative Convention refugee claim based on family group cannot be sustained. (*Klinko* was overturned by the Federal Court of Appeal on other grounds: *Klinko, Alexander v. M.C.I.* (F.C.A., no. A-321-98), Létourneau, Noël, Malone, February 22, 2000).

See also *Asghar, Imran Mohammad v. M.C.I.* (F.C., no. IMM-8239-04), Blanchard, May 31, 2005; 2005 FC 768 where the son of a policeman feared terrorists his father had arrested.

In *Ramirez Aburto, Williams v. M.C.I.* (F.C., no. IMM-7680-10 and no. IMM-7683-10), Near, September 6, 2011; 2011 FC 1049 the family members of businessmen targeted by criminal gangs for extortion were found to have no nexus.

In *Nyembua, Placide Ntaku W v. M.C.I.* (F.C., No. IMM-7933-14), Gascon, August 14, 2015; 2015 FC 970, Mr. Nyembua's claim was based on membership in a particular social group, his son's family. Though he alleged that his son had tried to expose corruption in his unit in the Congolese army, there was insufficient evidence to support that his son had denounced corruption or that such denunciations stemmed from his son's political opinion. The Court found it was not unreasonable for the RPD to conclude that the son was being pursued for desertion, not because of his political opinion and that Mr. Nyembua had failed to demonstrate that he would face a risk as a family member of a person fearing persecution.

<sup>45</sup> In *Pizarro, Claudio Juan Diaz v. M.E.I.* (F.C.T.D., no. IMM-2051-93), Gibson, March 11, 1994, the first issue addressed by the CRDD was whether the claimant's sexual orientation, of itself, constituted him a member of a particular social group. The CRDD determined that it did not, but the Federal Court held that the question had effectively been put beyond doubt by the Supreme Court of Canada when it reached the opposite conclusion in *Ward, supra*, footnote 1.

<sup>46</sup> *Rodriguez, Juan Carlos Rodriguez v. M.E.I.* (F.C.T.D., no. IMM-4109-93), Dubé, October 25, 1994. In the Court's opinion it was clear that a group voluntarily engaged in union activities was included in *Ward's* second category: "groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association".

4. the poor;<sup>47</sup>
5. wealthy persons or landlords were found by the Trial Division not to be particular social groups.<sup>48</sup> The Court focused on the fact that these groups were no longer being persecuted although they had been in the past.<sup>49</sup>

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<sup>47</sup> In *Sinora, Frensel v. M.E.I.* (F.C.T.D., no. 93-A-334), Noël, July 3, 1993, Justice Noël noted that “[I]t is important to note that this group [the poor] has been recognized as a social group by the Federal Court of Appeal.” Unfortunately, there is no reference for the Court of Appeal decision but Justice Noël may have been referring to *Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 592, where the Court was dealing with a decision of the credible basis panel. The claim in question was based on membership in the group of “poor and disadvantaged people of Haiti”. The argument before the credible basis panel was that all Haitians outside Haiti have a credible basis for claiming to be refugees, not that all Haitians are refugees. The credible basis panel ruled that “it would be absurd to accept the proposition ... that all Haitian are refugees, since this would offer international protection to both the victims and the perpetrators of the crimes”. The Court agreed that the tribunal misunderstood the argument: “With respect, it is not axiomatic that nationals of a country who have escaped that country may not have a well founded fear of persecution by reason of their nationality should they be returned.” However, the Court, per Mahoney J., also noted the following: “I am inclined to agree with [the panel] on this point: there is nothing to distinguish the applicant’s claim to be persecuted by reason of membership in that particular social group [the poor and disadvantaged] from their claim to be persecuted by reason of Haitian nationality itself.”

In *Mia, Samsu v. M.C.I.* (F.C., no. IMM-2677-99), Tremblay-Lamer, January 26, 2000, a domestic servant employed at the High Commission for Bangladesh claimed refugee status on the basis of his membership in a particular social group, the poor. After he talked about his experiences on a television show, he and his family in Bangladesh both received threats. It seems that neither the CRDD nor the Court took issue with a particular social group composed of the poor but the Court found it was reasonable for the member to conclude that the claimant was a victim of a personal vendetta rather than persecution linked to that group.

<sup>48</sup> In *Mortera, Senando Layson v. M.E.I.* (F.C.T.D., no. A-1084-92), McKeown, December 8, 1993, the claimant was a wealthy person and landlord in the Philippines. The Court rejected the argument that he was part of *Ward’s* third category of particular social group. .

See also *Wilcox, Manuel Jorge Enrique Tataje v. M.E.I.* (F.C.T.D., no. A-1282-92), Reed, November 2, 1993; in which the Court held that upper middle class Peruvians, who feared extortion against the rich, could not claim to be subject to persecution in the Convention refugee sense.

In *Karpounin, Maxim Nikolajevitsh v. M.E.I.* (F.C.T.D., no. IMM-7368-93), Jerome, March 10, 1995; the Court rejected the argument that the claimant’s status as a financially successful person in the Ukraine, places him in a particular social group defined by voluntary association “for reasons so fundamental to their human dignity they should not be forced to forsake the association.”

In *Montchak, Roman v. M.C.I.* (F.C.T.D., no. IMM-3068-98), Evans, July 7, 1999, at para. 4, the Court summarizes the state of the law: “There is ample authority in this Court for the proposition that those who have made money in business do not comprise a particular social group, and therefore if they attract the attention of criminals by virtue of their wealth they cannot be said to fear persecution on a Convention ground.”

<sup>49</sup> In *Ward, supra*, footnote 1, at 731, the Court said: “The persecution in the ‘Cold War cases’ was imposed upon the capitalists not because of their contemporaneous activities but because of their past status as ascribed to them by the Communist leaders.” Thus, in *Lai, Kai Ming v. M.E.I.* (F.C.A., no. A-792-88), Marceau, Stone, Desjardins, September 18, 1989. Reported: *Lai v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 245 (F.C.A.), at 245-246, the Court implicitly accepted that “persons with capitalist backgrounds” constitute a particular social group in the context of China.

In *Karpounin, supra*, footnote 48, however, the Court stated at 4: “it does not necessarily follow that, merely because the historical underpinning of including the use of the term ‘particular social group’ as found in the Convention, was based on the desire to protect capitalists and independent businessmen fleeing Eastern Bloc persecution during the cold war, should it lead to the conclusion that the [claimant] in this case was persecuted



6. women subject to domestic abuse;<sup>50</sup>
7. men who become victims of abuse at the hands of former abusive partners of their spouse because of that relationship with their spouse,<sup>51</sup>
8. women forced into marriage without their consent;<sup>52</sup>
9. Haitian returnees (citizens who return to Haiti after a stay abroad) were found not to constitute a particular social group within the meaning of section 96 of the Act.<sup>53</sup>
10. women subject to circumcision;<sup>54</sup>
11. persons subject to forced sterilization;<sup>55</sup>

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for that very reason.” The CRDD had found that the claimant, an independent businessman, was targeted because of the size of his bank account and not because of his choice of occupation or the state of his conscience.

In *Étienne, Jacques v. M.C.I.* (F.C., no. IMM-2771-06), Shore, January 25, 2007; 2007 FC 64, the Court upheld the RPD’s determination that acquiring wealth or winning a lottery does not constitute membership in a particular social group.

<sup>50</sup> In *Narvaez, supra*, footnote 8, Mr. Justice McKeown referred extensively to *Ward, supra*, footnote 1 and to the IRB Chairperson’s Gender Guidelines in finding “women subject to domestic abuse in Ecuador” to constitute a particular social group; the judgment did not address the issue of whether the group can be defined by the persecution feared. (In *Ward, supra*, footnote 1, at 729-733, the Court rejected the notion that “particular social group” could be defined solely by the persecution feared, i.e., the common victimization.)

The reasoning in *Narvaez, supra*, footnote 8, was explicitly adopted in the decision of *Diluna, Roselene Edyr Soares v. M.E.I.* (F.C.T.D., no. IMM-3201-94), Gibson, March 14, 1995. Reported: *Diluna v. Canada (Minister of Employment and Immigration)* (1995), 29 Imm. L.R. (2d) 156 (F.C.T.D.), where the Court held that the CRDD erred in not finding that “women subject to domestic violence in Brazil” constitute a particular social group.

In *Hernandez Cornejo, Lisseth Noemi v. M.C.I.* (F.C., no. IMM-5751-11), Rennie, March 19, 2012; 2012 FC 325, the Court noted that a man’s relentless pursuit of his ex-girlfriend does not cease to be gender-related persecution simply because that man also harasses her male relatives in an effort to get her back.

<sup>51</sup> *Sebok, Judit v. M.C.I.* (F.C., no. IMM-2893-12), Snider, September 21, 2012, 2012 FC 1107.

<sup>52</sup> *Vidhani v. M.C.I.*, [1995] 3 F.C. 60 (T.D.), where the Court expressly considered the IRB Guideline on *Women Refugee Claimants Fearing Gender-Related Persecution* and held that such women have suffered a violation of a basic human right (the right to enter freely into marriage) and would appear to fall within the first category identified in *Ward, supra*, footnote 1.

<sup>53</sup> *Cius, Ligene v. M.C.I.* (F.C., no. IMM-406-07), Beaudry, January 7, 2008; 2008 FC 1, paragraphs 14-21. However, see footnote 87, *infra*.

<sup>54</sup> *Annan v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 25 (T.D.), where the Court implicitly seemed to accept that the claim was grounded. See also the IRB Guideline on *Women Refugee Claimants Fearing Gender-Related Persecution*, where this case is mentioned in endnote 14.

<sup>55</sup> *Cheung, supra*, footnote 26, at 322, (“women in China who have one child and are faced with forced sterilization”).

But note *Liu, Ying Yang v. M.C.I.* (F.C.T.D., no. IMM-4316-94), Reed, May 16, 1995, where the Court found that the claimant had shown no subjective fear of persecution as a result of the threat of sterilization and there was no evidence she objected to the government policy.

12. children of police officers who are anti-terrorist supporters;<sup>56</sup>
13. former fellow municipal employees terrified and terrorized by what they know about the ruthless, criminal mayor;<sup>57</sup>
14. uneducated girls in a country where girls are not allowed to go to school;<sup>58</sup>
15. single women without male protection<sup>59</sup> (in some countries and circumstances);
16. "law abiding citizens" was held not to be a particular social group;<sup>60</sup>
17. persons suffering from mental<sup>61</sup> or physical illness.<sup>62</sup>

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See also *Chan* (S.C.C.), *supra*, footnote 37, at 644-646, where La Forest J. (dissenting) formulates the group under *Ward*'s second category (see section 4.5. of this Chapter), as an association or group resulting from a "common attempt by its members to exercise a fundamental human right" (at 646), namely, "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children." (at 646). For further discussion of China's one child policy, see Chapter 9, section 9.3.7.

<sup>56</sup> *Badran, Housam v. M.C.I.* (F.C.T.D., no. IMM-2472-95), McKeown, March 29, 1996.

<sup>57</sup> *Reynoso, Edith Isabel Guardian v. M.C.I.* (F.C.T.D., no. IMM-2110-94), Muldoon, January 29, 1996. Mr. Justice Muldoon stated that the claimant's group was defined by an innate or unchangeable characteristic, they had acquired knowledge which put them in jeopardy. Though the Court acknowledged that this characteristic was one acquired later in life, it was unchangeable.

<sup>58</sup> *Ali, Shaysta-Ameer v. M.C.I.* (F.C.T.D., no. IMM-3404-95), McKeown, October 30, 1996. Reported: *Ali v. Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 34 (F.C.T.D.). The case mentions that the mother of the applicant was found to be a refugee as part of a group of educated women (there is no analysis of this finding) but the issue in the case was whether the Board was wrong in refusing the daughter's claim because she was an uneducated girl. The Court stated: "I do not agree with this reasoning since it means if [the girl] is returned to Afghanistan, the only way she can avoid being persecuted is to refuse to go to school. Education is a basic fundamental right and I direct the Board to find she should be found to be a Convention refugee."

<sup>59</sup> *Selvaratnam, Thevananthini v. M.C.I.* (F.C., no. IMM-520-15), Annis, January 19, 2016; 2016 FC 50 (re Tamil female citizen of Northern Sri Lanka).

<sup>60</sup> *Serrano, Roberto Flores v. M.C.I.* (F.C.T.D., no. IMM-2787-98), Sharlow, April 27, 1999. The Court certified a question on this issue but no appeal was filed.

<sup>61</sup> In *Liaquat, Mohammad v. M.C.I.* (F.C., no. IMM-9550-04), Teitelbaum, June 23, 2005; 2005 FC 893, the Applicant had been diagnosed with schizophrenia and depression with psychotic features. In the context of the judicial review of a negative PRRA decision, the Applicant submitted that his mental illness was an innate and unchangeable characteristic, notwithstanding that its severity may fluctuate with treatment. The Minister appeared to concede that the Applicant was a member of a particular social group because of his mental illness and the Court was in agreement.

In *Jasiel, Tadeusz v. M.C.I.* (F.C., no. IMM-564-05), Teitelbaum, September 13, 2005; 2005 FC 1234, the Applicant, a 50-year old citizen of Poland, premised his claim on the basis that he is a severe alcoholic who will relapse if returned to Poland, and be committed to a psychiatric hospital as a result of his condition. The Court agreed with the Board's finding that the Applicant had failed to establish a nexus between the Applicant's alcoholism and the Convention refugee grounds.

In *M.C.I. v. Oh, Mi Sook* (F.C., no. IMM-5048-08), Pinard, May 22, 2009; 2009 FC 506 the minor claimant was found to be a member of a particular social group, "children of the mentally ill".

18. “abandoned children.”<sup>63</sup>

#### 4.6. POLITICAL OPINION

A broad and general interpretation of political opinion is “any opinion on any matter in which the machinery of state<sup>64</sup>, government, and policy may be engaged”.<sup>65</sup> However, this does

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<sup>62</sup> In *A.B. v. Canada (Minister of Citizenship and Immigration)*, (F.C., no. IMM-3522-05), Barnes, April 5, 2006; 2006 FC 444, the RPD accepted that the claimant, whose claim of persecution was premised on the stigma, discrimination and mistreatment of persons who suffer from HIV/AIDS, met the requirement for membership in a particular social group, that is, persons fearing persecution because of an unchangeable characteristic. While a nexus to the definition was accepted, the claim was rejected because it failed to meet other elements of the definition. The Court allowed the judicial review but on other issues.

In *Rodriguez Diaz, Jose Fernando v. M.C.I.* (F.C., no. IMM-4652-07), O’Keefe, November 6, 2008, the Court notes that HIV-positive individuals constitute a particular social group.

See also *Mings-Edwards, Feron Elaine v. M.C.I.* (F.C., no. IMM-3696-10), Mactavish, January 26, 2011; 2011 FC 91, where there is an implicit finding that status related to “women infected with HIV” can provide a nexus to the refugee definition.

<sup>63</sup> *Patel, supra*, footnote 30.

Note that in one case age *per se* was held not to be an unchangeable characteristic: *Jean, supra*, footnote 30

In *Woods, Kinique Kemira v. M.C.I.* (F.C., no. IMM-4863-06), Beaudry, March 26, 2007; 2007 FC 318, the 12-year-old claimant was afraid of returning to her country because she would be left to fend for herself on the streets and because the child welfare system in Saint Vincent was inadequate to provide for her needs. The Court held that while the claimant’s situation aroused compassion, the fact remained that she did not prove the merits of her claim.

Also note that in *M.C.E. v. M.C.I.* (F.C., no. IMM-1116-10), Beaudry, November 16, 2010; 2010 FC 1140, the Court noted that now that the applicant was an adult, the fears she had as a child were no longer relevant.

<sup>64</sup> In *Martinez Menendez, Mynor v. M.C.I.* (F.C., no. IMM-3830-09), Boivin, February 25, 2010; 2010 FC 221, the Court held it was reasonable for the RPD to conclude that the criminal gangs did not constitute a *de facto* government and that refusing to pay extortion to them would not be seen as political opinion. Also see *Salazar, Eber Isai Oajaca v. M.C.I.* (F.C., no. IMM-2166-17), Kane, January 26, 2018; 2018 FC 83 where the Court found that a risk from refusing “job offers” made by criminal gangs in Guatemala did not constitute a nexus on the ground of imputed political opinion.

<sup>65</sup> *Ward, supra*, footnote 1, at 746. The word “engaged” was interpreted in *Femenia, Guillermo v. M.C.I.* (F.C.T.D., no. IMM-3852-94), Simpson, October 30, 1995. The claimants asserted that their political opinion was that they opposed the existence of corrupt police and advocated their removal and prosecution. They argued that this was an opinion on a matter “in which the machinery of state, government and policy may be engaged.” Madam Justice Simpson concluded that the state is “engaged” in the provision of police services, but not in the criminal conduct of corrupt officers. In her view, that was not conduct officially sanctioned, condoned or supported by the state and therefore, the claimants’ asserted political opinion did not come within the *Ward, supra*, footnote 1, characterization of political opinion. The Court of Appeal in *Klinko, supra*, footnote 44, rejected the approach followed by the Trial Division in *Femenia* as being too narrow an interpretation of *Ward*. The Court answered in the affirmative the following certified question:

Does the making of a public complaint about widespread corrupt conduct by customs and police officials to a regional governing authority, and thereafter, the complainant suffering persecution on this account, when the corrupt conduct is not officially sanctioned, condoned or supported by the state, constitute an expression of political opinion as that term is understood in the definition of Convention refugee in subsection 2(1) of the Immigration Act?

not mean that only political opinions regarding the state will be relevant. As noted in Chapter 3, there is no requirement that the agent of persecution be the state.

The Supreme Court of Canada in *Ward* stated that there are two refinements to political opinion within the context of the Convention refugee definition.

The first is that “the political opinion at issue need not have been expressed outright.”<sup>66</sup> The Court recognized that the claimant may not always articulate his or her beliefs and that the political opinion will be perceived from the claimant’s actions or otherwise imputed to him or her.<sup>67</sup>

The second refinement in *Ward* is that the “political opinion ascribed to the claimant” by the persecutor “need not necessarily conform to the claimant’s true beliefs.”<sup>68</sup> In other words, the political opinion may not be correctly attributed to the claimant.

The Supreme Court makes it clear that it is the perception of the persecutor which is relevant. The question to be answered is: does the agent of persecution consider the claimant’s conduct to be political or does it attribute political activities to him or her?<sup>69</sup>

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See also *Berrueta, Jesus Alberto Arzola v. M.C.I.* (F.C.T.D., no. IMM-2303-95), Wetston, March 21, 1996, where the Court overturned the CRDD decision on the basis that the CRDD did not suitably analyze the facts to determine the issue of political opinion. With respect to corruption, the Court stated, at 2, that “[c]orruption is prevalent in some countries. To decry corruption, in some cases, is to strike at the core of such governments’ authority.”

See also *Zhu, Yong Qin v. M.C.I.* (F.C.T.D., no. IMM-5678-00), Dawson, September 18, 2001 where the claimant received a subpoena to testify against snakeheads. The Court held that the CRDD erred in its analysis of Mr. Zhu’s sur place claim, construing “political opinion” too narrowly, by asking only whether the claimant’s actions would be perceived by Chinese authorities as contrary to the authorities’ opinion and by limiting the perceived opinion to one which challenges the state apparatus, instead of considering whether the Government of China or its machinery “may be engaged” in the issue of human smuggling.

<sup>66</sup> *Ward, supra*, footnote 1, at 746.

<sup>67</sup> *Ward, supra*, footnote 1, at 746. In *Sopiqoti, Spiro v. M.C.I.* (F.C., no. IMM-5640-01), Martineau, January 29, 2003; 2003 FC 95, the Court held that the claimant’s statement that he had not had any political involvement and was not familiar with the political ideologies in his country did not exempt the panel from its obligation to consider whether the gestures he had made, such as refusing to fire on pro-democracy demonstrators, were considered to be political activities. Even if the agents of persecution acted out of personal or pecuniary motives, the CRDD had to determine whether the government authority had imputed a political opinion to the claimant.

<sup>68</sup> *Ward, supra*, footnote 1, at 747.

<sup>69</sup> *Inzunza Orellana, Ricardo Andres v. M.E.I.* (F.C.A., no. A-9-79), Heald, Ryan, Kelly, July 25, 1979. Reported: *Inzunza v. Canada (Minister of Employment and Immigration)* (1979), 103 D.L.R. (3d) 105 (F.C.A.), at 109. See also *Ismailov, Dilshod v. M.C.I.* (F.C., no. IMM-4286-16), Heneghan, September 18, 2017; 2017 FC 837 where the Court stated that it was not sufficient for the RAD to have stated it did not consider the appellant to be an active participant in the Gulen movement, the RAD should have also addressed the question of whether he would be perceived to be an adherent. In *Gopalapillai, Thinesrupan v. M.C.I.* (F.C. no. IMM-3539-18), Grammond, February 26, 2019; 2019 FC 228, the Court found the RPD had erred by focusing on whether or not the claimant actually supported the LTTE. This was the wrong question. What mattered was whether the claimant would be perceived as such by the Sri Lankan authorities.

In *Zhou*,<sup>70</sup> the Court found that the RPD erred when it seemed to say that political opinion can be assessed objectively (the RPD found that the claimant's behavior, shouting insults at officials in the Family Planning Office, did not approach the level of political opinion necessary to warrant consideration). In the Court's view, the relevant question is subjective: whether the relevant agent of persecution would view the claimant's statements as political and persecute him on the basis.

In contrast, in *Ni*,<sup>71</sup> the RPD found that if the claimant were arrested in China, he faced prosecution due to his resistance to the expropriation of his home. He would not face persecution. The RPD accepted that the claimant shouted slogans against the government and called the government corrupt but found that such actions would not lead to persecution. The findings were premised on the Applicant's specific actions, such as his participation as one of many in the opposition, his lack of an established leadership role and the fact that his comments were made in the heat of the moment. His evidence did not demonstrate opposition to the Chinese government's expropriation law and policy generally. It was limited to the specific issue of compensation.

The claimant does not have to belong to a political party<sup>72</sup> nor does the claimant have to belong to a group that has an official title, office or status<sup>73</sup> nor does the claimant have to have a high-profile within a political party<sup>74</sup> in order for there to be a determination that the claimant's fear of persecution is by reason of political opinion. The relevant issue is the persecutor's perception of the group and its activities, or of the individual and his or her activities.<sup>75</sup>

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<sup>70</sup> *Zhou, Zhi Tian v. M.C.I.* (F.C., no. IMM-385-12), Zinn, October 30, 2012; 2012 FC 1252.

<sup>71</sup> *Ni, Kong Qiu v. M.C.I.* (F.C. no. IMM-229-18), Walker, September 25, 2018; 2018 FC 948. Similarly, in *Yan, Guiying v. M.C.I.* (F.C. no. IMM-3-18), McVeigh, July 25, 2018; 2018 FC 781, at paragraphs 21-22, even though the claimant was wanted for protesting expropriation in China, "she did not point to any evidence before the RPD connecting that charge to political opinion" but that "each case will turn on its facts." These decisions were followed in *obiter* in *Huang, Shaoqian v. M.C.I.* (F.C. no. IMM-2022-18), Gagné, February 5, 2019; 2019 FC 148.

<sup>72</sup> *Armson, Joseph Kaku v. M.E.I.* (F.C.A., no. A-313-88), Heald, Mahoney, Desjardins, September 5, 1989. Reported: *Armson v. Canada (Minister of Employment and Immigration)*. (1989), 9 Imm. L.R. (2d) 150 (F.C.A.), at 153.

<sup>73</sup> *Hilo, Hamdi v. M.E.I.* (F.C.A., no. A-260-90), Heald, Stone, Linden, March 15, 1991. Reported: *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 199 (F.C.A.), at 203.

<sup>74</sup> *Surajnarain, Doodnauth v. M.C.I.* (F.C., no. IMM-1309-08), Dawson, October 16, 2008; 2008 FC 1165.

<sup>75</sup> *Hilo, supra.*, footnote 73 at 202-203 (re charitable group). *Salvador (Bucheli), Sandra Elizabeth v. M.C.I.* (F.C.T.D., no. IMM-6560-93), Noël, October 27, 1994 (re witness to crime committed by paramilitary group); *Marvin, infra*, footnote 83, (re reporting of drug traffickers to authorities); *Kwong, Kam Wang (Kwong, Kum Wun) v. M.C.I.* (F.C.T.D., no. IMM-3464-94), Cullen, May 1, 1995 (re defiance of one-child policy) - but compare *Chan (C.A.)*, *supra*, footnote 1, at 693-696, per Heald J.A., and at 721-723, per Desjardins J.A.

In *Aguirre Garcia, Marco Antonio v. M.C.I.* (F.C., no. IMM-3392-05), Lutfy, May 29, 2006; 2006 FC 645, the claimant alleged that he faced retribution due to his political affiliation. The RPD concluded, however, that the difficulties arose as a result of his allegiance to his friends (who were candidates for the PRI), rather than the party itself, noting that the claimant was not a member of the PRI. The Court upheld the RPD's finding of no nexus.

In *Marino Gonzalez*,<sup>76</sup> a case where the Court held that the RPD applied an incorrect test to political opinion, the Court, reviewing the case law on the subject, reiterated the following principles (among others): an individual knowledge of or opposition to corruption may constitute political opinion; the meaning of “political opinion” is not confined to partisan opinion or membership in parties and movements and does not refer exclusively to national, political or municipal state politics; and refusal to participate in corruption may constitute the expression of a political opinion.

For a discussion of the ground of political opinion as it relates to laws of general application and, in particular, the dress code and military service (evasion/desertion) laws, see Chapter 9, sections 9.3.6 and 9.3.8.1.

In *Colmenares*,<sup>77</sup> the Court held that a victim of politically motivated persecution is not required to abandon his commitment to political activism in order to live safely in his country.

In *Makala*,<sup>78</sup> the Trial Division considered the applicability of paragraph 82 of the UNHCR *Handbook*, which states:

There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reason of political opinion.

The Court found that the CRDD’s erroneous finding that the claimant was not politically involved while in Congo may have affected its appreciation of the strength of the claimant’s political convictions and potential actions against the government upon return to Congo.

#### **4.7. VICTIMS OF CRIMINALITY AND NEXUS TO GROUNDS**

In a number of cases, the Trial Division has held that victims of crime, corruption<sup>79</sup> or vendettas, including blood feuds<sup>80</sup> generally cannot establish a link between their fear of

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<sup>76</sup> *Marino Gonzalez, Francisco v. M.C.I.* (F.C., no. IMM-3094-10), Russell, March 30, 2011; 2011 FC 389 at paras. 58-60.

<sup>77</sup> *Colmenares, supra*, footnote 9

<sup>78</sup> *Makala, François v. M.C.I.* (F.C.T.D., no. IMM-300-98), Teitelbaum, July 17, 1998. Reported: *Makala v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm. L.R. (2d) 251 (F.C.T.D.).

<sup>79</sup> *Kang, Hardip Kaur v. M.C.I.* (F.C., no. IMM-775-05), Martineau, August 17, 2005; 2005 FC 1128, at para.10: “victims or potential victims of crime, corruption or personal vendettas, generally cannot establish a link between fear of persecution and Convention reasons”.

In *Calero, Fernando Alejandro (Alejandro) v. M.E.I.* (F.C.T.D., no. IMM-3396-93), Wetston, August 8, 1994, the Court found no nexus for two families fleeing death threats from drug traffickers. ;

persecution and one of the five grounds in the definition.<sup>81</sup>

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In *Gomez, José Luis Torres v. M.C.I.* (F.C.T.D., no. IMM-1826-98), Pinard, April 29, 1999 the claimant was the victim of corrupt government officials responsible for cattle thefts.

In *Larenas, Alberto Palencia v. M.C.I.* (F.C., no. IMM-2084-05), Shore, February 14, 2006; 2006 FC 159, the Court held that the claimants' fear of corrupt union officials resulted from criminality, which did not constitute a fear of persecution based on a Convention ground.

<sup>80</sup> *Rivero, Omar Ramon v. M.C.I.* (F.C.T.D., no. IMM-511-96), Pinard, November 22, 1996, where the CRDD was upheld in its finding of no nexus where the claimant was the target of a personal vendetta, thus criminal activity, by a government official.

See also *De Arce, Rita Gatica v. M.C.I.* (F.C.T.D., no. IMM-5237-94), Jerome, November 3, 1995. Reported: *De Arce v. Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm. L.R. (2d) 74 (F.C.T.D.) where the claimant testified against her brother-in-law, leading to his conviction for murder. She received threatening phone calls from him and suffered various physical assaults after his release. The Court upheld the Board's conclusion that she was the victim of a personal vendetta and did not fall within the definition of a Convention refugee.

In *Xheko, Aida Siri v. M.C.I.* (F.C.T.D., no. IMM-4281-97), Gibson, August 28, 1998 the claimants were threatened and assaulted when they tried to reclaim their family which had been confiscated during the Communist regime.

In *Lara, Benjamin Zuniga v. M.C.I.* (F.C.T.D., no. IMM-438-98), Evans, February 26, the harassment the claimant suffered was found to be motivated by a personal vendetta which resulted from a corruption investigation his employer had asked him to conduct.

In *Pena, Jose Ramon Alvarado v. M.C.I.* (F.C.T.D., no. IMM-5806-99), Evans, August 25, 2000, the claimant's girlfriend (now wife) Ms. Ordonez, was granted refugee status on the basis of domestic abuse she suffered at the hands of Mr. Arnulfo. The claimant alleged that Mr. Arnulfo had perpetrated acts of violence against him because of his relationship with Ms. Ordonez. The CRDD concluded that there was no nexus. The Court found that it was reasonably open to the Board to conclude that the cause of the violence against the claimant was the jealousy of a rival for the affections of Ms. Ordonez, not the fact that the claimant was a family member of a person whom Mr. Arnulfo had subjected to gender-based violence.

Regarding blood feuds, in *Zefi, Sheko v. M.C.I.*, (F.C., no. IMM-1089-02), Lemieux 2003 FCT 636 May 21, 2003, at para. 41 Justice Lemieux wrote:

[41] Revenge killing in a blood feud has nothing to do with the defence of human rights -- quite to the contrary, such killings constitute a violation of human rights. Families engaged in them do not form a particular social group for Convention purposes. Recognition of a social group on this basis would have the anomalous result of according status to criminal activity, status because of what someone does rather than what someone is (see *Ward*).

However, in *Shkabari, Zamir v. M.C.I.* (F.C., no. IMM-4399-11), O'Keefe, February 8, 2012; 2012 FC 177, a case where the claimants (distant cousins) feared harm as a result of a blood feud because they had married contrary to Karun, the customary Albanian law that prohibits marriage between cousins in the same blood line, the Court found the claimants to be members of a particular social group due to their association in a social group of individuals that marry contrary to the Karun law that limits the internationally recognized right to marry freely.

<sup>81</sup> In *Barrantes, Rodolfo v. M.C.I.* (F.C., no. IMM-1142-04), Harrington, April 15, 2005; 2005 FC 518, the Applicants' feared persecution by criminals who believed that the principal claimant was a police informant. The Court upheld the RPD's finding that fear of persecution as a victim of organized crime and a fear of personal vengeance do not constitute a fear of persecution within the meaning of *IRPA*, s. 96.

See also, *Prato, Jorge Luis Machado v. M.C.I.* (F.C., no. IMM-10670-04), Pinard, August 12, 2005; 2005 FC 1088, where the Court upheld the Board's conclusion that the applicant, who was kidnapped for money, was really a victim of extortion which has no nexus to any of the grounds.

In *Kang, Hardip Kaur v. M.C.I. supra*, footnote 79 (F.C., no. IMM-775-05), Martineau, August 17, 2005; 2005 FC 1128, the Applicant's stated fear of her uncle, due to her refusal to sell him property, was found to arise as a

However, these cases must be read with caution in light of the Federal Court of Appeal decision in *Klinko*,<sup>82</sup> where the Court answered in the affirmative the following certified question:

Does the making of a public complaint about widespread corrupt conduct by customs and police officials to a regional governing authority, and thereafter, the complainant suffering persecution on this account, when the corrupt conduct is not officially sanctioned, condoned or supported by the state, constitute an expression of political opinion as that term is understood in the definition of Convention refugee in subsection 2(1) of the Immigration Act?

The Court found that given the widespread government corruption in the Ukraine (“where the corrupt elements so permeate the government as to be part of its very fabric”), the claimant’s denunciation of the existing corruption constituted an expression of political opinion.

Although the opposition to corruption and criminality can, in the circumstances outlined in *Klinko*, be characterized as an expression of political opinion, the existence of a political

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result of her individual experience as a victim of crime rather than due to her membership in a particular social group (i.e., gender-related); consequently, no nexus existed.

In *Mwakotbe, Sarah Gideon v. M.C.I.* (F.C., no. IMM-6809-05), O’Keefe, October 16, 2006; 2006 FC 1227, the applicant alleged danger from her estranged husband’s family clan which practiced witchcraft, including ritualistic killings of relatives. The Court upheld the PRRA officer’s determination that the applicant’s in-laws would be motivated by the pursuit of wealth and, therefore, the harm feared was purely criminal in nature. (Under the circumstances, the Court held that it was unnecessary for the officer to have considered whether educated, perceived wealthy members of a family clan that practices witchcraft may be considered a particular social group.)

<sup>82</sup> *Klinko* (F.C.A.), *supra*, footnote 44. In *Fernandez De La Torre, Mario Guillermo v. M.C.I.* (F.C.T.D., no. IMM-3787-00), McKeown, May 9, 2001, the male claimant claimed a fear of persecution from Mexican criminal elements based on his association with prominent anti-corruption figures. The Court found that it was reasonable for the CRDD to conclude that no nexus existed. The CRDD had reasonably distinguished *Klinko* (F.C.A.) in determining that the male claimant was not a political target, given that he had not himself actually denounced corruption.

In *Zhu, Yong Qin v. M.C.I.*, *supra*, footnote 65, the claimant claimed to be a refugee *sur place*, because he gave information to the RCMP about Korean and Chinese individuals charged with human smuggling and feared repercussions by the snakeheads in China, notwithstanding the crackdown by the Chinese government against smugglers. The Court held that persons informing on criminal activity do not form a particular social group. However, the CRDD erred in its attempt to distinguish *Klinko* (F.C.A.). “Political opinion” should be given a broad interpretation and need not be expressed vis-à-vis the state. The CRDD must consider whether the government of China or its machinery “may be engaged” in human trafficking so as to provide the required nexus to a Convention ground.

In *Adewumi, Adegboyega Oluseyi v. M.C.I.* (F.C.T.D., no. IMM-1276-01), Dawson, March 7, 2002; 2002 FCT 258, the claimant was targeted by cult members after he delivered an anti-cult lecture at the University of Benin where he condemned cult activities and criticized the police force and government for non-prosecution of serious crimes. The CRDD concluded that what the claimant feared was criminal activity. In the Court’s view, since the claimant’s criticism extended to the police and the government, the CRDD erred in its conclusion that there was no nexus.

In *Yoli, Hernan Dario v. M.C.I.* (F.C.T.D., no. IMM-399-02), Rouleau, December 30, 2002; 2002 FCT 1329, at para. 41 the Court agreed with the CRDD that “Boca” (a soccer fan club involved in criminal activities) threatened the claimant with harm after his refusal to participate in its criminal activities and subsequent disassociation from the group, not because of his political opinion but because he could reveal evidence of the members’ identities and their criminal activity to the authorities



opinion, and therefore nexus to a Convention ground, is fact-driven and must be determined on the basis of the evidence provided in each particular case.

In general, an opinion expressed in opposition to a criminal organization will not provide a nexus on the basis of political opinion unless the evidence shows the claimant's opposition is rooted in political conviction.<sup>83</sup> Similarly, opposition to corruption or criminality may constitute a perceived political opinion when it can be seen to challenge the state apparatus.<sup>84</sup>

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<sup>83</sup> *Ward, supra*, footnote 1, at 750, the Court stated that not just any dissent to any organization will unlock the gates of asylum; the disagreement has to be rooted in political conviction.

In *Suarez, Jairo Arango v. M.C.I.* (F.C.T.D., no. IMM-3246-95), Reed, July 29, 1996, the Court found there was no political content or motivation when the claimant informed on drug lords. His opposition was to criminal activity.

See also *Marvin, Mejia Espinoza v. M.C.I.* (F.C.T.D., no. IMM-5033-93), Joyal, January 10, 1995, at para. 16, a case in which the drug trafficking operations that the applicant witnessed and reported involved certain officers of the security forces and members of the government. The Court found that although the action of reporting drug traffickers to the Costa Rican authorities was a sign of the applicant's integrity, it was not an expression of political opinion; it was more of a criminal nature.

In *Neri, Juan Carlos Herrera v. M.C.I.* (F.C., no. IMM-9988-12), Strickland, October 23, 2013; 2013 FC 1087, the principal claimant called police after hearing gunshots. When the police arrived, he complained that they were slow in responding. He also gave an interview to a reporter restating his dissatisfaction with response time of the police. He claimed protection on the basis that his actions in calling and speaking to the police and speaking to the reporter, communicated to organized crime his "pro-rule of law, anti-corruption political opinion". He also argued that by making the call, he was reporting a crime, which, given the rampant criminality in Mexico, must be viewed as political act or statement. The RPD found that fear of revenge by criminals for having spoken to the police about the gunfire he heard was not linked to a Convention ground. The Court agreed, finding that unlike *Klinko*, the claimant did not intend to make a political act or to put forward a political statement intended to formally denounce corruption of state officials. Rather, his complaint concerned the untimely response of the police to his call. This alone, was not sufficient to demonstrate political conviction.

In *Lai, Cheong Sing v. M.C.I.* (F.C.A., no. A-191-04), Malone, Richard, Sharlow, April 11, 2005; 2005 FCA 125, the male appellant alleged that, because of his refusal to participate in a political intrigue, he had been wrongly accused by the Chinese government of smuggling and bribery. The Court found that the Board correctly concluded that there was no nexus between the alleged crimes and any political motive; the motive was one of personal gain and the crimes should not be viewed as political. The Court also rejected the appellants' argument that where a potential prosecution is politically manipulated by the state, then a person subject to such a prosecution can be a refugee by reason of political opinion. The Court "seriously doubted" that the ground of political opinion could be read to include the political opinion of the persecutor towards the claimant's situation.

<sup>84</sup> See *Klinko* (F.C.A.), *supra*, footnote 44. The FCA's decision was rendered in 2000, but a number of earlier cases were decided using similar reasoning. In *Berrueta, supra*, footnote 65, at para.5, the claimant had denounced kingpins of a drug cartel in Venezuela and the CRDD had found this not to be an expression of political opinion. However, the Court overturned the decision, stating that in countries where corruption is pervasive throughout the state, to denounce corruption is to undermine a government's authority.

Also in *Bohorquez, Gabriel Enriquez v. M.C.I.* (F.C.T.D., no. IMM-7078-93), McGillis, October 6, 1994 the claimant was licensed by the central government to establish a cooperative for social and political reform which raised funds by selling lottery tickets. When he opposed the state lottery which was being operated as a monopoly, he faced threats by corrupt officials. The Court found that the claimant's opposition to the lottery challenged vested political interests and that the Board erred in failing to consider the evidence concerning his claim on the ground of political opinion.

See also *Vassiliev, Anatoli Fedorov v. M.C.I.* (F.C.T.D. IMM-3443-96), Muldoon, July 4, 1997, where the claimant refused to participate in corruption between business people and government officials. Stating that although opposition to criminal activity per se is not political expression, in cases where criminal activity

A claimant's exposure of corruption or opposition to crime will not generally place him or her in a particular social group.<sup>85</sup> A claimant who refuses to participate in crime as a matter of conscience is not a member of a political group.<sup>86</sup> However, in some cases, the grounds of

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permeates State action, opposition to criminal acts becomes opposition to State authorities, the Court found that the claimant's refusal to transfer bribes to Russian government officials and to launder money was an expression of political opinion.

See also *Mehrabani, Paryoosh Solhjoui v. M.C.I.* (F.C.T.D., no. IMM-1798-97), Rothstein, April 3, 1998, where the Court upheld the CRDD finding that the claimant's fear of highly placed embezzlers whom he had exposed and against whom he provided evidence, did not ground the claim in political opinion. Denouncing corruption was not seen as a challenge to government activities, as the state (Iran), had taken strong action against some of the corrupt officials.

In *Murillo Garcia, Orlando Danilo v. M.C.I.* (F.C.T.D., no. IMM-1792-98), Tremblay-Lamer, March 4, 1999, the claimant witnessed and reported murders committed by government agents. After reviewing the documentary evidence, the Court found no evidence to suggest that a political opinion could be imputed merely as a result of witnessing and reporting a crime. In fact, the evidence showed that the government did not endorse such acts, as agents who committed abuses were prosecuted.

In *Palomares, Dalia Maria Vieras v. M.C.I.* (F.C.T.D., no. IMM-933-99), Pelletier, June 2, 2000, at para. 15, Justice Pelletier makes the point that "Even if members of the state apparatus are involved, the fact of making a complaint does not necessarily involve political action, nor does it mean that the complaint will be seen by them as political action."

In *Kouril, Zdenek v. M.C.I.* (F.C.T.D., no. IMM-2627-02), Pinard, June 13, 2003; 2003 FCT 728, the Court distinguished *Klinko* on the basis that in *Klinko*, the political opinion expressed took the form of a denunciation of state officials' corruption whereas in this case, the claimant had complained about a group of private citizens acting outside the law. Even under *Ward's* broad definition of political opinion, the claimant's complaint would not constitute an expression of political opinion, especially since the evidence before the Board was that corruption was not endemic in the Czech Republic.

<sup>85</sup> In *Ward, supra*, footnote 1, at 745, the Court found that the claimant was not part of a social group since he was the target of highly individualized persecution due to what he did as an individual and not because of any group characteristics or association. This reasoning has been followed in *Suarez, supra*, footnote 83, and in a similar case, *Munoz, Tarquino Oswaldo Padron v. M.C.I.* (F.C.T.D., no. IMM-1884-95), McKeown, February 22, 1996., at paras 3 and 7, where the Court held it was reasonable for the CRDD to conclude that the reporting of drug traffickers to expose corruption was a laudable goal but not so fundamental to human dignity that it would place the claimant in a particular social group. See also *Mason, supra*, footnote 34; and *Soberanis, Enrique Samayoa v. M.C.I.* (F.C.T.D., no. IMM-401-96), Tremblay-Lamer, October 8, 1996, where "small business proprietors victimized by extortionists acting in concert with police authorities" was found not to be a particular social group.

In *Valderrama, Liz Garcia v. M.C.I.* (F.C.T.D., no. IMM-444-98), Reed, August 5, 1998, counsel defined the claimant's social group as "successful businessman opposed to corruption and unwilling to pay bribes". The facts revealed that it was "successful businessmen" who were being targeted, regardless of their opposition to corruption. After considering *Ward* and *Chan* the Court held that there was no nexus between the targeted class and a Convention social group.

And see *Lozano Navarro, Victor v. M.C.I.* (F.C., no. IMM-5598-10), Near, June 24, 2011; 2011 FC 768, where the Court agreed with the RPD in rejecting the claimants' argument that reporting to the authorities and refusing to co-operate with the cartel extorting them was an immutable part of the claimants' past such that they were members of *Ward's* third category of social group.

Also see *Palomares, supra*, footnote 84, at para.12, where the Court held that the claimant who witnessed a murder was at risk not because of membership in a particular social group but because of a very personal characteristic, namely, her ability to give evidence which could lead to a prosecution.

political opinion or particular social group can provide a nexus where the claimant fears persecution as a result of criminal activity.<sup>87</sup>

Persons who fear becoming targets of crime because they are perceived to have wealth have been found by the Federal Court not to be members of a particular social group.<sup>88</sup> The Court reasoned that as a group, people who are perceived to be wealthy are not marginalized; rather they are more frequent targets of criminal activity. The perception of wealth is insufficient to sustain the position that persons returning from abroad constitute a social group. It is clear from *Ward* that protection afforded under the Convention is intended to provide protection on the grounds of human rights and anti-discrimination considerations and not general criminality.

In *Soimin*,<sup>89</sup> a Haitian woman alleged a fear of rape based on her membership in a particular social group, “women in Haiti who may be targeted by criminals on the basis of her sex.” The Court upheld the RPD finding that the violence feared by the claimant was a result of widespread generalized criminality in Haiti and not discriminatory targeting of women in particular. The harm feared was criminal in nature and had no nexus to the Convention refugee definition. However, more recently the Court arrived at a different conclusion in *Dezameau*<sup>90</sup> and *Josile*,<sup>91</sup> also claims made by Haitian women claiming a fear of persecution in the form of

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<sup>86</sup> *Lezama, Orlando Rangel v. M.C.I.* (F.C., no. IMM-3396-09), Russell, August 11, 2011; 2011 FC 986 , at para.54.

<sup>87</sup> *Klinko* (F.C.A.), *supra*, footnote 44.

In *Cen v. Canada (Minister of Citizenship and Immigration)*, [1996] 1 F.C. 310 (T.D.), the claimant was sexually exploited by corrupt government officials. The Court found she belonged to a particular social group of women subject to exploitation and violation of security of the person.

In *Reynoso*, *supra*, footnote 57, the claimant was the target of a corrupt mayor because she had uncovered his illegal activities. The Court held that her knowledge of the mayor’s corruption was an unchangeable characteristic that placed her in *Ward*’s first category of social group.

For cases in which opposition to corruption was considered political opinion, see *Berrueta*, *supra*, footnotes 65 and 82; and *Bohorquez*, *supra*, footnote 84.

<sup>88</sup> *Cius, Ligene v. M.C.I.* , *supra*, footnote 53. The claimant was perceived as wealthy because he was returning to Haiti after a stay abroad.

In *Navaneethan, Kalista v. M.C.I.* (F.C., no. IMM-51-14), Strickland, May 21, 2015; 2015 FC 664, at para.53, the Court noted that it has consistently held that a perception of wealth, without more, is insufficient to qualify claimants as members of a particular social group. In this case, the claimant alleged he would be perceived as wealthy because he had family in Canada.

It is important to exercise caution in applying *Cius*, *supra*, which concerns a claimant returning to Haiti after a stay abroad. The Court states, at para. 21, that “people returning to Haiti after a stay abroad do not constitute a particular social group within the meaning of section 96 of the Act”, but see *Ocean, Marie Nicole v. M.C.I.*, (F.C., no. IMM-5528-10), Lemieux, June 29, 2011; 2011 FC 796 where the returnee from abroad was a woman claiming to fear gender-related persecution. The Court upheld the RPD’s rejection of her claim but the reason it did so was that the claimant’s testimony made it clear that the basis of her fear was different from a fear of persecution because she belonged to the particular social group of “Haitian women returning to that country after a prolonged absence and fearing being raped because of their gender.” (at para.18)

<sup>89</sup> *Soimin, Ruth v. M.C.I.* (F.C., no. IMM-3470-08), Lagacé, March 4, 2009; 2009 FC 218.

<sup>90</sup> *Dezameau, Elmancia v. M.C.I.* (F.C. no., IMM-4396-09), Pinard, May 27, 2010; 2010 FC 559.

<sup>91</sup> *Josile, Duleine v. M.C.I.* (F.C., no. IMM-3623-10, Martineau, January 17, 2011; 2011 FC 39.

sexual violence. In these cases, the Court cited the principle in *Ward* that “gender” can provide the basis for a particular social group. The Court also cited jurisprudence from the Supreme Court of Canada in support of the proposition that rape and other forms of sexual assault are crimes grounded in the status of women in society.<sup>92</sup>

In *Dezameau*, the Court found that the error of the Board was to use its finding of a widespread risk of violence in Haitian society to rebut the assertion that there is a nexus between the applicant’s social group and the risk of rape. A finding of generality<sup>93</sup> does not prohibit a finding of persecution on the basis of one of the Convention grounds. This is explicitly set out in the IRB’s Guideline 4.

Based on a review of Canadian law and the documentary evidence, the Court in *Josile* concluded that the notion that rape is an act of violence faced generally by all Haitians is untenable; rather, the risk of rape was grounded in the applicant’s membership in a particular social group, that of Haitian women.

In *Mancia*,<sup>94</sup> the Court noted that in a gender-based claim, a claimant’s burden is to satisfy the Board that she was targeted as a woman. “Stated differently, a claimant needs to demonstrate that she would not have been attacked but for the fact that she was a woman.”

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<sup>92</sup> *R. v. Osolin* [1993] 4 S.C.R.595; *R. v. Seaboyer* [1991] 2 S.C.R. 577; *R. v. Lavalle* [1990] 1 S.C.R. 582. In *Belle, Asriel Asher v. M.C.I.* (F.C., no. IMM-5427-11), Mandamin, October 10, 2012; 2012 FC 1181, the Court, relying on *Osolin*, found that the RPD erred in concluding that the sexual assault inflicted on the minor applicant was not gender violence simply because it was retaliation by a gang member not inflicted within the context of a domestic relationship.

<sup>93</sup> For example, in *Nel, Charl Willem v. M.C.I.* (F.C., no. IMM-4601-13), O’Keefe, September 4, 2014; 2014 FC 842, the Court noted that rape does not become a gender-neutral crime merely because all people in the country face some risk of other types of violence.

<sup>94</sup> *Mancia, Veronica Margarita Santos v. M.C.I.* (F.C., no. IMM-148-11), Snider, July 28, 2011; 2011 FC 949. The Court gives as an example, “if a claimant’s attackers robbed and attacked her, she would have to satisfy the Board that the robbery was not the motive. Otherwise, a man in her situation (even if he, too, had been raped) would not receive protection but would face the same risk of attack.” It is important to note, however, the context in which the Court upheld the Board’s decision that the claim was not gender-based. The claimant’s evidence and oral testimony strongly indicated that she was targeted because of her relationship to her brother, and the reason the MS 18 targeted her brother was because of his perceived wealth.

## CHAPTER 4 - GROUNDS OF PERSECUTION

### 4.8. TABLE OF CASES

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## CHAPTER 5

### 5. WELL-FOUNDED FEAR

#### 5.1. GENERALLY

The definition of Convention refugee is forward-looking. In a claim for refugee status, the issue is not whether the claimant had good reason to fear persecution in the past, but whether, at the time the claim is being assessed, the claimant has good grounds for fearing persecution in the future.<sup>1</sup>

Claimants must establish that they have a subjective fear of persecution and also that the fear is well-founded in an objective sense,<sup>2</sup> that is, it is justified in light of the objective situation. When evaluating conditions in the claimant's country of origin, the tribunal is required to consider evidence of the conditions as they exist at the time of the hearing.<sup>3</sup>

Claimants do not have to establish that they have been persecuted in the past.<sup>4</sup> Even if they can do so, "past persecution is insufficient of itself to establish a fear of future persecution".<sup>5</sup> Nonetheless, past persecution remains a relevant consideration because evidence relating to it (or to a fear of past persecution) can properly be the foundation of a present fear.<sup>6</sup> In *Natynczy*,<sup>7</sup> the Court remarked that even though the test for a well-founded fear was forward-looking, in cases where incidents of past persecution were alleged, the Board had an obligation to assess those incidents because "evidence of past persecution is one of the most effective means of showing that a fear of future persecution is objectively well-founded." Where a claimant is able to establish a pattern of long-standing persecution, there may be reason to believe that the pattern will continue.<sup>8</sup>

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<sup>1</sup> *Mileva v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 398 (C.A.) at 404.

<sup>2</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85, at 723.

<sup>3</sup> *M.E.I. v. Paszkowska, Malgorzata* (F.C.A., no. A-724-90), Hugessen, MacGuigan, Décary, April 16, 1991. Reported: *Canada (Minister of Employment and Immigration) v. Paszkowska* (1991), 13 Imm. L.R. (2d) 262 (F.C.A.).

<sup>4</sup> *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (C.A.), at 258.

<sup>5</sup> *Fernandopulle, Eomal v. M.C.I.* (F.C., no. IMM-3069-03), Campbell, March 18, 2004, 2004 FC 415, at para. 10. In this case, Mr. Justice Campbell rejected the argument that there is a rebuttable presumption under Canadian law that a person who has been the victim of persecution in the past has a well-founded fear of persecution. The ruling was confirmed by the Federal Court of Appeal in *Fernandopulle, Eomal v. M.C.I.* (F.C.A., no. A-217-04), Sharlow, Nadon, Malone, March 8, 2005, 2005 FCA 91.

<sup>6</sup> *M.E.I. v. Satiacum, Robert* (F.C.A., no. A-554-87), Urie, Mahoney, MacGuigan, June 16, 1989. Reported: *Canada (Minister of Employment and Immigration) v. Satiacum* (1989), 99 N.R. 171 (F.C.A.).

<sup>7</sup> *Natynczyk v. Canada (Minister of Employment and Immigration)*, (F.C., no. IMM-2025-03), O'Keefe, June 25, 2004, at para. 71.

<sup>8</sup> *Lai, Kai Ming v. M.E.I.* (F.C.A., no. A-792-88), Marceau, Stone, Desjardins, September 18, 1989. Reported: *Lai v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 245 (F.C.A.).

Evidence about persecution faced by similarly-situated people will often be compelling because it tends to show that a claimant would face the same risks. However, that does not change the fact that it is still the claimant who must face a serious possibility of persecution.<sup>9</sup>

## 5.2. TEST - STANDARD OF PROOF

Claimants must establish the factual elements of their claim on a balance of probabilities, but they do not have to prove that persecution would be more likely than not.<sup>10</sup> The evidence must show only that there are “good grounds” for fearing persecution.<sup>11</sup> The test, which has become known as the Adjei test, was set out as:

Is there a reasonable chance that persecution would take place were the applicant returned to his country of origin?<sup>12</sup>

In *Li*,<sup>13</sup> the Federal Court of Appeal cautioned against confusing the “standard of proof” and the “legal test to be met”. The standard of proof refers to the standard the panel will apply when assessing the evidence adduced for the purpose of making factual findings, whereas the legal test is the test for the likelihood of persecution which a claimant must establish in order to obtain Convention refugee status.

Courts have used various terms to describe this test – “good grounds”, “reasonable chance”, and “reasonable” or even “serious” possibility, as opposed to a “mere” possibility. The test does not require a probability of persecution<sup>14</sup> and asking claimants to establish that they “would” be persecuted in the future, has been held to be the wrong test.<sup>15</sup> However, in one case, the Court held that the RPD did not err when it stated that there was insufficient evidence that the claimant would face a serious possibility of persecution, as the word “would” has “both a degree of certainty in some contexts and a degree of likelihood in other contexts”. In the Court’s view, the member was speaking of the reasonable likelihood, not the absolute certainty.<sup>16</sup>

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<sup>9</sup> *Awadh, Ahmed v. M.C.I.* (F.C., no. IMM-4221-13), Noël, May 29, 2014; 2014 FC 521.

<sup>10</sup> *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.), at 682. For a case where the Court does an in-depth analysis of the RPD’s language and finds that it incorrectly required the claimant to prove persecution on a balance of probabilities, see *Ramanathy, Murugesakumar v. M.C.I.* (F.C., no. IMM-1241-13), Mosley, May 27, 2014; 2014 FC 511.

<sup>11</sup> *Seifu, Eshetu v. M.E.I.* (F.C.A., no. A-277-82), Pratte, Le Dain, Hyde, January 12, 1983.

<sup>12</sup> *Adjei*, *supra*, footnote 10 at 683.

<sup>13</sup> *Li, Yi Mei v. M.C.I.* (F.C.A., no. A-31-04), Rothstein, Noël, Malone, January 5, 2005; 2005 FCA 1.

<sup>14</sup> *Adjei*, *supra*, footnote 10 at 682-3.

<sup>15</sup> *Yeboah, Christian v. M.E.I.* (F.C.T.D., no. 92-A-7049), Teitelbaum, July 16, 1993 at para. 53. Reported: *Yeboah v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 81 (F.C.T.D.). The Court in *Li*, *supra*, footnote 13, considered that the word “would” implies a probability test.

<sup>16</sup> *Thanapalasingam, Kengeswaran v. M.C.I.* (F.C., no. IMM-10063-12), Phelan, July 29, 2013; 2013 FC 830, at para. 19.

The test for the well-foundedness of a fear of persecution was further clarified in *Ponniah*,<sup>17</sup> where Desjardins J.A. stated:

“Good grounds” or “reasonable chance” is defined in *Adjei* as occupying the field between upper and lower limits; it is less than a 50 per cent chance (i.e., a probability), but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is “good grounds”.

In *Ioda*,<sup>18</sup> the Court referred to the test set out in *Adjei* and *Ponniah* and rejected the argument that when the Refugee Division based its negative decision on there being a “mere risk” of persecution it was equivalent to finding a “mere possibility”. In the Court’s view, “risk” conveyed a higher threshold of probability. The Court found in *Rajagopal*<sup>19</sup> that the Officer misstated the test when he concluded that the claimant “would not be at particular risk”.

In *Sivaraththinam*<sup>20</sup> the claimant alleged that all he was required to establish was that there was more than a minimal possibility that he would be persecuted upon return to Sri Lanka. Justice Annis undertook a detailed examination of the wording of the legal test for section 96. According to his interpretation of *Adjei*, the Court of Appeal was not proposing either “more than a mere possibility” or “not more than a 50 percent chance” as the test for determining a well-founded fear under section 96. In his view, the Court was looking for a compromise standard between the two extremities, neither of which it suggested should apply. Justice Annis concluded that *Adjei* established the proper expression of the standard to determine a well-founded fear as a “reasonable chance”, “reasonable possibility”, “serious possibility”, or “good grounds”. He went on to express his own preference:

[49] Returning to the issue of appropriate qualifiers of possibilities, chances, etc, I am of the view that any test not containing the term “reasonable” as a limitation should be shunned. This would leave the appropriate standard to be either a “reasonable chance” or a “reasonable possibility”, as there is no distinction between a chance or a possibility.

The Court also cautions that if the tribunal sets out a multiplicity of misstated tests in its reasons, then later stating the test correctly elsewhere in the reasons will not cure those errors and the decision may not be saved.<sup>21</sup>

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<sup>17</sup> *Ponniah, Manoharan v. M.E.I.* (F.C.A., no. A-345-89), Heald, Hugessen, Desjardins, May 16, 1991. Reported: *Ponniah v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 241 (F.C.A.), at 245.

<sup>18</sup> *Ioda, Routa v. M.E.I.* (F.C.T.D., no. 92-A-6604), Dubé, June 18, 1993. Reported: *Ioda v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 294 (F.C.T.D.).

<sup>19</sup> *Rajagopal, Gnanathas v. M.C.I.* (F.C., no. IMM-1350-11), Hughes, November 10, 2011; 2011 FC 1277, at para. 11.

<sup>20</sup> *Sivaraththinam, Mayooran v. M.C.I.* (F.C., no. IMM-13174-12), Annis, February 20, 2014; 2014 FC 162.

<sup>21</sup> See *Gopalarasa, Raveendran v. M.C.I.* (F.C., no. IMM-4617-13), Diner, November 26, 2014; 2014 FC 1138, at para. 27. Also see *Conka, Emil v. M.C.I.* (F.C. no. IMM-4601-17), Strickland, May 23, 2018; 2018 FC 532 where the Court found that the PRRA officer had applied an incorrect or elevated test by requiring the applicant

With regard to the standard of proof used to assess evidence, the Federal Court has held that certain phrasing in CRDD reasons, such as “we are not convinced”<sup>22</sup> or “the claimant did not persuade the panel”<sup>23</sup> implied overly exacting standards of proof.

### 5.3. SUBJECTIVE FEAR AND OBJECTIVE BASIS

A claimant’s subjective fear of persecution must have an objective basis.

The subjective component relates to the existence of a fear of persecution in the mind of the refugee. The objective component requires that the refugee’s fear be evaluated objectively to determine if there is a valid basis for that fear.<sup>24</sup>

Claimants may have a subjective fear that they will be persecuted if returned to their country, but the fear must be assessed objectively in light of the situation in that country in order to determine whether the fear is well founded.<sup>25</sup>

Both subjective fear and the objective basis for it are crucial elements in the definition of a Convention refugee. In *Kamana*,<sup>26</sup> Madam Justice Tremblay-Lamer held that the panel’s finding that the claimant had not credibly established the subjective element was reasonable and that:

The lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition – subjective and objective – must be met.

The same reasoning was repeated by Madam Justice Tremblay-Lamer shortly afterwards in *Tabet-Zatla*,<sup>27</sup> a case which was followed by a number of judges at the Trial Division<sup>28</sup>. In 2002,

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to demonstrate a sustained and systemic denial of his core human rights that would “prevent his basic functioning in Slovakian society”.

<sup>22</sup> *Chichmanov, Yordan Anguelov v. M.E.I.* (F.C.A., no. A-243-91), Isaac, Heald, Létourneau, September 3, 1992.

<sup>23</sup> *Petrescu, Mihai v. S.G.C.* (F.C.T.D., no. A-980-92), Tremblay-Lamer, October 26, 1993, at para. 20.

<sup>24</sup> *Rajudeen, Zahirdeen v. M.E.I.* (F.C.A., no. A-1779-83), Heald, Hugessen, Stone (concurring), July 4, 1984. Reported: *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129 (F.C.A.), at 134.

<sup>25</sup> In *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, at 664 (para. 134), Major, J. stated: “The objective component of the test requires an examination of the ‘objective situation’ and the relevant factors include the conditions in the applicant’s country of origin and the laws in that country together with the manner in which they are applied.”

<sup>26</sup> *Kamana, Jimmy v. M.C.I.* (F.C.T.D., no. IMM-5998-98), Tremblay-Lamer, September 24, 1999.

<sup>27</sup> *Tabet-Zatla, Mohamed v. M.C.I.* (F.C.T.D., no. IMM-6291-98), Tremblay-Lamer, November 2, 1999.

<sup>28</sup> *Tabet-Zatla, ibid.*, was followed in *Fernando v. M.C.I.* (F.C.T.D., no. IMM-4601-00), Nadon, July 5, 2001 and *Anandasivam, Vallipuram v. M.C.I.* (F.C.T.D., no. IMM-4748-00), Lemieux, October 10, 2001. Similarly, the same principle was applied in *Akacha, Kamel v. M.C.I.* (F.C., no. IMM-548-03), Pinard, December 19, 2003; 2003 FC 1489 at para. 5; and *Herrera, William Alexander Cruz v. M.C.I.* (F.C., IMM-782-07), Beaudry, October 1, 2007, at para. 23, which followed *Kamana*.



Justice Tremblay-Lamer was faced with a challenge to her holding in the *Maqdassy* case.<sup>29</sup> The applicant relied on *Yusuf*,<sup>30</sup> an earlier decision by the Federal Court of Appeal which had found that the soundness of rejecting a claim because of the absence of subjective fear in the presence of an objective basis for the fear was “doubtful.” In *Yusuf*, Hugessen J.A. stated:

I find it hard to see in what circumstances it could be said that a person who, we must not forget, is by definition claiming refugee status could be right in fearing persecution and still be rejected because it is said that fear does not actually exist in his conscience.

The applicant in *Maqdassy*<sup>31</sup> relied on this to argue that it might not be necessary to establish a subjective fear of persecution where an objective basis for the fear had been shown to exist. Justice Tremblay-Lamer disagreed, noting that *Yusuf* had been decided prior to *Ward*,<sup>32</sup> in which the Supreme Court made it clear that both components of the test were required.<sup>33</sup> In *Geron*,<sup>34</sup> a case decided several months later, Mr. Justice Blanchard also referred to *Ward* as authority for finding that the lack of evidence going to the subjective element of the claim was a “fatal flaw”. Mr. Justice Harrington too, cited *Ward* when he held in *Nazir*<sup>35</sup> that it was not necessary for him to rule on other issues in that case because “even if there were grounds for an objective fear, there must also be a subjective fear of persecution.”

### 5.3.1. Establishing the Subjective and Objective Elements

As mentioned in *Yusuf*,<sup>36</sup> children or persons suffering from mental disability may be incapable of experiencing fear. The *Patel* case<sup>37</sup> concerns a minor but notes that either age or disability may cause a claimant to be incapable of articulating his or her subjective fear in a rational manner. If a claimant is not competent and the evidence establishes an objective basis for fear of persecution, the person acting as the claimant’s designated representative may establish a

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<sup>29</sup> *Maqdassy, Joyce Ruth v. M.C.I.* (F.C.T.D., no. IMM-2992-00), Tremblay-Lamer, February 19, 2002; 2002 FCT 182.

<sup>30</sup> *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629 (C.A.), at 632.

<sup>31</sup> *Maqdassy, supra*, footnote 29.

<sup>32</sup> *Canada (Attorney General) v. Ward, supra*, footnote 2.

<sup>33</sup> See *Ramos Contreras, Manuel v. M.C.I.* (F.C., no. IMM-4188-08), Heneghan, May 20, 2009; 2009 FC 525, where the Court noted that documentary evidence cannot, by itself, establish the subjective element of persecution. In *Mailvakanam, Subhas v. M.C.I.* (F.C., no. IMM-3155-11), Scott, December 6, 2011; 2011 FC 1422, the Court confirmed that the RPD has no obligation to conduct an assessment of objective risk after concluding that a claimant lacks subjective fear.

<sup>34</sup> *Geron, Fernando Bilog v. M.C.I.* (F.C.T.D., no. IMM-4951-01), Blanchard, November 22, 2002; 2002 FCT 1204.

<sup>35</sup> *Nazir, Qaiser Mahmood v. M.C.I.* (F.C., no. IMM-3857-04), Harrington, February 3, 2005; 2005 FC 168 at para. 4.

<sup>36</sup> *Yusuf, supra*, footnote 30.

<sup>37</sup> *Canada (Minister of Citizenship and Immigration) v. Patel, Dhruv Navichandra* (F.C., no. IMM-2482-07), Lagacé, June 17, 2008; 2008 FC 747.

subjective fear.<sup>38</sup> However, the claim must be evaluated from the perspective of the minor.<sup>39</sup> In some cases, it may be possible for the tribunal to infer the subjective fear from the evidence. As the Court points out in *Patel*, it is rare that a claimant who has good reason to be afraid will not be – unless the claimant is incompetent, exceptionally committed to a cause, or perhaps just foolhardy.

Judicial reviews are seldom about such cases. Far more often, they concern claimants who have not met their burden of establishing the subjective component of a well-founded fear because of a credibility issue.

The relationship between subjective fear and credibility has been analyzed from various perspectives and the Federal Court and Federal Court of Appeal have provided a number of observations on this subject, including the following:

- MacGuigan, J. in *Shanmugarajah*<sup>40</sup>: “(...) it is almost always foolhardy for a Board in a refugee case, where there is no general issue as to credibility, to make the assertion that the claimants had no subjective element in their fear (...)”.(underlining added)
- Cullen, J. in *Parada*<sup>41</sup> held that if a claimant testifies that he fears for his life and there is evidence to reasonably support those fears, it is improper for the Refugee Division to reject that testimony out of hand without making a negative finding of credibility.
- Teitelbaum, J. in *Assadi*<sup>42</sup> wrote: “Failure to immediately seek protection can impugn the claimant’s credibility, including his or her testimony about events in his country of origin.”
- Joyal, J. in several cases, including *Parmar*,<sup>43</sup> stated that the subjective component of the well-founded fear test depended solely on the claimant’s credibility.

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<sup>38</sup> In *Sandoval Mares, Martha v. M.C.I.* (F.C., no. IMM-2716-12), Gagné, March 25, 2013; 2013 FC 297, the Court noted that with regard to the children’s claim, the RPD could reasonably rely on the testimony of the principal applicant acting as the children’s designated representative in assessing the children’s subjective fear. No risks were raised as being faced by the minor applicants separate from those faced by their mother.

<sup>39</sup> *Owobowale, Lillian Naomi v. M.C.I.* (F.C., no. IMM-2025-10), Zinn, November 16, 2010; 2010 FC 1150 was a case involving a mother and her three minor daughters whose claims were based on the minors’ fear of female genital mutilation at the hands of family members. The Board erred in unreasonably approaching the minors’ claims from the perspective of the mother. The life choices of the mother are not relevant in assessing the subjective fear of her children. The RPD also erred in not assessing the objective basis from the perspective of the minor applicants.

<sup>40</sup> *Shanmugarajah, Appiah v. M.E.I.* (F.C.A., no. A-609-91), Stone, MacGuigan, Henry, June 22, 1992. This principle has been applied in many cases since. See for example *Ramirez-Osorio, Alexander v. M.C.I.* (F.C., no. IMM-7418-12), Shore, May 3, 2013; 2013 FC 461.

<sup>41</sup> *Parada, Felix Balmore v. M.C.I.* (F.C.T.D., no. A-938-92), Cullen, March 6, 1995, at para. 16.

<sup>42</sup> *Assadi, Nasser Eddin v. M.C.I.* (F.C.T.D., no. IMM-2683-96), Teitelbaum, March 25, 1997. at para. 14.

<sup>43</sup> *Parmar, Satnam Singh v. M.C.I.* (F.C.T.D., no. IMM-838-97), Joyal, January 21, 1998; *Chudinov, Nikolai v. M.C.I.* (F.C.T.D., no. IMM-2419-97), Joyal, August 14, 1998; and *Maximilok, Yuri v. M.C.I.* (F.C.T.D., no. IMM-1861-97), Joyal, August 14, 1998.

- Cullen, J. in *Dirie*<sup>44</sup>: “Once the objective grounds for the claimant’s fear are present, it is very likely that a subjective fear is also present unless the Board questions the claimant’s credibility. (*underlining added*)
- Lemieux, J. in *Hatami*<sup>45</sup> held that the Board had no evidentiary basis on which to conclude that the claimant did not have a genuine subjective fear of persecution when her subjective fear was clearly established in her PIF and the Board had found her evidence credible.
- Beaudry, J. in *Herrera*<sup>46</sup> first cites *Ward* to say that the determination of the existence of a subjective fear is based on the claimant’s credibility. Then, he agrees with the respondent that the absence of subjective fear “may be fatal to a refugee claim, beyond the simple negative inference of credibility.”
- Blais, J. in *Ahoua*<sup>47</sup>: “The Minister properly pointed out that a negative finding regarding subjective fear may render the assessment of the objective aspect of the complaint superfluous and may in itself warrant the dismissal of the claim.”
- Mactavish, J. in *Hidalgo Tranquino*<sup>48</sup>: “Having accepted Ms. Hidalgo’s evidence as truthful, including the explanation that she provided for her failure to claim elsewhere, it was simply unreasonable for the Board to dismiss her claim for protection under section 96 on the basis that she lacked subjective fear.”
- Bédard, J. in *Gomez*,<sup>49</sup> after stating that a finding of a lack of subjective fear is determinative only for a section 96 claim, adds that “subjective fear may sometimes be relevant when assessing the truth of the allegations of a person who claims to be a person in need of protection (...)”.
- O’Keefe, J. in *Kunin*<sup>50</sup>: “A finding that a claimant lacks a subjective fear of persecution necessarily impugns any claimant’s credibility.” The Court does add a caveat to the effect that this finding may only impugn one aspect of the claimant’s credibility and does not

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<sup>44</sup> *Dirie, Abdulle Milgo v. M.C.I.* (F.C.T.D., no. IMM-5428-97), Cullen, October 6, 1998.

<sup>45</sup> *Hatami, Arezo v. M.C.I.* (F.C.T.D., no. IMM-2418-98), Lemieux, March 23, 2000, at para. 25.

<sup>46</sup> *Herrera, supra*, footnote 28, at para. 23.

<sup>47</sup> *Ahoua, Wadjams Jean-Marie v. M.C.I.* (F.C., no. IMM-1757-07), Blais, November 27, 2007; 2007 FC 1239, at para. 16.

<sup>48</sup> *Hidalgo Tranquino, Claudia Isabel v. M.C.I.* (F.C., no. IMM-86-10), Mactavish, July 29, 2010; 2010 FC 793, at para. 8.

<sup>49</sup> *Gomez v. Canada (Minister of Citizenship and Immigration)* (F.C., IMM-1412-10), Bédard, October 22, 2010, at para. 34.

<sup>50</sup> *Kunin, Aleksandr v. M.C.I.* (F.C., no. IMM-5225-09), O’Keefe, November 4, 2010; 2010 FC 1091, at para. 20. Also see *Louis, Benito v. M.C.I.* (F.C. no. IMM-3068-18), Bell, March 28, 2019; 2019 FC 355 where the Court rejected the argument that the RPD erred by importing a subjective fear component into its section 97 analysis. The Court noted that the RPD never used the term “subjective fear” and “although the RPD’s analysis is similar to that which would be employed by a panel considering a Convention refugee’s claim of subjective fear, it used this information in its assessment of Mr. Louis’ credibility...”

equate to a finding that the claimant is less than credible in all aspects of the claim and thus an analysis of the claim under IRPA s. 97 may still be required.<sup>51</sup>

When the Board concludes that a claimant who alleges having a fear is not credible concerning the existence of subjective fear, it almost always does so on the basis of some behaviour of the claimant which it considers to be inconsistent with that allegation. Case law has confirmed that there are certain ways that persons fearful of serious harm can normally be expected to act. As the Court stated in *Aslam*,<sup>52</sup>

The Board would expect that individuals who fear for their personal safety and their life would not only flee at their earliest opportunity but would seek refugee protection as soon as they are beyond the reach of their persecutors and it is reasonable to do so.

Consequently, staying any longer than necessary in a country where a claimant fears persecution, voluntarily returning to that country, passing through other countries without asking for protection or failing to make a claim for protection immediately upon arrival in Canada are all behaviours which, in numerous cases, have been found to be indicative of a lack of subjective fear.<sup>53</sup> However, none of these behaviours mandates the rejection of a claim to Convention refugee status without further examination. The Board may be justified in drawing a negative inference when claimants are unable to provide satisfactory explanations for conduct that seems incompatible with their alleged fear.

In addition to seeking protection in a timely manner, there are other types of conduct normally associated with being fearful. If a claimant provides credible evidence demonstrating efforts to avoid detection, such as going into hiding,<sup>54</sup> this evidence is considered to support the existence of subjective fear. Conversely, adverse inferences may be drawn when claimants fail to vary their routine<sup>55</sup> or to take other precautions against falling victim to the persecution they claim to fear.<sup>56</sup>

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<sup>51</sup> See *M.C.I. v. Sellan, Theyaseelan* (F.C.A. no. A-116-08), Desjardins, Nadon, Blais, December 2, 2008; 2008 FCA 381, where the Court, in answering a certified question, stated: "... where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim."

<sup>52</sup> *Aslam, Muhammad v. M.C.I.* (F.C., no. IMM-3264-05), Shore, February 16, 2006; 2006 FC 189, at para. 28.

<sup>53</sup> It is not unusual for claimants to engage in more than one kind of conduct that may be seen to undermine their subjective fear. For example, in *Rivera, Jesus Vargas v. M.C.I.* (F.C., no. IMM-5826-02), Beaudry, November 5, 2003; 2003 FC 1292, the claimant went back to work for eight months for the same employer who had had him beaten; secondly, after he left Mexico for the U.S., he made no claim during the year he lived there; and finally, he returned to his country to take a flight to Canada.

<sup>54</sup> *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.) at para. 5.

<sup>55</sup> *Castillejos, Joaquin Torres v. M.C.I.* (F.C.T.D., no. IMM-1950-94), Cullen, December 20, 1994, at para. 11 and *Akram, Ejaz v. M.C.I.* (F.C., no. IMM-3106-03), Pinard, July 2, 2004; 2004 FC 927, at para. 5.

<sup>56</sup> In *Bibby-Jacobs, Shannon Shenika v. M.C.I.* (F.C., no. IMM-2508-12), Martineau, October 9, 2012; 2012 FC 1176, the Court cautions against the misuse of the concept of subjective fear in sexual harassment cases. The

## 5.4. DELAY

When claimants do not take steps to seek protection promptly, decision-makers often conclude that their behaviour shows a lack of subjective fear. Case law has been consistent in saying that delay in making a claim to refugee status is not in itself determinative. Three often-cited Federal Court of Appeal decisions acknowledged that delay is, nonetheless, a relevant, and potentially important consideration.<sup>57</sup> In *Huerta*, Mr. Justice Létourneau wrote:

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>58</sup>

As Madam Justice Simpson explained in *Cruz*,<sup>59</sup> the reason why delay is an important factor in the assessment of a refugee claim is because it addresses the existence of a subjective fear, which is an essential element of a Convention refugee claim.

Although not generally a determinative factor in a refugee claim, there are circumstances in which delay can assume a decisive role. A claim to be a Convention refugee may be rejected when delay is accepted as evidence that establishes, on a balance of probabilities, that the claimant lacks subjective fear.<sup>60</sup> Such a determination would be made on the basis of a claimant's failure to provide good reasons for the delay. Mr. Justice Crampton remarked that it is

[...] well established that, in the absence of a satisfactory explanation for the delay, the delay can be fatal to such claim, even where the credibility of an applicant's claim has not otherwise been challenged.<sup>61</sup>

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claimant was a young woman who had been victimized by a sexual predator, a prominent businessman and her employer. The RPD concluded that she did not have a subjective fear stating that “if the risk were of a level of severity that could be described as persecution, the claimant would have left her job.” The Court noted that this particular use of the concept of subjective fear by the RPD is hardly applicable in a sexual harassment case.

<sup>57</sup> *Hue, Marcel Simon Chang Tak v. M.E.I.* (F.C.A., no. A-196-87), Marceau, Teitelbaum, Walsh, March 8, 1988; *Heer, Karnail Singh v. M.E.I.* (F.C.A., no. A-474-87), Heald, Marceau, Lacombe, April 13, 1988 and *Huerta, Martha Laura Sanchez v. M.E.I.* (F.C.A., no. A-448-91), Hugessen, Desjardins, Létourneau, March 17, 1993. Reported: *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.). In *Andrade Ramos, Norberto v. M.C.I.* (F.C. no., IMM-1867-10), Russell, January 10, 2011; 2011 FC 15 at para. 28, the Court reiterated this principle as follows: “[...] the RPD’s conclusion that the Applicants’ failure to claim asylum at the earliest opportunity (that is, in the U.S.) indicates their lack of subjective fear is contrary to Federal Court of Appeal jurisprudence, which says that a board may consider this factor in assessing subjective fear, provided it is not the only evidence upon which the board relies. See *Hue* [...]”

<sup>58</sup> *Huerta*, *supra*, footnote 57 at 227.

<sup>59</sup> *Cruz v. Canada (Minister of Employment and Immigration)* (F.C.T.D., no. IMM-3848-93) Simpson, June 16, 1994, at para.10.

<sup>60</sup> *Castillejos, supra*, at footnote 55, where the Court stated, at para. 11, that delay points to a lack of subjective fear and does not relate to the objective basis of the claim.

<sup>61</sup> *Velez, Liliana v. M.C.I.* (F.C., no. IMM-5660-09), Crampton, September 15, 2010; 2010 FC 923, at para. 28. The converse of the same principle was expressed in *Abawaji, Abdulwahid Haji Hassen v. M.C.I.* (F.C., no. IMM-6276-05), Mosley, September 6, 2006; 2006 FC 1065; at para. 16: “Delay in making a claim for refugee protection should not be fatal to the claim where it is supported by a reasonable explanation.”

The Board must weigh the evidence and it may reject an explanation for the delay if it finds it inadequate or implausible on reasonable grounds.

It is essential that decision-makers express clearly their findings on the credibility of a claimant's explanation for behaving in a particular manner.<sup>62</sup> When the Board does not accept an explanation as valid, the member is obliged to give reasons.<sup>63</sup> In *Martinez Requena*,<sup>64</sup> the Board asked the claimant to explain why she had returned to Bolivia, and then simply concluded that she had no subjective fear of persecution. Madam Justice Dawson held that the Board could not make that finding unless it found the evidence to be incredible - which it had not done.

The length of the delay is often a factor taken into consideration<sup>65</sup> but it is not in and of itself determinative. While short delays may tend to be more easily explained,<sup>66</sup> even very long delays cannot be assumed to indicate a lack of subjective fear. They must be examined in light of the circumstances and the explanations offered by the claimant. Madam Justice Bédard reviewed a decision<sup>67</sup> where the Board had found a six-year delay in claiming to be incompatible with the attitude of a person who feared for her life. However, the claimant was a minor when she arrived to live with some relatives in Canada and the Court held:

[...] There is a presumption that a person having a well-founded fear of persecution will claim refugee protection at the earliest opportunity. If they do not, the legitimacy of the subjective fear that they allege is called into question (*Singh citation omitted*) This presumption makes sense in the context of an adult refugee who, upon entering Canada, is expected to be aware that in order to stay in Canada indefinitely, he or she will need to regularize their status. However, the mere existence of delay in claiming cannot always be construed as indicating an absence of subjective fear. The delay, and even more importantly, the reasons for the delay, must be assessed in the context of the specific circumstances of each case. (*underlining added*)

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<sup>62</sup> For example, in *Mubengaie Malaba, Gea v. M.C.I.* (F.C., no. IMM-3814-12), Martineau, January 28, 2013; 2013 FC 84, at para. 25, the Court noted that “a distinction must be made between a behaviour that is inconsistent with a well-founded fear of persecution (which may be presumed from a lengthy delay in making a claim) and whether the applicant’s account of persecution is credible or not.”

<sup>63</sup> *Beltran, Luis Fernando Berrio v. M.C.I.* (F.C.T.D., no. IMM-829-96), Dubé, October 29, 1996.

<sup>64</sup> *Martinez Requena, Ericka Marlene v. M.C.I.* (F.C., no. IMM-4725-06), Dawson, September 27, 2007; 2007 FC 968.

<sup>65</sup> In *Salguero, Erbin Salomon Rosales v. M.C.I.* (F.C., no. IMM-4402-04), Mactavish, May 18, 2005; 2005 FC 716, the Court distinguishes the claimants’ 16 year residence in the U.S. from the “short stays” en route to Canada referred to in para. 37 of *Mendez, Alberto Luis Calderon v.* (F.C., no. IMM-1837-04), Teitelbaum, January 27, 2005; 2005 FC 75.

<sup>66</sup> Claimants often spend short periods of time in transit through countries where they do not seek protection. For example, in *Packinathan, Lindan Lorance v. M.C.I.* (F.C., no. IMM-6640-09), Snider, August 23, 2010; 2010 FC 834, the Board considered that the claimant’s failure to make a claim during a two-hour stop-over in Switzerland indicated a lack of subjective fear. The Board’s conclusion was held to be unreasonable, as the claimant was at all times in transit to Canada.

<sup>67</sup> *John, Shontel Dion v. M.C.I.* (F.C., no. IMM-1683-10), Bédard, December 14, 2010; 2010 FC 1283 at para. 23.

Canadian case law has consistently stressed that the assessment of the credibility and reasonableness of explanations must be done in light of the particular circumstances of the claimant. In the case of *El-Naem*,<sup>68</sup> the Court found that the 19-year-old Syrian claimant's explanation for spending a year in Greece without claiming was not unreasonable "considering all of his circumstances." The young man testified that he had heard that refugee protection in Greece was problematic and he feared deportation to Syria if he exposed his illegal status. He was alone in Greece, anxious to join a brother in Canada who had successfully claimed refugee status. However, he first had to accumulate the money he needed to travel.

In a similar vein, case law has also pointed out the need to closely assess the reasons a claimant engages in behaviour that would normally be seen as incompatible with having a fear. In one case where the Board found that the claimant had no subjective fear because he continued to put himself at risk by returning home to protect his mother against her abusive husband, the Court observed that bonds of family loyalty may lead a person to engage in dangerous conduct that otherwise could be viewed as conduct inconsistent with a lack of subjective fear.<sup>69</sup>

Psychological reports may provide useful insight into the reasons for a claimant's behaviour, and thus whether or not a particular way of behaving can be taken to be indicative of an absence of fear. In *Diluna*,<sup>70</sup> the Trial Division held, *in obiter*, that the Refugee Division should have considered a psychiatric assessment that supported the claimant's assertion that she delayed seeking refugee status due to post-traumatic stress syndrome.

Not all expert reports, however, are probative regarding the issue of subjective fear. In one case,<sup>71</sup> the Court noted that though there was a psychological report, it provided no explanation justifying the claimant's 14-month delay in claiming protection in Canada. In another case in which the claimant had voluntarily given up protection in the U.K.,<sup>72</sup> it was argued that her mental disorders would have affected the rationality of her decision to give up protection. The Court rejected that argument because the psychiatric report submitted was dated more than two years after she left the U.K. and did not establish that the claimant was suffering from any mental disorder at the time she gave up protection.

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<sup>68</sup> *El-Naem, Faisal v. M.C.I.* (F.C.T.D., no. IMM-1723-96), 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.).

<sup>69</sup> *Ribeiro, Wender Magno v. M.C.I.* (F.C., no. IMM-8843-04), Dawson, October 11, 2005; 2005 FC 1363, at para. 11.

<sup>70</sup> *Diluna, Roselene Edyr Soares v. M.E.I.* (F.C.T.D., no. IMM-3201-94), Gibson, March 14, 1995. Reported: *Diluna v. Canada (Minister of Employment and Immigration)* (1995), 29 Imm. L.R. (2d) 156 (F.C.T.D.), at 162.

<sup>71</sup> *Espinosa, Roberto Pablo Hernandez v. M.C.I.* (F.C., no. IMM-5667-02), Rouleau, November 12, 2003; 2003 FC 1324, at para. 19.

<sup>72</sup> *Sabapathy, Thevi v. M.C.I.* (F.C.T.D., no. IMM-1507-96), Campbell, March 27, 1997.

### 5.4.1. Delay in leaving the country of persecution

Mr. Justice Shore stated in *Rahim*<sup>73</sup> that “[T]he time it takes an applicant to leave his or her country of origin can be taken into account in determining whether that person had a subjective fear of persecution.”

Delay in leaving the country if a claimant alleges he or she had reason to fear persecution there normally calls into question the credibility of the fear. In *Zuniga*,<sup>74</sup> the claimant alleged that he feared for his life and that of his family, and yet his wife and children, who already had visas, did not leave the country at the first opportunity. Nor did he himself follow as soon as he could. The whole family left Honduras five months after the principal claimant was issued his U.S. visa. The Court did not accept his explanation that he remained to arrange his papers and pay taxes, as reasonable.

The failure to leave in a timely manner must be assessed in light of all the circumstances.<sup>75</sup> In *Gbremichael*<sup>76</sup> the claimants remained in hiding in their country for a month, despite having acquired visas for the U.S.. The Board drew an adverse inference concerning their subjective fear, a conclusion which the Court upheld as reasonable and clearly explained. It is interesting to note, however, that as a preface to its analysis of the issue, the Court wrote that delay in fleeing a country could normally be justified if the claimant was in hiding at that time.

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 Federal Court has warned that it is problematic to consider delay to be indicative of an absence of subjective fear.

In *Voyvodov*,<sup>77</sup> the first of the two claimants left Bulgaria after being beaten by skinheads. His partner stayed and endured other incidents of violence and discrimination. The Refugee Division considered that the first claimant had failed to meet his burden because he had

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<sup>73</sup> *Rahim, Ziany v. M.C.I.* (F.C., no. IMM-2729-04), Shore, January 18, 2005, 2005 FC 18 at para. 11.

<sup>74</sup> *Zuniga, Alexis Ramon Garcia v. S.C.C.* (F.C.T.D., no. IMM-118-94), Teitelbaum, July 4, 1994 at para. 49 – 50. See also *Singh, Sebastian Swatandra v. M.C.I.* (F.C.T.D., no. IMM-3840-97), Nadon, December 7, 1998 where the Court upheld the negative finding of the CRDD based on the view that the male claimant had not made a serious attempt to leave Fiji between 1987 and 1995, conduct which undermined his subjective fear of persecution.

<sup>75</sup> As noted in *Bibby-Jacobs, supra*, footnote 56, it was not appropriate for the RPD to expect that “if the risk were of a level of severity that could be described as persecution, the claimant [a young woman subject to sexual harassment at the hands of her powerful employer] would have left her job.” In the same vein is the case of a claimant who was subject to domestic abuse but had returned to her husband after several earlier trips to Canada. See *Abdi Ahmed, Ilham v. M.C.I.* (F.C., no. IMM-3178-12), O’Reilly, December 18, 2012; 2012 FC 1494, where the Court found that the RPD failed to take into account the claimant’s personal circumstances and apply the IRB’s Guidelines on Women Refugee Claimants Fearing Gender Related Persecution (Guideline 4) when evaluating her testimony regarding why she stayed with and returned to her husband.

<sup>76</sup> *Gbremichael, Addis v. M.C.I.* (F.C., no. IMM-2670-05), Russell, May 1, 2006; 2006 FC 547, at para. 44.

<sup>77</sup> *Voyvodov, Bogdan Atanassov v. M.C.I.* (F.C.T.D., no. IMM-5601-98), Lutfy, September 13, 1999, at para. 10.



experienced only one incident. It then went on to express its concern about the second claimant having delayed his departure from the country. The Court observed:

[...] The tribunal appears to place the applicants in an impossible position. It implies that it does not believe Mr. Galev's claim of persecution because he only experienced one alleged attack due to his sexual orientation. On the other hand, it finds that Mr. Voyvodov is not credible because he delayed seeking international protection after being initially attacked.

The Court was similarly critical of the Board's conclusion in *Shah*,<sup>78</sup> describing the claimant as being "between a rock and a hard place". The Board rejected the claim essentially because the claimant waited a year and a half rather than fleeing when his troubles first started. The Court found the Board's conclusion unreasonable in view of the claimant's explanation that the threats had become progressively more serious, that he moved from home the same evening his life was threatened, and left the country the next month.

The analytical flaw was more fully explained by Justice Heneghan in *Ibrahimov*<sup>79</sup>:

[...] If a person's claim is actually based on several incidents which occur over time, the cumulative effects of which may amount to persecution, then looking to the beginning of such discriminatory or harassing treatment and comparing that to the date on which a person leaves the country to justify rejection of the claim on the basis of delay, undermines the very idea of cumulative persecution.

#### 5.4.2. Failure to seek protection in other countries

A claimant's behaviour after leaving his or her country, but before arriving in Canada, may also be taken into consideration in determining whether the subjective component of a well-founded fear has been established. Failure to seek the protection of another country which is also a signatory to the Convention may be a significant factor to consider but is not in itself determinative. Voluntarily leaving a country where the claimant could safely live is another example of behaviour that can cast doubt on a claimant's subjective fear.<sup>80</sup>

There is no provision in the Convention that obliges refugee claimants to seek asylum in the first country they reach.<sup>81</sup> However, there is a presumption that persons fleeing persecution

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<sup>78</sup> *Shah, Mahmood Ali v. M.C.I.* (F.C., no. IMM-4425-02), Blanchard, September 30, 2003; 2003 FC 1121, at para. 23.

<sup>79</sup> *Ibrahimov, Fikrat v. M.C.I.* (F.C., no. IMM-4258-02), Heneghan, October 10, 2003; 2003 FC 1185., at para. 19. This reasoning was more recently followed in *Ramirez Rodas, Carlos v. M.C.I.* (F.C., no. IMM-6560-13), Zinn, February 27, 2015; 2015 FC 250, at para. 31. A number of incidents over a period of a few months culminated in an event which convinced the claimants they had to leave.

<sup>80</sup> *Molano Fonnoll, German Guillermo v. M.C.I.* (F.C., no. IMM-2626-11), Scott, December 12, 2011; 2011 FC 1461.

<sup>81</sup> *Menjivar, Carlos Othmar Navarrete v. M.C.I.* (F.C., no. IMM-9660-04), Dawson, January 6, 2006; 2006 FC 11 at para. 33. For more recent cases supporting this principle see *Rodrigues, Gustavo Adolfo v. M.C.I.* (F.C., no. IMM-2214-11), Pinard, January 6, 2011; 2012 FC 4, and *Ghotra, Balkar Singh v. M.C.I.* (C.F., No. IMM-5472-15), Bell, October 19, 2016; 2016 CF 1161.

will seek protection at the first opportunity, which would normally be in the first country they reach. Case law states that a negative inference can be drawn from a claimant's failure to claim in a safe third country, but it also clearly states that this failure cannot be a determinative.<sup>82</sup> The claimant's explanation must be considered in order to determine whether the claimant's behaviour can fairly be considered to be evidence of a lack of subjective fear.<sup>83</sup>

For example, some jurisprudence has suggested that where the claimant had a legal status in the third country, and was therefore not at immediate risk of removal, it is not reasonable to draw a negative inference from the claimant's failure to claim in that country.<sup>84</sup>

Another important consideration is the age of the claimant. In *Pulido Ruiz*,<sup>85</sup> the Court noted that:

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

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<sup>82</sup> In *Mendez*, *supra*, footnote 65, at para. 34–38, Justice Teitelbaum held that the Board had erred in law when it wrote that the case law was clear that persons claiming to fear persecution were required to claim in the first Convention country in which they arrived. The Court also found that the Board has not fulfilled its requirement to carefully consider the claimant's testimony.

<sup>83</sup> For example, in *Enongene, Joseph Asue v. M.C.I.* (F.C. no. IMM-106-18), Favel, September 24, 2018; 2018 FC 927 at para. 16 the Court quashed a decision because the RPD had disregarded the claimant's explanation for delaying six months to claim asylum in the United States. His explanation was that he was following the advice of people by trying to gather documents before making the claim. Similarly, in *Yasun, Guler v. M.C.I.* (F.C. no. IMM-3669-18), Grammond, March 20, 2019; 2019 FC 342, the Court criticized the negative inference drawn from the claimant's failure to claim while in the United States for two months. Her explanation was a member of her family was in Canada. Similarly, in *Gbemudu, Richard Obiajulu v. M.C.I.* (F.C. no. IMM-4320-17), Russell, April 26, 2018; 2018 FC 451 the Court quashed a decision in which the RAD had drew a negative inference due to the claimant's failure to claim protection while living in the U.K.. The Court noted that the claimant feared persecution due to engaging in same-sex relationships in the past and then being unexpectedly outed after arriving in Canada. The RAD's analysis was based on speculation that any bisexual person from Nigeria would claim protection at the first opportunity irrespective of whether they have been outed.

<sup>84</sup> *Salomon, Jonathan Castro v. M.C.I.* (F.C., no. IMM-1120-17), Locke, October 6, 2017; 2017 FC 888.

<sup>85</sup> *Pulido Ruiz, Cristian Danilo v. M.C.I.* (F.C., no. IMM-2819-11), Scott, February 24, 2012; 2012 FC 258. See also *Manege, Pierrette v. M.C.I.* (F.C., no. IMM-4966-13), Kane, April 17, 2014; 2014 FC 374, where the RPD had found that the applicants' failure to seek asylum in Kenya and Germany, while in transit to Canada, demonstrated a lack of subjective fear. The Court held that this finding was not reasonable based on the applicants' circumstances and youth. The RPD unreasonably expected the applicants to appreciate that their failure to seek asylum in the very first country they landed would jeopardize their claim and undermine their subjective fear of persecution.

Whether or not a country is a signatory to the Convention is relevant to determining whether it is reasonable to expect the claimant to have sought protection there. It is clearly a factor for decision-makers to consider.<sup>86</sup>

The significance of the failure to claim and the resulting conclusion of an absence of subjective fear is highlighted by the case of *Memarpour*<sup>87</sup> where, despite finding that the claimants had been denied a fair hearing, Madame Justice Simpson declined to send the case back for rehearing. She made this rather exceptional ruling because she had no doubt that the Board would again reject the claim, based on the claimant's conduct which indicated a total lack of a subjective fear of persecution. In the ten-year period after he left Iran the claimant studied and worked in several countries but never sought asylum in any of them. His testimony that he was deterred from claiming by the prospect of line-ups at embassies showed how little importance he attached to the issue of protection. Moreover, he travelled extensively on false documents, apparently little worried by the prospect of being discovered and deported to Iran.

In cases concerning claimants who do not claim in a third country, their reasons for not claiming are rarely as easy to dismiss as a reluctance to wait in line. There are many cases of claimants whose intention it is to claim refuge in Canada, and who simply transit through other countries on their way. Some claimants say that they were not aware that they could ask for asylum in the other country. Others choose not to claim in the third country because they have been warned that they have little chance of success there. A reviewing court will normally uphold a decision that considers whether the explanation is reasonable in light of the circumstances of the claimant, including whether they have engaged in other conduct that tends to support or undermine the subjective fear element. The following are examples that illustrate how the various factors have been weighed.

➤ *In transit*

The Court has frequently held that a short stay in a safe third country *en route* to Canada is not necessarily considered a sufficiently material sojourn to create an expectation that the claimant would claim refugee status during that stay.<sup>88</sup>

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<sup>86</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 was 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. But in *Tung, Zhang Shu v. M.E.I.* (F.C.A., no. A-220-90), Heald, Stone, Linden, March 21, 1991, where the claimant visited four countries en route to Canada, the Court pointed to the lack of evidence that any of the countries in question had ratified the Convention or Protocol. Although the Board was authorized to take notice of any facts that could be judicially noticed, the Board was wrong to “speculate” that refugee protection was available in those countries.

<sup>87</sup> *Memarpour, Mahdi v. M.C.I.* (F.C.T.D., no. IMM-3113-94), Simpson, May 25, 1995, at para. 23-24.

<sup>88</sup> *Mendez, supra*, footnote 65, at para. 37. In *Nel, Charl Willem v. M.C.I.* (F.C., no. IMM-4601-13), O’Keefe, September 4, 2014; 2014 FC 842, the claimants spent approximately 7 hours in an airport in the UK while waiting for a flight to Canada. The Court found that the RPD erred in finding a lack of subjective fear based on their short layover. The Court noted that it is unsurprising that someone who actually fears persecution would want to go to a country where their claim has the best chance of success, since the price of failure is a return to the persecution they fear.

A failure to make a refugee claim in a third country may raise doubt that a refugee claimant has a subjective fear (*citation omitted*). However, where a claimant had always planned to come to Canada, and merely was in transit during a stopover in a third country, the Court has held that such a situation does not undermine the subjective fear of persecution.<sup>89</sup>

➤ *Family in Canada*

Failure to make a refugee claim in an en-route country because the claimant would rather make the claim in Canada because he or she has family here may be a valid reason for not making the claim at the first opportunity.<sup>90</sup>

➤ *Ignorance of the process*

In *Perez*,<sup>91</sup> the Court upheld the Board's finding that the claimant who spent five years in the U.S. before claiming refugee protection in Canada did not provide convincing evidence of his subjective fear. His testimony that he was unaware he could claim asylum in the U.S. was found implausible in light of his repeated attempts to apply to stay under another U.S. program which offered temporary protection. Similarly, in *Idahosa*,<sup>92</sup> the Court found that it was reasonable for the RAD to conclude that the appellant would have some understanding that she could claim refugee status in the United States in light of the contradictory evidence she gave. On the one hand, she stated she left the United States to come to Canada due to her concerns about changes in American refugee policies. On the other hand, she denied knowing she could file a refugee claim in the United States.

In the case of *Bello*,<sup>93</sup> the claimant from Cameroon lived in France for seven years, traveled in adjoining countries and lived in the U.S. for another six months, without ever claiming refugee status. The Board found this to be inconsistent with a subjective fear of persecution. It noted that all the countries in question were either signatories to the 1951 Convention or to the 1967 Protocol. The reason given by the claimant for not seeking protection was that France supported the

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<sup>89</sup> *Packinathan, supra*, footnote 66, at para. 7.

<sup>90</sup> In *Alekozai, Rafi v. M.C.I.* (F.C., no. IMM-8260-13), Rennie, February 6, 2015; 2015 FC 158, the Court noted that reunification with family is a valid reason for not claiming refugee protection at the first opportunity. However, in *Gebetas, Ergun v. M.C.I.* (F.C., no. IMM-11313-12), Shore, December 10, 2013; 2013 FC 1241, the Court held that the mere fact that an applicant has one relative in Canada is not a sufficient basis to overcome the fact that he or she did not claim refugee status in the United States as quickly as possible. And in *Ndambi, Guy v. M.C.I.* (F.C., no. IMM-12682-12), Roy, January 31, 2014; 2014 FC 117, the Court held that there was ample evidence for the RPD to conclude that the applicant had no subjective fear. The applicant chose to leave more than two weeks after his visas for the United States and Belgium were issued, and he did not claim asylum when he arrived in the United States. His choice to come to Canada because his nephew is here was more of a conscious choice made for immigration purposes than a decision to seek refuge wherever possible.

<sup>91</sup> *Perez, Franklin Antonio v. M.C. I.* (F.C., no. IMM-4450-09), Boivin, March 30, 2010; 2010 FC 345 at para. 19.

<sup>92</sup> *Idahosa, Musili Amoke v. M.C.I.* (F.C. no. IMM-1124-18), Favel, March 29, 2019; 2019 FC 384 at para. 31.

<sup>93</sup> *Bello, Salihou v. M.C.I.* (F.C.T.D., no. IMM-1771-96), Pinard, April 11, 1997.

Cameroonian government, and as for the neighbouring countries, he did not know about claiming refugee status. The Court held that it was open to the Board to disbelieve the claimant had a subjective fear of persecution, given the delay in claiming refugee status. It noted that the Board's conclusion was also influenced by the claimant having returned twice to Cameroon.

➤ *Little hope of success*

In *Madoui*,<sup>94</sup> an Algerian claimant failed to claim during 19 months in Italy. He had been told by friends that he had little, if any, chance of obtaining refugee status in Italy. Despite statistics in evidence showing that similar claims were rarely accepted, the Board was not satisfied that the subjective component had been met and the Court saw no error in the Board's assessment.<sup>95</sup>

In *Mekideche*,<sup>96</sup> when the Board asked why the claimant did not claim refugee status during his two years in Italy, he testified that it was because he believed that Algerian refugees would be denied and returned to Algeria. This belief was based on news reports that other European countries were not receptive to Algerian refugees. Noting that he travelled throughout Europe with false documentation before arriving in Canada, the Board stated that this was a risk that a person who feared persecution would not take. The Court found no error in the Board's conclusion that these two issues showed an absence of a subjective fear of persecution.

In another case,<sup>97</sup> a young Pakistani claimant who arrived in the U.S. came to Canada after just nine days. He feared that he would not be considered for asylum because of the negative atmosphere towards persons from his part of the world following the September 11 attack. The Court held that the circumstances were comparable to those in *El Naem*<sup>98</sup> and that the Board had erred in drawing an unreasonable inference that there was no subjective basis to the claim.

In *Liblizadeh*<sup>99</sup>, the Court quashed the decision of the Board when it found that there was no evidence before the panel that the claimant could realistically have applied for refugee status in Turkey, even though he was there 7 months, and in the U.S., where he was only in transit.

A few cases have pointed out that failure to claim in a third country may not be indicative of a lack of subjective fear in situations where a person is not anticipating a return to his or her

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<sup>94</sup> *Madoui, Nidhal Abderrah v. M.C.I.* (F.C.T.D., no. IMM-660-96), Denault, October 25, 1996.

<sup>95</sup> In *Milian Pelaez, Rogelio v. M.C.I.* (F.C., no. IMM-3611-11), de Montigny, March 2, 2012; 2012 FC 285, the Court held (at para. 14) that the RPD had wrongly held against the claimant his failure to claim asylum in the US without considering his explanation that his intention at the time was simply to temporarily flee Guatemala in order to be forgotten or his explanation that, unlike Canada, the United States refuses claims based on risk related to criminality "as was the case in Canada before section 97 was introduced in the Act".

<sup>96</sup> *Mekideche, Anouar v. M.C.I.* (F.C.T.D., no. IMM-2269-96), Wetston, December 9, 1996.

<sup>97</sup> *Ilyas, Muhammad v. M.C.I.* (F.C., no. IMM-5636-03), Russell, September 16, 2004; 2004 FC 1270.

<sup>98</sup> *El-Naem, supra*, footnote 68.

<sup>99</sup> *Liblizadeh, Hassan v. M.C.I.* (F.C.T.D., no. IMM-5062-97), MacKay, July 8, 1998.

country. These were the circumstances in *Yoganathan*.<sup>100</sup> Mr. Justice Gibson followed the same reasoning as the Court of Appeal in *Hue*.<sup>101</sup> Both cases involved seamen. Justice Gibson held that the CRDD erred in concluding that the claimant did not have a subjective fear of persecution as he had failed to claim refugee status at the first opportunity in other signatory countries: “The [claimant] had his ‘sailor’s papers’ and ‘a ship to sail on’. In the circumstances, he did not have to seek protection. He was safe from persecution in Sri Lanka.”

Leaving a country which has provided refuge and where a claimant has no fear of persecution is generally considered to be behaviour indicative of a lack of subjective fear. In *Shahpari*,<sup>102</sup> the Court suggested, in *obiter*, that:

Applicants should also remember that actions they themselves take which are intended to result in their not being able to return to a country which has already granted them Convention refugee status may well evidence an absence of the subjective fear of persecution in their original country from which they purport to be seeking refuge.

In *Geron*,<sup>103</sup> the Board concluded that the claimants, citizens of the Philippines, were not credible and lacked subjective fear, as evidenced by the long delay before they claimed refugee status and the fact that they had valid residence permits for Italy but allowed them to lapse during the 18 months they remained in Canada prior to making their claims. The Court held that the Board had not erred in failing to consider the objective basis of the claim; it could be dismissed in the absence of any credible evidence to support the claimants’ subjective fear.

Even where the refuge is not necessarily a permanent one, questions about the claimant’s fear will usually be raised whenever a safe haven is abandoned in order to claim refugee status in Canada. In *Bains*,<sup>104</sup> a claimant from India who applied for asylum in England, left after waiting five or six years without an answer. He explained that he had heard that the British authorities were removing claimants awaiting status, though he produced no evidence of this. The Court noted that the British authorities had clearly told the claimant that he would not be deported before a decision on his status had been made. The Court considered that the CRDD was justified in verifying the reason the claimant gave for leaving England and that it was reasonable to conclude that the claimant’s decision to leave did not demonstrate a fear of being returned to India.

### 5.4.3. Delay in making a claim upon arrival in Canada

Mr. Justice Shore summarized the basic principles related to delay in claiming once in Canada:

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<sup>100</sup> *Yoganathan, Kandasamy v. M.C.I.* (F.C.T.D., no. IMM-3588-97), Gibson, April 20, 1998, at para. 8.

<sup>101</sup> *Hue, supra*, footnote 57.

<sup>102</sup> *Shahpari, Khadijeh v. M.C.I.* (F.C.T.D., no. IMM-2327-97), Rothstein, April 3, 1998, at para.14.

<sup>103</sup> *Geron, supra*, footnote 34.

<sup>104</sup> *Bains, Gurmukh Singh v. M.C.I.* (F.C.T.D., no. IMM-3698-98), Blais, April 21, 1999.

There is a well-established principle to the effect that any person having a well-founded fear of persecution should claim refugee protection in Canada as soon as he or she arrives in the country, if that is his or her intent. On this point, the Federal Court of Appeal has already concluded that any delay in claiming refugee protection is an important factor which the Board may take into consideration in its analysis. Such a delay indicates a lack of a subjective fear of persecution, since there is a presumption to the effect that a person having a well-founded fear of persecution will claim refugee protection at the first opportunity. Accordingly, in conducting its assessment, the Board is entitled to take into consideration the applicant's delay in claiming refugee protection. [citations omitted]<sup>105</sup>

There is case law dealing with the issue of timing; namely whether the proper reference point is always the date of arrival in Canada. The Court in *Gabeyehu*<sup>106</sup> stated otherwise. The Court noted as a general proposition that “[d]elay in making a claim can only be relevant from the date as of which [a claimant] begins to fear persecution.” It is the same principle applied to a *sur place* claim<sup>107</sup> in *Tang*.<sup>108</sup>

Because delay is relevant only after the claimant has a reason to fear persecution, it has been argued that negative inferences cannot be drawn when persons who have legal status in Canada fail to claim. In *Gyawali*,<sup>109</sup> Madame Justice Tremblay-Lamer agreed that there exist situations in which negative inferences may not be drawn from a failure to apply for refugee status immediately upon arrival. She found that a valid status in Canada could constitute a good reason for not claiming refugee protection. The Court drew a parallel between the sailor on the ship whose contract expired, leaving him nowhere to go but home,<sup>110</sup> and the claimant, who had a student visa and had also made an application for permanent residency in Canada. Until he could no longer pay for his studies, he had no reason to fear having to return to his country. Both the sailor and the student had left their countries fearing persecution, but having found a safe place to stay, they felt no immediate need to apply for refugee status. As soon as they found themselves at risk of being forced to return home, they filed claims for refugee protection.

In several cases, the Court has upheld Board decisions in which possession of a valid but temporary status was not found to be an acceptable reason to delay claiming protection. Madame Justice Tremblay-Lamer, the year before her ruling in *Gyawali*, held that it was open to the Board to reject a claim based largely on a two-year delay in claiming refugee status. The claimant in that

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<sup>105</sup> *Singh, Pritam v. M.C.I.* (F.C., no. IMM-2513-06), Shore, January 25, 2007; 2007 FC 62, at para. 24.

<sup>106</sup> *Gabeyehu, Bruck v. M.C.I.* (F.C.T.D., no. IMM-863-95), Reed, November 8, 1995, at para. 7.

<sup>107</sup> See Chapter 5, Section 5.6 and Chapter 7, Section 7.3.

<sup>108</sup> *Tang, Xiaoming v. M.C.I.* (F.C.T.D., no. IMM-3650-99), Reed, June 21, 2000, at para. 6. “His claim is a *sur place* claim and, therefore, the date as of which he became aware that he would allegedly face persecution on return to China is the relevant date, not the date on which he arrived in Canada.”

<sup>109</sup> *Gyawali, Nirmal v. M.C.I.* (F.C., no. IMM-926-03), Tremblay-Lamer, September 24, 2003; 2003 FC 1122.

<sup>110</sup> *Hue, supra*, footnote 57.

case<sup>111</sup> was on a student visa in Canada. On the advice of a consultant, he applied for permanent residence and claimed refugee status only after his permanent residence application was unsuccessful. Other cases of persons in status were similarly rejected in 2005 and 2007.<sup>112</sup> In 2009, Mr. Justice de Montigny wrote:

It is trite law that a delay in submitting a refugee protection claim, while not decisive, remains a relevant element that the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant: *Huerta* [citation omitted]. The claimant knew upon his arrival in Canada that he was only authorized to stay in Canada for a specific and limited period of time. Under these circumstances, it was reasonable to expect that he would regularize his status as soon as possible if he truly feared for his life and physical integrity in India.<sup>113</sup>

Apart from persons who do not feel the need to claim immediately, there are claimants who have no knowledge of the refugee process or their eligibility to claim protection. In the absence of any adverse credibility finding, the explanation that a claimant did not know that she could claim refugee status based on spousal abuse has successfully been used to refute findings that lengthy delays in claiming were due to an absence of subjective fear.<sup>114</sup>

In *Ahshraf*,<sup>115</sup> the Court found that the Board's finding that the claimant's five-year delay in filing her claim showed her fear was not genuine was unreasonable as there was evidence that while her husband was in Canada she had been entirely under his influence and never left the house alone.

In a case where the claimant did not claim refugee status for four years because he wanted to know what was needed to claim,<sup>116</sup> his explanation was not accepted. The Board interpreted the fact that he renewed his visa twice without ever making inquiries about claiming refugee status as evidence that he had no subjective fear. The Court saw nothing unreasonable about that conclusion.

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<sup>111</sup> *Ahmad, Mahmood v. M.C.I.* (F.C.T.D., no. IMM-1012-01), Tremblay-Lamer, February 14, 2002; 2002 FCT 171.

<sup>112</sup> *Niyonkuru, Joseph v. M.C.I.* (F.C., no. IMM-4230-04), De Montigny, February 4, 2005, 2005 FC 174; *Correia, Osvaldo De Matos v. M.C.I.* (F.C., no. IMM-8077-04), O'Keefe, August 3, 2005, 2005 FC 1060 and *Singh*, supra, footnote 105.

<sup>113</sup> *Nijjer, Yadhwinder Singh v. M.C.I.* (F.C., no. IMM-340-09), de Montigny, December 9, 2009; 2009 FC 1259, at para. 24. In *Peti, Qamile, v. M.C.I.* (F.C., no. IMM-1764-11), Scott, January 19, 2012; 2012 FC 82, the claimant, who was found to be not credible by the RPD, had a valid visa and waited six months before filing her claim. The Court found the Minister's contention that "possession of a visa does not rebut the presumption that a true refugee would claim protection at the first opportunity" to be a sound argument.

<sup>114</sup> *Williams, Debby v. S.S.C.* (F.C.T.D., no. IMM-4244-94), Reed, June 30, 1995. See also *A.G.I. v. M.C.I.* (F.C.T.D., no. IMM-5771-01), Kelen, December 11, 2002; 2002 FCT 1287, where the claimant made the refugee claim only after her visitor status in Canada had lapsed and immigration authorities advised her that she could base a refugee claim on her fear of persecution by her husband.

<sup>115</sup> *Ashraf, Shahenaz v. M.C.I.* (F.C., no. IMM-5375-08), O'Reilly, April 19, 2010; 2010 FC 425.

<sup>116</sup> *Lameen, Ibrahim v. S.S.C.* (F.C.T.D., no. A-1626-92), Cullen, June 7, 1994.



Depending on the advice or help of others has also been held to be an unsatisfactory reason to delay claiming. For example, in *Singh*,<sup>117</sup> the claimant waited almost one and a half years after he arrived in Canada before filing his refugee claim. The RPD did not accept the claimant's explanation that he had asked the gurdwara management to help him file for political asylum but that whenever he asked them about his immigration status, he received no satisfactory response. The Court dismissed the judicial review on the grounds of delay, saying it was not reasonable that someone fearing for his life would not take any action himself. When the claimant had not received any help for almost a year and a half, he should have taken the initiative and inquired about his rights and obligations under the Canadian immigration system.

## 5.5. RE-AVAILMENT OF PROTECTION

The issue of re-availment<sup>118</sup> arises in two contexts: 1) the assessment of subjective fear in the determination of the refugee claim, and 2) the assessment of a cessation application made by the Minister under IRPA, section 108(2).

Return to the country of nationality is the kind of re-availment that is most often discussed in the case law. Citing several cases in *Kabengele*,<sup>119</sup> Mr. Justice Rouleau stated:

It is quite proper for the Refugee Division to take the plaintiff's actions into account in assessing his subjective fear. It is reasonable for it to conclude that the fact he returned to the country where he feared persecution makes the existence of such a fear unlikely (*citations omitted*)

However, the Court has cautioned that the mere fact of returning to a country of nationality is not determinative of whether a refugee claimant possesses a subjective fear, or has ceased to be a Convention refugee. The Court gave the examples of evidence of a claimant's belief that country conditions have changed or evidence of a claimant's temporary visit while he or she remained in hiding that would be evidence inconsistent with a finding of a lack of subjective fear.<sup>120</sup>

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<sup>117</sup> *Singh, Nirmal v. M.C.I.* (F.C., no. IMM-7334-05), Teitelbaum, June 13, 2006, 2006 FC 743. In *Ismayilov, Anar v. M.C.I.* (F.C., no. IMM-7263-14), Mactavish, August 26, 2015; 2015 FC 1013, the claimant had explained to the RPD that he had delayed claiming because his lawyer had advised him to wait until his wife and child arrived in Canada so that they could make their claims as a family. The Court noted that the RPD had an obligation to consider this evidence before it could conclude that the delay in claiming indicated a lack of subjective fear.

<sup>118</sup> The word re-availment refers to voluntarily returning to the country of origin and availing oneself of the protection of that country (see IRPA, section 108(1)(a)).

<sup>119</sup> *Kabengele v. M.C.I.* (F.C. no., IMM-1422-99), Rouleau, November 16, 2000, at para. 41.

<sup>120</sup> *Martinez Requena, supra*, footnote 64, at para. 7. In *Milian Pelaez, Rogelio v. M.C.I.* (F.C., no. IMM-3611-11), de Montigny, March 2, 2012; 2012 FC 285, the Court noted that the RPD held against the applicant his return to Guatemala, the place where the people he feared could be found, without considering that he had apparently relocated 100 km away from the place where he had had problems and had changed his profession. In *Ascencio Gutierrez, Arnoldo Maximilano v. M.C.I.* (F.C., no. IMM-4903-13), O'Keefe, March 3, 2015; 2015 FC 266, the Court disagreed with the RPD's finding that two one-month returns to Mexico City (not to the claimant's home state) to renew his student visa amounted to re-availment. In *Yuan, Xin v. M.C.I.* (F.C., no. IMM-5365-14), Boswell, July 28, 2015; 2015 FC 923, the RPD allowed the Minister's application for cessation because the refugee had returned to his country of origin for one month. The Court found the decision to be

The credibility assessment of the reasons claimants give for returning to their country is important. If they clearly state that they did not intend to re-avail themselves of the protection of their country and assert not having lost their subjective fear, absent an adverse finding of credibility, the Board would err in finding that the claimants had re-availed themselves of protection and did not have a subjective fear.<sup>121</sup> In *Kanji*, the Board made no express finding that it disbelieved the claimant's evidence and it gave no reasons for doing so. The Court held that the claimant's clear statement that she did not re-avail herself of the protection of India, nor lose her subjective fear contradicted and negated any possible finding to the contrary on the basis of the purely circumstantial evidence of her returns to India.

In *Caballero*,<sup>122</sup> where the claimant testified that he went back to Honduras intending to stay a year in order to sell his land, the Court agreed with the Refugee Division that his behaviour was inconsistent with a well-founded fear of persecution.

Even where the motivation for returning may be seen as quite compelling, a consideration of all the circumstances may result in a negative inference as to the existence of subjective fear. In *Arayo*,<sup>123</sup> the principal claimant had returned to Chile and remained there for some nine weeks while she obtained the permission of the father of her child to remove the child from Chile. While the evidence regarding re-availment clearly indicated that it was for the sole purpose of allowing the mother to bring her son to Canada with her, the evidence did not go so far as to establish that other arrangements could not have been made so that the two claimants could have left Chile together when the mother first left.

In *Prapaharan*,<sup>124</sup> where the claimants alleged they had suffered persecutory treatment before the first time they left Sri Lanka as well as after their return there, with the main claims pre-dating the claimants' return, the Court states that "subsequent persecution after re-availment does not preclude a person from making a claim for refugee status without being faced with the re-availment argument." However, in *Gopalapillai*<sup>125</sup> the claimant had returned to Sri Lanka and, after his return, had been arrested, questioned and beaten more than once. The Court held that "to the extent that the RPD considered that re-availment in 2008 was a bar to the claim, without considering subsequent events...this would be unreasonable."

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unreasonable because the refugee had returned to arrange his mother's funeral and during his stay had remained in hiding and had avoided the actual funeral out of fear that his persecutors (the Chinese PSB) would find him there.

<sup>121</sup> *Kanji, Mumtaz Badurali v. M.C.I.* (F.C.T.D., no. IMM-2451-96), Campbell, April 4, 1997.

<sup>122</sup> *Caballero, Fausto Ramon Reyes v. M.E.I.* (F.C.A., no. A-266-91), Marceau (dissenting), Desjardins, Létourneau, May 13, 1993. In *Duarte, Augustina Castelanos v. M.C.I.* (F.C.T.D., no. IMM-6616-02), Kelen, August 21, 2003; 2003 FCT 988 the Board and the Court took a similar view of the claimant's return to Cuba to transfer ownership of her house to prevent the government from confiscating it.

<sup>123</sup> *Araya, Carolina Isabel Valenzuela v. M.C.I.* (F.C.T.D., no. IMM-3948-97), Gibson, September 4, 1998.

<sup>124</sup> *Prapaharan, Sittampalam v. M.C.I.* (F.C. no. IMM-3667-00), McKeown, March 30, 2001; 2001 FCT 272 at para. 17.

<sup>125</sup> *Gopalapillai, Thinesrupan v. M.C.I.* (F.C. no. IMM-3539-18), Grammond, February 26, 2019; 2019 FC 228 at paras 17-19.

Claimants may exhibit an apparent absence of subjective fear not only in physically returning to their home country, but also in actions such as obtaining or renewing a passport or travel document<sup>126</sup>, and leaving or emigrating through lawful channels.<sup>127</sup> The evidence is all assessed in the same way: the surrounding circumstances and the credibility of the claimant's explanations determine whether it can reasonably be concluded that they indicate the absence of the subjective component of a well-founded fear of persecution.

In *Vaitialingam*,<sup>128</sup> although the claimant argued that she did not intend to remain in Sri Lanka, the Court was satisfied that it was reasonable for the Board to conclude that the claimant did not harbour a genuine fear of persecution in Sri Lanka because she had voluntarily made two trips back to her country. The Board also considered that the claimant's renewal of her Sri Lankan passport for the purpose of travelling there indicated her willingness to entrust her welfare to the state of Sri Lanka.

In *Chandrakumar*,<sup>129</sup> the Court held that the Board erred in drawing the inference that the applicant re-availed himself of his country's protection from the mere fact that he renewed his passport. More evidence was required, particularly concerning the claimant's motivations in renewing his passport, namely whether his intention was to re-avail himself of Sri Lanka's protection.

The Federal Court has held that it is an error to find a lack of subjective fear when the claimant was removed to his or her country, and thus did not return voluntarily. In *Kurtkapan*,<sup>130</sup> the Court found the Board's conclusion that the claimant lacked a subjective basis for a fear of persecution "perverse, capricious and unreasonable" because it ignored the fact that he was deported to Turkey and did not return there voluntarily.

## 5.6. SUR PLACE CLAIMS<sup>131</sup> AND WELL-FOUNDED FEAR

It is proper for the Refugee Division, when considering the subjective element, to look at the fact that the claimant took allegedly self-endangering actions after making his or her claim,

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<sup>126</sup> In *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.), at 304, the Court pointed out that the Immigration Appeal Board had ignored the fact that the claimant was able to obtain his passport (and exit papers) through his brother's contacts with the government.

<sup>127</sup> *Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 592 (C.A.), at 611. Though the Court acknowledged that applying for immigrant visas might possibly be relevant to deciding whether a person really had a fear of persecution, it remarked that a desire to emigrate and a fear of persecution could hardly be considered mutually exclusive.

<sup>128</sup> *Vaitialingam v. M.C.I.* (F.C., no. IMM-9445-03), O'Keefe, October 20, 2004, 2004 FCT 1459, at para. 27.

<sup>129</sup> *Chandrakumar v. M.E.I.* (F.C.T.D., no. A-1649-92), Pinard, May 16, 1997, at para. 6.

<sup>130</sup> *Kurtkapan, Osman v. M.C.I.* (F.C.T.D., no. IMM-5290-01), Heneghan, October 25, 2002; 2002 FCT 1114, at para. 31.

<sup>131</sup> See the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, September 1979, paragraphs 94-96. Paragraph 94 provides the following definition: "A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee "*sur place*"." See also Chapter 7, section 7.3., *sur place* claims.

and to inquire into the claimant's motivation.<sup>132</sup> However, the case law is consistent that if dealing with a *sur place* claim, even when the motivation indicates the absence of subjective fear, the analysis cannot end there.<sup>133</sup>

Mr. Justice Hugessen affirmed the relevance of motive in assessing the subjective component of a well-founded fear in cases where the claimants themselves were responsible for creating the circumstances leading to their *sur place* claims, but he also warned that the objective component nonetheless had to be assessed. In *Asfaw*,<sup>134</sup> he stated:

In my view, it has been the law for a very long time that a Convention refugee claimant must demonstrate both an objective and a subjective basis for his fear of persecution. It is my view that the case will be rare where there is an objective fear but not a subjective fear, but such cases may exist. In my view, it is certainly relevant to examine the motives underlying a claimant's participation in demonstrations such as this one in order to determine whether or not that claimant does have a subjective fear. The Board's examination of the motives was therefore not an irrelevant matter and the determination which they reached on that subject was one which was open to them on the evidence. It would I agree have been an error if the Board had stopped its examination at that point and had not also looked at whether or not the claimant had an objective fear but, they did not commit that error. The Board looked at the evidence with respect to the objective basis for the applicant's fear of return and found it not to be well-founded. That was a determination which was equally open to the Board on the evidence before it and I can take no issue with it.

In a similar case,<sup>135</sup> decided on the same date, he stated:

The argument is that it was irrelevant for the Board to examine the applicant's motives in acting as she did. In the view which I and other members of this Court have previously expressed, it is not irrelevant. The matter of motive goes to the genuineness or otherwise of the applicant's expressed subjective fear of persecution. That said, however, there is and must always be an intimate interplay between the subjective and objective elements of the fear of persecution which is central to the definition of convention refugee and, I have previously expressed the view that it would be an error for a Board to rely exclusively on its view that a claimant did not have a subjective

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<sup>132</sup> *Herrera, Juan Blas Perez de Corcho v. M.E.I.* (F.C.T.D., no. A-615-92), Noël, October 19, 1993, at para. 10. The Court upheld the Board's conclusion that the claimant had no subjective fear and was not a *bona fide* refugee because the basis for his alleged fear, namely speaking out against the Cuban regime after claiming refugee status in Canada, was a self-serving act intended to facilitate his refugee claim.

<sup>133</sup> In *Ngongo, Ngongo v M.C.I.* (F.C.T.D., no. IMM-6717-98), Tremblay-Lamer, October 25, 1999, at para. 23, from Justice Tremblay-Lamer's remarks concerning *sur place* claims, it is clear that the objective basis of the risk must be assessed even where a claimant's behaviour may have been opportunistic.

[...] The only relevant question is whether activities abroad might give rise to a negative reaction on the part of the authorities and thus a reasonable chance of persecution in the event of return.

<sup>134</sup> *Asfaw, Napoleon v. M.C.I.* (F.C.T.D., no. IMM-5552-99), Hugessen, July 18, 2000, at para. 4.

<sup>135</sup> *Zewedu, Haimanot v. M.C.I.* (F.C.T.D., no. IMM-5564-99), Hugessen, July 18, 2000, at para. 5.

fear of persecution without also examining the objective basis for that fear. The Board in this case, however, did not commit an error of that sort.

In *Ejtehadian*,<sup>136</sup> the Court stated that it is necessary to consider the credible evidence of the claimant's activities while in Canada independently from his motives for conversion, and assess the risk of persecution on return.

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<sup>136</sup> *Ejtehadian, Mostafa v. M.C.I.* (F.C., no. IMM-2930-06), Blanchard, February 12, 2007; 2007 FC 158, at para. 11.

## CHAPTER 5 - WELL-FOUNDED FEAR

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# CHAPTER 6

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## CHAPTER 6

### 6. STATE PROTECTION

#### 6.1. INTRODUCTION - GENERAL PRINCIPLES

The issue of state protection was extensively canvassed by the Supreme Court of Canada in *Ward*.<sup>1</sup> The context for the discussion of this topic is the requirement in the definition of Convention refugee that the claimant be unable, or by reason of his or her fear of persecution, unwilling to avail him or herself of the protection of the country of nationality (citizenship). As indicated below, the state's ability to protect the claimant is a crucial element in determining whether the fear of persecution is well founded, and as such, is not an independent element of the definition. The issue of state protection goes to the objective portion of the test of fear of persecution and it is not enough to simply assert a subjective belief that protection is not available.<sup>2</sup>

State protection must be considered in context.<sup>3</sup> The contextual approach was explained by the Court in *Gonzalez Torres*<sup>4</sup> as follows:

[37]...state protection cannot be determined in a vacuum. When undertaking a contextual approach in determining whether the refugee claimant has rebutted the presumption of state protection, many factors ought to be considered, including the following:

- a. The nature of the human rights violation;
- b. The profile of the alleged human rights abuser;
- c. The efforts that the victim took to seek protection from authorities;
- d. The response of the authorities to requests for their assistance, and
- e. The available documentary evidence.

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<sup>1</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85.

<sup>2</sup> *M.C.I. v. Olah, Bernadett* (F.C.T.D., no. IMM-2763-01), McKeown, May 24, 2002; 2002 FCT 595. The Court noted that the relevant evidence to determine the issue of state protection would include the documentary evidence and the personal circumstances of the claimant. However, the claimant's own subjective feelings on state protection would not be a relevant factor. See also *Judge, Gurwinder Kaur v. M.C.I.* (F.C., no. IMM-5897-03), Snider, August 9, 2004; 2004 FC 1089, where the Court confirmed that the test for determining whether state protection might reasonably be forthcoming is an objective one. In *Camacho, Jane Egre Sonia v. M.C.I.* (F.C., no. IMM-4300-06), Barnes, August 10, 2007; 2007 FC 830, the Court noted that a refugee claimant does not rebut the presumption of state protection in a functioning democracy by asserting only a "subjective" reluctance to engage the state. On the same point, see *Kambiri, Nandeviara v. M.C.I.* (F.C., no. IMM-9979-12), Noël, September 4, 2013; 2013 FC 930, where the Court noted that the applicant had failed to access the programs and initiatives aimed at protecting women in Namibia.

<sup>3</sup> A case that illustrates an analysis of state protection that does not consider the relevant context is *Burton, Raoul Andre v. M.C.I.* (F.C., no. IMM-8199-12), Mactavish, May 24, 2013; 2013 FC 549, where the PRRA Officer failed to consider the claimant's personal circumstances as a publicly identified criminal, a victim of inter or intra-gang violence and as someone who had cooperated with the police in the prosecution of other gang members.

<sup>4</sup> *Gonzalez Torres, Luis Felipe v. M.C.I.* (F.C., no. IMM-1351-09), Zinn, March 1, 2010; 2010 FC 234. The Court elaborates further at paragraphs 37-42.

Reference should be made to the Guidelines on *Women Refugee Claimants Fearing Gender-Related Persecution*: Update issued by the Chairperson pursuant to section 65(3) of the *Immigration Act* on November 25, 1996, for an analysis of state protection as it relates to gender-related persecution.<sup>5</sup>

### **6.1.1. Surrogate Protection**

The responsibility to provide international protection only becomes engaged when national or state protection is unavailable to the claimant (international protection as a surrogate).<sup>6</sup>

### **6.1.2. Multiple Nationalities**

In the case of multiple nationalities (citizenship), the claimant is normally expected to make inquiries or applications to ascertain whether or not he or she might avail him or herself of the protection of all the countries of nationality. The claimant need not literally approach the other states for protection unless there is a reasonable expectation that protection will be forthcoming.<sup>7</sup>

### **6.1.3. Timing of Analysis**

The state's ability to protect, whether one is speaking of the claimant being "unable" or "unwilling", must be considered at the stage of the analysis when one is examining whether the claimant's fear is well founded.

... The test is in part objective; if a state is able to protect the claimant, then his or her fear is not, objectively speaking, well-founded ...

It is clear that the lynch-pin of the analysis is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded, and thereby the objective reasonableness of his or her unwillingness to seek the protection of his or her state of nationality.<sup>8</sup>

Some jurisprudence suggests that the Board should assess the subjective fear of the claimant before addressing the objective basis of his fear, including the availability of state

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<sup>5</sup> For example, in *Ndjavera, Eveline v. M.C.I.* (F.C., no. IMM-7018-12), Rennie, April 30, 2013; 2013 FC 452, the applicant testified that she unsuccessfully sought assistance from the police and the Traditional Authority. The RPD considered it implausible that the applicant did not go on to complain to the Police Commissioner or hire a lawyer. In the Court's view, the RPD erred in making this plausibility finding without adequate regard to the applicant's age, culture, background and prior experiences, as set out in the Gender Guidelines. See also *Hindawi, Manal v. M.C.I.* (F.C., no. IMM-4337-14), Shore, May 6, 2015; 2015 FC 589, where the Court noted that it was unreasonable for the Board to find that the applicant's fear was a mere subjective reluctance to engage the state, without having first explored the applicant's particular circumstances.

<sup>6</sup> *Ward, supra*, footnote 1, at 709.

<sup>7</sup> *Ward, supra*, footnote 1, at 724 and 754. As well, at 754, the Court stated that a valid claim against one country of nationality will not fail if the claimant is denied protection (for example, by being denied admittance) by another country of which he or she is a national.

<sup>8</sup> *Ward, supra*, footnote 1, at 712 and 722.

protection. See for example, *Troya Jimenez; Pikulin*,<sup>9</sup> and *Moreno*,<sup>10</sup> where the Court said that “the state protection issue should not be a means of avoiding a clear determination concerning the subjective fear of persecution”. In *Lopez*,<sup>11</sup> the Court allowed that “there is nothing wrong in doubting the truth of certain facts, which might otherwise suggest credibility concerns, but nevertheless treating them as true for the purpose of considering state protection.” [emphasis added]

A claimant who is not at risk does not need state protection and therefore, the issue need not be addressed.<sup>12</sup>

#### **6.1.4. Unable or Unwilling - A Blurred Distinction - No Requirement for State Complicity**

The Convention refugee definition refers to inability or unwillingness to avail of state protection, however, the distinction between “unable” (physically or literally unable) and “unwilling” (not wanting) has become blurred.<sup>13</sup>

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<sup>9</sup> *Troya Jimenez, Jose Walter v. M.C.I.* (F.C., no. IMM-128-10), Mainville, July 7, 2010; 2010 FC 727; and *Pikulin, Alexandr v. M.C.I.* (F.C., no. IMM-5787-09), Martineau, October 1, 2010; 2010 FC 979.

<sup>10</sup> *Velasco Moreno, Sebastian v. M.C.I.* (F.C., no. IMM-454-10), Lutfy, October 5, 2010; 2010 FC 993.

<sup>11</sup> *Lopez, Centeotl Mazadiego v. M.C.I.* (F.C., no. IMM-1938-13), Simpson, May 29, 2014; 2014 FC 514. In *Varon, Manuel Guillerm Mendez v. M.C.I.* (F.C., no. IMM-5332-13), Russell, March 20, 2015; 2015 FC 356, the Court finds the RPD’s state protection analysis confusing because it was not clear what facts were believed and what facts were not.

<sup>12</sup> *Muotoh, Ndukwe Christopher v. M.C.I.* (F.C., no. IMM-3330-05), Blais, November 25, 2005; 2005 FC 1599. However, if the claimant is at risk, it is not enough to analyze the existence of state protection generally. The Board must link the general findings to the specifics of the claimant: *Ullah, Safi v. M.C.I.* (F.C., no. IMM-7814-04), Phelan, July 22, 2005; 2005 FC 1018. See also *Sanchez Mestre, Adriana Lucia v. M.C.I.* (F.C., no. IMM-7767-13), Brown, March 25, 2015; 2015 FC 375.

<sup>13</sup> The Supreme Court of Canada essentially adopted paragraphs 98, 99 and 100 of the UNHCR *Handbook* as being an “entirely reasonable reading of the current definition” (*Ward*, at 718). These paragraphs read as follows:

98. Being *unable* to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant’s fear of persecution, and may indeed be an element of persecution.

99. What constitutes a refusal of protection must be determined according to the circumstances of the case. If it appears that the applicant has been denied services (e.g., refusal of a national passport or extension of its validity, or denial of admittance to the home territory) normally accorded to his co-nationals, this may constitute a refusal of protection within the definition.

100. The term *unwilling* refers to refugees who refuse to accept the protection of the Government of the country of their nationality. It is qualified by the phrase “owing to such fear”. Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country “owing to well-founded fear of persecution”. Whenever the protection of the country of nationality is available, and there is no ground based on

Whether the claimant is “unwilling” or “unable” to avail him- or herself of the protection of a country of nationality, state complicity in the persecution is irrelevant. The distinction between these two branches of the “Convention refugee” definition resides in the party’s precluding resort to state protection: in the case of “inability”, protection is denied to the claimant, whereas when the claimant is “unwilling”, he or she opts not to approach the state by reasons of his or her fear on an enumerated basis. In either case, the state’s involvement, in the persecution is not a necessary consideration. This factor is relevant, rather in the determination of whether a fear of persecution exists.<sup>14</sup>

### 6.1.5. Presumptions

There are two presumptions at play in refugee determination:

**Presumption 1:** If the fear of persecution is credible (the Court uses the word “legitimate”)<sup>15</sup> and there is an absence of state protection, it is not a great leap “... to presume that persecution will be likely, and the fear well-founded.”<sup>16</sup>

Having established the existence of a fear and a state’s inability to assuage those fears, it is not assuming too much to say that the fear is well-founded. Of course, the persecution must be real - the presumption cannot be built on fictional events - but the well-foundedness of the fear can be established through the use of such a presumption.<sup>17</sup>

The presumption goes to the heart of the inquiry, which is whether there is a likelihood of persecution. ... nothing wrong with this, if the Board is satisfied that there is a legitimate fear, and an established inability of the state to assuage those fears through effective protection. The presumption is not a great leap.<sup>18</sup>

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well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.

<sup>14</sup> *Ward, supra*, footnote 1, at 720-721.

<sup>15</sup> See *Ward, supra*, footnote 1, at 722.

<sup>16</sup> *Ward, supra*, footnote 1, at 722. See also *Sandy, Theresa Charmaine v. M.C.I.* (F.C.T.D., no. IMM-22-95), Reed, June 30, 1995, where the Court stated: “The presumption that persecution will be likely and fear well founded only arises from the establishment of a claimant’s subjective fear, ‘if there is an absence of state protection’ (*Ward...*). That is, proof of the state’s inability to protect, or a presumption relating thereto, does not arise from a finding that the [claimant] has a subjective fear. The need to prove ‘state inability to protect’ is an additional requirement, and it relates to establishing the objective well-foundedness of the [claimant’s] subjective fear.” See also *Olah, supra*, footnote 2.

<sup>17</sup> *Ward, supra*, footnote 1, at 722.

<sup>18</sup> *Ward, supra*, footnote 1, at 722.



**Presumption 2:** Except in situations where the state is in a state of complete breakdown, states must be presumed capable of protecting their citizens. This presumption can be rebutted by “clear and convincing” evidence of the state’s inability to protect.<sup>19</sup>

The danger that [presumption one] will operate too broadly is tempered by a requirement that clear and convincing proof of a state’s inability to protect must be advanced.<sup>20</sup>

In *Hinzman*,<sup>21</sup> the Federal Court of Appeal held that the presumption of state protection described in *Ward* applies equally to cases where the state is alleged to be the agent of persecution. However, where agents of the state are themselves the source of persecution, the presumption of state protection can be rebutted without exhausting all avenues of recourse in the country.<sup>22</sup>

### 6.1.6. Nexus

In *Badran*,<sup>23</sup> the Court indicated that the “law does not require that the inability to protect be connected to a Convention reason.” Conversely, one may argue that even though the source of the persecution is not grounded in a Convention reason, a State’s failure to act (protect), if motivated by a Convention ground, can establish the nexus to the definition, i.e., the failure to protect for a Convention reason can in itself amount to persecutory treatment.

### 6.1.7. Burden and Standard of Proof and Rebutting the Presumption

In *Flores Carrillo*,<sup>24</sup> the Federal Court of Appeal stated that there are three different factual realities and legal concepts which should not be confused. They are the burden of proof, the standard of proof and the evidentiary burden to rebut the presumption of state protection.

In answering the certified question, the Court summarized the law as follows:

A refugee who claims that the state protection is inadequate or non-existent bears the evidentiary burden of adducing evidence to that effect and the legal burden of persuading the trier of fact that his or her claim in this respect is

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<sup>19</sup> *Ward, supra*, footnote 1, at 724-726.

<sup>20</sup> *Ward, supra*, footnote 1, at 726.

<sup>21</sup> *Hinzman, Jeremy v. M.C.I. and Hughey, Brandon David v. M.C.I.* (F.C.A, nos. A-182-06; A-185-06) . Décary, Sexton, Evans, April 30, 2007; 2007 FCA 171 (leave to appeal dismissed by the SCC on November 15, 2007, [2007] S.C.C.A. No. 321). See also chapter 9 for a full discussion of *Hinzman*.

<sup>22</sup> *Chaves, Alejandro Jose Martinez v. M.C.I.* (F.C., no. IMM-603-04), Tremblay-Lamer, February 8, 2005; 2005 FC 193. See also *Lopez Gonzalez, Jaqueline v. M.C.I.* (F.C., no. IMM-5321-10), Rennie, May 24, 2011; 2011 FC 592, where the Court noted at paragraph 12 that “[T]he case law shows that an applicant must include proof that they have exhausted all recourse available, except in exceptional circumstances where it would be unreasonable for them to do so, such as when the persecutor is an agent of the state, because of police corruption .... or where it would otherwise be futile.”

<sup>23</sup> *Badran, Housam v. M.C.I.* (F.C.T.D., no. IMM-2472-95), McKeown, March 29, 1996, at 3-4.

<sup>24</sup> *M.C.I. v. Flores Carrillo, Maria del Rosario* (F.C.A., no. A-225-07), Létourneau, Nadon, Sharlow, March 12, 2008; 2008 FCA 94.

founded. The standard of proof applicable is the balance of probabilities and there is no requirement of a higher degree of probability than what that standard usually requires. As for the quality of the evidence required to rebut the presumption of state protection, the presumption is rebutted by clear and convincing evidence<sup>25</sup> that the state protection is inadequate or non-existent.

### **6.1.7.1 Burden of Proof and Obligation to Approach the State**

The burden or onus of showing the absence of state protection is on the claimant, not the Board.<sup>26</sup> This however, does not relieve the RPD of its obligation to provide clear and adequate reasons indicating why the onus was not met.<sup>27</sup>

A claimant is required to approach his or her state for protection in situations in which protection might reasonably be forthcoming.

... the claimant will not meet the definition of “Convention refugee” where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities: otherwise, the claimant need not literally approach the state.<sup>28</sup>

In other words, the claimant must show that it was reasonable for him or her not to seek state protection. However, a claimant is not required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.<sup>29</sup>

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<sup>25</sup> Explained by the Court as being “reliable and probative”.

<sup>26</sup> *Segura Cortes, Tania Elisa v. M.C.I.* (F.C., no. IMM-951-06), von Finckenstein, December 12, 2006; 2006 FC 1487... See also *Rodrigues Bexiga, Ana Emilia Zoega v. M.C.I.* (F.C., no. IMM-3449-10), O’Keefe, June 13, 2011; 2011 FC 676, where the Court noted at paragraph 30 that [T]he onus is on the refugee claimant to rebut the presumption of state protection, not on the Board to provide evidence of adequate state protection.”

<sup>27</sup> *Malveda, Dennis v. M.C.I.* (F.C., no. IMM-6519-06), Russell, April 4, 2008; 2008 FC 447... See also *M.C.I. v. Bari, Tibor* (F.C., no. IMM-2634-14), Brown, May 21, 2015; 2015 FC 656, in which the Court analyzed the adequacy of reasons on state protection. Citing *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, it indicated that reasons must allow the reviewing court to understand why the Board made its decision and permit it to determine whether the conclusion is reasonable.

<sup>28</sup> *Ward, supra*, footnote 1, at 724.

<sup>29</sup> *Ward, supra*, footnote 1, at 724. In *Aurelien, Eyon v. M.C.I.* (F.C., no. IMM-10661-12), Rennie, June 26, 2013; 2013 FC 707, the Court explained that it is an error to place a legal burden of seeking state protection on a refugee claimant. It is an evidentiary burden which, if met, displaces a legal presumption. An applicant need not seek state protection if the evidence indicates it would not reasonably have been forthcoming. On this point, see also *Nel, Charl Willem v. M.C.I.* (F.C., no. IMM-4601-13), O’Keefe, September 4, 2014; 2014 FC 842. In *Sanchez Mestre, supra, footnote 12*, the Court noted that where the evidence establishes that a request for state protection would be futile, the claimant does not have to make the request just to prove the point. In *Galogaza, Ljubisa v. M.C.I.* (F.C., no. IMM-3078-13), O’Reilly, March 31, 2015; 2015 FC 407, where the claimant feared openly discussing his sexual orientation because it could have led to further persecution, not protection, the Court noted that there is no absolute requirement to approach the state for protection as the refugee definition includes those who are unwilling, out of fear of persecution, to avail themselves of state protection.

The Trial Division in *Peralta*<sup>30</sup> stated that a claimant is not required to show that he or she has exhausted all avenues of protection. Rather, the claimant has to show that he or she has taken all steps reasonable in the circumstances, taking into account the context of the country of origin in general, the steps taken and the claimant's interactions with the authorities. In determining if the claimant took reasonable steps, the Board is required to consider the claimant's personal circumstances and characteristics as well as previous efforts to access state protection.<sup>31</sup>

Where the claimant left his or her country several years prior to claiming, the country conditions evidence may take on greater importance than the claimant's efforts to seek protection.<sup>32</sup>

The obligation of minors to approach the state for protection requires special consideration. For example, the Court has cautioned about faulting a sexually molested child with not approaching the state for protection when the parents themselves do not do so.<sup>33</sup>

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<sup>30</sup> *Peralta, Gloria Del Carmen v. M.C.I.* (F.C.T.D., no. IMM-5451-01), Heneghan, September 20, 2002; 2002 FCT 989. See also *Sanchez, Leonardo Gonzalez v. M.C.I.* (F.C., no. IMM-3154-03), Mactavish, May 18, 2004; 2004 FC 731 and the discussion under section 6.1.8. and the discussion under section 6.1.8. In *Garcia Aldana, Paco Jesus v. M.C.I.* (F.C., no. IMM-2113-06), Hughes, April 19, 2007; 2007 FC 423, *v. M.C.I.* (F.C. no. IMM-2113-06), Hughes, April 19, 2007; 2007 FC 423, the Court noted that the Board must assess the steps actually taken by the claimant in the context of country conditions and consider the interaction that the claimant did have with the police authorities; and in *Prieto Velasco, Augusto Pedro v. M.C.I.* (F.C., no. IMM-3900-06), Shore, February 8, 2007; 2007 FC 133, the Court noted that the RPD failed to consider the fact that the claimants' situation worsened after they filed a complaint with the police. The same point was made in *Aguilar Soto, Rafael Alberto v. M.C.I.* (F.C., no. IMM-1883-10), Shore, November 25, 2010; 2010 FC 1183. In *Moreno Maniero, Ronald Antonio v. M.C.I.* (F.C., no. IMM-8536-11), Zinn, June 19, 2012; 2012 FC 776, the Court held that the RPD erred in holding that the applicant must exhaust every possible avenue of state protection – the test is that all “reasonable” efforts must be made.

<sup>31</sup> In *Lakatos, Brigitta v. M.C.I.* (F.C. no. IMM-3939-17), Diner, April 5, 2018; 2018 FC 367, the Court found that the PRRA officer erred when he did not analyze whether the applicant's efforts to test state protection met the evidentiary burden in her circumstances, including the credible evidence that she had, in the past, sustained injuries in attacks and that the Hungarian police had treated her harshly. In *Kauhonina, Claretha v. M.C.I.* (F.C. no. IMM-2459-18), Diner, December 21, 2018; 2018 FC 1300 the Court found the RPD erred when it concluded that the claimant had failed to take adequate steps to seek state protection. The Board needed to address the fact that the claimant had previously reported being beaten to the police but that she was sent away because it was a domestic matter and then was subsequently beaten by the same man. Similarly, in *Sandoval, Dulce Dennis Gomez v. M.C.I.* (F.C. no. IMM-349-18), Walker, November 5, 2018; 2018 FC 1110 the Court quashed a PRRA decision because the officer failed to assess the applicant's profile as an individual whose ex-husband has ties to a drug cartel in Mexico.

<sup>32</sup> In *Moreira Chavez, Reina De La Paz v. M.C.I.* (F.C. no. IMM-80-18), Southcott, July 6, 2018; 2018 FC 705 the Court upheld an RPD decision in which it had accepted the claim and found the claimant had rebutted the presumption of state protection despite the fact she had not approached the state for help. The RPD relied upon the country conditions evidence only. The Court stated at paragraph 29: “I agree with the logic of the submission by the Respondent's counsel at the hearing of this application, to the effect that, in the particular circumstances of this case, there would have been very limited probative value in efforts made by the Respondent to seek police protection before leaving El Salvador, as that would have been at least 15 years ago. Such efforts would therefore have provided little insight into the availability of state protection under the circumstances that now exist 15 years later.”

<sup>33</sup> *James, Sherica Sherilon v. M.C.I.* (F.C., no. IMM-5039-09), Mainville, May 18, 2010; 2010 FC 546. In *D.C.L. v. M.C.I.* (F.C., no. IMM-3542-05), von Finckenstein, March 27, 2006; 2006 FC 384, the claimant was a minor

### 6.1.7.1.1. More Than One Authority in the Country

The Court of Appeal in *Zalzali*<sup>34</sup> recognized that there may be several established authorities in a country which are each able to provide protection in the part of the country controlled by them.

The “country”, the “national government”, the “legitimate government”, the “nominal government” will probably vary depending on the circumstances and the evidence and it would be presumptuous to attempt to give a general definition. I will simply note here that I do not rule out the possibility that there may be several established authorities in the same country which are each able to provide protection in the part of the territory controlled by them, protection which may be adequate though not necessarily perfect.<sup>35</sup>

In *Chebli-Haj-Hassam*,<sup>36</sup> the Court of Appeal answered a certified question on this matter as follows:

In the circumstances where there is a legitimate government supported by the forces of another government and there is no difference in interest between the two governments in relation to a refugee claimant, the protection given to the claimant is adequate to establish an internal refuge.

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when she was sexually abused by her stepfather. The Court noted that her failure to seek state protection must be assessed in light of her status as a minor at the time. In *Ayala Nunez, Luisa Fernanda v. M.C.I.* (F.C., no. IMM-4500-11), Rennie, February 23, 2012; 2012 FC 255, the Court noted that the RPD had not expected the minor herself to seek state protection but that it was reasonable to expect that her family would do so. In *Sanchez Cruz, Flora Leydi v. M.C.I.* (F.C., no. IMM-6527-11), Scott, May 30, 2012; 2012 FC 664, the Court found that the RPD had erred when it determined that state protection was available to the minor applicants. The RPD should have conducted a separate analysis of the children’s situation. The evidence adduced with respect to the situation of each individual child should have triggered separate analyses of the risk and the ability of the Mexican state to protect these children and whether they could reasonably access such protection taking into consideration each child’s individual circumstances.

<sup>34</sup> *Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 (C.A.).

<sup>35</sup> *Zalzali, supra*, footnote 404, at 615. Applied in *Sami, Sami Qowdon v. M.E.I.* (F.C.T.D., no. A-629-92), Simpson, June 1, 1994 (re Somaliland). See also *Saidi, Ahmed Abrar v. M.E.I.* (F.C.T.D., no. A-749-92), Wetston, September 14, 1993, at 3 (re IFA in North Somalia).

<sup>36</sup> *Chebli-Haj-Hassam, Atef v. M.C.I.* (F.C.A., no. A-191-95), Marceau, MacGuigan, Décary, May 28, 1996. Reported: *Chebli-Haj-Hassam v. Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 112 (F.C.A.). See also *Isufi, Arlind v. M.C.I.* (F.C., no. IMM-5631-02), Tremblay-Lamer, July 15, 2003; 2003 FC 880, where the Court considered the situation of a claimant from Kosovo and had this to say: “In the case at bar, there is no difference in interest between the UN forces and the government of the Federal Republic of Yugoslavia. As such, the Board did not commit an error in determining that state protection was available to the applicant through non-state actors. ... The presence of UN forces is not evidence of a breakdown of the state apparatus in Yugoslavia or Kosovo. The UN forces and security police in Kosovo work in conjunction with the local Kosovo police service to maintain order.””

In *Choker*,<sup>37</sup> the Court appears to question the reasonableness of the CRDD conclusion that a Lebanese claimant could and should seek the protection of an invading army (the Court was considering whether the tribunal had applied the law on IFA correctly.)

### **6.1.7.2 Standard of Proof**

The lack of state protection is proven on a balance of probabilities. The requirement set out in *Ward* that the claimant’s evidence to rebut the presumption must be “clear and convincing” does not mean a higher degree of probability than the normal standard of “more likely than not”. As explained by Létourneau, J. in *Flores Carrillo*:

The *Ward* case does not require a higher probability than what is normally required on the balance of probabilities standard to meet the legal burden... I fully agree with the finding of the judge that La Forest J. in *Ward* was referring to the quality of the evidence necessary to rebut the presumption and not to a higher standard of proof.

That a person “might” receive state protection is not the proper test. While no state offers perfect protection, and there will always be instances of persons who were not able to obtain adequate or any protection, the level necessary to show “adequate” state protection is a level where it is more likely than not that the individual will be protected.<sup>38</sup>

### **6.1.7.3 Rebutting the Presumption of Protection**

In this section, there are two concepts that are discussed: the evidentiary burden, and the standard of protection a claimant must establish.

#### **6.1.7.3.1 The evidentiary burden of “clear and convincing”**

Rebutting the presumption refers to the ability of a claimant to establish that state protection is not forthcoming in his or her case. This is an evidentiary burden and as noted above, the question is whether there is sufficient “clear and convincing” evidence of the state’s failure to protect. Absent an admission by the state that it is unable to protect (as was the case in *Ward*), a claimant can establish, with “clear and convincing evidence”,<sup>39</sup> that state protection would not be reasonably forthcoming (thus rebutting the presumption) where:

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<sup>37</sup> *Choker, Ali v. S.G.C.* (F.C.T.D., no. A-1345-92), Dubé, July 30, 1993. See also section 6.1.8. of this Chapter, Source of Protection.

<sup>38</sup> *Salamanca, Miguel Angel Sandoval v. M.C.I.* (F.C., no. IMM-6737-11), Zinn, June 19, 2012; 2012 FC 780. Note that while the Court in *Salamanca* uses the phrase “far more likely than not” (in paragraph 17), a number of subsequent cases have referred to the phrase but have omitted the word “far”. For example, see *Bakos, Robert v. M.C.I.* (F.C., no. IMM-2424-15), Manson, February 12, 2016 (amended September 7, 2016); 2016 FC 191, which says that *Salamanca* suggests that adequate state protection means that it is more likely than not that the applicant will be protected (see paragraph 30).

<sup>39</sup> In *Ayisi-Nyarko, Isaac v. M.C.I.* (F.C., no. IMM-3671-03), O’Reilly, December 10, 2003; 2003 FC 1425, the claimant thought that making a police report would probably be ineffective because suspects were often released

- (a) there is a complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*;<sup>40</sup>
- (b) there is evidence “...similarly situated individuals [were] let down by the state protection arrangements...;”<sup>41</sup>
- (c) there is evidence “...of past personal incidents in which state protection did not materialize.”<sup>42</sup>

The Supreme Court in *Ward* refers to the Federal Court of Appeal decision in *Satiacum*<sup>43</sup> and quotes with approval the following statement:

In the absence of exceptional circumstances established by the claimant, it seems to me that in a Convention refugee hearing, as in an extradition hearing, Canadian tribunals have to assume a fair and independent judicial process in the foreign country. In the case of a non-democratic State, contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself.<sup>44</sup>

In *Kadenko*,<sup>45</sup> the Court of Appeal noted that the burden of proof to establish absence of state protection is “directly proportional to the level of democracy in the state in question ...”

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on bail and then would exact reprisals against their accusers. This evidence, however, was not sufficient to displace the presumption that states are willing and able to protect their citizens (*Ward*). As noted earlier, the Federal Court of Appeal in *Flores Carrillo*, clarified that the evidentiary burden of producing “clear and convincing evidence” is merely that, an evidentiary burden, on a balance of probabilities, to rebut the presumption of state protection. However, in *A.B. v. M.C.I.* (F.C., no. IMM-2803-17), Grammond, March 2, 2018; 2018 FC 237 the Court cautioned against placing too strict a requirement on producing evidence of precise police shortcomings in an individual case, as such evidence may be difficult to obtain. In this case, the police conducted an investigation into the claimant’s complaints, but the file was eventually closed. The Court held this fit a pattern of lack of effective protection of victims of domestic violence which was reflected in the documentary evidence. Likewise, in *Zatreanu, Ion v. M.C.I.* (F.C. no. IMM-4059-17), Elliott, March 18, 2019; 2019 FC 332, the evidence indicated that the police showed up and took notes when complaints were made, but nothing happened. The Court held at paragraph 52 that that the RAD did not turn its mind to whether or not the kind of investigation that was carried out by the police in response to the many complaints actually was protection or whether such evidence rebutted the presumption of state protection.

<sup>40</sup> *Zalzali, supra*, footnote 40, at 614, *Ward, supra*, footnote 1, at 725.

<sup>41</sup> *Ward, supra*, footnote 1, at 725. For a case where the RPD did not have proper regard for evidence of similarly situated individuals, see *Campodonico Palma, Carlo Alfredo v. M.C.I.* (F.C., no. IMM-6195-14), O’Keefe, September 8, 2015; 2015 FC 1056.

<sup>42</sup> *Ward, supra*, footnote 1, at 725.

<sup>43</sup> *M.E.I. v. Satiacum, Robert* (F.C.A., no. A-554-87), Urie, Mahoney, MacGuigan, June 16, 1989. Reported: *Canada (Minister of Employment and Immigration) v. Satiacum* (1989), 99 N.R. 171 (F.C.A.).

<sup>44</sup> *Ward, supra*, footnote 1, at 725 (quoting from *Satiacum*, at 176).

<sup>45</sup> *M.C.I. v. Kadenko, Ninal* (F.C.A., no. A-388-95), Hugessen, Décary, Chevalier, October 15, 1996. Reported: *Canada (Minister of Citizenship and Immigration) v. Kadenko* (1996), 143 D.L.R. (4th) 532 (F.C.A.),

In *Alassouli*,<sup>46</sup> the Court held that “... democracy should not be used as a proxy for state protection. There is obviously a strong relationship between the citizens’ participation in the institutions of the state on the one hand, and the effectiveness and fairness of the state’s apparatus to protect them. There is no automatic equation between the two, and an assessment of state protection must always rest on a more nuanced analysis, taking into account the particular circumstances of a claimant, as well as the state involved.”

In *Shaka*,<sup>47</sup> the Court clarified that the question as to whether the presumption has been rebutted is a factual question and that the test is the same for all countries. What varies is the amount of evidence necessary to rebut the presumption:

The newness or the age of the democracy are not necessarily demonstrative of whether the state is truly democratic. More scrutiny may be required of countries that are in transition, but there is no automatic presumption or lesser threshold as contended. The test is the same, for all countries. What may vary is the amount of evidence required to rebut the presumption.

In *Hinzman*,<sup>48</sup> the Federal Court of Appeal noted that a claimant coming from a democratic country (like the US) will have a heavy burden when attempting to show that he or she should not have been required to exhaust all of the recourses available domestically before claiming protection elsewhere. However, as noted in *Katwaru*,<sup>49</sup> democracy alone does not guarantee effective state

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(application for leave to appeal dismissed by the S.C.C. on May 8, 1997). In *Diaz De Leon, Andromeda v. M.C.I.* (F.C., no. IMM-6429-06), Frenette, December 12, 2007; 2007 FC 1307, the Court noted that in the case of a developing democracy (in this case Mexico), where corruption and drug trafficking are prevalent, the presumption of state protection can be more easily overcome, particularly if, as in this case, those whose job was to protect could not protect themselves. In *Rodriguez Capitaine, Rogelio v. M.C.I.* (F.C., no. IMM-3449-07), Gauthier, January 24, 2008; 2008 FC 98, the Court, in paragraphs 20-22, discusses the notion of “democracy spectrum” raised in *Hinzman, supra*, footnote 21. It appears to apply not only to exhausting recourses, but also to determining the extent of the evidence needed to displace the presumption and whether it would be unreasonable not to seek protection.

<sup>46</sup> *Alassouli, Yousf v. M.C.I.* (F.C., no. IMM-6451-10), de Montigny, August 16, 2011; 2011 FC 998. See also *Ahmed, Ahmed Ibrahim v. M.C.I.* (F.C. no. IMM-2187-18), Kane, November 16, 2018; 2018 FC 1157 at paragraph 52 where, in the context of a claim against Iraq, the Court stated that “the RAD’s conclusions do not reflect the principle that democracy alone may not be an indicator of state protection, nor do they sufficiently account for the Applicant’s particular circumstances.”

<sup>47</sup> *Shaka, Abdul Shema v. M.C.I.* (F.C., no. IMM-4141-11), Rennie, February 21, 2012; 2012 FC 235. Some cases appear to treat the presumption as being different depending on the level of democracy; however, the presumption as set out by the SCC in *Ward* was a presumption that applied to all countries. What was recognized was that the presumption could be rebutted differently depending on the level of democracy in the state in question. Cases such as *Sow, Harouna Sibou v. M.C.I.*, no. IMM-5287-10, Rennie, June 6, 2011; 2011 FC 646, and *Masalov, Sergey v. M.C.I.* (F.C., no. IMM-7207-13), Diner, February 4, 2015; 2015 FC 277, which refer to the notion that the presumption varies with the nature of democracy in a country should be read with caution in this regard.

<sup>48</sup> *Hinzman, supra*, footnote 21.

<sup>49</sup> *Katwaru, Shivanand Kumar v. M.C.I.* (F.C., no. IMM-3368-06), Teitelbaum, June 8, 2007; 2007 FC 612. The Court found that the documentary evidence in the case did not support the Board’s conclusion that “there is an effective security force in place [in Guyana] and that police deficiencies, although existing, are not generalized.”

protection,<sup>50</sup> it is merely an indicator of the likely effectiveness of a state institution. The Board is required to do more than determine whether a country has a democratic political system and must assess the quality of the institutions that provide state protection.

Another case that refers to the need for a contextual analysis is *Loaiza*,<sup>51</sup> where the Court noted that the analysis must begin with an assessment of the personal circumstances of the claimant and the degree of the individual risk faced. The Court noted that in some countries there may be only a weak correlation between the existence of a constitutional democracy and a willingness of the state to take effective measures against spousal abuse. See also *Leon Davila*,<sup>52</sup> where the Court noted that the Board must proceed with a fulsome and contextualized analysis of each claimant's particular situation and that it is not enough to state broadly that there are free and general elections, and that legislation has been enacted to ensure basic standards of human rights.

### 6.1.7.3.2. Standard of Protection

Over the years, there has been much discussion and confusion about what the standard of protection should be. The argument has boiled down to either requiring that the protection offered be adequate or that it be more than that, namely effective. To the extent that establishing that the protection offered be effective has been understood in some cases as shifting the burden to the Board, the Court of Appeal in *Mudrak*<sup>53</sup> stated that this inference is wrong.

As noted by the Court, the cases that have faulted the Board for not analyzing the operational adequacy of protection were not shifting the burden to the Board but were simply finding that the Board's decisions could not stand "because they ignored relevant evidence or because the syllogism was flawed, which were legitimate grounds to intervene."<sup>54</sup> The Court illustrates this point by referring to two cases, *Hercegi*<sup>55</sup> and *Majlat*<sup>56</sup>:

[32] For example, in [*Hercegi*], it was determined that the Board failed to turn its mind to the question of state protection:

[5] The reasons do not address the issue of state protection properly. They do not show whether, and if so, what, the Member considered as to provisions made by Hungary to provide adequate state protection now to its citizens. It is not enough to say that steps are being taken that some day may result in adequate state protection. It is what state protection is actually provided at the present time that is relevant. In the present case, the

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<sup>50</sup> While the Court refers to "effective protection", which in later cases has been questioned as the correct standard to apply, (see Section 6.1.7.3.2. of this Chapter) the point of the case is that the documentary evidence must support the findings that state protection is available.

<sup>51</sup> *Loaiza Brenes, Heyleen v. M.C.I.* (F.C., no. IMM-2445-06), Barnes, April 2, 2007; 2007 FC 351.

<sup>52</sup> *Leon Davila, Marco Antonio v. M.C.I.* (F.C., no. IMM-7645-05), de Montigny, December 11, 2006; 2006 FC 1475. See also *Campos, Arnoldo Alfredo v. M.C.I.* (F.C., no. IMM-7839-12), Manson, August 19, 2013; 2013 FC 882, where the Court noted that "what is reasonable depends on an applicant's individualized context."

<sup>53</sup> *Mudrak, Zsolt Jozsef v. M.C.I.* (F.C.A., no. A-147-15), Stratas, Webb, Scott, June 14, 2016; 2016 FCA 178.

<sup>54</sup> *Mudrak, supra*, footnote 53, para 31.

<sup>55</sup> *Hercegi, Jozsef v. M.C.I.* (F.C., no. IMM-4225-11), Hughes, February 22, 2012; 2012 FC 250.

<sup>56</sup> *Majlat, Robert Attila v. M.C.I.* (F.C., no. IMM-1886-13), Gleason, October 10, 2014; 2014 FC 965.



evidence is overwhelming that Hungary is unable presently to provide adequate protection to its Roma citizens.

[Emphasis in original]

[33] In *[Majlat]* the Federal Court found that the analysis did not only focus on mere speculation but was based on failures by the applicants to seek protection of the state and dismissed the judicial review:

[36] However, despite the use of language that speaks to efforts made by the Hungarian state, the RPD did not focus its state protection analysis in this case only on the mere fact that efforts had been made. Rather, when the decision is read carefully, it is apparent that it turns on the fact that the applicants failed to make a complaint to the police in 2010, failed to follow up on the 2009 complaint and did not make any complaints about the alleged sub-standard medical treatment. The RPD held that in light of these failures the applicants had not rebutted the presumption of adequate state protection because the documentary evidence, while mixed, does not establish that the Hungarian state would have been unable to address their complaints. This is made clear from the following passages in the decision:

[...]

[37] Thus, unlike the cases of *Orgona*, *Garcia*, *Bors*, and *Kovacs*,<sup>57</sup> the RPD here did not assess only whether the Hungarian state was making efforts to correct the plight of the Roma. Rather, it reviewed both those efforts and the adequacy of those efforts and accordingly did not apply the wrong test. Thus, this argument likewise fails.

[Emphasis in original]

The Court in *Mudrak* was of the view that the question that was certified by the Federal Court, namely: “Whether the Refugee Protection Board commits a reviewable error if it fails to determine whether protection measures introduced in a democratic state to protect minorities have been demonstrated to provide operational adequacy of state protection in order to conclude that adequate state protection exists?” was based on a misunderstanding of the jurisprudence and did not arise on the record. Also, the question was theoretical and not of general importance and therefore did not need to be answered.

The standard of adequate protection has been further qualified by the notion that the degree of protection required is not perfection, but adequacy.<sup>58</sup> In *Villafranca*, the Federal Court of Appeal stated:

No government that makes any claim to democratic values or protection of human rights can *guarantee* the protection of all of its citizens at all times.

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<sup>57</sup> *Orgona, Tiborne v. M.C.I.* (F.C. no., IMM-2267-12), Zinn, December 7, 2012; 2012 FC 1438; *De Araujo Garcia, Debora v. M.C.I.* (F.C., no. IMM-5987-05), Campbell, January 24, 2007; 2007 FC 79; *Bors, Karolyne v. M.C.I.* (F.C. no., IMM-1899-10, Shore, October 12, 2010; 2010 FC 1004; *Kovacs, Gabor v. M.C.I.* (F.C., no. IMM-1897-10, Shore, October 12, 2010; 2010 FC 1003.

<sup>58</sup> *Zalzali, supra*, footnote 40 at 614. *M.E.I. v. Villafranca, Ignacio* (F.C.A., no. A-69-90), Hugessen, Marceau, Décary, December 18, 1992.

Thus it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation. Terrorism in the name of one warped ideology or another is a scourge afflicting many societies today; its victims, however much they may merit our sympathy, do not become Convention refugees simply because their governments have been unable to suppress the evil. ... where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection.<sup>59</sup>

In summary, according to the Federal Court of Appeal in *Mudrak*, the law on state protection is settled law and the apparent debate about whether protection has to be effective rather than adequate is based on a misunderstanding of the jurisprudence. It would appear that the evidence relating to measures taken by the state (also referred in some cases as “serious efforts”) to protect its citizens and the efficacy of those measures (sometimes referred to as “operational adequacy” or “effectiveness at the operational level”) are evidentiary issues, not legal tests that need to be assessed in each individual case. In this regard, the Court notes that each case will turn on its own facts.<sup>60</sup>

In an earlier case, *Gonzalez Camargo*,<sup>61</sup> the Federal Court had expressed similar thinking as follows:

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<sup>59</sup> *Villafranca*, *supra*, footnote 58. In *Lopez Gonzalez, Jaqueline v. M.C.I.* (F.C., no. IMM-5321-10), Rennie, May 24, 2011; 2011 FC 592, the Court noted that the “test of police protection is... adequacy; *Carillo* [sic] at para 32. The test is not that of successful arrest, detention and conviction... A failure of state protection cannot be founded, therefore, on a failure to bring a perpetrator to justice.” Much the same point was made in *Salvagno, Sergio Santiago Raymond v. M.C.I.* (F.C., no. IMM-5848-10), Pinard, May 26, 2011; 2011 FC 595. In two earlier cases involving Costa Rica, the Court followed *Villafranca* and noted that the absence of a witness protection program did not render the Board’s decision on protection unreasonable, and that a duty to provide personal protection to every person who files a police complaint is unreasonable by the standards of any country: *Alfaro, Oscar Luis Alfaro v. M.C.I.* (F.C., no. IMM-6905-03), O’Keefe, January 20, 2005; 2005 FC 92 and *Arias Aguilar, Jennifer v. M.C.I.* (F.C., no. IMM-1000-05), Rouleau, November 9, 2005; 2005 FC 1519.).

Also, the Federal Court stated in *Gomez Gonzalez, Veronica v. M.C.I.* (F.C., no. IMM-485-11), de Montigny, October 4, 2011; 2011 FC 1132: “As stated by this Court on a number of occasions, it is difficult to criticize the state authorities for their failure to act when the Applicants do not give them a reasonable opportunity to protect them.” In other words, the authorities should be given the information that is necessary in order to react adequately.

In *Boston, Edwin v. M.C.I.* (F.C., no. IMM-6554-06), Snider, December 4, 2007; 2007 FC 1271, the Court noted that *Villafranca* is not inconsistent with *Ward*. The Court noted that “[a]bsent evidence to the contrary, a state that can provide adequate protection to all of its citizens who may be subject to persecution by the NPA [guerilla group operating in the Philippines], can also reasonably be found to be able to protect an individual who has suffered at the hands of the same organization. Thus, the Board did not err by focusing its examination on the level of protection vis-à-vis the NPA available for all citizens in the Philippines.”

<sup>60</sup> What is becoming clear from the case law is that it is an error to stop the analysis of state protection at the “serious efforts” level without also examining the operational adequacy of those efforts. See for example, *Boakye, Kofi v. M.C.I.* (F.C., no. IMM-2361-15), Strickland, December 18, 2015; 2015 FC 1394; *Hasa, Ana v. M.C.I.* (F.C., no. IMM-3700-17), Strickland, March 7, 2018; 2018 FC 270.

<sup>61</sup> *Gonzalez Camargo, Hernando v. M.C.I.* (F.C., no. IMM-38-14), Gleeson, September 2, 2015; 2015 FC 1044.

[27] The Board correctly identifies the principles underpinning state protection as set out in *Ward* and *Hinzman* including the claimant’s burden of providing clear and convincing evidence of the state’s inability to protect its citizens and the requirement that claimants must approach the state for protection in situations where that protection might be reasonably forthcoming. In my opinion, however, the Board failed to correctly recognize that the assessment of the adequacy of state protection involves more than a consideration of state efforts. This caused the Board to focus on state efforts and not consider the operational adequacy of state protection for the applicants and individuals in like circumstances; the proper test when considering the question of adequate state protection.

In *Moran*,<sup>62</sup> the Court explained it as follows:

[25] I pause to note that counsel for [the applicant] appears to try to distinguish between what is “adequate” protection and what is protection “effective at an operational level”. There is indeed a line of jurisprudence from this Court suggesting that “adequate” may be different from “effective”; however, these cases do not dispute that the protection needs to yield actual results... A protection that is adequate is a protection that works at the operational level. Adequacy of state protection has been held to mean that the RPD has to consider the state’s capacity to implement measures at the operational or practical level for the persons concerned.

The following appear to be the evidentiary factors that need to be considered in order to determine whether the presumption of state protection has been rebutted:

- the efforts made by the claimant to obtain protection, including:
  - reports made to the authorities,
  - whether sufficient details were provided,
  - follow-up efforts,
  - whether other agencies besides the police were approached (see section 6.1.8 below for more details on this issue)
- measures taken by the state and the efficacy of those measures , including:
  - applicable laws in place,
  - mechanisms to protect (police, other agencies),
  - enforcement efforts,
  - tangible results
- evidence of similarly situated individuals,
- particular circumstances of the claimant and profile,

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<sup>62</sup> *Moran Gudiel, Hugo v. M.C.I.* (F.C., no. IMM-2054-14), Gascon, July 23, 2015; 2015 FC 902.

- addressing the basis of the claim (e.g., gender etc.), not just generalities.

### 6.1.8. Source of Protection

As part of the assessment of what constitutes clear and convincing evidence of the state's failure to protect, the question has arisen as to who exactly is a claimant required to approach for protection. In other words, what avenues of protection is a claimant required to exhaust before claiming international protection? At issue is whether state protection is to be provided by the police (the state organ entrusted with the role of protecting a country's citizens) or whether other agencies play a role that the tribunal needs to consider. What those governmental and non-governmental agencies might be will depend on the country in question. What follows is a review of the jurisprudence in this area.

A number of Federal Court decisions state that it is the police force that has the primary responsibility to protect a nation's citizens and is in possession of enforcement powers commensurate with this mandate. Therefore, alternative institutions do not constitute avenues of protection *per se*.

An often quoted case is *Flores Zepeda*,<sup>63</sup> where the Court, in the context of a Mexican gender claim, considered a number of proposed alternate sources of protection besides the police and concluded that "... these alternate institutions do not constitute avenues of protection *per se*; unless there is evidence to the contrary, the police force is the only institution mandated with the protection of a nation's citizens and in possession of enforcement powers commensurate with this mandate." Other cases supporting this view include *Barajas*,<sup>64</sup> *Bari*<sup>65</sup> as well as *Katinszki*.<sup>66</sup> In this latter decision, the Court stated:

14. (...) More importantly, the mandate of each of the organizations referred to by the Board (the Independent Police Complaints Board, the Parliamentary Commissioners' Office, the Equal Treatment Authority, the Roma Police Association, the Complaints Office at the National Police Headquarters) is not

<sup>63</sup> *Flores Zepeda, Rosario Adriana v. M.C.I.* (F.C., no. IMM-3452-07), Tremblay-Lamer, April 16, 2008; 2008 FC 491. In concurring with this case, Justice Zinn in *Corneau, Marie Madeleine v. M.C.I.* (F.C., no. IMM-6120-10), Zinn, June 20, 2011; 2011 FC 722, put it thus: "... While shelters, counseling services, and hotlines may be helpful to women escaping abuse, these institutions are not tasked with ensuring physical safety – this is the job of the police. In most cases, if a claimant establishes that the police force or analogous authority is unable to protect him or her from threats identified in ss. 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, he or she will have rebutted the presumption of state protection."

<sup>64</sup> In *Barajas, Leonardo Macias v. M.C.I.* (F.C., no. IMM-2393-09), Russell, January 7, 2010; 2010 FC 21, the Court summarized the evidence as follows: "... the [Mexican] police force was not only unwilling to protect the Applicant, it was also the perpetrator of the threat, and that threat was immediate and deadly. It was not just that the police refused to accept his report or to help him; the police threatened to arrest him and put him in jail... Under such circumstances, I think it was entirely unreasonable for the Board to expect that the Applicant could have countered such a threat by going to alternative institutions that deal with corrupt police and other state officials."

<sup>65</sup> *Bari, Viktor Karoly v. M.C.I.* (F.C., no. IMM-1735-13), de Montigny, September 11, 2014; 2014 FC 862.

<sup>66</sup> *Katinszki, Piroska v. M.C.I.* (F.C., no. IMM-2520-12), de Montigny, November 15, 2012; 2012 FC 1326.:

to provide protection but to make recommendations and, at best, to investigate police inaction after the fact.

15. The jurisprudence of this Court is very clear that the police force is presumed to be the main institution mandated to protect citizens, and that other governmental or private institutions are presumed not to have the means nor the mandate to assume that responsibility. As Justice Tremblay-Lamer aptly stated in *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2009] 1 FCR 237, at paras 24-25:

In the present case, the Board proposed a number of alternate institutions in response to the applicants' claim that they were dissatisfied with police efforts and concerned with police corruption, including National or State Human Rights Commissions, the Secretariat of Public Administration, the Program Against Impunity, the General Comptroller's Assistance Directorate or through a complaints procedure at the Office of the Attorney General (PGR).

I am of the view that these alternate institutions do not constitute avenues of protection *per se*; unless there is evidence to the contrary, the police force is the only institution mandated with the protection of a nation's citizens and in possession of enforcement powers commensurate with this mandate. For example, the documentary evidence explicitly states that the National Human Rights Commission has no legal power of enforcement ...

However, in *Ahmed*,<sup>67</sup> the Court stated that “while the jurisprudence has established that the police are the first line of contact where a refugee claimant fears for their safety (as opposed to asserting persecution based on, for example, sexual orientation or ethnicity), the presumption can be rebutted. The police may not always be the appropriate recourse.” In that case, the RAD found that the claimant did not make reasonable efforts to seek state protection because he had not approached the police. The Court quashed the decision because the RAD did not consider if the fact the claimant had sought protection from the Asayish, a security and intelligence organization in Iraq, constituted reasonable efforts in the overall context.

In *Graff*,<sup>68</sup> a case involving police misconduct, the Court followed the jurisprudence that holds that “the police force is presumed to be the main institution mandated to protect citizens, and that other governmental or private institutions are presumed not to have the means nor the mandate to

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<sup>67</sup> *Ahmed*, supra, footnote 46 at paragraph 67.

<sup>68</sup> *Graff, Krisztian Istva v. M.C.I.* (F.C., no. IMM-6504-13), Zinn, April 10, 2015; 2015 FC 437. See also *Csoka, Attila v. M.C.I.* (F.C. no., IMM-1244-16, Gascon, November 2, 2016; 2016 FC 1220, where the Court noted that “[a]lternate institutions concerned with police corruption or abuse do not constitute substitutes or avenues able to replace the police protection itself.”

assume that responsibility”, but went on to note that more critically in the decision of the RPD was the lack of evidence and analysis of how taking complaints to higher authorities would result in the claimant obtaining state protection.

The Court has also noted that the capacity to initiate some form of legal action is not a surrogate for state protection.<sup>69</sup>

Other Federal Court cases have held that assistance provided by other state agencies, such as those charged with investigating police conduct, can also be considered.

For example, in *Flores Carrillo*,<sup>70</sup> the Federal Court of Appeal upheld a decision of the RPD where the Board had concluded that the claimant had not made additional efforts to seek protection from the authorities when the local police officers did not provide protection. The Board had held that the Mexican claimant could have sought redress from National or State Human Rights Commissions, the Secretariat of Public Administration, the Program Against Impunity, the General Comptroller’s Assistance Directorate and the complaints procedure at the office of the Federal Attorney General.

In *Mudrak*,<sup>71</sup> the Court of Appeal considered the following certified question: “Whether refugee protection claimants are required to complain to policing oversight agencies in a democratic state as a requirement of assessing state protection, when no risk of harm arises from doing so?” The Court held that the question failed to meet the criteria for certification because it was not a question of general importance. In the Court view, “[t]he requirement of going to an oversight agency in a specific country is heavily fact driven.” (para 43) and “... the requirement to complain to policing oversight agencies in a democratic country in any given case is too specific and multifactorial to be certifiable.” (para 48). The Court went on to state that:

[49] ... the Board needs to review the specific evidence adduced in a case before it determines if there was a requirement to go to an oversight agency. It is fact specific. It could be warranted in one case, but not in another.

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<sup>69</sup> *Orsos, Erzsebet v. M.C.I.* (F.C., no. IMM-5888-13), Rennie, February 26, 2015; 2015 FC 248. See also *Risak, Boris v. M.E.I.* (F.C.T.D., no. IMM-6087-93), Dubé, October 24, 1994.

<sup>70</sup> *Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*, (F.C.A. no., A-225-07), Létourneau, Nadon, Sharlow, March 12, 2008; 2008 FCA 94, para. 34. This reasoning was followed in *Hernandez Gonzalez, Karla Del Carmen v. M.C.I.* (F.C., no. IMM-2265-08), Hughes, November 13, 2008; 2008 FC 1259, and *Ramirez Albor, David v. M.C.I.* (F.C., no. IMM-2359-09), Boivin, December 1, 2009; 2009 FC 1231, where the Court added this caveat:

[19] I agree that alternate organisations or institutions put in place in order to overcome corruption issues in a given state must be more than an empty shell lacking the effective means to achieve their purposes and protect persons such as the Applicants. Such organisations or institutions must reflect a genuine alternative and translate into more than good intentions on the part of the government. A mere expression of an intention on the part of a state to address a corruption problem with no evidence of a follow-through will generally be insufficient.

<sup>71</sup> *Mudrak, supra*, footnote 53.

In *Saavedra Sanchez*,<sup>72</sup> the Federal Court expressed the same thought as follows:

[10] I also do not accept that the Board erred by referring to agencies which may not have a direct responsibility for the provision of protective assistance, such as the Mexican Human Rights Commission. State agencies which are outside of the criminal justice system, and even a person's employer, can play a helpful role in cases like this where the initial local police response may not be adequate. In this case there were a number of alternate agencies noted by the Board which could have been approached and it is surprising that the Applicants chose not to do so in the face of the events they described.

In *Ruszo*,<sup>73</sup> the Court conducted an extensive review of the jurisprudence on state protection and with respect to pursuing other sources of police protection (in this case speaking to a police supervisor, going to a different police station, or complaining to the local Roma self-government), the Chief Justice concluded as follows:

[49] In my view, the weight of the jurisprudence establishes that, in the absence of compelling or persuasive evidence which establishes an objectively reasonable basis for refraining from fully exhausting all reasonably available avenues of state protection, it is reasonably open to the RPD to find that the presumption of state protection has not been rebutted with clear and convincing evidence.

[50] In this regard, compelling or persuasive evidence is evidence that provides an objective basis for the belief that taking any of these actions might reasonably expose the applicant to persecution, physical harm or inordinate monetary expense, or would otherwise be objectively unreasonable. It is not unreasonable to expect a person who wishes to seek the assistance and generosity of Canada to make a serious effort to identify and exhaust all reasonably available sources of potential protection in his or her home state, unless there is such a compelling or persuasive basis for refraining from doing so. In brief, this would not satisfy the requirements of the “unable” branch of section 96, discussed at paragraphs 30-33 above. And in the absence of a demonstration of an objectively reasonable well founded fear of persecution, the requirements of the “unwilling” branch, discussed at paragraph 34 above, also would not be met.

Some Federal Court cases state that protection can be provided not just by the police and state agencies but also by non-governmental agencies which receive state funding. For example,

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<sup>72</sup> *Saavedra Sanchez, Perla v. M.C.I.* (F.C., no. IMM-1604-07), Barnes, February 5, 2008; 2008 FC 134. See also *Sanchez Gutierrez, Alejandro v. M.C.I.* (F.C., no. IMM-237-08), Mactavish, August 26, 2008; 2008 FC 971; and *Hall, Zita v. M.C.I.* (F.C., no. IMM-3705-10), Rennie, March 4, 2011; 2011 FC 26. In *Lopez Gonzalez, Jaqueline v. M.C.I.* (F.C., no. IMM-5321-10), Rennie, May 24, 2011; 2011 FC 592, the Court noted that while the existence or non-existence of governmental and non-governmental agencies that might facilitate access to state protection or shelter to victims of domestic violence formed part of the contextual assessment of the ability of the state to protect its citizens, in this particular case, what was critical to the finding of state protection was the fact that the police responded to the assault when it was reported.

<sup>73</sup> *Ruszo, Zsolt v. M.C.I.* (F.C. no., IMM-5386-12), Crampton, October 1, 2013; 2013 FC 1004.

in *Karoly*,<sup>74</sup> the Court noted that “this Court has determined on numerous occasions that for the purpose of determining the existence of state protection, one can rely on the availability of state run or funded agencies and not only from the police”.

However, other Federal Court decisions hold a contrary view regarding non-state agencies. For example, in *Aurelien*,<sup>75</sup> the Court held that the Officer erred in relying on non-governmental agencies... as these organizations do not provide protection.

[16] This Court has repeatedly emphasized that the police force is presumed to be the main institution responsible for providing protection and in possession of the requisite enforcement powers. Shelters, counsellors and hotlines may be of assistance, but they have neither the mandate nor the capacity to provide protection ...

[17] It is exceedingly difficult, from an evidentiary standpoint, to determine whether a non-governmental organization can be a surrogate for the state to provide protection. This is one of the policy considerations that underlies the consistent requirement in the jurisprudence that the police provide protection. Agencies have diffuse mandates and their effectiveness is hard to measure. This case amply demonstrates the rationale that underlies the jurisprudence.

The Chairperson’s Guideline on *Women refugee Claimants Fearing Gender-Related Persecution*, at section C.2 provides that:

... If the claimant can demonstrate that it was objectively unreasonable for her to seek the protection of her state, then her failure to approach the state for protection will not defeat her claim. Also, the fact that the claimant did or did not seek protection from non-government groups is irrelevant to the assessment of the availability of state protection.<sup>76</sup>

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<sup>74</sup> *Karoly, Szalo v. M.C.I.* (F.C., no. IMM-1566-04), Blais, March 24, 2005; 2005 FC 412. See also *Carrera Mendez, Luz Maria Sonia v. M.C.I.* (F.C., no. IMM-1806-08), Pinard, December 22, 2008; 2008 FC 1385; *Baku, Ervin v. M.C.I.* (F.C., no. IMM-1090-10), Pinard, November 25, 2010; 2010 FC 1163; and *Darcy, Enola Feria v. M.C.I.* (F.C., no. IMM-7203-10), Pinard, December 13, 2011; 2011 FC 1414, where the Court quoted from *Baku* and held that “state protection may be expected to be sought from sources other than the police, such as state-run agencies.”

<sup>75</sup> *Aurelien, Eyon v. M.C.I.* (F.C., no. IMM-10661-12), Rennie, June 26, 2013; 2013 FC 707. This case was followed in *Davidova, Dana v. M.C.I.* (F.C., no. IMM-6542-12), Noël, September 5, 2013; 2013 FC 908, where the Court noted that “... there is extensive case law supporting the proposition that non-state actors, which include NGOs, may not replace the protection that should primarily be provided by the state.” In *Corneau, supra*, footnote 63, the Court held that a claimant is not required to seek protection or assistance from non-governmental organizations or administrative agencies in order to rebut the presumption of state protection.

<sup>76</sup> Note 25 of the Guideline states the following: “It is clear that the claimant's failure to seek protection from non-government groups can have no impact on the assessment of the availability of state protection. In certain circumstances, however, the fact that the claimant did not approach existing non-government organizations in her country of origin may have an impact on her credibility or, more generally, on the well foundedness of her claim.

A case that discusses this section of the Guideline is *De Araujo Garcia, Debora v. M.E.I.*, (F.C. no., IMM-5987-05), Campbell, January 24, 2007, 2007 FC 79. In *Salamon, Gyorgyne v. M.C.I.* (F.C., no. IMM-6773-12), Rennie, May 30, 2013; 2013 FC 582, the Court held that: “[10] The Board considered it reasonable to expect the applicant to approach additional agencies and community organizations and activists. In the case of sexual assault



The reference in the tribunal’s reasons to efforts made by non-governmental agencies will not necessarily be fatal to the decision where the tribunal otherwise makes a reasonable finding that adequate state protection is available. As put in *Naumets*,<sup>77</sup>

[19] I agree with the applicant that the existence of efforts on the part of civil society cannot be considered as part of the assessment of state protection. This is for the reason that measures taken by NGOs are generally undertaken to plug holes in the fabric of the state. They highlight problems, rather than serving as indicia of government-based solutions... The Panel member’s error in emphasizing this evidence is not fatal, in my view, as the conclusion that state protection for victims of domestic violence in the Ukraine is adequate was a reasonable finding on all of the evidence.

If the Board relies upon alternative avenues of recourse, it should explain how these alternatives will result in adequate state protection for the claimant.<sup>78</sup>

## 6.2. STATELESS CLAIMANTS

As to whether stateless claimants need to avail themselves of state protection, the UNHCR *Handbook*, in paragraph 101 states that “...[i]n the case of a stateless refugee, the question of ‘availment of protection’ of the country of his former habitual residence does not, of course, arise...”

In the very early case of *El Khatib*,<sup>79</sup> Mr. Justice McKeown agreed with this approach and stated:

... the discussion and conclusions reached in *Ward* apply only to citizens of a state, and not to stateless people. In my view the distinction between paragraphs 2(1)(a)(i) and 2(1)(a)(ii) of the *Act* is that the stateless person is

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and other serious crimes of physical violence, state protection is measured by the response of the police, not by secondary agencies such as complaints bodies or organizations which help victims cope with the consequences of the crime. The two are not to be conflated.” See also *Csoke, Anita Fustosne v. M.C.I.* (F.C., no. IMM-5957-14), Fothergill, October 15, 2015; 2015 FC 1169, where the Court referred to the *Guideline* and noted that it is an error for the RPD to cite the availability of services offered by non-governmental organizations in support of a finding of adequate state protection.

<sup>77</sup> *Naumets, Nina v. M.C.I.* (F.C., no. IMM-2071-07), Mosley, April 22, 2008, 2008 FC 522.

<sup>78</sup> *Balogh, Timea Maria v. M.C.I.* (F.C., no. IMM-4870-13), Russell, January 20, 2015; 2015 FC 76. As the Court noted, “[i]n conclusion, in reviewing the alternative avenues of state protection available to the Applicant, the Officer fails to answer the same question as stated by Justice Zinn in *Majoros [Majoros, Lajos v. M.C.I.]* (F.C. no., IMM-7541-12, Zinn, April 24, 2013; 2013 FC 421): “[H]ow would state protection be more forthcoming if the applicants had followed up with, e.g., the Minorities Ombudsman’s Office? Would they be any safer or any more protected?” The Officer lists a number of agencies in Hungary and concludes that they will provide state protection for the Applicant but fails to actually address *how* these agencies will protect the Applicant.” See also *Graff, supra*, footnote 68.

<sup>79</sup> *El Khatib, Naif v. M.C.I.* (F.C.T.D., no. IMM-5182-93), McKeown, September 27, 1994.

not expected to avail himself of state protection when there is no duty on the state to provide such protection.<sup>80</sup>

However, more recent case law has interpreted the law differently. For example, starting with *Nizar*,<sup>81</sup> where the Court was of the view that, even though states owe no duty of protection to non-nationals, “it is relevant for a stateless person, who has a country of former habitual residence, to demonstrate that defacto [sic] protection within that state, as a result of being resident there is not likely to exist.” The Court reasoned that this was relevant to the well-foundedness of the claimant’s fear.

The Federal Court of Appeal in *Thabet*,<sup>82</sup> in the context of discussing whether a stateless claimant who has more than one country of former habitual residence must establish the claim with respect to one, some or all of the countries,<sup>83</sup> had this to say about the issue of state protection:

... The definition takes into account the inherent difference between those persons who are nationals of a state, and therefore are owed protection, and those persons who are stateless and without recourse to state protection. Because of this distinction one cannot treat the two groups identically, even though one should seek to be as consistent as possible. (At 17).

... If it is likely that a person would be able to return to a country of former habitual residence where he or she would be safe from persecution, that person is not a refugee. This means that the claimant would bear the burden ... of showing on the balance of probabilities that he or she is unable or unwilling to return to any country of former habitual residence. (At 28).

In *Popov*,<sup>84</sup> the claimants argued that as stateless individuals, they were not subject to the presumption of state protection and in support of their argument relied on *Thabet*. The Court rejected the argument and held that,

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<sup>80</sup> *El Khatib, ibid.*, at 2. The Court agreed to certify the following question:

On a claim to Convention refugee status by a stateless person, is the “well-foundedness” analysis set out by the Supreme Court of Canada in [*Ward*] applicable, based as it is on the availability of state protection, or is it only applicable if the claimant is a citizen of the country in which he or she fears persecution?

The Court of Appeal, in dismissing the appeal in *El Khatib*, declined to deal with the certified question because it was not determinative of the appeal. See *M.C.I. v. El Khatib, Naif* (F.C.A., no. A-592-94), Strayer, Robertson, McDonald, June 20, 1996. In *Tarakhan, Ali v. M.C.I.* (F.C.T.D., no. IMM-1506-95), Denault, November 10, 1995. Reported: *Tarakhan v. Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm. L.R. (2d) 83 (F.C.T.D.), at 89, the Court held that where the claim is that of a stateless person, the claimant need only show that he or she is unable, or by reason of a well-founded fear of persecution, is unwilling to return to the country of former habitual residence. The claimant does not have to prove that the authorities of that country are unable or unwilling to protect him or her. See also *Pachkov, Stanislav v. M.C.I.* (F.C.T.D., no. IMM-2340-98), Teitelbaum, January 8, 1999; and *Elastal, Mousa Hamed v. M.C.I.* (F.C.T.D., no. IMM-3425-97), Muldoon, March 10, 1999, to the same effect, which cited the Court of Appeal decision in *Thabet, supra*, footnote 80.

<sup>81</sup> *Nizar v. M.C.I.* (F.C.T.D., no. A-1-92), Reed, January 10, 1996, at 5.

<sup>82</sup> *Thabet, Marwan Youssef v. M.C.I.* (F.C.A., no. A-20-96), Linden, McDonald, Henry, May 11, 1998. Reported: *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 21 (C.A.).

<sup>83</sup> See Chapter 2, section 2.2.2.

<sup>84</sup> *Popov, Alexander v. M.C.I.* (F.C. no., IMM-841-09, Beaudry, September 10, 2009; 2009 FC 898.

[42] Although it is true that in *Thabet*, the Federal Court of Appeal creates a distinction between stateless individuals and those who do have a state, one must read further. The Court answered the certified question before it as follows:

In order to be found to be a Convention refugee, a stateless person must show that, on a balance of probabilities he or she would suffer persecution in any country of former habitual residence, and that he or she cannot return to any of his or her countries of former habitual residence. (*Thabet* at paragraph 30) [emphasis added]

[43] *Thabet* clearly set out that it is not sufficient to simply be unable to return to all countries of former habitual residence - the individual must prove that they will suffer persecution in one of those countries.

[44] In this case, [the claimants], being stateless individuals, must establish that they would suffer persecution in either Russia or the United States – their countries of former habitual residence and that they cannot return to the other. Although it is clear they cannot return to Russia, they have made their claim against the United States and as such must prove that they would suffer persecution in that country.

[45] In order to do so, they must prove not only a subjective fear but also an objective fear. This requires that they rebut the presumption of state protection and are “required to prove that they exhausted all the domestic avenues available to them before without success before claiming refugee status in Canada” (*Hinzman* at paragraph 46).

[46] Consequently, the RPD was correct in finding that the stateless Applicants must have exhausted all domestic avenues in order to establish that they have a well-founded fear of persecution in one of their countries of former habitual residence.

And more recently, in *Khattr*,<sup>85</sup> the court agreed with *Popov* that the presumption of state protection applies to stateless individuals.

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<sup>85</sup> *Khattr, Amani Khzaee v. M.C.I.* (F.C. no., IMM-3249-15), Zinn, March 22, 2016; 2016 FC 341.

## CHAPTER 6 - STATE PROTECTION

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## CHAPTER 7

### 7. CHANGE OF CIRCUMSTANCES, COMPELLING REASONS AND *SUR PLACE* CLAIMS

#### 7.1. CHANGE OF CIRCUMSTANCES

The issues dealt with in this chapter arise out of situations where the reasons why claimants fear returning to their country have changed from the time they fled. The changes can relate to the situation in the country of reference or the personal circumstances of the claimant.

Section 108(1) of the Act provides that:

108(1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances: ...

(e) the reasons for which the person sought refugee protection have ceased to exist.

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, treatment or punishment.

The wording of section 108 reflects the fact that the section provides the framework for cessation of status (i.e., s. 108(2) provides that the Minister may apply for cessation of status for any of the reasons in subsection (1)). However, it is clear that the determination of the claim by the RPD includes consideration of the situation both at the time of fleeing and at the time of the hearing. In other words, the question raised by a claim to refugee status is not whether the claimant had reasons to fear persecution in the past, but rather whether he or she now, at the time the claim is being decided, has good grounds to fear persecution in the future.

On the issue of whether the Board is required to notify the claimant that change of circumstances is an issue in the claim, there appears to be some disagreement in the case law. In *Alfarsy*,<sup>1</sup> the Court was of the view that since the definition of a Convention refugee is forward looking, there is no further obligation on the Board beyond indicating that “objective fear” is an issue in the claim and the changes are part of the evidence relating to the well foundedness of the claim. In a more recent case, *Buterwa*,<sup>2</sup> the Court, without deciding the issue, stated that it doubted that a separate notice of change of circumstances was required. On the other hand, in *Kerimu*,<sup>3</sup> the

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<sup>1</sup> *Alfarsy, Asma Haidar Jabir v. M.C.I.* (F.C., no. IMM-3395-02), Russell, December 12, 2003; 2003 FC 1461.

<sup>2</sup> *Buterwa, Bongo Tresor v. M.C.I.* (F.C., no. IMM-902-11), Mosley, October 19, 2011; 2011 FC 1181.

<sup>3</sup> *Kerimu, Calvin v. M.C.I.* (F.C., no. IMM-9793-04), Blanchard, February 28, 2006, 2006 FC 264. This case is followed in *Stankov, Todor Georgiev v. M.C.I.* (F.C., no. IMM-6712-05), Blais, August 6, 2006; 2006 FC 991; and in *Sarker, Sanjoy v. M.C.I.* (F.C., no. IMM-6418-13), de Montigny, December 3, 2014; 2014 FC 1168, where the Court agreed with the applicant that when a hearing is conducted by reverse order-questioning (member first, then counsel), “the person with the onus is no longer in control of the process and there is an

Court holds that notice must be given of issues that are determinative of the claim, including change of circumstances. Since the right to know the case is an issue of natural justice, it seems prudent for the Board to explicitly raise the issue of change of circumstances, especially where the issue might be determinative of the claim. It is however doubtful that the issue needs to be raised by a formal pre-hearing notice.

While the change in circumstances may negate the well foundedness of a claim, it may also create the conditions that would allow a claimant to establish a *sur place* claim (see section 7.3.).

### 7.1.1. Standard of Proof and Criteria

As in all other refugee claims heard by the Refugee Protection Division, the test of well-foundedness found in *Adjei*<sup>4</sup> applies to claims involving an assessment of changed or changing country conditions,<sup>5</sup> and the onus remains on the claimant to establish his or her claim (the onus shifts where the Minister applies for cessation of status).

Earlier jurisprudence generated a considerable body of case law in which divergent positions were taken on the applicability of the so-called “Hathaway test”<sup>6</sup> in assessing claims where there have been changes in country conditions since the claimant’s departure from his or her country of nationality.

The issue was clarified by the Court of Appeal in *Yusuf*,<sup>7</sup> which explicitly rejected the notion that there is a separate legal test by which the changed circumstances must be measured. Justice Hugessen stated for the Court:

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increased burden on the Board to ensure that issues which are determinative of the claim are raised at the hearing.”

<sup>4</sup> *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.).

<sup>5</sup> In *Stoyanov, Gueorgui Ivanov v. M.E.I.* (F.C.A., no. A-206-91), Hugessen, Mahoney, Décary, April 26, 1993, at 2, Justice Hugessen, speaking for the Court, stated: “... when the [Refugee] Division has a refugee claim before it, it must apply the test stated by this Court in *Adjei*, and not ... the test (assuming that it is different) that would apply to an application for loss of status (“cessation”) made by the Minister under s. 69.2. [now s. 108(2)]” Some decisions of the Trial Division, in the context of the debate on the “Hathaway test”, have taken the position that there may be a different (i.e., higher) standard of proof that is applied at a cessation hearing under section 69.2 of the *Immigration Act*, e.g., *Villalta, Jairo Francisco Hidalgo v. S.G.C.* (F.C.T.D., no. A-1091-92), Reed, October 8, 1993. See, however, *Youssef, Sawsan El-Cheikh v. M.C.I.* (F.C.T.D., no. IMM-990-98), Teitelbaum, March 29, 1999, which actually involved a cessation application, for a different view. See also *M.C.I. v. Serhan, Jaafar* (F.C.T.D., no. IMM-539-00), Dawson, September 19, 2001; 2001 FCT 1029, which held that the correct test on applications for cessation is whether changes occurred which rendered the previously established fear of persecution to be unfounded.

<sup>6</sup> See James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pages 200-203. When discussing the cessation clause, which has been incorporated into section 108(1)(e) of the *Immigration and Refugee Protection Act* and was previously found in section 2(2)(e) of the *Immigration Act*, Professor Hathaway stated that the changes must be shown to be of (1) substantial political significance, (2) truly effective, and (3) durable. This is the so-called three-prong “Hathaway test” referred to in the jurisprudence.

<sup>7</sup> *Yusuf, Sofia Mohamed v. M.E.I.* (F.C.A., no. A-130-92), Hugessen, Strayer, Décary, January 9, 1995. Reported: *Yusuf v. Canada (Minister of Employment and Immigration)* (1995), 179 N.R. 11 (F.C.A.). Leave to appeal to the S.C.C. denied June 22, 1995.

... the issue of so-called “changed circumstances” seems to be in danger of being elevated, wrongly in our view, into a question of law when it is, at bottom, simply one of fact. A change in the political situation in a claimant’s country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return there. That is an issue for factual determination and there is no separate legal “test” by which any alleged change in circumstances must be measured. The use of words such as “meaningful”, “effective” or “durable” is only helpful if one keeps clearly in mind that the only question, and therefore the only test, is that derived from the definition of Convention Refugee in s. 2 of the [*Immigration*] Act: does the claimant now have a well-founded fear of persecution?

In the subsequent decision of the Court of Appeal in *Rahman*,<sup>8</sup> Justice Robertson elaborated on this issue:

This Court has previously held in *Yusuf* ... that the issue of “changed circumstances” is essentially one of fact. Indeed, what is important is not so much the change as the actual circumstances existing in the claimant’s country of origin. The question is whether those circumstances support the claimant’s alleged well-founded fear of persecution.

In *Fernandopulle*,<sup>9</sup> the Court of Appeal confirmed that the question of changed country conditions is one of fact.

Although the Board may find, in appropriate cases, that even recent changes are sufficient to remove the basis of the claimant’s fear of persecution,<sup>10</sup> it should not rely on or give much, if

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<sup>8</sup> *Rahman, Sheikh Mohammed Mostafizur v. M.E.I.* (F.C.A., no. A-398-92), Hugessen, Létourneau, Robertson, March 3, 1995, at 1.

<sup>9</sup> *Fernandopulle, Eomal v. M.C.I.* (F.C.A., no. A-217-04), Sharlow, Nadon, Malone, March 8, 2005; 2005 FCA 91. In *Anthonipillai, Anton Jekathas v. M.C.I.* (F.C., no. IMM-1273-13), Simpson, June 25, 2014; 2014 FC 611, the Court rejected the applicant’s argument that the RPD had erred in not applying the three-pronged test (substantial, effective and durable) and noted that “the law is now clear that there is no such test... [see *Yusuf* and *Fernandopulle*].”

<sup>10</sup> In *Rahman, Faizur v. M.E.I.* (F.C.A., no. A-1244-91), Marceau, Desjardins, Létourneau, May 14, 1993, at 3, the ouster of President Ershad (in Bangladesh) followed by the electoral victory of the claimant’s party, in the view of Marceau J.A., “may, in themselves, recent though they have been, amount to a sufficient change of circumstances, given the basis of the fear on which the [claimant] relied.” However, in *Ahmed, Ali v. M.E.I.* (F.C.A., no. A-89-92), Marceau, Desjardins, Décary, July 14, 1993, Marceau J.A. cautioned that “the mere declarations of the new four-month old government that it favoured the establishment of law and order can hardly be seen, when the root of the [claimant’s] fear and the past record of the new government with respect to human rights violations are considered, as a clear indication of the meaningful and effective change which is required to expunge the objective foundation of the ... claim.” On the other hand, when dealing with changes of longer duration, in *Ofori, Beatrice v. M.E.I.* (F.C.T.D., no. IMM-3312-94), Gibson, March 14, 1995, the Court stated at 4: “Durability does not equate with permanence. ... the concept of meaningful and effective change implies an element of durability, not in an absolute sense but in a comparative sense ...” The Court came to a similar conclusion in *Castellanos, Julio Alfredo Vaquerano v. M.C.I.* (F.C.T.D., no. IMM-2082-94), Gibson, October 18, 1994. Reported: *Castellanos v. Canada (Minister of Citizenship and Immigration)* (1994), 30 Imm. L.R. (2d) 77 (F.C.T.D.), where Gibson J. stated at 80: “I know of no decision of this court that has adopted the position that changes must be: ‘... durable in the sense that there is no possible chance of a reversal in the future.’” Moreover, after conceding that “the situation was not perfect and that some unrest continued,” the

any, weight to changes that are short-lived, transitory, inchoate, tentative, inconsequential or otherwise ineffective in substance or implementation.<sup>11</sup>

In the context of a change in government, the Court in *Soe*<sup>12</sup> made an analogy to the analysis carried out when assessing state protection, which must be adequate at an operational level. The Court quashed the pre-removal risk assessment decision because, amongst other things, the Minister's delegate failed to consider if the recent regime change in Myanmar was durable and effective, and whether the democratic reforms were operational. The delegate "relied heavily on the fact that a democratic government was elected, without considering the quality of the institutions of the democratic government."

The changes which are being relied on as removing the reasons for the claimant's fear of persecution are not to be assessed in the abstract but for their impact on the claimant's particular situation.<sup>13</sup> The change in circumstances often relates to the conditions in the claimant's country of nationality, but it may also relate to the claimant's personal circumstances.<sup>14</sup>

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Court in *Belozerova, Natalia v. M.C.I.* (F.C.T.D., no. IMM-912-94), Simpson, May 25, 1995, stated at 4: "No one can predict the future and there is no doubt that, in situations charged with ethnic rivalry, there will always be some uncertainty."

<sup>11</sup> In *Abarajithan, Paramsothy v. M.E.I.* (F.C.A., no. A-805-90), Stone, MacGuigan, Linden, January 28, 1992, the CRDD was found to have relied incorrectly on tentative changes in Sri Lanka (cooperation between the Tigers and the Sri Lankan Army). In *Magana, Douglas Ivan Ayala v. M.E.I.* (F.C.T.D., no. A-1670-92), Rothstein, November 10, 1993 at 303-304, the Court categorized the articles published before or at the time of the three-month-old peace accord in El Salvador as "preliminary, tentative indications of the effect of the changes ... especially in light of contrary evidence ... that the peace process was in danger and death squad activity continued." In *Agyakwah, Elizabeth Lorna v. M.E.I.* (F.C.T.D., no. A-7-93), McKeown, December 10, 1993, the CRDD was found to have erred in relying on the lifting of the ban on political parties just two days prior to the hearing where no change of government had occurred and the poor human rights record of the Ghanaian government was longstanding. In *Antonio, Neto Xavier v. M.C.I.* (F.C.T.D., no. A-472-92), Noël, January 27, 1995, the CRDD erroneously relied on tentative changes in Angola: the peace accord was only a few days old; the same regime was in power; elections were supposed to take place in 18 months; a previous accord had failed; the accord contained no guarantee for former enemies of the regime. In *Chaudary, Imran Akram v. M.C.I.* (F.C.T.D., no. IMM-2048-94), Reed, May 4, 1995, the Court held, at 4, that the statement that "a greater possibility of stability" than existed previously did not carry "sufficient weight to counterbalance a finding that an objective basis would otherwise exist." In *Quaye, Sarah Adjoa v. M.C.I.* (F.C.T.D., no. IMM-3999-00), Tremblay-Lamer, May 23, 2001; 2001 FCT 518, the Court noted that "cultural and traditional norms [sic] do not change overnight," and that "the mere enactment of new laws" may not be in itself sufficient to remove the objective basis of the claim. In *Alfarsy, supra*, footnote 1, the Court stated that declarations of intent must be examined against the history of the conflict with a view to evaluating the likely permanence of the changes.

<sup>12</sup> *Soe, Than v. M.P.S.E.P.* (F.C. no. IMM-2957-17), Kane, May 30, 2018; 2018 FC 557 at paragraphs 114-122.

<sup>13</sup> *Rahman, Faizur supra*, footnote 10, at 2, per Marceau J.A.: "Whether a change of circumstances is sufficient for a fear of persecution to be no longer well-founded must naturally be determined in relation to the basis of and reasons for the fear relied on."

<sup>14</sup> See, for example, *Umana, Cesar Emilio Campos v. M.C.I.* (F.C. no. IMM-1434-02), Snider, April 2, 2003; 2003 FCT 393 where the claimant was targeted due to his relationship with his partner. Since the relationship had broken down since they arrived in Canada, the Court upheld the RPD's conclusion that this constituted a change in circumstances such that the claimant was no longer at risk.

### 7.1.2. Reasons and Assessment of Evidence

The Court of Appeal pointed out in *Ahmed*<sup>15</sup> that it is not sufficient for the Board to simply state that a change has taken place (e.g. the declarations of a new government), “without more explanation to establish that the appropriate legal principles were applied.” Where the changes are very recent, the evidence must be subjected to a detailed analysis to determine whether this change is significant enough to eliminate the claimant’s fear.<sup>16</sup>

In the decision of *Mohamed*,<sup>17</sup> Justice Denault of the Trial Division set out the following helpful checklist or approach:

... when making a finding on the issue of changes in circumstances the tribunal must, at least, turn its mind to the objective basis of the [claimant’s] fear of persecution, the alleged agents of persecution and the form or nature of the persecution feared in order to properly evaluate the effect of the change. This evaluation must relate to the particular circumstances of the [claimant] and the tribunal should provide a clear indication or explanation for its finding.

Although there is no requirement to cite every piece of evidence before it, the Refugee Protection Division’s reasons should demonstrate that it was not unduly selective, but rather has considered all of the relevant evidence, both that which supports a conclusion of changed country conditions and that which does not, in reaching its decision.<sup>18</sup> Moreover, before arriving at a conclusion on the impact of the changes on the claim the Board should have received evidence that relates specifically to the basis of the claimant’s fear of persecution.<sup>19</sup>

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<sup>15</sup> *Ahmed*, *supra*, footnote 10, per Marceau J.A.

<sup>16</sup> *Kifoueti, Didier Borrone Bitemo v. M.C.I.* (F.C.T.D., no. IMM-937-98), Tremblay-Lamer, February 11, 1999. In this case, as in *Vodopianov, Victor v. M.E.I.* (F.C.T.D., no. A-1539-92), Gibson, June 20, 1995, the changes were so recent that there was no evidence to indicate how the new regime would behave.

<sup>17</sup> *Mohamed, Mohamed Yasin v. M.E.I.* (F.C.T.D., no. A-1517-92), Denault, December 16, 1993, at 4.

<sup>18</sup> *Chowdhury, Mashiul Haq v. M.E.I.* (F.C.T.D., no. 92-A-6565), Noël, June 2, 1993; *Munkoh, Frank v. M.E.I.* (F.C.T.D., no. IMM-4056-93), Gibson, June 3, 1994; *Ventura, Simon Alberto v. M.E.I.* (F.C.T.D., no. IMM-6061-93), Cullen, October 5, 1994; *Hanfi, Aden Abdullah v. M.E.I.* (F.C.T.D., no. A-610-92), Gibson, March 31, 1995. In *Alam, Mohammed Mahfuz v. M.C.I.* (F.C.T.D., no. IMM-4883-97), McGillis, October 7, 1998, the Court held that the CRDD failed to consider the specific evidence that the claimant’s problems with the police and with goons of the BNP continued after the election of the Awami League.

<sup>19</sup> *Doganian, Rafi Charvarch v. M.E.I.* (F.C.A., no. A-807-91), Hugessen, MacGuigan, Décary, April 26, 1993. In *Moz, Saul Mejia v. M.E.I.* (F.C.T.D., no. A-54-93), Rothstein, November 12, 1993. Reported: *Moz v. Canada (Minister of Employment and Immigration)* (1993), 23 Imm. L.R. (2d) 67 (F.C.T.D), the claim was referred back to the CRDD to obtain evidence relating to the treatment of army deserters in El Salvador. See also *Vodopianov, supra*, footnote 16, and *Kifoueti, supra*, footnote 16, where the changes were so recent that there was no evidence to indicate how the new regime would behave. In *Alfarsy, supra*, footnote 1, the Court held that if the legal action against the claimants was politically based, there is no reason to assume that they would be treated differently from other party members who had previously suffered persecution, legal harassment and incarceration.

### 7.1.3. Post-Hearing Evidence

There is no obligation on the Refugee Protection Division to consider post-hearing evidence relating to changes in country conditions unless that evidence has been submitted by the claimant,<sup>20</sup> and accepted by the panel,<sup>21</sup> before the panel renders a final decision on the claim.

The Refugee Protection Division may, on its own motion, provide additional documents and reconvene a hearing into a claim that has not been concluded with a final decision, to hear evidence relating to changes in country conditions.<sup>22</sup>

## 7.2. COMPELLING REASONS

### 7.2.1. Applicability

In the *Obstoj*<sup>23</sup> decision, the Court of Appeal considered the issue of the applicability of the exception found in section 2(3) of the *Immigration Act* (“compelling reasons arising out of any past persecution for refusing to avail ...”), and held that this provision can be properly considered by the Refugee Division in hearings under section 69.1 of that Act [now s. 170 of IRPA].<sup>24</sup>

This principle continues to apply under the *Immigration and Refugee Protection Act (IRPA)*, where a similarly worded “compelling reasons” provision is found in section 108(4).

In *Isacko*,<sup>25</sup> the Federal Court stated that section 108(4) of IRPA is very similar to section 2(3) of the *Immigration Act* and therefore, the jurisprudence that developed with respect to section 2(3) of the former Act may be used as guidance in the interpretation of section 108(4) of IRPA. (The difference between the two provisions is that, under IRPA, “compelling reasons” may arise out of previous persecution, torture, treatment or punishment, while the *Immigration Act* referred only to previous persecution.)

In applying sections 96 and 97 of IRPA, the Federal Court has held that the compelling reasons exception only applies when there has been a determination that the person was a Convention refugee or a person in need of protection, and also that the conditions that led to that

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<sup>20</sup> *Hernandez, Alvaro Odilio Valladares v. M.E.I.* (F.C.A., no. A-210-90), Stone, Linden, McDonald, July 7, 1993.

<sup>21</sup> See rules 36, 43 and 50 of the *Refugee Protection Division Rules*.

<sup>22</sup> *M.E.I. v. Salinas, Marisol Escobar* (F.C.A., no. A-1323-91), Stone, MacGuigan, Henry, June 22, 1992. Reported: *Canada (Minister of Employment and Immigration) v. Salinas* (1992), 17 Imm. L.R. (2d) 118 (F.C.A.).

<sup>23</sup> *Canada (Minister of Employment and Immigration) v. Obstoj*, [1992] 2 F.C. 739 (C.A.), at 746.

<sup>24</sup> Although section 2(3) of the *Immigration Act* is framed as an exception to section 2(2)(e), there was no requirement for a formal determination of cessation of status in the context of a hearing under section 69.1 (as would be required in the context of a hearing under section 69.2 of that Act). The same can be said about section 108(4) of IRPA.

<sup>25</sup> *Isacko, Ali v. M.C.I.* (F.C., no. IMM-9091-03), Pinard, June 28, 2004; 2004 FC 890. The Court then went on to endorse the decision in *Shahid, Iqbal v. M.C.I.* (F.C.T.D., no. IMM-6907-93), Noël, February 15, 1995. Reported: *Shahid v. Canada (Minister of Citizenship and Immigration)* (1995), 28 Imm. L.R. (2d) 130 (F.C.T.D.), which was decided under the *Immigration Act*.

finding no longer exist.<sup>26</sup> In *Najdat*,<sup>27</sup> the Court rejected the notion that section 108(4) applies only if refugee protection has actually been conferred.

In order for the “compelling reasons” exception to apply the claimant does not need to show a *subsisting* well-founded fear of persecution or an ongoing subjective fear of persecution.<sup>28</sup> However, the claimant must first establish that he or she, at some point, would have met the definition of Convention refugee or person in need of protection.<sup>29</sup>

The “compelling reasons” exception arises only when the reasons for which the person sought protection “have ceased to exist”. Therefore, there must be a change in circumstances to trigger the consideration of this exception.<sup>30</sup> In *Cortez*,<sup>31</sup> the Trial Division held that the applicability of section 2(2)(e) and 2(3) of the *Immigration Act* was dependent on a finding that the claimant had a well-founded fear of persecution when the person left his or her country of nationality. The reasons for one’s fear of persecution have to have ceased thereafter for the compelling reasons exception to be triggered.<sup>32</sup>

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<sup>26</sup> *Martinez, Luis Amado Contreras v. M.C.I.* (F.C., no. IMM-3662-05), Noël, March 17, 2006; 2006 FC 343; *Lorne, Daniella Chandya v. M.C.I.* (F.C., no. IMM-3542-05), von Finckenstein, March 27, 2006; 2006 FC 384; and *Stapleton, Elizabeth Sylvia v. M.C.I.* (F.C., no. IMM-1315-06), Blanchard, November 1, 2006; 2006 FC 1320.

<sup>27</sup> *Najdat, Parviz v. M.C.I.* (F.C., no. IMM-3995-05), Russell, March 9, 2006; 2006 FC 302. The Court also rejected the argument “that the psychological trauma resulting from the lashing and treatment by Iranian authorities should give rise to a compelling reasons analysis under section 108(4) as a separate and distinct avenue for seeking protection, rather than an exception that should be considered where past persecution sufficient to qualify for refugee protection has been established and accepted but refugee status should not be conferred because the “reasons for the claim have ceased to exist.”

<sup>28</sup> In *Obstoj, supra*, footnote 23, at 748, Justice Hugessen stated that the exception applies, “...even though they may no longer have any reason to fear further persecution.” This interpretation was followed in *Hassan, Nimo Ali v. M.E.I.* (F.C.T.D., no. A-653-92), Rothstein, May 4, 1994.

<sup>29</sup> *Najdat, supra*, footnote 27.

<sup>30</sup> *Jairo, Marcos Amador Soto v. M.C.I.* (F.C., no. IMM-3864-13), de Montigny, June 26, 2014; 2014 FC 622.

<sup>31</sup> *Cortez, Delmy Isabel v. S.S.C.* (F.C.T.D., no. IMM-2482-93), McKeown, December 15, 1993, at 2. In *Sow, Kadiatou v. M.C.I.* (F.C., no. IMM-1493-11), Russell, November 16, 2011; 2011 FC 1313, the Court stated that s. 108 (4) is engaged when the reasons for the claim have ceased to exist due to changed country conditions, not a change in personal circumstances. However, this restriction does not appear to have been explicitly adopted in other cases. Other cases refer to the requirement for a change in country conditions but do not go on to explicitly exclude changes in personal circumstances.

<sup>32</sup> *Hassan, Noor 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.); *Brovina, Qefsere v. M.C.I.* (F.C., no. IMM-2427-03), Layden-Stevenson, April 29, 2004; 2004 FC 635; and *Kalumba, Banza v. M.C.I.* (F.C., no. IMM-8673-04), Shore, May 17, 2005; 2005 FC 680. There is some confusion in the pre-*Cihal, infra*, footnote 33, case law as to what point in time the claimant had to have met the requirements for Convention refugee. For example, in *Singh, Gurmeet v. M.C.I.* (F.C.T.D., no. IMM-75-95), Richard, July 4, 1995. Reported: *Singh, (Gurmeet) v. Canada (Minister of Citizenship and Immigration)* (1995), 30 Imm. L.R. (2d) 226 (F.C.T.D.), at 230, the Court referred to the fact that the claimant “might at one time have been a Convention refugee” (emphasis added). The principle of alienage, i.e., a claimant must be outside his or her country of origin, would necessitate that the person met the requirements of refugeehood at the time of departure from his or her country of origin, and that there was a subsequent change in circumstances, before the panel could consider the compelling reasons exception. The existence of past persecution does not automatically trigger the need to consider the application of the exception.



This interpretation was adopted by the Court of Appeal in *Cihal*,<sup>33</sup> where the Court confirmed that the CRDD was not required to consider whether past persecution constitutes compelling reasons under section 2(3) of the *Immigration Act*, where it determines that the claimant was not a Convention refugee at the time of departure from the country of nationality. The same approach would prevail under the *Immigration and Refugee Protection Act*.

In *Corrales*,<sup>34</sup> the Trial Division held that since the CRDD never made a determination that the claimant was a Convention refugee, having found that state protection was available in her country, there was no need for it to consider compelling reasons. The exception does not apply where the Board determines that the claimant has not established that they were at risk.<sup>35</sup> Thus, the “compelling reasons” exception need only be considered where the determination of the claim is based, in whole or part, on a change in country conditions.<sup>36</sup>

In *Guzman*,<sup>37</sup> the CRDD found, primarily based on the long delay in making their claims, that the claimants lacked a subjective fear. The Trial Division held that the fact that the CRDD then went on to consider changed country conditions, as an additional reason for which to reject the claim, did not eliminate or undermine its earlier finding that the claimants had no subjective fear of persecution. Justice Rothstein reasoned that:

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<sup>33</sup> *Cihal, Pavla v. M.C.I.* (F.C.A., no. A-54-97), Stone, Evans, Malone, May 4, 2000. See also *M.C.I. v. Dolamore, Jessica Robyn* (F.C.T.D., no. IMM-4580-00), Blais, May 1, 2001; 2001 FCT 421, where the Court held that the CRDD erred in not examining the issue of state protection regarding the claimant’s objective fear before considering whether there was a change of circumstances (and compelling reasons). In *Adjibi, Marcelle v. M.C.I.* (F.C.T.D., no. IMM-2580-01), Dawson, May 8, 2002; 2002 FCT 525, the Court held that the CRDD erred in not considering whether section 2(3) of the *Immigration Act* applied to the minors’ claims, since the principal claimant had been found to be persecuted and the claims of all of the claimants were dismissed on the basis of changed country conditions.

<sup>34</sup> *Corrales, Maria Cecilia Abarca v. M.C.I.* (F.C.T.D., no. IMM-4788-96), Reed, October 3, 1997. See also *Naivelt, Andrei v. M.C.I.* (F.C., no. IMM-9552-03), Snider, September 17, 2004; 2004 FC 1261. See also *Martinez*, and *Stapleton*, *supra*, footnote 26.

<sup>35</sup> In *Ortiz, Ligia Ines Arias v. M.C.I.* (F.C.T.D., no. IMM-4416-01), Pinard, November 13, 2002; 2002 FCT 1163, the CRDD determined that the claimant had not established that she was in fact at risk from her former employer. Since there were no changed country conditions, the exception did not apply. See also *Thiaw, Hamidou v. M.C.I.* (F.C., no. IMM-6877-05), Blais, August 14, 2006; 2006 FC 965, where the RPD determined that the claimant was a victim of discrimination and not persecution. The Court held that in the absence of a previous finding of persecution, the compelling reasons exception does not apply.

<sup>36</sup> In *Kudar, Peter v. M.C.I.* (F.C., no. IMM-2218-03), Layden-Stevenson, April 30, 2004; 2004 FC 648, the Court stated that:

... there may be situations where the board can be said to implicitly have found that a claimant was previously a refugee and, but for the changed country conditions, would still be a refugee. This is not such a case. The RPD found that police protection was available to Mr. Kudar. Thus, the board found that he was not a refugee. The changed country conditions do not apply. Nor does the exception of compelling reasons...

<sup>37</sup> *Guzman, Jesus Ruby Hernandez v. M.C.I.* (F.C.T.D., no. IMM-3748-97), Rothstein, October 29, 1998. *Note:* A distinction needs to be drawn between a case where the evidence shows that there was a fundamental lack of subjective fear, as in *Guzman*, and a case where there was once a subjective fear and that fear no longer exists because of a change of circumstances. In the latter case, the claimant can still argue that there are compelling reasons not to return him or her to the country of past persecution.

... paragraph 2(2)(e) and subsection 2(3) [of the *Immigration Act*, i.e., the “compelling reasons” exception] only come into play if there is a finding that the [claimants], at least at one time, were Convention refugees. I think this includes a finding that at one time they would have met the definition of Convention refugee. In the present case, there is no such finding.

The “compelling reasons” exception does not arise where a claimant’s factual evidence is not believed.<sup>38</sup>

A determination that the claimant had an internal flight alternative (IFA) when he left his or her country would preclude the application of the “compelling reasons” exception, since the person could not have been determined to be a Convention refugee.<sup>39</sup> In *Moore*,<sup>40</sup> the Trial Division held that the terms of reference for applying section 2(3) of the *Immigration Act* are changes in country conditions, and not changes in the personal circumstances of an individual claimant. The wording of that provision and section 108(1)(e) of *IRPA*, however, does not suggest that the changes are restricted to changes in country conditions.

### 7.2.2. Duty to Consider the “Compelling Reasons” Exception

In *Yamba*,<sup>41</sup> the Court of Appeal clarified the law in this area when it stated:

In summary, in every case in which the Refugee Division concludes that a claimant has suffered past persecution, but [there] has been a change of country conditions under paragraph 2(2)(e) [of the *Immigration Act*], the Refugee Division is obligated under subsection 2(3) to consider whether the evidence presented establishes that there are “compelling reasons” as contemplated by that subsection. This obligation arises whether or not the claimant expressly invokes subsection 2(3). That being said the evidentiary burden remains on the

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<sup>38</sup> *Gyamfuah, Cecilia v. M.E.I.* (F.C.T.D., no. IMM-3168-93), Simpson, June 3, 1994. Reported: *Gyamfuah v. Canada (Minister of Employment and Immigration)* (1994), 25 Imm. L.R. (2d) 89 (F.C.T.D.), at 94; *Abdul, Gamel v. M.C.I.* (F.C.T.D., no. IMM-1796-02), Snider, February 28, 2003; 2003 FCT 260. See also *Rahman, Kbm Abdur v. M.C.I.* (F.C., no. IMM-4634-06), Snider, July 3, 2007; 2007 FC 689, where the rationale was applied in relation to section 108(4) of *IRPA* since the Board did not believe the claimants’ fear of past persecution in their country (Bangladesh). Similarly, in *Krishan, Bal v. M.C.I.* (F.C. no. IMM-1113-18), McVeigh, November 29, 2018; 2018 FC 1203, the Court stated that it was a “condition precedent” that the claimant would have once qualified as either a Convention refugee or person in need of protection. Since the RPD disbelieved the claimant, there was no condition precedent for the application of the compelling reasons exception.

<sup>39</sup> *Sangha, Karamjit Singh v. M.C.I.* (F.C.T.D., no. IMM-1555-98), Reed, September 8, 1998; *Kalumba, supra*, footnote 32. In *Singh, Gurmeet v. M.C.I.*, *supra*, footnote 32, the Court held that, since the determination was based, in part, on a change of circumstances, the finding that the claimants had an IFA did not excuse the panel from considering the “compelling reasons” exception, given the past persecution and supporting medical report. In *Rabbani, Sayed Moheyudee v. M.C.I.* (F.C.T.D., no. IMM-236-96), Noël, January 16, 1997, the Court held that the CRDD had erred, for among other reasons, because its finding that the claimant had an IFA in Afghanistan was inconsistent with its implied finding that there must have been a fear of persecution throughout the country prior to the change of circumstances.

<sup>40</sup> *Moore, Clara v. M.C.I.* (F.C.T.D., no. IMM-682-00), Heneghan, October 27, 2000.

<sup>41</sup> *M.C.I. v. Yamba, Yamba Odette Wa* (F.C.A., no. A-686-98), Isaac, Robertson, Sexton, April 6, 2000.

claimant to adduce the evidence necessary to establish that he or she is entitled to the benefit of that subsection.<sup>42</sup>

The same principle would hold true with regard to section 108(4) of the *Immigration and Refugee Protection Act*.

It follows, therefore, that where the Board finds that the claimant has suffered no past persecution (explicitly or implicitly),<sup>43</sup> it is under no obligation to consider the compelling reasons exception.

In *Alfaka Alharazim*,<sup>44</sup> the Court provided the following guidance on this issue:

[31] ... it is settled law that the RPD is entitled to proceed directly to a forward-looking assessment of whether the applicant for refugee protection has a well-founded fear of future persecution, without first making a determination of whether a person has suffered past persecution and, if so, whether subsection 108(4) applies. ...

[44] That said, given the underlying spirit of subsection 108(4), I agree with the [claimants] that there may be some situations in which the nature of past

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<sup>42</sup> The principles in *Yamba*, *supra*, footnote 41, were recently confirmed in *Cabdi, Mhad Cali v. M.C.I.* (F.C., no. IMM-1365-15), Gleeson, January 8, 2016; 2016 FC 26, where the Court found the RAD's failure to consider the compelling reasons exception to be a reviewable error because the RAD decision reflected that the applicant had suffered past persecution, and that the reasons for which the applicant was seeking refugee protection had ceased to exist. Also see *Velez, Daniel Augusto Aristizabal v. M.C.I.* (F.C., no. IMM-3964-17), Brown, March 13, 2018; 2018 FC 290.

<sup>43</sup> See *Buterwa*, *supra*, footnote 2 and *Rajadurai, Kalaichelvan v. M.C.I.* (F.C., no. IMM-5030-12), Strickland, May 22, 2013; 2013 FC 532. In *Ravichandran, Karthik Mario v. M.C.I.* (F.C. no. IMM-313-17), Elliott, August 2, 2018; 2018 FC 811, in the context of an application in the Convention refugee abroad class, the Court found the visa officer erred by not considering the compelling reasons exception despite not making an explicit finding of past persecution or a change in circumstances. By accepting the truth of the applicants' allegations and then discussing the effect of the passage of time on the applicants' future fear, the condition precedent for considering the compelling reasons exception was implicitly met.

<sup>44</sup> *Alfaka Alharazim, Suleyman v. M.C.I.* (F.C., no. IMM-1828-09), Crampton, October 22, 2010; 2010 FC 1044. See also *Brovina*, *supra*, footnote 32, where the Court said that there was no need to make a finding of past persecution because the RPD properly made a forward-looking analysis and concluded that the claimant would not suffer future persecution. The Court noted that it was implicit in the RPD reasons that the panel had found that the claimant had not experienced past persecution. *Brovina* was distinguished in *Buterwa*, *supra*, footnote 2, where the Court stated that *Brovina* does not stand for the proposition that the Board does not have to consider whether the compelling reasons exception should be applied in every case in which it does not make an express finding of past persecution. In *Buterwa*, there was nothing in the RPD reasons to support a finding that the claimant had not experienced past persecution (as an 8 year-old he had witnessed the brutalization and rape of his mother and later had been brutalized and raped in a prison camp). The Court concluded that "[T]he member side-stepped the question of past persecution and proceeded directly to review present conditions in the DRC. This did not, in my view, absolve the Board from its statutory obligation to consider whether the applicant had established compelling reasons why he should not be required to go back there. That obligation was simply ignored. See also *Sabaratanam, Manivannan v. M.C.I.* (F.C., no. IMM-8703-11), Rennie, July 4, 2012, 2012 FC 844; *Kostrzewa, Grzegorz v. M.C.I.* (F.C., no. IMM-4563-11), Crampton, December 7, 2012; 2012 FC 1449, where the Court noted that there is no obligation on the Board to consider s. 108(4) unless (i) it has specifically found that the applicant has suffered past persecution; or (ii) there is *prima facie* evidence of past persecution that is so exceptional in its severity that it rises to the level of being "appalling" or "atrocious"; and *Rajadurai*, *supra*, footnote 43.

persecution is so severe that it would be contrary to that spirit and a reviewable error for anyone reviewing an application for refugee protection in such situations to fail to consider the potential applicability of that provision, notwithstanding the settled law that the focus of the assessment to be made under sections 96 and 97 of the IRPA is forward-looking in nature.

[53] ... it is appropriate to confine that category of situations to those that in which there *is prima facie* evidence of “appalling” or “atrocious” past persecution. In those cases, a decision-maker under the IRPA is required to perform an assessment under subsection 108(4) of the IRPA. In all other cases, a decision-maker may exercise discretion as to whether to perform such an assessment.

### 7.2.3. Meaning of “Compelling Reasons”

In *Obstoj*,<sup>45</sup> Justice Hugessen of the Court of Appeal held that section 2(3) of the *Immigration Act* – now section 108(4) of the *Immigration and Refugee Protection Act* – should be read

as requiring Canadian authorities to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e. those who have suffered such appalling persecution that their experience alone is compelling reason not to return them, even though they may no longer have any reason to fear further persecution.

The phrase “appalling persecution” in this context harks back to paragraph 136 of the UNHCR *Handbook*, which states in part:

It [i.e., the “compelling reasons” exception] deals with the special situation where a person may have been subjected to very serious persecution in the past and not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. ... The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognized that a person who— or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate.

Justice Hugessen went on to state, in *Obstoj* (at 748), that “[t]he exceptional circumstances envisaged by subsection 2(3) [of the *Immigration Act*] must surely apply only to a tiny minority of present day claimants.”<sup>46</sup>

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<sup>45</sup> *Obstoj*, *supra*, footnote 23, at 748.

<sup>46</sup> This caution was repeated in subsequent decisions of the Federal Court, e.g., *Cortez*, *supra*, footnote 31, at 2 (“in unusual circumstances”); *Yusuf*, *supra*, footnote 7, at 1-2 (“that very rare class of persons to whom this exceptional provision applies”). The following cases are examples of fact situations that have come before the Board over the years. In *Arguello-Garcia, Jacobo Ignacio v. M.E.I.* (F.C.T.D., no. 92-A-7335), McKeown, June 23, 1993 (amended reasons issued November 10, 1993). Reported: *Arguello-Garcia v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 285 (F.C.T.D.), the claimant had suffered serious physical and sexual abuse while in detention for 45 days, and his relatives had been killed. The CRDD decision rejecting his claim was overturned. In *Lawani, Mathew v. M.C.I.* (F.C.T.D., no. IMM-1963-99), Heneghan, June 26, 2000, the Court held that the CRDD erred when, after accepting the claimant’s evidence as credible, it found that there was insufficient evidence that his treatment was sufficiently appalling and atrocious. The claimant

The case law indicates that the threshold necessary to demonstrate “compelling reasons” is a high one. In *Nimo Ali Hassan*, Justice Rothstein stated:

While many refugee claimants might consider the persecution they have suffered to fit within the scope of subsection 2(3) [of the *Immigration Act*] it must be remembered that the nature of all persecution, by definition, involves death, physical harm or other penalties. Subsection 2(3), as it has been interpreted, only applies to extraordinary cases in which the persecution is relatively so exceptional, that even in the wake of changed circumstances, it would be wrong to return refugee claimants.<sup>47</sup>

The issue as to whether “compelling reasons” exist in a given case is a question of fact.<sup>48</sup> Each case must be assessed and decided on its own merits, based on the totality of the evidence.<sup>49</sup> However, the delineation of the concept of “compelling reasons” is a question of law.<sup>50</sup>

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was brutally and severely ill-treated by government agents while in detention, including being hung upside down for long periods of time, being burnt with hot irons and cigarette fire, being whipped on the back and being made to expose his genitalia to the guards who inserted broom sticks and needles into his penis. In *Gorria, Pablo Mauro v. M.C.I.* (F.C., no. IMM-3003-06), Beaudry, March 16, 2007; 2007 FC 284, the Court stated: “Sexual assault and physical assault such as that to which the applicant was subjected are not to be measured on a sliding scale of atrocity when the immutable factor giving rise to such victimization and human degradation, forms one of the very core characteristics enunciated and protected under Article 5 of the Declaration of Human Rights. ... Sexual assault is appalling and atrocious particularly in this instance where it is used as a tool by the police against the applicant’s sexual orientation. Similarly, physical assault and the form of prior persecution inflicted on the applicant were such that it was patently unreasonable for the Board to ask the applicant to return to not only his country, Argentina, but to his home city, Buenos Aires, where the events took place.” On the other hand, in *Siddique, Ashadur Rahman v. M.C.I.* (F.C.T.D., no. IMM-4838-93), Pinard, July 18, 1994, the Court upheld the CRDD’s finding that the torture the claimant had endured during his 15-day detention in Bangladesh in the early 1980s, albeit abhorrent, did not constitute atrocious persecution. In *E.T. v. S.S.C.* (F.C.T.D., no. IMM-3380-94), Gibson, June 1, 1995; [1995] F.C.J. No. 857, the Court upheld the CRDD’s finding that the claimant’s detention, torture, beatings and sexual assaults were not “sufficiently serious”, “atrocious” or “appalling” to warrant the application of section 2(3). See also similar findings in *R.E.D.G. v. M.C.I.* (F.C.T.D., no. IMM-2523-95), McKeown, May 10, 1996; [1996] F.C.J. No. 631, where the claimant had been abducted, beaten and raped; and *Nallbani, Ilir, v. M.C.I.* (F.C.T.D., no. IMM-5935-98), MacKay, June 25, 1999, where the claimant had been detained on five occasions, beaten, tortured, deprived of food and drink, and his life threatened. In *Gicu, Andrei Marian v. M.C.I.* (F.C.T.D., no. IMM-2140-98), Tremblay-Lamer, March 5, 1999, the Court pointed out that the events reported by the claimant (internment in a psychiatric hospital for a few months, two periods of imprisonment and beatings during his stays in prison) did not meet the test required by the case law in terms of the level of atrocity. In *Nwaozor, Justin Sunday v. M.C.I.* (F.C.T.D., no. IMM-4501-00), Tremblay-Lamer, May 23, 2001; 2001 FCT 517, the claimant’s father was killed, though not in the claimant’s presence, and his brother shot by unknown persons; the claimant and other family members had been beaten and harassed by the Nigerian army on three occasions over a 6-month period. The Court upheld the CRDD’s finding that this did not meet the high standard of “atrocious and appalling”.

<sup>47</sup> *Hassan, supra*, footnote 32, at 5-6.

<sup>48</sup> *Shahid, supra*, footnote 25, at 138; *Hitimana, Gustave v. M.C.I.* (F.C.T.D., no. IMM-5804-01), Pinard, February 21, 2003; 2003 FCT 189; *Isacko, supra*, footnote 25.

<sup>49</sup> *Suleiman, Juma Khamis v. M.C.I.* (F.C., no. IMM-1439-03), Martineau, August 12, 2004; 2004 FC 1125. Reported: *Suleiman v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 F.C.R. 26 (F.C.).

<sup>50</sup> *Kotorri, Rubin v. M.C.I.* (F.C., no. IMM-1316-05), Beaudry, September 1, 2005; 2005 FC 1195. As such the Board has no specific expertise in this task.

In *Shahid*,<sup>51</sup> the Federal Court set out the relevant considerations for determining whether “compelling reasons” exist:

The board, once it embarked upon the assessment of the applicant’s claim under subs. 2(3) [of the *Immigration Act*], had the duty to consider the level of atrocity of the acts inflicted upon the applicant, the repercussions upon his physical and mental state, and determine whether this experience alone constituted a compelling reason not to return him to his country.

#### 7.2.4. Adequacy of Reasons for Decision

In *Adjibi*,<sup>52</sup> the Trial Division stressed that the reasons given by the CRDD for concluding that section 2(3) of the *Immigration Act* does not apply must be adequate. In that case, the reasons of the CRDD were simply that there was “insufficient evidence” to warrant the application of section 2(3). The Court found that it was not clear what the panel meant when it spoke of “insufficient evidence”. Secondly, the panel must provide a sufficiently intelligible explanation as to why persecutory treatment does not constitute compelling reasons. (The claimant was found to have been raped repeatedly and was diagnosed with Post-Traumatic Stress Disorder.) This requires thorough consideration of the level of atrocity of the acts inflicted upon the claimant, the effect on her physical and mental state, and whether the experiences and their sequelae constitute a compelling reason not to return her to her country of origin.<sup>53</sup>

The Refugee Protection Division is required to assess whether or not the nature of the persecution in a particular case before it constitutes “compelling reasons”, and it must explain why the reprehensible treatment, does or does not meet the requirements of section 108(4) of *IRPA*.<sup>54</sup> Thus, if the Board finds the treatment received by the claimant to be “revolting” or “vile and reprehensible”, as it did in *Biakona*,<sup>55</sup> it should go on to state (which it failed to do in that case) why it concluded that the acts committed cannot be considered compelling reasons.

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<sup>51</sup> *Shahid*, *supra*, footnote 25, at 138. This approach was cited with approval in *Adjibi*, *infra*, footnote 33; and, in relation to *IRPA*, in *Isacko*, *supra*, footnote 25. In *Shahid*, the Court (at 136) also set out a summary of the state of the case law based on *Arguello-Garcia*, *supra*, footnote 46, however some of those propositions, especially the second one (relating to ongoing subjective fear), are in doubt, as shown by the discussion earlier in the text of this chapter (section 7.2.1).

<sup>52</sup> *Adjibi*, *supra*, footnote 33.

<sup>53</sup> *Shahid*, *supra*, footnote 25.

<sup>54</sup> *Igbalajobi, Buki v. M.C.I.* (F.C.T.D., no. IMM-2230-00), McKeown, April 18, 2001; 2001 FCT 348.

<sup>55</sup> *Biakona, Leonie Bibomba v. M.C.I.* (F.C.T.D., no. IMM-1706-98), Teitelbaum, March 23, 1999. See also *Quintero Guzman, Jean Pierre Hernan v. M.C.I.* (F.C., no. IMM-2458-08), Kelen, December 1, 2008; 2008 FC 1329, where the RPD decision was overturned for failing to provide an explanation of why the abhorrent attack was insufficient to trigger the application of s. 108(4). See also *Suleiman*, *supra*, footnote 49. In *Kulla, Saimir v. M.C.I.* (F.C., no. IMM-6837-03), von Finckenstein, August 24, 2004; 2004 FC 1170, the Court upheld the Board’s finding that the incidents were merely “abhorrent” but not sufficiently atrocious or appalling to trigger the “compelling reasons” exception. See also, to the same effect, *Oprysk, Vitaliy v. M.C.I.* (F.C., no. IMM-5441-06), Mandamin, March 7, 2008; 2008 FC 326.

### 7.2.5. Level or Severity of Harm

In the *Moya*<sup>56</sup> case, the Court dealt with the issue of the level of severity required for compelling reasons to apply and noted the two approaches that have emerged in the jurisprudence, the narrow one based on *Obstoj*, which requires a finding that the persecution be “atrocious” or “appalling”, and the broader one based on cases such as *Suleiman*,<sup>57</sup> which adopts a factual determination of “compelling reasons” based on all the circumstances of the case, including a consideration of the trauma caused by repatriation. The Court in *Moya* does not explicitly adopt one test over the other although it does seem to state that the preponderance of the case law adopts *Obstoj* as the correct test:

[129] However, if the RAD had imposed the atrocious and appalling threshold, I would not find that it erred in law. The RAD cannot be faulted for relying on the jurisprudence that reflects that the level of atrocity of past persecution must be considered and the preponderance of the jurisprudence that reflects that appalling and/or atrocious past persecution is the high threshold required to establish compelling reasons. The RAD considered *Suleiman*; however, since *Suleiman* and *Kotorri* were decided in 2004 and 2005, other jurisprudence has continued to refer to appalling and atrocious past persecution to guide determinations of whether an applicant has established compelling reasons.

As noted, the jurisprudence has not been consistent on the issue of whether the previous persecution (or treatment under section 97(1) of *IRPA*) must reach the level of being “atrocious” or “appalling” for the “compelling reasons” exception to apply. The standard imported by words such “atrocious” and “appalling” (this language is found in the Court of Appeal decision in *Obstoj* and the UNHCR *Handbook*) has been applied in numerous Federal Court decisions to describe the level of past persecution required for “compelling reasons”, for example, *Arguello-Garcia*, *Hassan*, *Shahid*, *Nwazoor*, *Isacko*, *Saimir Kulla*, among others. One case held that the words “appalling” and “atrocious” are proper interpretative aids to guide the Board (*Adjibi*). Another line of cases, however, has questioned whether the *Obstoj* decision established such a test or has held that it did not: *Hasan Kulla*, *Dini*, *Elemah*, *Suleiman*, *Kotorri*. In *Shpati*,<sup>58</sup> the Court stated, in *obiter*, that there is no jurisprudence that raises a doubt about the correctness of the “appalling and atrocious” test.

In *Arguello-Garcia*, in assessing the “objective factors” (i.e., the nature and severity of the claimant’s experiences), the Trial Division turned to dictionary definitions of “atrocious” and “appalling” for guidance on the issue of what may be considered sufficiently serious persecution to find “compelling reasons”.<sup>59</sup>

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<sup>56</sup> *Moya, Silvia Myrian v. M.C.I.* (F.C., No. IMM-2227-15), Kane, March 14, 2016; 2016 FC 315.

<sup>57</sup> *Suleiman, supra*, footnote 49, this decision was followed in *Kotorri, supra*, footnote 50.

<sup>58</sup> *Shpati, Zef v. M.C.I.* (F.C., no. IMM-1801-06), Snider, March 1, 2007; 2007 FC 237.

<sup>59</sup> *Arguello-Garcia, supra*, footnote 46, at 288-289, per McKeown J.: “*The Concise Oxford Dictionary of Current English*, Clarendon Press, Oxford, 1990, contains the following definitions: “atrocious”: 1 very bad or unpleasant ... 2 extremely savage or wicked (atrocious cruelty). “Atrocity”: 1 an extremely wicked or cruel act, esp. one involving physical violence or injury ... “appalling”: shocking, unpleasant; bad.”

In *Hasan Kulla*,<sup>60</sup> however, the Court held that the issue is not whether the claimant's past experience could be characterized as "atrocious" and "appalling", descriptions found in other jurisprudence, but rather, as Justice Reed stated in *Dini*:<sup>61</sup> "If the person establishes there are compelling reasons arising out of any previous persecution for refusing to avail himself of the protection of the country that the person left."

In a subsequent judicial review of *Dini*, it was argued that Justice Reed implicitly determined that under section 2(3) of the *Immigration Act*, the treatment might not have to reach the level of "appalling" or "atrocious". The confusion in the case law of the Trial Division regarding the issue of the proper test to assess "compelling reasons" led the Court to certify a question.<sup>62</sup> Subsequently, in *Elemah*,<sup>63</sup> the Trial Division held that *Obstoj* did not establish a test which necessitates that the persecution reach a level to qualify it as "atrocious" and "appalling".

In *Adjibi*,<sup>64</sup> the Trial Division concluded that it did not have to consider whether in every case the standard of "compelling reasons" is subsumed in an inquiry into prior "appalling" and "atrocious" persecution. In view of the evidence before the CRDD (the claimant had been raped repeatedly), the words "appalling" and "atrocious" were proper interpretative aids to guide the CRDD as to whether the evidence supported the claimant's submission that compelling reasons existed not to return her to her country.

The issue arose again in *Suleiman*,<sup>65</sup> where the Federal Court reiterated that section 104(8) of *IRPA* does not require a determination that the acts or situation be "atrocious" or "appalling". The issue is whether, considering the totality of the situation, i.e., humanitarian grounds, unusual or exceptional circumstances, it would be wrong to reject the claim in the wake of a change of circumstances. Consideration should be given to the claimant's age, cultural background and previous social experiences. Being resilient to adverse conditions will depend on a number of factors which differ from one individual to another. Past acts of torture and extreme acts of mental abuse, alone, in view of their gravity and seriousness, can be considered "compelling reasons" despite the fact that these acts have occurred many years before.

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<sup>60</sup> *Kulla, Hasan v. M.C.I.* (F.C.T.D., no. IMM-4707-99), MacKay, August 24, 2000, Justice MacKay commented:

In this case, while I am persuaded that the panel's conclusion is not adequately explained, having found the claimant's past experience to be 'cruel and harsh' but not 'atrocious' and 'appalling', ultimately, in my opinion the panel did not address the issue that was raised.

<sup>61</sup> *Dini, Majlinda v. M.C.I.* (F.C.T.D., no. IMM-3562-98), Reed, June 24, 1999.

<sup>62</sup> In *Dini, Majlinda v. M.C.I.* (F.C.T.D., no. IMM-2596-00), Gibson, March 22, 2001; 2001 FCT 217, the Court certified the following question:

In relation to a determination under s. 2(3) of the *Immigration Act*, does a finding of "compelling reasons" require a finding of "appalling" or "atrocious" past persecution?

The appeal in this case was dismissed by the Court of Appeal on May 21, 2002 because the appeal record was not filed on time.

<sup>63</sup> *Elemah, Paul Omorogbe v. M.C.I.* (F.C.T.D., no. IMM-2238-00), Rouleau, July 10, 2001; 2001 FCT 779.

<sup>64</sup> *Adjibi, supra*, footnote 33.

<sup>65</sup> *Suleiman, supra*, footnote 49. This decision was followed in *Kotorri, supra*, footnote 50.



## 7.2.6. Psychological After-Effects

Evidence – usually in the form of a medical report or psychological assessment – of present psychological and emotional suffering can be used to demonstrate that the claimant continues to suffer the effects of past persecution (or s.97 harms). Evidence of continuing psychological after-effects, or its absence,<sup>66</sup> is relevant to a determination of whether there are compelling reasons, however, the existence of such evidence is not a separate test that has to be met.

In *Mwaura*,<sup>67</sup> the Court held that s. 108(4) does not require a psychological report from all those claiming compelling reasons for the following reasons: (1) it runs contrary to well-established jurisprudence; (2) it unreasonably fetters the discretion of the decision-maker; and (3) it imposes too high a burden on refugee claimants.

In *Arguello-Garcia*, the Federal Court stated that in considering the particular persecution experienced, as well as the reasons for it, the Board should also take into account the negative or psychological effect of past persecution.<sup>68</sup> Since such evidence is supportive of the existence of compelling reasons, it should not be disregarded.

In *Jiminez*,<sup>69</sup> Justice Rouleau held that the jurisprudence does not support the proposition that there is a further requirement of establishing continuing psychological after-effects of previous persecution, once there is evidence the claimant suffered “atrocious” or “appalling” acts of persecution. While evidence of continuing psychological after-effects is relevant to a determination of the issue, it is not a separate test that has to be met.

In *Hinson*,<sup>70</sup> the Court stated: “The criteria to be considered are the psychological and emotional states of the claimant both at the time of the persecution and at the present time as a result of the persecution.” It then directed the CRDD to consider “the negative or psychological effects of past persecution as well as present psychological and emotional suffering as a result of past persecution.”

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<sup>66</sup> In *Kazi, Feroz Adeel v. M.C.I.* (F.C.T.D., no. IMM-850-97), Pinard, August 15, 1997, the Court upheld a CRDD decision where the claimant did not provide evidence that he suffered continuing psychological after-effects of the previous persecution.

<sup>67</sup> *Mwaura, Anne v. M.C.I.* (F.C., no. IMM-7462-14), Brown, July 16, 2015; 2015 FC 874.

<sup>68</sup> *Arguello-Garcia*, *supra*, footnote 46, at 289. See also *Adaros-Serrano, Maria Macarena v. M.E.I.* (F.C.T.D., no. 93-A-124), McKeown, September 31, 1993. Reported: *Adaros-Serrano v. Canada (Minister of Employment and Immigration)* (1993), 22 Imm. L.R. (2d) 31 (F.C.T.D.), at 38, where the Court directed the CRDD to consider (at the rehearing of the claim) the fact that the claimant suffered from a post-traumatic stress disorder.

<sup>69</sup> *Jiminez, Wilfredo v. M.C.I.* (F.C.T.D., no. IMM-1718-98), Rouleau, January 25, 1999. Relying on the evidence presented, the CRDD had concluded that the claimant’s psychological state at the time of the hearing was premised on the severe brain injury he had suffered in Canada and possibly on contributing factors such as alcohol and drugs, and that, therefore, “there was insufficient evidence upon which to base a finding that the [claimant’s] experience of persecution in El Salvador was so exceptional that it causes ongoing suffering of the order experienced by the applicant in *Arguello-Garcia*, *supra*, footnote 46.” The Court found that the CRDD had erred in its approach and remitted the case back for a determination of whether or not the claimant’s experiences in El Salvador alone met the exceptional circumstances envisioned by section 2(3) of the *Immigration Act*.

<sup>70</sup> *Hinson, Jane Magnanang v. M.C.I.* (F.C.T.D., no. IMM-5034-94), Richard, July 18, 1996, at 5-6.

In *Hitimana*,<sup>71</sup> although the claimant contended that the incidents he had experienced resulted in trauma (as a teenager, 5-7 years before his arrival in Canada, he witnessed the murder and disappearance of close family members in Rwanda), neither he nor an expert substantiated this statement. Moreover, as the claimant demonstrated that he could adapt well and was resourceful, it was not patently unreasonable to conclude that he was not suffering from any psychological trauma that constituted a compelling reason.

If the Refugee Protection Division accepts the claimant's description of his or her treatment, and the medical and psychological reports are consistent with that description, a delay in seeking medical treatment does not appear to be a relevant factor.<sup>72</sup>

### 7.2.7. Persecution of Others and Other Factors

The Court has also held that the Board may take into account the experiences of family members in its assessment of "compelling reasons."<sup>73</sup> According to *Velasquez*, persecution of a family member can of itself be sufficient to constitute "compelling reasons".<sup>74</sup> However, the *obiter* comment in *Velasquez* was not followed in *Saimir Kulla*,<sup>75</sup> where the Federal Court held that the claimant must suffer the mistreatment directly. In the most recent case of *Villegas Echeverri*,<sup>76</sup> the Court referred to paragraph 136 of the *UNHCR Handbook* and noted that the past persecution contemplated in the second paragraph of Article C(5) of the Convention (which is equivalent to s.108(4) of IRPA) extends to persecution of family members of the refugee claimant. As the Court explains in paragraph 37:

...where the *prima facie* evidence of "appalling" or "atrocious" past persecution concerns the past persecution of an immediate family member, there must also be credible evidence that could establish either some direct past

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<sup>71</sup> *Hitimana*, *supra*, footnote 48. In *Gicu*, *supra*, footnote 46, the Court noted that, given the claimant's adaptability and resourcefulness, it was difficult to conclude he had suffered from a psychological trauma so severe that he continued to be affected by it nearly ten years after it had occurred. See also *Isacko*, *supra*, footnote 25, where the Court held that the Board did not err in its conclusion that the claimant had not proven that he suffered permanent psychological consequences of the level required for section 108(4) of IRPA.

<sup>72</sup> *Igbalajobi*, *supra*, footnote 54. In *Hinson*, *supra*, footnote 70, the Court held that it was improper to draw an adverse inference from the fact that the claimant delayed in obtaining a medical report, especially when the report in question diagnosed post-traumatic stress syndrome; nor does a delay in seeking psychological treatment in such a case mean that there was no adverse psychological effect.

<sup>73</sup> *Arguello-Garcia*, *supra*, footnote 46.

<sup>74</sup> In *Velasquez, Ana Getrudiz v. M.E.I.* (F.C.T.D., no. IMM-990-93), Gibson, March 31, 1994, the Court stated, in *obiter*, that a finding of "compelling reasons" may be based on the persecution inflicted on a family member (spouse). In *Bhardwaj, Shanti Parkash v. M.C.I.* (F.C.T.D., no. IMM-240-98), Campbell, July 27, 1998. Reported: *Bhardwaj v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm. L.R. (2d) 192 (F.C.T.D.), the CRDD applied section 2(3) of the *Immigration Act* to the eldest daughter of a family of claimants because she was profoundly affected by witnessing the shooting of her mother, but denied the other claims, including the mother's. The Court found that the CRDD disregarded psychiatric evidence regarding the effect of the incident on the mother.

<sup>75</sup> *Kulla, Saimur*, *supra*, footnote 55.

<sup>76</sup> *Villegas Echeverri, Clara Ines v. M.C.I.* (F.C., no. IMM-4046-10), Crampton, March 30, 2011; 2011 FC 390.

persecution of the specific applicant for refugee protection, or persecution of that person's family as a social group.

The generalized character of past persecution in a particular country should not serve as a bar to the application of the "compelling reasons" exception.<sup>77</sup> A brief return to the country of alleged persecution does not necessarily preclude the application of the "compelling reasons" exception.<sup>78</sup>

In *Adjibi*,<sup>79</sup> the Trial Division held that the CRDD was not obliged to consider section 2(3) of the *Immigration Act* in respect of the incidents that took place when the claimant, a national of the Congo, resided in South Africa. Persecutory treatment in another country cannot justify a refusal to avail oneself of the protection of one's home country. However, these events may exaggerate or amplify the effect of the persecutory conduct, and the Board must take refugee claimants as they are at the time of the hearing before the Board in order to determine whether the claimant should not be expected to repatriate. In this case, the CRDD would properly have had regard to the cumulative effect on the claimant of the events she experienced both in the Congo and South Africa.

### 7.3. SUR PLACE CLAIMS

A claimant may be a refugee as a consequence of events which have occurred in his or her country of origin since departure,<sup>80</sup> or because of a significant intensification of pre-existing factors since departure from his or her country.<sup>81</sup>

In a *sur place* claim based on the insecurity in the country of reference (in this case<sup>82</sup> it was the major upheaval that occurred in Tunisia after the claimants left their country), the Court agreed with the RPD that there was no connection between that situation and the claim for refugee protection and that the claimants were affected to the same degree as all the citizens of their

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<sup>77</sup> *Hitimana, supra*, footnote 48; *Suleiman, supra*, footnote 49.

<sup>78</sup> In *Aragon, Luis Roberto v. M.E.I.* (F.C.T.D., no. IMM-4632-93), Nadon, August 12, 1994, the Court held that the CRDD had not properly considered the circumstances surrounding the claimant's return to El Salvador (namely, to see his mother). The torture he experienced had also occurred during an earlier visit, but this too was held not to be a bar to invoking section 2(3) of the *Immigration Act*. But see *Ahmed, Jawad v. M.C.I.* (F.C., no. IMM-6673-03), Mosley, August 5, 2004; 2004 FC 1076, where the Court upheld the Board's finding that compelling reason did not exist, noting that the claimant's voluntary return to his country was indicative of a lack of subjective fear. See also the discussion on reavailment in chapter 5, section 5.5.

<sup>79</sup> *Adjibi, supra*, footnote 33. See also *M.C.I. v. Munderere, Bagambake Eugene* (F.C.A., no. A-211-07), Décary, Létourneau, Nadon, March 5, 2008; 2008 FCA 84, which is discussed in chapter 2, section 2.1.1. Multiple Nationalities.

<sup>80</sup> *Chaudri, Tahir Ahmad Nawaz v. M.E.I.* (F.C.A., no. A-1278-84), Thurlow, Hugessen, McQuaid, June 5, 1986. Reported: *Chaudri v. Canada (Minister of Employment and Immigration)* (1986), 69 N.R. 114 (F.C.A.); *Diallo, Abdou Salam v. M.C.I.* (F.C.T.D., no. A-1157-92), Noël, June 8, 1995.

<sup>81</sup> *Ghazizadeh, Reza v. M.E.I.* (F.C.A., no. A-393-90), Hugessen, MacGuigan, Décary, May 17, 1993. Reported: *Ghazizadeh v. Canada (Minister of Employment and Immigration)* (1993), 154 N.R. 236 (F.C.A.).

<sup>82</sup> *Ben Zaid, Ali v. M.C.I.* (F.C., no. IMM-7171-11), Boivin, June 18, 2012; 2012 FC 771.

country. Claims may also be advanced based, in whole or part, on the activities of the claimant since leaving his or her country.<sup>83</sup>

Some cases have held that the Board is not required to deal with the issue of whether the claimant is a refugee *sur place* where it determines that the basis of the claim is not credible.<sup>84</sup> However, other cases hold that the Board should consider the *sur place* claim even when it does not believe the account of the experiences in the home country.<sup>85</sup> The failure to assess the *sur place* claim can be a reviewable error.<sup>86</sup> It is an error to totally discount the evidence relating to the *sur place* claim without explaining why.<sup>87</sup>

In *Alfaro*,<sup>88</sup> the Court overturned the decision of the RPD because the RPD framed its analysis of the claim entirely on the breach of the Cuban exit laws and failed to consider that the catalyst for the claim for protection was the letter from the Cuban government which the claimant received before the expiration of his exit visa. The claim required analysis both as a *sur place* claim and as a breach of exit laws. In a *sur place* claim, while it is correct to inquire into the potential request for state protection, it is incorrect to require the claimant to have already pursued state protection.<sup>89</sup>

The fact that the claimant's departure from his or her homeland may have been perfectly legal is not relevant when considering a *sur place* possibility. What is required is an assessment of the situation in the country of origin after the claimant left it.<sup>90</sup>

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<sup>83</sup> *Urur, Mohamed Ahmed v. M.E.I.* (F.C.A., no. A-228-87), Pratte, Joyal, Walsh, January 15, 1988. In *Cai, Heng Ye v. M.C.I.* (F.C.T.D., no. IMM-1088-96), Teitelbaum, May 16, 1997, the Court underscored the importance of considering the claimant's activities both in the home country and abroad in combination.

<sup>84</sup> *Barry, Abdoulaye v. M.C.I.* (F.C.T.D., no. IMM-573-01), Pinard, February 26, 2002; 2002 FCT 203; *Ghribi, Abdelkarim Ben v. M.C.I.* (F.C., no. IMM-2580-02), Blanchard, October 14, 2003; 2003 FC 1191; *Lai, Li Min v. M.C.I.* (F.C., no. IMM-1849-04), Simpson, February 8, 2005; 2005 FC 179.

<sup>85</sup> *Manzila, Nicolas v. M.C.I.* (F.C.T.D., no. IMM-4757-97), Hugessen, September 22, 1998. See also *A. B. v. M.C.I.* (F.C., no. IMM-3497-08), Gibson, March 27, 2009; 2009 FC 325. Reported: *A.B. v. Canada (Minister of Citizenship and Immigration)*, [2010] 2 F.C.R. 75 (F.C.), a PRRA case involving a claimant who rejected Islam after he came to Canada.

<sup>86</sup> *Demirtas, Alev v. M.C.I.* (F.C., no. IMM-1781-10), O'Keefe, May 19, 2011; 2011 FC 584. See also *Hannoon, Rami v. M.C.I.* (F.C., no. IMM-3079-11), O'Keefe, April 18, 2012; 2012 FC 448, where the Court noted that "once a *sur place* claim was present, it was for the Board to deal with it ...and should have considered the evidence and arguments presented." In *Gurung, Subash v. M.C.I.* (F.C., no. IMM-10808-12), Mosley, October 16, 2013; 2013 FC 1042, the Court allowed the judicial review application because the RPD failed to deal with the *sur place* claim. Although the *sur place* claim was raised late, the issue was squarely put before the Board at the hearing and in post-hearing evidence. In *Desalegn, Tiruedel v. M.C.I.* (F.C. no., IMM-2400-16), Russell, November 25, 2016; 2016 FC 1311, the Court held that where an appellant raises a *sur place* issue in her submissions to the RAD, the RAD should consider the issue. The same obligation applies to a PRRA officer, see *Reyad Gad, Malak Lofti v. M.C.I.* (F.C., no. IMM-4714-10), Harrington, March 14, 2011; 2011 FC 303.

<sup>87</sup> *Huang, Xiao Fang v. M.C.I.* (F.C., no. IMM-3396-11), Zinn, February 10, 2012; 2012 FC 205. In this case, the evidence that was discounted without an explanation related to the claimant's current religious beliefs.

<sup>88</sup> *Alfaro, Victor Labrador v. M.C.I.* (F.C., no. IMM-7390-10), Rennie, July 22, 2011; 2011 FC 912.

<sup>89</sup> *Nasha Ragguette, Onica Efuru v. M.C.I.* (F.C., no. IMM-7214-10), Rennie, December 21, 2011; 2011 FC 1511.

<sup>90</sup> *Ghazizadeh, supra*, footnote 81.

In *Tang*,<sup>91</sup> the Trial Division pointed out that, in the case of a *sur place* claim, the relevant date to assess a delay in making a refugee claim is the date as of which the claimant became aware that he or she would allegedly face persecution on return to the country of nationality, and not the date on which the claimant arrived in Canada.

A claimant may become a refugee *sur place* by virtue of the actions of Canadian authorities in that person's home country.<sup>92</sup>

### 7.3.1. Claimant's Activities Abroad

According to paragraph 96 of the UNHCR *Handbook*, the key issues in cases based on the claimant's activities since leaving his or her home country are "whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities." Even though a claimant's actions subsequent to departure may have come to the attention of the authorities there, it may nevertheless be that, in the circumstances, those actions do not give rise to a well-founded fear of persecution.<sup>93</sup>

In *Zhu*,<sup>94</sup> the Trial Division held that once the evidence established that the claimant's information was given to counsel for the accused, and filed in evidence at a public trial in Canada and in publicly accessible court records, it was patently unreasonable for the CRDD to suggest that further evidence was required to establish that the information actually came to the attention of a potential agent of persecution in the claimant's country of origin. In the Court's view, that is too high a requirement to establish more than a mere possibility of persecution.

In *Win*,<sup>95</sup> the Court held that the standard to be used in assessing evidence relating to a *sur place* claim is likelihood, or balance of probabilities, that is, whether the claimant's activities were likely to come to the attention of the authorities of his or her country.

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<sup>91</sup> *Tang, Xiaoming v. M.C.I.* (F.C.T.D., no. IMM-3650-99), Reed, June 21, 2000.

<sup>92</sup> In *M.C.I. v. Asaolu, Daniel Oluwafemi* (F.C.T.D., no. IMM-237-98), Campbell, July 31, 1998. Reported: *Canada (Minister of Citizenship and Immigration) v. Asaolu* (1998), 45 Imm. L.R. (2d) 190 (F.C.T.D.), Canadian immigration authorities sent the claimant's story and photograph to a Canadian visa officer in Nigeria to facilitate an investigation of his claim of persecution. The Court considered paragraphs 94-96 of the UNHCR *Handbook*. In *Mutamba, Phydellis v. M.C.I.* (F.C.T.D., no. IMM-2868-98), Pinard, April 15, 1999, Canadian authorities in Nairobi and Harare made inquiries of the Zimbabwean government with respect to the claimant's passport application.

<sup>93</sup> In *Vafaei, Farah Angiz v. M.E.I.* (F.C.T.D., no. IMM-1276-93), Nadon, February 2, 1994, the Court referred specifically to paragraph 96 of the UNHCR *Handbook*. See also *André, Marie-Kettelie v. M.E.I.* (F.C.T.D., no. A-1444-92), Dubé, October 24, 1994, where the CRDD found that the claimant's participation in a large pro-Aristide demonstration in Montreal was not likely to cause her problems in Haiti.

<sup>94</sup> *Zhu, Yong Qin v. M.C.I.* (F.C.T.D., no. IMM-5678-00), Dawson, September 18, 2001; 2001 FCT 1026. Reported: *Zhu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 F.C. 379 (T.D.). The claimant, who arrived on a Korean vessel, had informed the RCMP about individuals later charged in Canada with offences relating to human smuggling and was subpoenaed to testify at their trial. He feared that if he returns to China he would be severely punished by the Chinese authorities and that the "snakeheads" in China seriously harm him, if not kill him.

<sup>95</sup> *Win, Ko Ko v. M.C.I.* (F.C., no. IMM-1248-08), Shore, March 28, 2008; 2008 FC 398.

Where claims are based on the claimant's activities abroad, some decisions have focused on the issue of the *bona fides* or motivation (or good faith) of the claimant and have found that the claimant did not have a subjective fear of persecution.<sup>96</sup>

However, other cases, which now appear to reflect the currently accepted approach, have held that there is no "good faith" requirement in making a *sur place* claim. A recent case explaining this approach is *Ye*.<sup>97</sup> What matters is that the Board cannot reject a *sur place* claim solely on the basis of a lack of credibility or improper motive without examining the potential risk if returned to the country of origin.<sup>98</sup> As part of this assessment, the Board is entitled to assess the genuineness of the claimant's beliefs.<sup>99</sup> In that regard, it is permissible for the Board to assess a claimant's genuineness, and therefore *sur place* claim, in light of credibility concerns relating to the original authenticity of a claim.<sup>100</sup>

The genesis of this approach goes back to much earlier case law. In *Ngongo*,<sup>101</sup> the Trial Division cited with approval the following passage from Professor Hathaway's *The Law of Refugee Status*:

It does not follow, however, that all persons whose activities abroad are not genuinely demonstrative of oppositional political opinion are outside the refugee definition. Even when it is evident that the voluntary statement or action was fraudulent in that it was prompted primarily by an intention to secure asylum, the consequential imputation to the claimant of a negative political opinion by authorities in her home state may nonetheless bring her within the scope of the Convention definition. Since refugee law is fundamentally concerned with the provision of protection against unconscionable state action, an assessment should be made of any potential harm to be faced upon return because of the fact of the non-genuine political activity engaged in while abroad.<sup>102</sup>

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<sup>96</sup> See *Said, Mohamed Ahmed v. M.E.I.* (F.C.T.D., no. 90-T-638), Teitelbaum, May 1, 1990, where the claimant continued to demonstrate against the Kenyan government after he had been ordered excluded from Canada; and *Herrera, Juan Blas Perez de Corcho v. M.E.I.* (F.C.T.D., no. A-615-92), Noël, October 19, 1993, where the claimant spoke out against the Cuban regime after claiming refugee status in Canada.

<sup>97</sup> *Ye, Jin v. M.C.I.* (F.C., no. IMM-5518-13), Zinn, January 8, 2015; 2015 FC 21. See also *Yang, Xiaohong v. M.C.I.* (F.C., no. IMM-8012-11), Rennie, July 4, 2012; 2012 FC 849, where the Court found the RPD decision to be unreasonable because it had erroneously said there exists a "good faith" requirement for one's religious beliefs.

<sup>98</sup> *Su, Hao Wen v. M.C.I.* (F.C., no. IMM-7356-12), Gleason, May 17, 2013; 2013 FC 518.

<sup>99</sup> *Su, supra*, footnote 98. A case where the Court accepted that the RPD can import its overreaching credibility findings into its implicit consideration of whether a *sur place* claim arises in the case is *Sanaei, Izad v. M.C.I.* (F.C., no. IMM-11449-12), Strickland, April 30, 2014; 2014 FC 402. In *Su, Jialu v. M.C.I.* (F.C., no. IMM-4968-14), Fothergill, May 25, 2015; 2015 FC 666, the Court noted that the RPD is permitted to conduct its *sur place* analysis in view of its concerns regarding the original authenticity of a claim but must nevertheless determine, either implicitly or explicitly, whether the applicant, due to events that have transpired since his departure from his country of origin, has become a member of a persecuted group and whether he would now face persecution upon his return.

<sup>100</sup> *Li, Mengting v. M.C.I.* (F.C. no. IMM-5548-17), Gagné, August 31, 2018; 2018 FC 877 at paragraph 29.

<sup>101</sup> *Ngongo, Ndjadi Denis v. M.C.I.* (F.C.T.D., no. IMM-6717-98), Tremblay-Lamer, October 25, 1999.

<sup>102</sup> Hathaway, *The Law of Refugee Status, supra*, footnote 6, page 39.

In *Asfaw*,<sup>103</sup> the Trial Division held that while it is relevant to examine the motives underlying a claimant's participation in demonstration against his government in Canada in order to determine whether the claimant has a subjective fear, it would be an error for the CRDD to stop the analysis there as it is also necessary to examine whether or not the fear has an objective basis.

In *Ghasemian*,<sup>104</sup> the Federal Court held that, once the Board accepted that the claimant had converted to Christianity while in Canada and now risked severe punishment in Iran as an apostate, it had to consider whether the claimant would be viewed as an apostate regardless of the motive for her conversion. While it was open to the Board to reject her *sur place* claim on the basis of a lack of subjective fear, the Board misconstrued her evidence regarding her alleged lack of fear of reprisals and applied the wrong test by rejecting her claim on the basis that it was not made in good faith, i.e., she did not convert for a purely religious motive. The Court followed the reasoning of the English Court of Appeal in *Danian*,<sup>105</sup> that opportunistic claimants are still protected under the Convention if they can establish a genuine and well-founded fear of persecution for a Convention ground.

The Court adopted a similar approach in two subsequent decisions involving Iranian claimants who had converted from the Muslim faith, holding that it is necessary to consider the credible evidence of the claimant's activities while in Canada, independently from their motive. Even if the motives are not genuine, the consequential imputation of religious or political beliefs to the claimant by the authorities of their country, may nonetheless be sufficient to bring the claimant within the scope of the Convention refugee definition.<sup>106</sup> However, the Board may still be able to find, in appropriate cases, that the claimant's activities were not likely to come to the attention of anyone in their country,<sup>107</sup> or that the claimant would not likely engage in such activities on return to their country.<sup>108</sup>

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<sup>103</sup> *Asfaw, Napoleon v. M.C.I.* (F.C.T.D., no. IMM-5552-99), Hugessen, July 18, 2000. In *El Aoudie, Nour El Houda v. M.C.I.* (F.C., no. IMM-7166-11), Shore, April 19, 2012; 2012 FC 450, the Court held that the RPD erred by limiting its analysis to the genuineness of the conversion instead of assessing whether that conversion made the applicant a refugee *sur place*.

<sup>104</sup> *Ghasemian, Marjan v. M.C.I.* (F.C., no. IMM-5462-02), Gauthier, October 30, 2003; 2003 FC 1266.

<sup>105</sup> *Danian v. Secretary of State for the Home Department*, [1999] E.W.J. No. 5459 online: QL.

<sup>106</sup> *Ejtehadian, Mostafa v. M.C.I.* (F.C., no. IMM-2930-06), Blanchard, February 12, 2007; 2007 FC 158; *Mohajery, Javad v. M.C.I.* (F.C., no. IMM-2528-06), Blanchard, February 19, 2007; 2007 FC 185. For a similar case involving a Chinese convert, see *Chen, Hanqi v. M.C.I.* (F.C., no. IMM-5203-08), de Montigny, June 29, 2009; 2009 FC 677.

<sup>107</sup> *Mutangadura, Chipso Pauline v. M.C.I.* (F.C., no. IMM-2553-06), Phelan, March 20, 2007; 2007 FC 298.

<sup>108</sup> See *Nthoubanza, Arthur Jholy v. M.C.I.* (F.C.T.D., no. IMM-207-98), Denault, December 17, 1998. See also *Sani, Navid Shahnazary v. M.C.I.* and *M.P.S.E.P.C.* (F.C., nos. IMM-5284-07 and IMM-5285-07), Lagacé, July 30, 2008; 2008 FC 913, where, given the doubts about the sincerity with respect to the claimant's conversion, the PRRA officer found that he could very well return to Islam once he was back in Iran and thus avoid being considered an apostate.

It is an error for the Board to base its analysis of the *sur place* claim (based on religious persecution) on the basis of an expectation that the claimant should be discreet about his religious beliefs upon his return to his country.<sup>109</sup>

In *Kammoun*,<sup>110</sup> the claimant had voluntarily approached representatives from his country in Canada. The Court held that the proper inquiry was whether the claimant's denouncement, albeit voluntary, of the Tunisian authorities in Canada could cause a negative reaction on the part of the authorities and, as a result, cause a risk should the claimant return.

With respect to exit laws, in *Zandi*,<sup>111</sup> the Court followed *Valentin*<sup>112</sup> in holding that a defector cannot gain legal status in Canada under *IRPA* by creating a "need for protection" under section 97 by freely, of their own accord and with no reason, making themselves liable to punishment by violating a law of general application in their home country about complying with exit laws.

Evidence of political activities in Canada should be considered by the panel whether or not the claimant specifically raises a *sur place* claim.<sup>113</sup> However, where the decision is under reserve, the onus is on the claimant to request a reconvening of the hearing (before a final decision on the claim has been rendered) in order to consider the impact that any newly alleged *sur place* basis to the claim might have.<sup>114</sup>

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<sup>109</sup> *Mohebbi, Hadi v. M.C.I.* (F.C., no. IMM-3755-13) Harrington, February 26, 2014; 2014 FC 182.

<sup>110</sup> *Kammoun, M. Hammadi Ben Hassen v. M.C.I.* (F.C., no. IMM-4096-05), Tremblay-Lamer, February 3, 2006; 2006 FC 128.

<sup>111</sup> *Zandi, Reza v. M.C.I.* (F.C., no. IMM-4168-03), Kelen, March 17, 2004; 2004 FC 411. See also *Mohajery, supra*, footnote 106.

<sup>112</sup> *Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390 (C.A.). For a discussion of this topic see Chapter 9, section 9.3.5. on *Exit Laws*.

<sup>113</sup> *Moradi, Ahmad v. M.C.I.* (F.C.T.D., no. IMM-2317-97), MacKay, September 23, 1998.

<sup>114</sup> *Maina, Ali Adjji v. M.C.I.* (F.C.T.D., no. IMM-1221-99), Gibson, March 14, 2000; *Yang, Hua v. M.C.I.* (F.C.T.D., no. IMM-380-00), Gibson, November 24, 2000. But see *Igbinosun, Nelson v. M.C.I.* (F.C.T.D., no. IMM-7410-93), McGillis, November 17, 1994, *M.C.I. v. Mbouko, Augustin* (F.C. No. IMM-1988-04), Lemieux, January 31, 2005; 2005 FC 126, and *M.C.I. v. Habimana, Djuma*, (IMM-5616-08), Pinard, January 6, 2010, 2010 FC 16, where the Court held that the Board did not properly assess the impact of the contact with the foreign authorities, i.e., were they already aware of the claimant's situation or was it disclosed that the claimant had claimed refugee protection in Canada. An analysis of those factors is a determining factor in deciding whether the claimant was endangered by the actions of the Canadian authorities.



## CHAPTER 7 - CHANGE OF CIRCUMSTANCES AND COMPELLING REASONS

### 7.4. TABLE OF CASES

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# CHAPTER 8

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## CHAPTER 8

### 8. INTERNAL FLIGHT ALTERNATIVE (IFA)

#### 8.1. THE TWO-PRONG TEST AND GENERAL PRINCIPLES

The question of whether an IFA exists is an integral part of the Convention refugee definition.<sup>1</sup> It arises when a claimant who otherwise meets all the elements of the Convention refugee definition in his or her home area of the country nevertheless is not a Convention refugee because the person has an IFA elsewhere in that country. The key concepts concerning IFA come from two cases: *Rasaratnam*<sup>2</sup> and *Thirunavukkarasu*.<sup>3</sup> From these cases it is clear that the test to be applied in determining whether there is an IFA is two-pronged.

- (1) "... the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists."<sup>4</sup>
- (2) Moreover, conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for him to seek refuge there.<sup>5</sup>

Both prongs must be satisfied for a finding that the claimant has an IFA.

The Court of Appeal in *Kanagaratnam*,<sup>6</sup> was of the view that the determination of whether a claimant has a well-founded fear of persecution in his or her home area of the country

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<sup>1</sup> *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.), at 710.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.).

<sup>4</sup> *Rasaratnam*, *supra*, footnote 1 at 710. In *Chowdhury, Swapan v. M.C.I.* (F.C., no. IMM-5618-06), de Montigny, January 8, 2008; 2008 FC 18, the Court noted that it is an error to require a claimant to show that persecution in the IFA "would" happen. See also *Sokol, Sterbyci v. M.C.I.* (F.C., no. IMM-1767-09), O'Keefe, December 8, 2009; 2009 FC 1257. In *Iqbal, Sherry v. M.C.I.* (F.C., no. IMM-3224-17), McDonald, March 15, 2018; 2018 FC 299 the Court quashed a visa officer's decision because his statement that there was a "low risk" that the applicant would be harmed in the IFA location did not allow the Court to determine that he had applied the correct test.

<sup>5</sup> *Ibid.*, at 709 and 711.

<sup>6</sup> *Kanagaratnam, Parameswary v. M.E.I.* (F.C.A., no. A-356-94), Strayer, Linden, McDonald, January 17, 1996. Reported: *Kanagaratnam v. Canada (Minister of Employment and Immigration)* (1996), 36 Imm. L.R. (2d) 180 (F.C.A.); *Arunachalam, Sinnathamby v. M.C.I.* (F.C.T.D., no. IMM-157-96), MacKay, August 14, 1996. The Court, in *Sarker*, noted that when looking at the existence of an IFA, the Board could find that the claimant faced harm, could assume (without finally determining the question) that he faced harm, or could ignore the whole question, as long as the Board applied the correct test to the IFA analysis, and the conclusion of an IFA was supported by the evidence. See *Sarker, Aatur Rahman v. M.C.I.* (F.C. no. IMM-5515-04), Snider, March 11, 2005; 2005 FC 353; *Nzayisenga, Jean Claude v. M.C.I.* (F.C., no. IMM-5203-11), Mandamin, September 30, 2012; 2012 FC 1103; and *Dakpokpo, Hilary Usomhine v. M.C.I.* (F.C., no. IMM-4559-16), Zinn, June 13, 2017; 2017 FC 580.

is not a prerequisite to the consideration of an IFA. At the same time, if a claimant fails to meet elements of the definition in the home area, it is open to the tribunal not to proceed to do an IFA analysis.<sup>7</sup>

The concept of an IFA does not require that the safe haven be in another city or province of the state of origin so long as it is truly an area in which the claimant can seek refuge from the experienced persecution.<sup>8</sup> At the same time, an IFA may still exist where the risks in the proposed IFA are risks faced by all inhabitants.<sup>9</sup>

A finding of IFA must be based on a distinct evaluation of a region for that purpose taking into account the claimant's identity. It cannot be inferred from earlier findings of fact unconnected to the issue of an IFA.<sup>10</sup>

The relationship between IFA, change of circumstances and the applicability of "compelling reasons" was considered by the Court,<sup>11</sup> which concluded that where an IFA applies to a claimant, that person is not and never could have been a Convention refugee. Accordingly, he or she could not cease to be a Convention refugee on the basis of a change of circumstances.

With respect to whether an "external flight alternative" might exist in the European Union for claimants who might have experienced persecution in one of the member states, the closest to a determination that this concept may not be applicable in Canadian law can be inferred from the *Mortocian*<sup>12</sup> case. The Court was considering the RPD's determination, which it found reasonable, that the Romanian claimant of Roma ethnicity was not a Convention refugee or a person in need of protection because what he faced was discrimination not amounting to persecution. The issue of an external flight alternative in the EU was addressed as follows:

[15] Regarding discrimination in employment, the Applicant submits that the Board, in essence, relied on an External Flight Alternative, suggesting that the Applicant could be employed elsewhere in the European Union. In addition, the Applicant submits that the Board failed to consider that the Applicant would be forced to work at menial jobs and or at a lesser wage in Romania and that this constitutes persecution.

[16] With respect to the notion of an External Flight Alternative, I agree with the Applicant that there is no such requirement. An Applicant need not demonstrate that

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<sup>7</sup> *Hernandez Cardozo, Eduardo v. M.C.I.* (F.C., no. IMM-5095-11), Shore, February 9, 2012; 2012 FC 190. In this case, the claimant failed to establish a subjective fear and thus it was open to the RPD not to perform an IFA analysis.

<sup>8</sup> *Jilani, Zia Uddin Ahmed v. M.C.I.* (F.C., no. IMM-711-07), Mosley, December 21, 2007; 2007 FC 1354.

<sup>9</sup> In *Muhammed, Falululla Peer v. M.C.I.* (F.C., no. IMM-5122-11), Harrington, February 17, 2012; 2012 FC 226, the risks in the proposed IFA area included unexploded landmines and infrastructural issues affecting millions of Sri Lankans of all backgrounds.

<sup>10</sup> *Selvakumaran, Sivachelam v. M.C.I.* (F.C.T.D., no. IMM-5103-01), Mckeown, May 31, 2002.

<sup>11</sup> *Singh, Gurmeet v. M.C.I.* (F.C.T.D., no. IMM-75-95), Richard, July 4, 1995. Reported: *Singh, (Gurmeet) v. Canada (Minister of Citizenship and Immigration)* (1995), 30 Imm. L.R. (2d) 226 (F.C.T.D.), at 4. See also, *Sangha, Karamjit Singh v. M.C.I.* (F.C.T.D., no. IMM-1555-98), Reed, October 28, 1998.

<sup>12</sup> *Mortocian, Alexandru v. M.C.I.* (F.C. no., IMM-3837-12), Kane, December 7, 2012; 2012 FC 1447.

they are unable to go to any country where they may have the right to work in order to establish that they satisfy the Convention refugee definition. Despite the increased mobility within the European Union [EU], those who work in other countries do not enjoy all the privileges of nationals and while they may be permitted to work, the periods of employment are limited. The European Union is a union of several distinct countries and is not one country. Whether this argument is cast as an Internal Flight Alternative within the EU or an External Flight Alternative beyond the country of origin, there is no requirement on an Applicant to exhaust employment opportunities in other countries.

## 8.2. NOTICE - BURDEN OF PROOF

Two other general principles that emerge from *Rasaratnam* and *Thirunavukkarasu* concern notice and burden of proof. With respect to notice, the issue of IFA must be raised by the panel or the Minister (before or during the hearing). The *Immigration and Refugee Protection Act* (IRPA) does not automatically put claimants on notice that IFA is an issue in the claim. The principles regarding fair notice expressed in *Rasaratnam* and *Thirunavukkarasu* are still relevant under IRPA.<sup>13</sup> The notice must be clear and sufficient.<sup>14</sup>

It is a breach of natural justice to tell the claimant that IFA is not an issue and then, later, make a contrary finding on that issue.<sup>15</sup> Extensive questioning during the hearing (by the Board or by counsel) on the subject of IFA can be sufficient notice.<sup>16</sup>

With respect to burden of proof, once the issue is raised, the onus is on the claimant to show that he or she does not have an IFA. Even though the burden of proof rests on the claimant, the Board cannot base a finding that there is an IFA, in the absence of sufficient evidence, solely on the basis that the claimant has not fulfilled the onus of proof.<sup>17</sup>

There is no onus on a claimant to personally test the viability of an IFA before seeking protection in Canada.<sup>18</sup>

While in earlier jurisprudence there was inconsistency about whether a specific location or region must be identified as the potential IFA,<sup>19</sup> more recent case law suggest that the RPD

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<sup>13</sup> *Thevarajah, Anton Felix v. M.C.I.* (F.C., no. IMM-695-04), Mosley, November 24, 2004; 2004 FC 1654.

<sup>14</sup> *Ay, Hasan v. M.C.I.* (F.C., no. IMM-4149-09), Boivin, June 21, 2010; 2010 FC 671.

<sup>15</sup> *Moya, Jaime Olvera v. M.C.I.* (F.C.T.D., no. IMM-5436-01), Beaudry, November 6, 2002.

<sup>16</sup> *Hasnain, Khalid v. M.C.I.* (F.C.T.D., no. A-962-92), McKeown, December 14, 1995. In *Scott, Dailon Ronald v. M.C.I.* (F.C., no. IMM-2691-12), Gagné, September 10, 2012; 2012 FC 1066, the questioning by counsel and the oral and written arguments were held to be adequate notice that IFA was an issue in the case.

<sup>17</sup> *Chauhdry, Mukhtar Ahmed v. M.C.I.* (F.C.T.D., no. IMM-3951-97), Wetston, August 17, 1998.

<sup>18</sup> *Alvapillai, Ramasethu v. M.C.I.* (F.C.T.D., no. IMM-4226-97), Rothstein, August 14, 1998. In *Estrado Lugo, Regina v. M.C.I.* (F.C., no. IMM-1166-09), O’Keefe, February 18, 2010; 2010 FC 170, the Court noted that there was no obligation on the claimants to have already sought state protection in the proposed IFA location. See also *Ramirez Martinez, Jorge Armando v. M.C.I.* (F.C., no. IMM-1284-09), Snider, June 1, 2010; 2010 FC 600, where the Court, quoting *Alvapillai*, held that it is an error to require that the IFA be tested before seeking refugee protection in Canada.

must identify the specific IFA locations.<sup>20</sup> The outcome of any one particular judicial review application involving this issue may hinge on how clearly the claimant was questioned regarding the IFA issue and how clearly the panel explains its findings.

### 8.3. INTERPRETATION AND APPLICATION OF THE TWO-PRONGED TEST

The abundance of case law on the topic of IFA basically concerns the interpretation and application of the two-pronged test. Some factors are relevant to both prongs of the test, some are relevant to one or the other prong.

#### 8.3.1. Fear of Persecution

On the issue of whether there is a serious possibility of persecution in the potential IFA, the considerations are basically the same as when making this determination with respect to the claimant's home area of the country. However, there are some specific points concerning this issue and IFA that are noteworthy:

- (a) In determining whether there is an objective basis for fearing persecution in the IFA, the Refugee Protection Division (RPD) must consider the personal circumstances of the claimant, and not just general evidence concerning other persons who live there.<sup>21</sup>

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<sup>19</sup> In *Rabbani, Sayed Moheyudee v. M.C.I.* (F.C.T.D., no. IMM-236-96), Noël, January 16, 1997, the Court said that the CRDD must identify a specific geographic location, but in *Singh, Ranjit v. M.C.I.* (F.C.T.D., no. A-605-92), Reed, July 23, 1996, the Court rejected the claimant's argument that the CRDD should identify a place within the country as an IFA, especially in a country as large as India. In *Vidal, Daniel Fernando v. M.E.I.* (F.C.T.D., no. A-644-92), Gibson, May 15, 1997 no notice was given at outset of hearing, but counsel presented evidence on IFA. The Court found no prejudice was suffered by the claimant as a result of the failure to give notice. Similarly, in *Gosal, Pardeep Singh v. M.C.I.* (F.C.T.D., no. IMM-2316-97), Reed, March 11, 1998, the Court found that one need not identify a specific location within the country for an IFA analysis. *Rabbani* was distinguished on its facts as in that case the country concerned was Afghanistan and control over areas considered safe tended to shift. In *Moreb, Sliman v. M.C.I.* (F.C., no. IMM-287-05), von Finckenstein, July 5, 2005; 2005 FC 945, the Court found the RPD to have erred when it referred to Jerusalem and Nazareth as the only possible IFA locations and then went on to consider Tel-Aviv-Yafo as an IFA. The Court offered that the panel could have raised the issue of IFA generally without referring to any specific location.

<sup>20</sup> *Utoh, Helen v. M.C.I.* (F.C., no. IMM-6120-11), Rennie, April 10, 2012; 2012 FC 399. This case relied on the checklist of legal criteria for determining whether an IFA exists set out in *Gallo Farias, Alejandrina Dayna v. M.C.I.*(F.C., no. IMM-658-08), Kelen, September 16, 2008; 2008 FC 1035, where the first criteria is set out as follows:

If IFA will be an issue, the Refugee Board must give notice to the refugee claimant prior to the hearing (*Rasaratnam ... , Thirunavukkarasu*) and identify a specific IFA location(s) within the refugee claimant's country of origin (*Rabbani ... , Camargo ...*)

In *Ahmed, Ishtiaq v. M.C.I.* (F.C.T.D., no. IMM-2931-99), Hansen, March 29, 2000, the Court found the CRDD had erred in considering Islamabad and Karachi as possible IFAs when the claimant only had notice that Lahore was being considered as a possible IFA. In *Lopez Martinez, Heydi Vanessa v. M.C.I.* (F.C., no. IMM-5081-09), Pinard, May 25, 2010; 2010 FC 550, the Court, at paragraph 23, noted: "...I do not propose that the Board is under an obligation to provide justification for selecting the city it did initially..." (Emphasis added). But note that the Board did have to explain why the proposed IFA was safe given that the agent of harm was active there.

- (b) The RPD must consider the circumstances of those persons in the IFA who are situated similarly to the claimant.<sup>22</sup>
- (c) In assessing the particular circumstances of the claimant, the RPD may consider the condition of family members who have sought refuge in the IFA.<sup>23</sup>
- (d) The nature and the agents of the persecution feared ought to suggest that the persecution would be confined to particular areas of the country.<sup>24</sup> In a case where the agents of persecution were the local police, the Court found that if the claimant was of no interest to the central authorities, the claimant may be able to relocate to other areas.<sup>25</sup> The fact

<sup>21</sup> See for example: *Abubakar, Fahmey Abdalla Ali v. M.E.I.* (F.C.T.D., no. A-572-92), Wetston, September 9, 1993, at 3-5; *Pathmakanthan, Indradevi v. M.E.I.* (F.C.T.D., no. IMM-2367-93), Denault, November 2, 1993. Reported: *Pathmakanthan v. Canada (Minister of Employment and Immigration)* (1993), 23 Imm. L.R. (2d) 76 (F.C.T.D.), at 79-80; *Kaler, Minder Singh v. M.E.I.* (F.C.T.D., no. IMM-794-93), Cullen, February 3, 1994, at 9; *Dhillon, Harbhagwant Singh v. S.S.C.* (F.C.T.D., no. IMM-3256-93), Rouleau, March 17, 1994, at 3; *Jeyachandran, Senthana v. S.G.C.* (F.C.T.D., no. IMM-799-94), McKeown, March 30, 1995; *Ratnam, Selvanayagam v. M.C.I.* (F.C.T.D., no. IMM-1881-94), Richard, March 31, 1995. However, it is an error to interpret the first prong of the test as requiring that all similar persons would be persecuted in the IFA area. In *Aria, Ashraf v. M.C.I.* (F.C., no. IMM-2499-12), de Montigny, April 2, 2013; 2013 FC 324, the RPD erred when it stated that it was “not credible that all young women are subject to forced marriages which are not forced by their own families”. A serious possibility of persecution does not mean that “all young women” would be subject to forced marriages with warlords. In *Ambrose-Esede, Benedicta Osemen v. M.C.I.* (F.C. no. IMM-1685-18), Russell, December 11, 2018; 2018 FC 1241, the Court quashed an RPD decision in which the RPD had concluded there was a viable IFA. The Court held that the fact the claimant was a lawyer and her name, along with her contact information, would appear on the Nigerian Bar Association’s members’ portal would make her easy to locate in the IFA location.

<sup>22</sup> *Kahlon, Hari Singh v. S.G.C.* (F.C.T.D., no. IMM-532-93), Gibson, August 5, 1993. Reported: *Kahlon v. Canada (Solicitor General)*, (1993), 24 Imm. L.R. (2d) 219 (F.C.T.D.), at 222-224; *Manoharan, Vanajah v. M.E.I.* (F.C.T.D., no. A-1156-92), Rouleau, December 6, 1993, at 7-8; *Naguleswaran, Pathmasilosini (Naguleswaran) v. M.C.I.* (F.C.T.D., no. IMM-1116-94), Muldoon, April 19, 1995, at 6 (however, caution is suggested concerning interpretation of the phrase, “...solid proof of personal persecution (either individually or collectively)...” given case law indicating there is no need for past persecution, individually or collectively, e.g. see *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (C.A.)).

<sup>23</sup> See for example *Ali, Chaudhary Liaqat v. M.E.I.* (F.C.T.D., no. A-1461-92), Noël, January 20, 1994, at 5-6.

<sup>24</sup> *Ahmed, Ali v. M.E.I.* (F.C.A., no. A-89-92), Marceau, Desjardins, Décary, July 14, 1993. Reported: *Ahmed v. Canada (Minister of Employment and Immigration)* (1993), 156 N.R. 221 (F.C.A.), at 223-224. See also for example: *M.E.I. v. Sharbdeen, Mohammed Faroudeen* (F.C.A., no. A-488-93), Mahoney, MacGuigan, Linden, March 21, 1994. Reported: *Canada (Minister of Employment and Immigration) v. Sharbdeen* (1994), 23 Imm. L.R. (2d) 300 (F.C.A.) (although this issue appears to be considered under reasonableness); *Nadarajah, Sivasothy Nathan v. M.E.I.* (F.C.T.D., no. IMM-4215-93), Simpson, July 26, 1994; *Randhawa, Faheem Anwar v. S.G.C.* (F.C.T.D., no. IMM-5621-93), Rouleau, August 12, 1994; *Zetino, Rudys Francisco Mendoza v. M.C.I.* (F.C.T.D., no. IMM-6173-93), Cullen, October 13, 1994. Reported: *Zetino v. Canada (Minister of Citizenship and Immigration)* (1994), 25 Imm. L.R. (2d) 300 (F.C.T.D.) (although this issue may be considered under reasonableness); See also *Khan, Naqui Mohd v. M.C.I.* (F.C.T.D., no. IMM-4127-01), Rothstein, July 26, 2002, where the court found that the localized nature of the claimants activities and the region’s legal system supported the panel’s finding of an IFA outside of that region. In *Siddiq, Dawood v. M.C.I.* (F.C., no. IMM-1684-03), Harrington, March 31, 2004; 2004 FC 490, the Court found that a failure to address the question of persecution by national authorities when considering an internal flight alternative is a reviewable error.

<sup>25</sup> *Singh, Harminder v. M.C.I.* (F.C. no. IMM-4333-13), Gleason, March 20, 2014; 2014 FC 269.

that the agents of persecution are the central authority in the country does not necessarily prevent a finding that there is an IFA.<sup>26</sup>

- (e) If an individual had to remain in hiding to avoid problems, this would not be evidence of an IFA.<sup>27</sup> Similarly, if a person has to hide their sexual orientation in order to be safe, the IFA is not available.<sup>28</sup>
- (f) The presence of close relatives in the putative IFA, and the duration of previous residence and past employment there, may have a bearing on “whether or not it is ‘objectively reasonable’ for the claimant to live in ... [the IFA] without fear of persecution”, rather than being matters merely of personal comfort or convenience.<sup>29</sup>

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<sup>26</sup> *Saini, Makhan Singh v. M.E.I.* (F.C.A., no. A-750-91), Mahoney, Stone, Linden, March 22, 1993. Reported: *Saini v. Canada (Minister of Employment and Immigration)* (1993), 151 N.R. 239 (F.C.A.), leave to appeal to the S.C.C. denied: *Saini v. M.E.I.* (S.C.C., no. 23619), Lamer, McLachlin, Major, August 12, 1993. Reported: *Saini v. Canada (Minister of Employment and Immigration)* (1993), 158 N.R. 300 (S.C.C.). See also for example: *Sidhu, Jadjish Singh v. M.E.I.* (F.C.T.D., no. 92-A-6540), Muldoon, May 31, 1993; *Badesha, Jagir Singh v. S.S.C.* (F.C.T.D., no. A-1544-92), Wetston, January 19, 1994. Reported: *Badesha v. Canada (Secretary of State)* (1994), 23 Imm. L.R. (2d) 190 (F.C.T.D.); *Uppal, Jatinder Singh v. S.S.C.* (F.C.T.D., no. A-17-93), Wetston, January 19, 1994, affirmed: *Uppal, Jatinder Singh v. M.C.I.* (F.C.A., no. A-42-94), Isaac, Hugessen, Décarý, November 1, 1994; *Kaler, supra*, footnote 21, at 9; *Karthikesu, Cumariah v. M.E.I.* (F.C.T.D., no. IMM-2998-93), Strayer, May 26, 1994; *Guraya, Balihar Singh v. S.S.C.* (F.C.T.D., no. IMM-4058-93), Pinard, July 8, 1994; *Balasubramaniam, Veergathy v. M.C.I.* (F.C.T.D., no. IMM-1902-93), McKeown, October 4, 1994; *Dhillon, Inderjit Kaur v. M.C.I.* (F.C.T.D., no. IMM-2652-94), McKeown, February 1, 1995; *Zamora Huerta, Erika Angelina v. M.C.I.* (F.C., no. IMM-1985-07), Blanchard, May 8, 2008; 2008 FC 586; and *Fosu, Frank Atta v. M.C.I.* (F.C., no. IMM-935-08), Zinn, October 8, 2008; 2008 FC 1135. In *Idris, Omer Mahmoud Hussein v. M.C.I.* (F.C. no. IMM-2321-18), Brown, January 9, 2019; 2019 FC 24 the Court held that an IFA was viable despite the fact the claimant had been targeted by the Sudanese security forces. He was targeted to spy on the customers in his shop and now that the shop was closed, there was no reason for the security forces to be interested in him.

In *Sharbdeen, supra*, footnote 24, in quashing the CRDD decision, the Court cited *Saini* and stated that in order to find a viable IFA in a part of the country controlled by the same army who was persecuting the claimant, it would require an evidentiary basis. *Saini* has been distinguished in *Singh, Sucha v. M.E.I.* (F.C.T.D., no. 93-A-91), Dubé, June 23, 1993, where the Court held that the CRDD's conclusion that an IFA existed because there was not a nation-wide campaign against the claimant's ethnic group did not satisfy the criteria for finding an IFA as established in *Rasaratnam, supra*, footnote 1.

<sup>27</sup> *Murillo Taborda, Lissed v. M.C.I.* (F.C., no. IMM-9365-12), Kane, September 17, 2013; 2013 FC 957; *Zaytoun, Hussein v. M.C.I.* (F.C., no. IMM-1769-14), Mactavish, October 2, 2014; 2014 FC 939; and *Ehondor, Tosan Erhun v. M.C.I.* (F.C., no. IMM-2372-17), Brown, December 14, 2017; 2017 FC 1143.

<sup>28</sup> *Fosu, Frank Atta v. M.C.I.* (F.C., no. IMM-935-08), Zinn, October 8, 2008; 2008 FC 1135. The *Fosu* decision was cited with approval in *Akpojiovwi, Evelyn Oboaguonona v. M.C.I.* (F.C. no. IMM-200-18), Roussel, July 17, 2018; 2018 FC 745 at paragraph 9. Also, it is not reasonable for the Board to suggest that the claimant should avoid contact with family member in the IFA to avoid the risk of being located: *I.M.P.P. v. M.C.I.* (F.C., no. IMM-4049-09), Mosley, March 9, 2010; 2010 FC 259.

<sup>29</sup> *Kulanthavelu, Gnanasegaram v. M.E.I.* (F.C.T.D., no. IMM-57-93), Gibson, December 3, 1993, at 5-6. In *Losowa Osengosengo, Victorine v. M.C.I.* (F.C., no. IMM-4132-13), Gagné, March 13, 2014; 2014 FC 244, the Court found that it was unreasonable for the RPD to find that the claimant, a nun, could find an IFA in Kinshasa where she had family and could make a living as a teacher. The Court found that it was legitimate for the claimant, as a nun, to insist upon living among her congregation as her religious duty. Evidence that she could seek refuge with her family members should not have been determinative for the Board.

- (g) There is some lack of clarity concerning how the concept of cumulative harassment or cumulative grounds applies in the consideration of IFA.<sup>30</sup> In *Karthikesu*, the Court appears to find that experiences in the non-IFA area do not form part of a cumulative assessment when considering the IFA area. In *Balasubramaniam*, however, the Court suggests that depending on the tribunal's other findings "... it [the tribunal] may or may not have to consider the question of the cumulative effect of all the incidents that occurred to the applicant at the hands of the Sri Lankan armed forces to determine whether these, together with the likelihood of continuing harassment at the hands of the authorities, might constitute persecution on a cumulative basis." (Emphasis added). This statement seems to suggest that experiences in the non-IFA area can form part of a cumulative assessment when considering the IFA area.
- (h) Large urban areas cannot be assumed to be an IFA by virtue of their population size alone.<sup>31</sup>
- (i) The fact that a putative location was "far away", would not, without more, constitute a viable IFA.<sup>32</sup>

### 8.3.2. Reasonable in All the Circumstances

The second prong of the IFA test may be stated as follows: would it be unduly harsh to expect the claimant to move to another, less hostile part of the country before seeking refugee status abroad?<sup>33</sup> The test is an objective one: is it objectively reasonable to expect the claimant to seek safety in a different part of the country? *Thirunavukkarasu*<sup>34</sup> sets a very high threshold for what makes an IFA unreasonable in all the circumstances. The hardship associated with dislocation and relocation is not the kind of undue hardship that renders an IFA unreasonable. The standard is high and requires proof of adverse conditions which would jeopardize the life and safety of the claimant in travelling to and in living in the IFA location.<sup>35</sup>

An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. The claimant cannot be required to encounter great physical danger or to undergo undue hardship

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<sup>30</sup> *Karthikesu, Cumariah v. M.E.I.* (F.C.T.D., no. IMM-2998-93), Strayer, May 26, 1994, *Balasubramaniam, Veergathy v. M.C.I.* (F.C.T.D., no. IMM-1902-93), McKeown, October 4, 1994.

<sup>31</sup> *Reynoso, Edith Isabel Guardian v. M.C.I.* (F.C.T.D., no. IMM-2110-94), Muldoon, January 29, 1996; *Sanno, Aminata v. M.C.I.* (F.C.T.D., no. IMM-2124-95), Tremblay-Lamer, April 25, 1996.

<sup>32</sup> *Cadena Ramirez, Francisco José v. M.C.I.* (F.C., no. IMM-5911-09), Rennie, December 20, 2010; 2010 FC 1276.

<sup>33</sup> *Thirunavukkarasu, supra*, footnote 3.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, (F.C.A., no. A-348-99), Létourneau, Sexton, Malone, December 21, 2000; [2001] 2 F.C. 164 (C.A.). In *Sikiratu Iyile, Sandra v. M.C.I.* (F.C., no. IMM-6609-10), Harrington, July 25, 2011; 2011 FC 928, the Court rejected the claimant's argument that it would be inhumane to send her back to Lagos, to return her to a life of begging and prostitution. The Court noted this is a situation in which any young uneducated female might find herself in a big city. It does not give rise to a refugee claim. It agreed with the RPD that although she professed that she had no knowledge of help available in Lagos from NGOs, she now had the knowledge and these organizations can help to find her shelter and employment.

in travelling there or staying there.<sup>36</sup> However, it is not enough for the claimant to say that he or she does not like the weather there, or that he or she has no friends or relatives there, or that he or she may not be able to find suitable work there.<sup>37</sup>

A distinction must be maintained between the reasonableness of an IFA and humanitarian and compassionate considerations. The fact that a claimant might be better off in Canada, physically, economically and emotionally than in a safe place in his own country is not a factor to consider in assessing the reasonableness of the IFA.<sup>38</sup>

Regarding the issue of “reasonable in all the circumstances”, the Court of Appeal has stated that the circumstances must be relevant to the IFA question. They cannot be catalogued in the abstract. They will vary from case to case.<sup>39</sup>

The Federal Court has provided the following general guidance:

- (a) The test is a flexible one that takes into account the particular situation of the claimant and the particular country involved.<sup>40</sup> The evidence, before the Refugee Division, of circumstances in the IFA must be more than general information and must be relevant to the claimant’s specific circumstances.<sup>41</sup>

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<sup>36</sup> *Thirunavukkarasu*, *supra*, footnote 3. In applying the principle set out in *Thirunavukkarasu* that the IFA must be an area that is realistically attainable, the Court in *Playasova, Liudmila Fedor v. M.C.I.* (F.C., no. IMM-3931-02), Martineau, July 18, 2003; 2003 FC 901 stated that the failure of the RPD to consider that the claimant could only relocate to the IFA if she had the means to pay bribes to obtain a *propiska* was an error. In *Dubravac, Petar v. M.C.I.* (F.C.T.D., no. IMM-839-94), Rothstein, February 1, 1995. Reported: *Dubravac v. Canada (Minister of Citizenship and Immigration)* (1995), 29 Imm. L.R. (2d) 55 (F.C.T.D.), where the claimant’s hometown had been surrounded by opposing Serbian forces, the Court commented that they “would not be required to go from their hometown to the safe zone of Croatia, but ... from wherever they were relanded upon being sent back.”

<sup>37</sup> *Thirunavukkarasu*, *supra*, footnote 3.

<sup>38</sup> *Ranganathan*, *supra*, footnote 35.

<sup>39</sup> *Sharbdeen*, *supra*, footnote 24.

<sup>40</sup> See for example: *Thirunavukkarasu*, *supra*, footnote 3; *Rasaratnam*, *supra*, footnote 1; *Fernando, Joseph Stanley v. M.E.I.* (F.C.T.D., no. 92-A-6986), McKeown, May 19, 1993; *Abubakar*, *supra*, footnote 21; *Megag, Sahra Abdilahi v. M.E.I.* (F.C.T.D., no. A-822-92), Rothstein, December 10, 1993; *Chkiaou, Dimitri v. M.C.I.* (F.C.T.D., no., IMM-266-94), Cullen, March 7, 1995; and *Sanno*, *supra*, footnote 31. In *Yoganathan, Kandasamy v. M.C.I.* (F.C.T.D., no. IMM-3588-97), Gibson, April 20, 1998, the Court noted that, in assessing the reasonableness of the IFA, the CRDD must look at the personal circumstances of the claimant and it is insufficient to simply assess whether the claimant fits the “most at risk profile.” In *Cartagena, Wilber Orlando v. M.C.I.* (F.C., no. IMM-961-06), Mosley, March 4, 2008; 2008 FC 289, the Court noted that the Board failed to take into account the claimant’s vulnerable mind-set; and in *Calderon, Sonia Blancas v. M.C.I.* (F.C., no. IMM-5367-08), Near, March 8, 2010; 2010 FC 263, the Court noted that it was unduly harsh and unreasonable for the RPD to hold that the claimant had a viable IFA as long as she never attempted to re-secure custody of her young children from her abusive ex-husband.

<sup>41</sup> See for example: *Singh, Sucha v. M.E.I.* (F.C.T.D., no. 93-A-91), Dubé, June 23, 1993; *Kahlon*, *supra*, footnote 22; *Dhaliwal, Jasbir Singh v. M.E.I.* (F.C.T.D., no. 93-A-364), MacKay, August 9, 1993; *Singh, Swarn v. M.E.I.* (F.C.T.D., no. A-1409-92), Rothstein, May 4, 1994. In *Thevasagayam, Ebenezer Thevaraj v. M.C.I.* (F.C.T.D., no. IMM-252-97), Tremblay-Lamer, October 23, 1997, the evidence of past detention and torture of the claimant in relation to a Colombo bombing cast doubt on the reasonableness of an IFA. In



- (b) Psychological evidence is central to the question of whether an IFA is reasonable and cannot be disregarded.<sup>42</sup>
- (c) The regional conditions which would make an IFA reasonable must be considered.<sup>43</sup>
- (d) The presence or absence of family in the IFA is a factor in assessing reasonableness,<sup>44</sup> especially in the case of minor claimants.<sup>45</sup> However, the absence of relatives in an IFA would have to jeopardize the safety of a claimant before that factor would make an IFA unreasonable.<sup>46</sup>

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*Premanathan, Gopalasamy v. M.C.I.* (F.C.T.D., no. IMM-4423-96), Simpson, August 29, 1997, it was noted that random roundups and routine reporting requirements do not make IFA unreasonable. In *Kaillyapillai, Srivasan v. M.C.I.* (F.C.T.D., no. IMM-1263-96), Richard, February 27, 1997, the Court found no IFA in Colombo for a claimant who had been arrested, beaten and released and told to leave Colombo. In *Masalov, Sergey v. M.C.I.* (F.C., no. IMM-7207-13), Diner, March 4, 2015; 2015 FC 277, the Court found that it was unreasonable to expect the applicants to relocate to the proposed IFA. The principal applicant had attempted to relocate to Kazan but could only obtain temporary residence for three or four days because he was unable to obtain a Propiska registration. The documentary evidence listed the cascading effects of an inability to register and how it operates as an invitation for harassment by the authorities. Also, expecting an elderly couple to endure persistent police harassment is unreasonable, as it implicates their safety within the IFA.

<sup>42</sup> *Cartagena, supra*, footnote 40. See also *Okafor, Sara v. M.C.I.* (F.C., no. IMM-6848-10), Beaudry, August 17, 2011; 2011 FC 1002. In *Kauhonina, Claretha v. M.C.I.* (F.C. no. IMM-2459-18), Diner, December 21, 2018; 2018 FC 1300 the Court quashed an RPD decision wherein it found there to be a viable in Namibia for the claimant. The Court held that the Board did not engage with the psychiatric report which set out her mental health issues and treatment she had been receiving at a major hospital in Toronto over two years. The Board also did not acknowledge her profile as a single mother of two young children.

<sup>43</sup> In *Idrees, Muhammad v. M.C.I.* (F.C., no. IMM-4136-13), Diner, December 10, 2014; 2014 FC 1194, the Court found that the RPD failed to consider the applicant's risk of ethnic violence in determining whether it was reasonable for him, an ethnic Pashtun, to seek refuge in Karachi. In *Chand, Mool v. M.C.I.* (F.C., no. IMM-61-14), Rennie, February 19, 2015; 2015 FC 212, the RPD was faulted with ignoring evidence of acts of violence and forced conversions against Hindus in finding that it was reasonable for the claimants to relocate to Karachi. In two cases involving Colombians and the finding that Bogota would constitute a safe IFA, the Court stated that the RPD ignored evidence that internally displaced persons (IDP) in Colombia lead a fragile and vulnerable existence and that they face life in overcrowded slums where they experience violations of their fundamental human rights. See *Arias Ultima, Angela Maria v. M.C.I.* (F.C., no. IMM-3984-12), Manson, January 25, 2013; 2013 FC 81; and *Barragan Gonzalez, Julio Angelo v. M.C.I.* (F.C., no. IMM-6335-13), Boswell, April 20, 2015; 2015 FC 502.

<sup>44</sup> *Ranganathan, supra*, footnote 35. More than the mere absence of relatives is needed in order to make an IFA unreasonable.

<sup>45</sup> The absence of family in an IFA is relevant to determining the unreasonableness of requiring a child to live there. *Elmi, Mahamud Hussein v. M.E.I.* (F.C.T.D., no. IMM-580-98), McKeown, March 12, 1999. Similarly, in *Hassan, Liban v. M.E.I.* (F.C.T.D., no. IMM-3634-98), Campbell, April 14, 1999, the Court found that in the case of a minor, an IFA cannot be reasonable unless proper settlement arrangements are made.

<sup>46</sup> *Ranganathan, supra*, footnote 35. As the Court put it: "The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations."

- (e) A destroyed infrastructure and economy in the IFA, and the stability or instability of the government that is in place there, are relevant factors.<sup>47</sup> Instability alone is not the test of reasonableness,<sup>48</sup> nor is a disintegrating infrastructure.<sup>49</sup>
- (f) An IFA is not reasonable if it requires the perpetuation of human rights abuses.<sup>50</sup>
- (g) Hardship in accessing the IFA must be assessed.<sup>51</sup>
- (h) In gender-based claims, the Board must have regard to section C4 of the Gender Guidelines.<sup>52</sup>

<sup>47</sup> *Farrah, Sahra Said v. M.E.I.* (F.C.T.D., no. A-694-92), Reed, October 5, 1993, at 3. Regarding stability, see also *Tawfik, Taha Mohammed v. M.E.I.* (F.C.T.D., no. 93-A-311), MacKay, August 23, 1993. Reported: *Tawfik v. Canada (Minister of Employment and Immigration)* (1993), 26 Imm. L.R. (2d) 148 (F.C.T.D.).

<sup>48</sup> *Megag, supra*, footnote 40. This case was relied on in *Muhammed, Falululla, Peer v. M.C.I.* (F.C. no., IMM-5122-11), Harrington, February 17, 2012; 2012 FC 226. The Court noted that [I]t was submitted that it would be unreasonable to have Mr. Peer Muhammed relocate in the east because, although not as ravaged as other parts of the country in the civil war, there are unexploded landmines and the infrastructure leaves much to be desired. However, this is a situation facing millions of Sri Lankans, Sinhalese and Tamils alike, be they Buddhist, Hindu, Christian or Muslim.”

<sup>49</sup> *Rumb, Serge v. M.E.I.* (F.C.T.D., no. IMM-1481-98), Reed, February 12, 1999. The Court held that, “[I]nsofar as the IFA is concerned, a disintegrating infrastructure is not equivalent to a dessert, or to a battle zone. In the first place, one must be careful when comparing the infrastructures of countries that the standard of our own is not held up as the required standard. There are many countries where telephones do not work well or all the time, where the roads are very very poor, where electricity only works at certain times. These conditions are not such however, that a person can say they cannot live in that country because it is not practical (reasonable) to do so. The Board was not in error in failing to assess the deteriorating infrastructure as a reason the applicant could not live in Kinshasa or elsewhere in the Congo.”

<sup>50</sup> *Mimica, Milanka v. M.C.I.* (F.C.T.D., no. IMM-3014-95), Rothstein, June 19, 1996, the claimant could only find accommodation in the IFA, the Serbian controlled part of Bosnia, if the current Muslim residents of the area were forcibly expelled because of their religion/ethnicity to make room for returning Serbian refugees. The Court held that making accommodation available to the claimant would be as a result of human rights abuses to other residents and that this could not be the basis of a finding of a viable internal flight alternative.

<sup>51</sup> In *Hashmat, Suhil v. M.C.I.* (F.C.T.D., no. IMM-2331-96), Teitelbaum, May 9, 1997, the claimant could only access the IFA in northern Afghanistan by going through the neighbouring state of Uzbekistan. The Court found it unreasonable for the panel to conclude, without any evidence, that the claimant would be allowed to cross the border. The Court also noted that the *Immigration Act* would not allow removal to a country that is not the claimant’s country of birth, nationality or former residence. See also *Dirshe, Safi Mohamud v. M.C.I.* (F.C.T.D., no. IMM-2124-96), Cullen, July 2, 1997, where the Court noted that a real possibility of rape while trying to get to the IFA makes it an unreasonable option. In fact *Hashmat*, the Court found there to be undue hardship in reaching the IFA because the claimant’s wife and child, who were not claimants, would have to travel with him to reach the IFA and there was evidence of widespread rape of women and children making that journey. In *Tahlil, Mohamed Sugule v. M.C.I.* (F.C., no. IMM-5920-10), Zinn, July 5, 2011; 2011 FC 817, the Court directed that if the applicant was removed from Canada to Somalia, he be returned directly to Bosaso and was not to travel into or through other areas of Somalia. In *Ajelal, Mustafa v. M.C.I.* (F.C., no. IMM-4522-13), Diner, November 19, 2014; 2014 FC 1093, the Court allowed the judicial review application noting that if the RPD wanted the claimant to reach either of the two identified IFAs, it failed to state how he would avoid going through the Tripoli airport, or alternate routes to the places of supposed safe haven.

<sup>52</sup> *Syvyryn, Ganna v. M.C.I.* (F.C., no. IMM-1569-09), Snider, October 13, 2009; 2009 FC 1027; and *Kayumba, Bijou Kamwanga v. M.C.I.* (F.C., no. IMM-1920-09), Beaudry, February 10, 2010; 2010 FC 138. In *Agimelen*

- (i) The Court has commented that the extent to which an applicant has settled in Canada is irrelevant to the question of whether it was reasonable for the applicant to relocate to an IFA.<sup>53</sup> As well, consideration of the presence of relatives in the country where asylum is sought is not relevant to the IFA test.<sup>54</sup>

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*Oriazouwani, Winifred v. M.C.I.* (F.C., no. IMM-6440-10), Shore, July 8, 2011; 2011 FC 827, the RPD's finding that an IFA existed did not take into account the specific evidence as to the unreasonableness of the IFA for the applicant and her two minor children especially in light of the Chairperson's Gender Guidelines. The RPD failed to consider the contradictory documentary evidence regarding female genital mutilation indicating that what is criminalized through legislation has not as yet become generalized in practice in respect to tenable protection.

<sup>53</sup> *Utoh, supra*, footnote 20.

<sup>54</sup> *Smirnova, Svetlana v. M.C.I.* (FC., no. IMM-6641-12), Noël, April 12 2013; 2013 FC 347.

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## CHAPTER 9

### 9. PARTICULAR SITUATIONS

#### 9.1. INTRODUCTION

This Chapter explores situations where more than one element of the Convention refugee definition is involved. At issue is not only whether what the claimant faces is persecution, but also whether there is a nexus to one of the Convention refugee grounds. The situations can be complex and difficult to analyze: the key is to identify what requirements are imposed by each element and to discern which circumstances in the situation go to which element.

#### 9.2. CIVIL WAR OR OTHER PREVALENT CONFLICT

The core of the case law in this area consists of two decisions from the Court of Appeal. The first of these is *Salibian*,<sup>1</sup> which sets out four general principles:<sup>2</sup>

It can be said in light of earlier decisions by this Court on claims to Convention refugee status that

- (1) the applicant does not have to show that he had himself been persecuted or would himself be persecuted in the future;
- (2) the applicant can show that the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him but from reprehensible acts committed or likely to be committed against members of a group to which he belonged;
- (3) a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition; and
- (4) the fear felt is that of a reasonable possibility that the applicant will be persecuted if he returns to his country of origin ....

The Court goes on to adopt the following description of the applicable law (provided by Professor Hathaway):<sup>3</sup>

In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin. In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether

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<sup>1</sup> *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (C.A.).

<sup>2</sup> *Salibian*, *supra*, footnote 1, per Décaré J.A.

<sup>3</sup> *Salibian*, *supra*, footnote 1, per Décaré, J.A.; Hathaway, James C., *The Law of Refugee Status*, (Toronto: Butterworths, 1991), page 97.

the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee.

The second of the leading precedents is the very brief decision in *Rizkallah*,<sup>4</sup> where the Court of Appeal said:

To succeed, refugee claimants must establish a link between themselves and persecution for a Convention reason. In other words, they must be targeted for persecution in some way, either personally or collectively.

... the evidence, as presented to us, falls short of establishing that Christians in the claimant's Lebanese village were collectively targeted in some way different from the general victims of the tragic and many-sided civil war.<sup>5</sup>

Since *Salibian* and *Rizkallah*, there have been multiple decisions in cases involving civil war. Most have cited, and purported to apply, *Salibian* and/or *Rizkallah*; none has taken issue with *Salibian* or *Rizkallah*. Neither expressly nor by implication do these later cases yield much in the way of additional, clear principles, although the application of the principle has not been uniform.

One further principle which has emerged is that a claimant's membership in one of the two groups involved in a two-sided conflict does not by itself establish that the claimant is a Convention refugee.<sup>6</sup>

### 9.2.1. Two Approaches: Comparative and Non-Comparative

The earlier jurisprudence involving claims arising out of civil war situations generated much confusion and inconsistency. Eventually, out of the confusion emerged an interpretation which was adopted by the Board in its Chairperson's *Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations*.<sup>7</sup> The Guidelines adopt the non-comparative approach. What follows explains the development of the jurisprudence.

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<sup>4</sup> *Rizkallah, Bader Fouad v. M.E.I.* (F.C.A., no. A-606-90), Marceau, MacGuigan, Desjardins, May 6, 1992. Reported: *Rizkallah v. Canada (Minister of Employment and Immigration)* (1992), 156 N.R. 1 (F.C.A.).

<sup>5</sup> *Rizkallah, supra*, footnote 4, per MacGuigan J.A.

<sup>6</sup> *Abdulle, Sadia Mohamed v. M.E.I.* (F.C.T.D., no. A-1440-92), Nadon, September 16, 1993. *Hassan, Jamila Mahdi v. M.E.I.* (F.C.A., no. A-757-91), Isaac, Marceau, McDonald, August 25, 1994. Reported: *Hassan v. Canada (Minister of Employment and Immigration)* (1994), 174 N.R. 74 (F.C.A.). A claimant's status as a Tamil male from the north of Sri Lanka is simply not enough, on its own, to establish a well-founded fear of persecution: *Subramaniam, Suresh v. M.C.I.* (F.C., no. IMM-5129-04), O'Reilly, May 12, 2005; 2005 FC 684 at paragraph 7.

<sup>7</sup> *Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations*, issued by the IRB Chairperson pursuant to section 65(3) of the *Immigration Act*, on March 7, 1996, as continued in effect by the Chairperson on June 28, 2002 under the authority found in section 159(1)(h) of the *Immigration and Refugee Protection Act*.

### 9.2.1.1. Background

The older case law seemed to suggest that, in considering whether there is a nexus between the harm feared and a Convention ground, the Courts were taking two different approaches to civil war claims and to the application of *Salibian* and *Rizkallah*. This is due to the interpretation of the wording used by the Court in these two cases. Specifically, in *Rizkallah*, the claim was seen as deficient because those constituting the claimant's group were not "collectively targeted in some way different from the general victims of the ... civil war." In *Salibian*, the Court stated that in order for a claim to succeed, the claimant's fear must not be "that felt indiscriminately by all citizens as a consequence of the civil war".

In some cases where these or similar phrases were invoked,<sup>8</sup> it appears that the Court saw this language as authority for adopting a "comparative approach", which involves comparing the claimant's predicament with the circumstances of other persons in the same country, and requiring that the claimant's predicament be worse than the predicaments of other people.<sup>9</sup>

In other cases, the Court took the position that a claimant who belongs to a group<sup>10</sup> which is at risk of attack by some second group may qualify as a Convention refugee - and, in particular, has the requisite nexus - even if persons other than the claimant and groups other than the claimant's group are also at risk of attack by the same or different attackers. This is colloquially known as the "non-comparative" approach.

According to the non-comparative approach, a claim which arises in a context of widespread violence must meet the same conditions as any other claim. The content of those

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<sup>8</sup> Perhaps the most clear-cut adopting of a comparative approach is found in *Isa, Sharmarka Ahmed v. S.S.C.* (F.C.T.D., no. IMM-1760-94), Reed, February 16, 1995.

Many if not most civil war situations are racially or ethnically based. If racially motivated attacks in civil war circumstances constitute a ground for convention refugee status, then, all individuals on either side of the conflict will qualify. The passages quoted by the Board from [paragraph 164 of] the United Nations Handbook ... indicates that this is not the purpose of the 1951 Convention.

The *Isa* decision was cited approvingly in *Ali, Farhan Omar v. M.C.I.* (F.C.T.D., no. A-1652-92), McKeown, June 26, 1995. Mr. Justice McKeown did not refer to any particular passage in *Isa*.

In *Ali, Shaysta-Ameer v. M.C.I.* (F.C.T.D., no. IMM-3404-95), McKeown, October 30, 1996. Reported: *Ali v. Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 34 (F.C.T.D.), the Trial Division certified the following question: "Are refugee claimants excluded from the definition of Convention refugee if all groups in their country, including the group of which they are members, are both victims and perpetrators of human rights violations in the context of civil war?" See, *infra*, footnote 13.

<sup>9</sup> Requiring a worse predicament might mean any one of several things. To succeed, a claimant might have to establish: (i) that the claimant's level of risk is greater than the risk level of persons in other groups, or (ii) that the claimant's risk level is greater than the risk level of other persons in the claimant's own group; or (iii) that the claimant is at risk of suffering harm greater than that which threatens others.

Regarding (i), see *Siad, Dahabo Jama v. M.E.I.* (F.C.T.D., no. 92-A-6820), Rothstein, April 13, 1993. Reported: *Siad v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 6 (F.C.T.D.); and *Omar, Suleiman Ahmed v. M.C.I.* (F.C.T.D., no. A-1615-92), McKeown, February 7, 1996. Regarding (ii), see *Hassan, supra*, footnote 6.

<sup>10</sup> The claimant's group must be one which is definable in terms of a Convention characteristic.

conditions is no different for such a claim, nor is the claim subject to extra requirements or disqualifications. Thus, under this approach, the decision maker would consider:

- ◆ Serious harm: whether the treatment that the claimant anticipates would amount to serious harm. The question is whether the harm which this particular claimant might experience is serious, not whether the claimant is at risk of harm greater than that to which some other group, or some other person in the claimant's own group, might be subjected.
- ◆ Risk of harm: whether there is a reasonable chance that the claimant would experience the apprehended harm. The issue is not whether this particular claimant carries a degree of risk greater than that which attaches to some other person or group.
- ◆ Nexus: whether there is a nexus between the anticipated inflicting of harm upon the claimant and one of the Convention grounds.<sup>11</sup> It is a matter of identifying the particular source(s) or perpetrator(s) who might inflict harm upon this particular claimant, and determining whether that perpetrator's reason for inflicting harm would tally with one of the grounds.<sup>12</sup> The claimant is not to be disqualified because other persons in the claimant's group or in different groups might also be targeted for similar reasons.

#### **9.2.1.2. The Non-Comparative Approach is the Legal and Preferred Test**

In *Ali, Shaysta-Ameer*,<sup>13</sup> the Court of Appeal affirmed that the proper test for persecution in a civil war context is the non-comparative approach set out in the *Salibian* and *Rizkallah* cases and, as noted earlier, advocated in the Chairperson's Guidelines, *Civilian Non-Combatants Fearing Persecution in Civil War Situations*.<sup>14</sup> The Court cited, with approval, the following passages from the Guidelines:

#### Non-comparative Approach

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<sup>11</sup> *Salibian, supra*, footnote 1, points out that there may be a nexus in a civil war context. *Rizkallah, supra*, footnote 4, may be seen as adding to *Salibian* little more than a reminder that nexus may also be absent in such a situation. Simple political instability does not make for a well-founded fear of persecution: *Del Busto Ezeta, Octavio Alberto v. M.C.I.* (F.C.T.D., no. IMM-2021-95), Cullen, February 15, 1996, where the claimant's difficulties were a result of the unsettled and dangerous political climate in Peru, rather than being linked to a Convention ground. In *Khalib, Amina Ahmed v. M.E.I.* (F.C.T.D., no. A-656-92), MacKay, March 30, 1994. Reported: *Khalib v. Canada (Minister of Employment and Immigration)* (1994), 24 Imm. L.R. (2d) 149 (F.C.T.D.), the claimants' home area, in which the claimants' Issaq clan predominated, had been sown with mines by the former Somali government, allegedly with the intention of harming Issaqs. Many mines remained, and the claimants feared injury. The Refugee Division held that the danger was one faced indiscriminately by all people in the area; and in upholding the decision, the Court noted that while Issaqs may have been the majority, the danger was nevertheless faced by all.

<sup>12</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, per La Forest J., "The examination of the circumstances should be approached from the perspective of the persecutor, since that is determinative in inciting the persecution."

<sup>13</sup> *Ali, Shaysta-Ameer v. M.C.I.* (F.C.A., no. A-772-96), Décary, Stone, Strayer, January 12, 1999.

<sup>14</sup> *Supra*, footnote 7.

The non-comparative approach to the assessment of a claim is the approach advocated in these Guidelines. This approach is more in accord with the third principle set out in *Salibian*, the decisions of the Court of Appeal in *Rizkallah* and *Hersi, Nur Dirie*, as well as the wording of the Convention refugee definition. With this approach, instead of an emphasis on comparing the level of risk of persecution between the claimant and other individuals (including individuals in the claimant's own group) or other groups, the Court examines the claimant's particular situation, and that of her group, in a manner similar to any other claim for Convention refugee status.

The issue is not a comparison between the claimant's risk and the risk faced by other individuals or groups at risk for a Convention reason, but whether the claimant's risk is a risk of sufficiently serious harm and is linked to a Convention reason as opposed to the general, indiscriminate consequences of civil war. A claimant should not be labelled as a "general victim" of civil war without full analysis of her personal circumstances and that of any group to which she may belong. Using a non-comparative approach results in a focusing of attention on whether the claimant's fear of persecution is by reason of a Convention ground. (footnotes omitted)

In *Fi*,<sup>15</sup> the Federal Court cited with approval the following statement referred to in the Guidelines: "if one of the warring parties singles out a person or group of persons for reasons of race, political opinion or one of the other elements enumerated in the refugee definition and subjects it serious human rights violations this clearly constitutes persecution".

### **9.3. PROSECUTION, OR PERSECUTION FOR A CONVENTION REASON?**

#### **9.3.1. Limits to Acceptable Legislation and Enforcement**

Any state is entitled to have, and to enact, laws which will contribute to the better, safer, more just functioning of the national community and its government. And any state is entitled to impose penalties upon those who break its laws. However, from the standpoint of international human rights law, there is a line over which the state cannot legitimately step. To determine whether the state has limited itself to its proper sphere or has overstepped, the Refugee Protection Division must be mindful of the distinction between two kinds of cases: (a) cases in which the treatment foreseen for the claimant would be punishment for nothing other than the breach of a law that does not violate human rights, and does not adversely differentiate on a Convention ground, either on its face or in its application; and (b) cases in which the claimant's actions might contravene a law of his homeland, but in which the law's terms or its anticipated enforcement might infringe upon human rights and adversely differentiate.

#### **9.3.2. Laws of General Application**

The Federal Court has dealt at some length with questions relating to "laws of general application". This term refers to a law which, on its face, applies to a country's entire population, without differentiation; and the term is not properly employed if the law in question targets only

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<sup>15</sup> *Fi v. Canada (Minister of Citizenship and Immigration)*, [2007] 3 F.C.R. 400; 2006 FC 1125 at paragraph 19.

some subset of the population.<sup>16</sup> For a time, the leading decision on this topic was *Musial*;<sup>17</sup> however, in *Zolfagharkhani*,<sup>18</sup> the Court of Appeal examined the theme in greater depth and provided interpretation of *Musial*. Therefore, *Zolfagharkhani* must now be regarded as pre-eminent. *Musial* should be used with caution, and only after taking *Zolfagharkhani* into account.

In *Zolfagharkhani*, the Court rejected the proposition that, so long as the action taken by a government against a claimant is the enforcement of “an ordinary law of general application”, the government is necessarily engaging in prosecution and not persecution. In a dictatorial or totalitarian state, any ordinary law of general application may well be an act of political oppression.<sup>19</sup>

The Court of Appeal in *Zolfagharkhani*<sup>20</sup> set forth “some general propositions relating to the status of an ordinary law of general application in determining the question of persecution”:

- (1) The statutory definition of Convention refugee makes the intent (or any principal effect)<sup>21</sup> of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.<sup>22</sup>
- (2) But the neutrality of an ordinary law of general application, *vis-à-vis* the five grounds for refugee status, must be judged objectively by Canadian

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<sup>16</sup> *Fathi-Rad, Farideh v. S.S.C.* (F.C.T.D., no. IMM-2438-93), McGillis, April 13, 1994. See also *Namitabar v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 42 (T.D.). Compare *Altawil, Anwar Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2365-95), Simpson, July 25, 1996. In *Canada (Secretary of State) v. Namitabar* (F.C.A., no. A-709-93), Décarý, Hugessen, Desjardins, October 28, 1996, the Court overturned the Trial Division on the basis that the CRDD credibility findings were not ambiguous. With respect to the issue of wearing veils in Iran, the Court was of the view that “the Refugee Division may have expressed itself incorrectly [but] that has no importance in the case at bar since the female [claimant] voluntarily complied with the clothing code and did not even display reluctance to do so...”

<sup>17</sup> *Musial v. Canada (Minister of Employment and Immigration)*, [1982] 1 F.C. 290 (C.A.). Speaking for the majority, Pratte J. said:

A person who is punished for having violated an ordinary law of general application, is punished for the offence he has committed, not for the political opinions that may have induced him to commit it. ... [A] person who has violated the laws of his country of origin by evading ordinary military service, and who merely fears prosecution and punishment for that offence in accordance with those laws, cannot be said to fear persecution for his political opinions even if he was prompted to commit that offence by his political beliefs.

<sup>18</sup> *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (C.A.).

<sup>19</sup> *Zolfagharkhani*, *supra*, footnote 18

<sup>20</sup> *Zolfagharkhani*, *supra*, footnote 18. These propositions have been cited with regularity in subsequent decisions dealing with conscientious objection to military service. See section 9.3.6., *infra*.

<sup>21</sup> In *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.), Linden J.A. said that the Refugee Division “wrongly required that a ‘persecutory intent’ be present, whereas a ‘persecutory effect’ suffices.”

<sup>22</sup> Compare *Antonio, Pacato Joao v. M.E.I.* (F.C.T.D., no. IMM-1072-93), Nadon, September 27, 1994 (re: treason, espionage and sabotage).

tribunals and courts when required.<sup>23</sup>

(3) In such consideration, an ordinary law of general application, even in non-democratic societies, should ... be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.

(4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.

Seriousness of harm is another issue which has been addressed in connection with laws of general application. It is quite possible that a law or policy of general application may well be violative of basic human rights.<sup>24</sup> Also, in *Cheung* it was decided that a law of general application may be persecutory where the penalty is disproportionate to the objective of the law, regardless of the authorities' intent:

... if the punishment or treatment under a law of general application is so Draconian as to be completely disproportionate to the objective of the law, it may be viewed as persecutory. This is so regardless of whether the intent of the punishment or treatment is persecution. Cloaking persecution with a veneer of legality does not render it less persecutory. Brutality in furtherance of a legitimate end is still brutality.<sup>25</sup>

In *In Chan* (S.C.C.), Mr. Justice La Forest approved the comments of Linden J.A. regarding “state authority arguments” (as they were called by La Forest J.).<sup>26</sup> And La Forest J. provided his own observations with respect to the “legitimate end” idea:

... I do not in general consider it appropriate for courts to make implicit or explicit pronouncements on the validity of another nation's social policies. In the present case, the full extent of the Chinese population policy is unknown in this country and undue speculation as to its legitimacy serves no purpose. Whether the Chinese government decides to curb its population is an internal

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<sup>23</sup> In *Daghighi, Malek v. M.C.I.* (F.C.T.D., no. A-64-93), Reed, November 16, 1995, the Refugee Division had held that the Iranian claimant had simply run afoul of “laws or a policy of general application founded on fundamentalist principles of Islamic law”. But evidence indicated that the claimant had incurred the authorities' displeasure for Western tendencies and unacceptable religious views, and that he had been obliged to undergo religious instruction. The Court rejected the conclusion that his difficulties were not related to a Convention ground.

In *Chan* (F.C.A.), Mr. Justice Heald ruled that punishment for breach of a government policy is not punishment for political opinion if the breach will be perceived by the authorities not as a challenge to their authority but only as a breach of a law: *Chan v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 675; (1993), 20 Imm. L.R. (2d) 181 (C.A.). See also *Ni, Kong Qiu v. M.C.I.* (F.C. no. IMM-229-18), Walker, September 25, 2018; 2018 FC 948 where the Court confirmed the RPD decision that if the claimant were arrested in China, he faced prosecution due to his resistance to the expropriation of his home. He would not face persecution.

<sup>24</sup> *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, per La Forest J. (dissenting).

<sup>25</sup> *Cheung, supra*, footnote 21, per Linden J.A.

<sup>26</sup> *Chan* (S.C.C.), *supra*, footnote 24, per La Forest J. (dissenting).

matter for that government to decide. Indeed, there are undoubtedly appropriate and acceptable means of achieving the objectives of its policy that are not in violation of basic human rights. *However, when the means employed place broadly protected and well understood basic human rights under international law such as the security of the person in jeopardy, the boundary between acceptable means of achieving a legitimate policy and persecution will have been crossed. It is at this point that Canadian judicial bodies may pronounce on the validity of the means by which a social policy may be implemented in an individual case by either granting or denying Convention refugee status ... [Emphasis added.]*<sup>27</sup>

(The distinction between the authorities' objective and their means of achieving it is discussed further in section 9.3.3. of this chapter.)

Furthermore, a penalty which is disproportionate to the *offence* may constitute persecution.<sup>28</sup> When imposed for certain offences, the death penalty may not constitute persecution.<sup>29</sup>

If the Refugee Protection Division applies the term “law of general application”, it must be careful to include within this characterization only what is actually authorized by the law in question. Where a given policy constitutes a law of general application, a particular sanction used to enforce that policy may not be a law of general application.<sup>30</sup> And even if such a law does figure in the claim, the Division certainly must not disregard measures which are beyond the law. Where there is evidence of extra-judicial punishment or (other) lack of due legal process, consideration must not be limited to the actual legislation itself.<sup>31</sup> Indeed, perversions in the

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<sup>27</sup> *Chan* (S.C.C.), *supra*, footnote 24 per La Forest J. (dissenting).

<sup>28</sup> *Namitabar* (T.D.), *supra*, footnote 16; *Rodriguez-Hernandez, Severino Carlos v. S.S.C.* (F.C.T.D., no. A-19-93), Wetston, January 10, 1994.

<sup>29</sup> *Antonio*, *supra*, footnote 22. See also *Singh, Tejinder Pal v. M.C.I.* (F.C.T.D., no. IMM-5294-97), Muldoon, December 23, 1997 (supplementary reasons), at paragraphs 9-13.

<sup>30</sup> In *Cheung*, *supra*, footnote 21, the Court noted that while China's one-child policy is generally applicable, the forced sterilization of women who have had a child is not a law of general application. See also *Lin, Qu Liang v. M.E.I.* (F.C.A., no. 93-A-142), Rouleau, July 20, 1993. Reported: *Lin v. Canada (Minister of Employment and Immigration)* (1993), 24 Imm. L.R. (2d) 208 (F.C.T.D.), where the Court stated that “economic sanctions, as a means to enforce compliance with the law, does [sic] not amount to persecution”. The Court followed this reasoning in *Li, Mei Yun v. M.C.I.* (F.C., no. IMM-3375-10), Near, May 25, 2011; 2011 FC 610. See also *Chan* (S.C.C.), *supra*, footnote 24, where Major J., citing *Cheung*, noted that “forced sterilization is not a law of general application but rather an enforcement measure used by some local authorities with, at most, the tacit acceptance of the central government. Thus, the reasonableness of a fear of persecution depends, *inter alia*, on the practices of the relevant local authority”.

<sup>31</sup> Regarding extra-judicial punishment, see *Cheung*, *supra*, footnote 21, at 323; and *Moslim, Mahdi Fraih v. S.S.C.* (F.C.T.D., no. 93-A-166), McGillis, February 14, 1994. Regarding lack of due process, see *Namitabar*, *supra*, footnote 16.

An enactment may itself allow for denial of due process, thereby increasing the chances that persecution will occur; see, for example, *Balasingham, Satchithanathan v. S.S.C.* (F.C.T.D., no. IMM-2469-94), Rothstein, February 17, 1995.



application of the law, such as the bringing of a trumped-up charge, and interference in the due process of law, may be aspects of persecutory treatment.<sup>32</sup> In one instance, the Court of Appeal has said that pursuit of a claimant for refusing to carry out a government order will constitute mere prosecution only if the order was a “valid” one, and not one that was “illegal” or with “no legal foundation”.<sup>33</sup>

If enforcement of the law against the claimant would proceed in accordance with due process, and if the sanctions for violating a particular law are not serious, the situation is not one of persecution.<sup>34</sup>

### 9.3.3. Policing Methods, National Security and Preservation of Social Order

In some situations, the argument for the acceptability of state actions may rely not on the presence of any particular authorizing law (if any), but instead on the idea that those actions were aimed at the preservation of social order, against dangers such as crime and terrorism. Indeed, the actions in question, rather than being approved by law, may be of very doubtful legality.

In this context as well, the courts have grappled with the question of whether harmful conduct may be excused by the purpose which prompts the authorities to engage in the conduct. In the first place, the above-quoted statement from *Cheung* - that “[b]rutality in furtherance of a legitimate end is still brutality”<sup>35</sup> - is again apposite. It is not rendered less relevant by the fact that the brutality is perpetrated without the screen, or superficial legitimation, of an authorizing law. Moreover, in *Thirunavukkarasu*,<sup>36</sup> a later decision dealing more directly with the notion of

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In *M.E.I. v. Satiacum, Robert* (F.C.A., no. A-554-87), Urie, Mahoney, MacGuigan, June 16, 1989. Reported: *Canada (Minister of Employment and Immigration) v. Satiacum* (1989), 99 N.R. 171 (F.C.A.), the Court held that the claimant’s fear of extra-judicial punishment, which was based partly on alleged irregularities in prosecution, was not well founded. Furthermore, the Court stated that “... Canadian tribunals have to assume a fair and independent judicial process in the foreign country. In the case of a non-democratic State contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching ... [some key element of the judicial system].” In *Chowdhury, Hasan Mahmud v. M.C.I.* (F.C., no. IMM-7284-05), Mosley, March 4, 2008; 2008 FC 290, the Court faulted the RPD for not considering evidence of enormous backlogs and prolonged or indefinite periods of detention before trial in the claimant’s country.

<sup>32</sup> For example, in *Pacificador, Rodolfo Guerrero v. M.C.I.*, no. IMM-4057-02), Heneghan, December 12, 2003; 2003 FC 1462, the Court held that the Board should have considered the objective basis of the claim relative to the claimant’s membership in a group consisting of persons in the Philippines who are prosecuted for political motives and whose prosecution appears to be tainted by corruption. In *Altun, Ali v. M.C.I.* (F.C., no. IMM-5854-11), Shore, August 29, 2012; 2012 FC 1034, the Court noted that the RPD had considered the matter as one of prosecution rather than persecution but failed to consider that a prosecution can be persecutory if there is clear evidence that the prosecution is not fair.

<sup>33</sup> *Mohamed, Abd Almoula Mohamed v. M.E.I.* (F.C.A., no. A-26-92), Strayer, MacGuigan, Robertson, November 7, 1994. The Court offered little elaboration in its brief reasons, and did not clearly articulate its measure(s) of validity.

<sup>34</sup> *Drozдов, Natalia v. M.C.I.* (F.C.T.D., no. IMM-94-94), Joyal, January 9, 1995.

<sup>35</sup> *Cheung, supra*, footnote 21, per Linden J.A.

<sup>36</sup> *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.).

preserving the social order, the Court of Appeal ruled that “beatings of suspects can never be considered ‘perfectly legitimate investigations’ [into criminal or terrorist activities], however dangerous the suspects are thought to be.”<sup>37</sup> The Court also affirmed that

... the state of emergency in Sri Lanka cannot justify the arbitrary arrest and detention as well as beatings and torture of an innocent civilian at the hands of the very government from whom the claimant is supposed to be seeking safety.<sup>38</sup>

It is inappropriate to dismiss mistreatment on the theory that, by transgressing the law, the claimant forfeited any right to complain about any treatment that was meted out to him or her in response. Rather than stating simply that the claimant could not expect to receive the authorities’ approval for committing illegal acts, the Refugee Protection Division must determine whether the treatment suffered by the claimant constituted persecution in the circumstances.<sup>39</sup>

In a number of cases, the Court has applied reasoning of the kind that was subscribed to in *Cheung* and *Thirunavukkarasu*.<sup>40</sup> However, there have also been cases in which such reasoning has not been applied.<sup>41</sup> In some of these latter cases, the Trial Division judgments appear to contradict the letter and spirit of the opinions from the Court of Appeal.

According to some judges, national security and peace and order are valid social objectives of any state, and temporary derogation of civil rights in an emergency does not necessarily amount to persecution.<sup>42</sup> In this regard, before finding mistreatment to be non-persecutory because there is an emergency, the Refugee Protection Division should consider several matters: Is there indeed an emergency? Is the particular right that is being violated a derogable right, or is it non-derogable?<sup>43</sup> If the right is derogable, what is the nature of the particular emergency, what is the

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<sup>37</sup> *Thirunavukkarasu*, *supra*, footnote 36, per Linden J.A.

<sup>38</sup> *Thirunavukkarasu*, *supra*, footnote 36, per Linden J.A.

<sup>39</sup> *Toledo, Ruben Fernando San Martin v. M.E.I.* (F.C.A., no. A-205-91), Hugessen, Desjardins, Décary, March 1, 1993.

<sup>40</sup> For example, see *Kaler, Minder Singh v. M.E.I.* (F.C.T.D., no. IMM-794-93), Cullen, February 3, 1994. In *Sran, Gurjeet Singh v. M.C.I.* (F.C.T.D., no. IMM-3195-96), McKeown, July 29, 1997, where the claimant had been repeatedly and badly tortured while in police custody, the Court observed: “Torture can never be excused at any time and it is insufficient to characterize it simply as abuse.”

<sup>41</sup> For example, see *Manihani, Saravjit Singh v. M.E.I.* (F.C.T.D., no. A-753-92), Noël, September 3, 1993; *Naguleswaran, Pathmasilosini (Naguleswaran) v. M.C.I.* (F.C.T.D., no. IMM-1116-94), Muldoon, April 19, 1995. In *Naguleswaran* the Court commented that those belonging to militant organizations ought not to be “treated with front-parlour civility”.

<sup>42</sup> *Brar, Jaskaran Singh v. M.E.I.* (F.C.T.D., no. IMM-292-93), Rouleau, September 8, 1993; and *Papou, Bhatia v. M.E.I.* (F.C.T.D., no. A-1040-92), Rouleau, August 15, 1994. See also *Naguleswaran*, *supra*, footnote 41, where Muldoon J. expressed the view that “western concepts of the administration of justice will just not work in some other countries” (emphasis omitted), given the need of those countries to safeguard public security, cope with civil war, and combat terrorism.

<sup>43</sup> *Alfred, Rayappu v. M.E.I.* (F.C.T.D., no. IMM-1466-93), MacKay, April 7, 1994: “The tribunal did not assess the physical mistreatment of the applicant by Colombo police in terms of persecution. Under the *International*

extent of the particular derogation, and is there a logical nexus between the emergency and the derogation?

Some judges have said that short-term detentions for the purpose of preventing disruptions<sup>44</sup> or dealing with terrorism<sup>45</sup> do not constitute persecution. It may also be proper to conclude that some forms of violence, including beatings, do not amount to persecution in the circumstances of a particular case, even though they are reprehensible and violative of human rights;<sup>46</sup> for example, the mistreatment may not have been repetitive or sufficiently severe,<sup>47</sup> and there may be no prospect of its being repetitive or sufficiently severe in the future. However, given *Cheung*, and *Thirunavukkarasu*, the Refugee Protection Division should be cautious about deeming violent conduct to be non-persecutory.<sup>48</sup>

### 9.3.4. Enforcement and Serious Possibility

Even if the evidence speaks of some harm that would qualify as serious, the Refugee Protection Division must consider whether there is a serious possibility that the harm will actually come to pass.<sup>49</sup> A statute which outlaws the claimant's conduct or characteristic may be in existence, and it may provide for unconscionably severe punishment for that conduct or characteristic, but this does not necessarily mean there is a serious possibility that the punishment

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*Covenant on Civil and Political Rights* [,] Articles 7 and 4 make clear that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment even in times of public emergency.”

<sup>44</sup> *Brar, supra*, footnote 42.

<sup>45</sup> *Mahalingam, Paramalingam v. S.G.C.* (F.C.T.D., no. A-79-93), Joyal, November 2, 1993; and *Naguleswaran, supra*, footnote 41. In *Vellupillai, Selvaratnam v. M.C.I.* (F.C.T.D., no. IMM-2043-99), Gibson, March 9, 2000, the Court concluded that while the statement “Short detentions for the purpose of preventing disruption or dealing with terrorism do not constitute persecution” may be generally true, the CRDD must take into account the special circumstances of the claimant, in particular his age and, given that age, the impact of his prior experiences as forecasted in a psychological report. *Kularatnam, Suhitha v. M.C.I.* (F.C., no. IMM-3530-03), Phelan, August 12, 2004; 2004 FC 1122, at paragraph 10, affirms this position. In *Abu El Hof, Nimber v. M.C.I.* (F.C., no. IMM-1494-05), von Finckenstein, November 8, 2005; 2005 FC 1515, the Court upheld as reasonable the RPD's conclusion that the claimant's two short detentions and interrogation, although humiliating, could be viewed as necessary security measures, given the heightened security in Israel at the time. In *Kuzu, Meral v. M.C.I.* (F.C. no. IMM-496-18), Lafrenière, September 14, 2018; 2018 FC 917, the Court came to a similar conclusion concerning two periods of detention for a total of eight hours. The Court noted that at no point did the police use violence towards the claimant nor interfere with his basic human rights.

<sup>46</sup> *Joseph, Christy Shanthakumar v. S.S.C.* (F.C.T.D., no. IMM-7503-93), MacKay, November 18, 1994.

<sup>47</sup> *Murugiah, Rahjendran v. M.E.I.* (F.C.T.D., no. 92-A-6788), Noël, May 18, 1993; *Soma, Ester Elvira v. M.C.I.* (F.C.T.D., no. A-1129-92), Richard, November 15, 1994.

<sup>48</sup> In *Wickramasinghe v. M.C.I.* (F.C.T.D., no. IMM-2489-01), Martineau, April 26, 2002; 2002 FCT 470, the Trial Division, following *Thirunavukkarasu, supra*, footnote 36, held “that beatings, arbitrary arrests and detention of suspects, even in a state of emergency, can never be justified or considered a legitimate part of investigations into criminal or terrorist activities, however dangerous the suspects are thought to be.”

<sup>49</sup> In *Rafieyan, Majid v. M.C.I.* (F.C., no. IMM-4221-06), Tremblay-Lamer, July 6, 2007; 2007 FC 727, the Court, reviewing a decision of an immigration officer on a humanitarian and compassionate application, noted that the officer did not err in finding that while penalties prescribed by law may be indicative of risk, they are not determinative of the issue where there is evidence that these laws are not being enforced.

will be inflicted on the claimant. The Supreme Court has emphasized that, in a determination as to whether the claimant’s fear is objectively well founded, the relevant factors include the laws in the claimant’s homeland, together with the manner in which they are applied. In this connection, the Court cited paragraph 43 of the *UNHCR Handbook*.<sup>50</sup> Enforcement measures may vary from area to area within a country, and if this is the case, “the reasonableness of a fear of persecution depends, *inter alia*, on the practices of the relevant local authority”.<sup>51</sup>

A pattern of non-enforcement might imply that there is less than a serious possibility.<sup>52</sup> However, a claimant should not have to live discreetly in order to avoid prosecution.<sup>53</sup> Also, Chairperson’s Guideline 9 indicates that even where laws criminalizing the claimant’s behaviour are not enforced, they may contribute to a climate of impunity and societal discrimination.<sup>54</sup>

### 9.3.5. Exit Laws

Some countries have laws which impose restrictions on travel abroad. Such laws may make it an offence to depart without prior permission (illegal departure),<sup>55</sup> or to stay abroad beyond some stipulated period (overstay),<sup>56</sup> or to visit certain countries.<sup>57</sup> Where such laws exist, generally sanctions for breaching them are also on the books. In some instances there may, in addition, be provision for extending the authorized travel period before it ends, or for obtaining retroactive authorization of travels that were not approved in advance.

In *Valentin*, Marceau J.A. spoke to those situations in which “the claimant may face criminal sanctions in his or her own country for leaving the territory without authorization or for remaining abroad longer than his or her exit visa allowed.”<sup>58</sup> His Lordship stated:<sup>59</sup>

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<sup>50</sup> *Chan* (S.C.C.), *supra*, footnote 24, per Major J7.

<sup>51</sup> *Chan* (S.C.C.), *ibid.*, per Major J.

<sup>52</sup> *John, Lindyann v. M.C.I.* (F.C.T.D., no. IMM-2833-95), Simpson, April 24, 1996 (reasons signed July 29, 1996), (re law criminalizing homosexual acts). More generally, note *Torres, Alejandro Rodriguez v. M.C.I.* (F.C.T.D., no. IMM-503-94), Simpson, February 1, 1995 (reasons signed April 26, 1995): “In my view, refugee claims are not to be considered on a theoretical level which ignores the realities of the evidence. ... [The Refugee Division] was entitled to make a practical assessment of the possibility of the Applicant facing future persecution.”

<sup>53</sup> See, for example, *Mohebbi, Hadi v. M.C.I.* (F.C., no. IMM-3755-13), Harrington, February 26, 2014; 2014 FC 182.

<sup>54</sup> *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression*, May 1, 2017, section 8.5.6.

<sup>55</sup> See, for example, *Cheng v. M.C.I.* (F.C.T.D., no. IMM-6589-00), Pinard, March 1, 2002; 2002 FCT 211; and *Zheng v. M.C.I.* (F.C.T.D., no. IMM-2415-01), Martineau, April 19, 2002; 2002 FCT 448.

<sup>56</sup> There may be an overstay law which applies to all residents of a country or to all of the country’s citizens, and which provides for penalties of fine or incarceration. Alternatively, a law may provide that a non-citizen resident (including a stateless resident) who travels abroad must return and report periodically, and that failure to do so will result in the loss of resident status and the right to return: e.g. *Altawil, supra*, footnote 16.

<sup>57</sup> For an example of this last situation, see *Losolohoh, James Salah v. M.E.I.* (F.C.T.D., no. IMM-2324-94), Wetston, December 13, 1994.

<sup>58</sup> *Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390 (C.A.).

<sup>59</sup> *Valentin, supra*, footnote 58.

Counsel then challenged the Board's rejection of the argument based on the existence of section 109 of the Czech Criminal Code [the exit law] and the fear of imprisonment that the section aroused in the claimants ... [C]ounsel recalled that there was one school of thought ... [which was] prepared to admit that the mere fear of punishment under a provision such as section 109 ... could amount to a well-founded fear of persecution and provide valid grounds for a refugee claim. We know that some supporters of this theory argue a sort of presumption that the authorities of the national State will automatically and inevitably interpret the decision of their fellow-citizen to leave the country without authorization, or to remain abroad beyond the time provided, as evidence of political opposition. Counsel acknowledged that this is an extreme position, which the vast majority of commentators rejected, and did not urge its acceptance *per se* ...

...

Neither the international Convention nor our *Act*, which is based on it, as I understand it, had in mind the protection of people who, having been subjected to no persecution to date, themselves created a cause to fear persecution by freely, of their own accord and with no reason, making themselves liable to punishment for violating a criminal law of general application. I would add ... that the idea does not appear to me even to be supported by the fact that the transgression was motivated by some dissatisfaction of a political nature ..., because it seems to me, first, that an isolated sentence can only in very exceptional cases satisfy the elements of repetition and relentlessness found at the heart of persecution<sup>60</sup> ..., but particularly because the direct relationship that is required between the sentence incurred and imposed and the offender's political opinion does not exist.

*Valentin* effectively bars self-induced refugee status. That decision starts from the premise that a claimant has a valid exit visa. It then bars the claimant from relying on the self-created overstay as a ground of persecution.<sup>61</sup> However, the Board must consider the validity of the exit visa and the circumstances under which it was obtained. Where the claimant had to pay a bribe to obtain the security clearance necessary to obtain the visa, that puts the validity of the exit visa into question.<sup>62</sup>

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<sup>60</sup> However, see *M.S. v. M.C.I.* (F.C.T.D., no. A-132-91), McKeown, August 27, 1996. The Court suggested that the severity of the penalty might be a very significant factor.

<sup>61</sup> See *Perez, Sofia Sofi v. M.C.I.* (F.C., no. IMM-6504-09), Snider, August 23, 2010; 2010 FC 833, where the Court applied *Valentin* and also found that based on the evidence, it was far from clear that the claimant would be charged and convicted under the applicable law. She could still apply for a special re-entry permit to return to Cuba and her allegation of imprisonment was mere speculation. In *Del Carmen Marrero Nodarse, Maria v. M.C.I.* (F.C., no. IMM-1706-10), Near, March 10, 2011; 2011 FC 289, the Court upheld the Board's finding that the applicant had artificially created a circumstance in which she might be punished for violating a Cuban law of general application. As there was no evidence that any prosecution the applicant would face would not be neutral, the RPD did not find that any potential prosecution constituted a risk of harm. In *Suarez Rosales, Reinaldo v. M.C.I.* (F.C., no. IMM-5038-11), Phelan, March 19, 2012; 2012 FC 323, the Cuban claimants had failed to seek an extension of their exit visas even though it is normal to extend such visas for 11 months and possibly longer.

<sup>62</sup> *Pernas Hernandez, Euler v. M.C.I.* (F.C., no. IMM-2072-08), Phelan, March 4, 2009; 2009 FC 229.

Where the claimant has violated an exit law, the decision to punish the claimant for that infraction, or to impose a certain degree of punishment, might be due to some characteristic of the claimant such as his political record. Repercussions beyond the statutory sentence may suggest that the actions of the authorities are persecutory.<sup>63</sup> The Board errs where it fails to consider whether the claimant would risk severe or extra-judicial treatment as a result of his or her illegal exit.<sup>64</sup>

### 9.3.6. Military Service: Conscientious Objection, Evasion, Desertion

The claimant's problems may be connected with a disinclination to serve in the military. Either the claimant entered the military and left it without authorization (i.e., the claimant deserted);<sup>65</sup> or the claimant was ordered to report for service, but refused to report or refused to be inducted; or the claimant has not yet received a call-up, but anticipates that the order will be forthcoming and does not wish to comply.

The courts have established some very basic points of departure for the analysis of such claims. Thus, conscientious objectors and army deserters are not automatically included in the Convention refugee definition, nor is a person precluded from being a Convention refugee because the person is a conscientious objector or deserter.<sup>66</sup> It is not persecution for a country to have compulsory military service.<sup>67</sup> An aversion to military service or a fear of combat is not in itself sufficient to justify a fear of persecution.<sup>68</sup>

Both human rights and humanitarian law prohibit the recruitment and engagement of children in armed conflict.<sup>69</sup>

Proceeding to a more detailed analysis of the claim, the Refugee Protection Division must consider whether the circumstances disclose a nexus between the treatment feared and one of the

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<sup>63</sup> *Castaneda, Robert Martinez v. M.E.I.* (F.C.T.D., no. A-805-92), Noël, October 19, 1993 (Cuba). In *Chow, Wing Sheung v. M.C.I.* (F.C.T.D., no. A-1476-92), McKeown, March 26, 1996, the Court noted that the Refugee Division had found that neither the maximum prescribed penalty nor the penalties actually imposed were harsh.

<sup>64</sup> *Donboli, Khosrow v. M.C.I.* (F.C., no. IMM-3013-02), Dawson, July 16, 2003; 2003 FC 883. See also *Alfaro, Victor Labrador v. M.C.I.* (F.C., no. IMM-7390-10), Rennie, July 22, 2011; 2011 FC 912; and *Gonzalez Salcedo, Maykel v. M.C.I.* (F.C., no. IMM-5975-13), Phelan, August 25, 2014; 2014 FC 822.

<sup>65</sup> For an example of a situation which was found not to constitute desertion, see *Nejad, Saeed Javidani-Tabriz v. M.C.I.* (F.C.T.D., no. IMM-4624-93), Richard, November 16, 1994.

<sup>66</sup> *Musial, supra*, footnote 17, per Thurlow C.J.

<sup>67</sup> *Popov, Leonid Anatolievich v. M.E.I.* (F.C.T.D., no. IMM-2567-93), Reed, April 11, 1994. Reported: *Popov v. Canada (Minister of Employment and Immigration)* (1994), 24 Imm. L.R. (2d) 242 (F.C.T.D.).

<sup>68</sup> *Garcia, Marvin Balmory Salvador v. S.S.C.* (F.C.T.D., no. IMM-2521-93), Pinard, February 4, 1994. In *Haoua, Mehdi v. M.C.I.* (F.C.T.D., no. IMM-698-99), Nadon, February 21, 2000, the Court stated at para. 16 "... I also note that military service does not, in itself, constitute persecution. Rather, the Applicant's claim hinged on the fear that he would be forced to commit atrocities if he were drafted. If there is no evidence of atrocities, as there was none in this case, there is no evidence of persecution."

<sup>69</sup> *Convention on the Rights of the Child*, Article 38(2) – under age 15; and *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, Article 2 - under age 18. The recruitment of child soldiers is a war crime under the *Rome Statute of the International Criminal Court*.

Convention grounds. *Zolfagharkhani*<sup>70</sup> is the leading case with respect to nexus (and other factors) in military-service situations.<sup>71</sup> The principles quoted from that case earlier on<sup>72</sup> should be referred to for guidance when determining whether the claimant's difficulties regarding service should be ascribed to a Convention ground, or instead should be considered punishment for a violation of a law of general application.

However, as an aside from *Zolfagharkhani*, the decision of the Federal Court of Appeal in *Ates*<sup>73</sup> has put into question whether conscientious objection to military service can ever be considered to be a ground for claiming Convention refugee status. The Court answered, without any analysis, the following certified question in the negative:

In a country where military service is compulsory, and there is no alternative thereto, do repeated prosecutions and incarcerations of a conscientious objector for the offence of refusing to do his military service, constitute persecution based on a Convention refugee ground?"

*Zolfagharkhani* indicates that it is not the claimant's motivation for refusing to serve which is relevant, but rather the intent or principal effect of the conscription law.<sup>74</sup> In accordance with this guideline, one must ask whether the reaction of the authorities to the claimant's refusal to serve would be a function of some Convention attribute which the claimant has, or would be perceived by the authorities as having (a political opinion often being the likeliest possibility).<sup>75</sup> Even where the claimant has no strong convictions which should be permitted to interfere with the claimant's serving, his refusal might be regarded by the authorities as an indication of an opinion which is

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<sup>70</sup> *Zolfagharkhani*, *supra*, footnote 18.

<sup>71</sup> *Musial*, *supra*, footnote 17, also dealt with military service but *Zolfagharkhani*, *supra*, footnote 18 has replaced *Musial* as the chief authority not only with respect to the more encompassing topic of laws of general application, but also with respect to this particular example of such laws. See Chapter 9, section 9.3.2.

<sup>72</sup> See Chapter 9, section 9.3.2.

<sup>73</sup> *Ates*, *Erkan v. M.C.I.* (F.C.A., no. A-592-04), Linden, Nadon, Sharlow, October 5, 2005; 2005 FCA 322 [Appeal from *Ates*, *Erkan v. M.C.I.* (F.C., no. IMM-150-04), Harrington, September 27, 2004; 2004 FC 1316]; leave to appeal to the Supreme Court of Canada dismissed without costs March 30, 2006 (31246). This case was followed in *Ielovski*, *Vladimir v. M.C.I.* (F.C., no. IMM-3520-07), de Montigny, June 13, 2008; 2008 FC 739; and in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 F.C.R. 561; 2006 FC 420, where the Court stated:

[207] At the present time, however, there is not internationally recognized right to either total or partial conscientious objection. While the UN Commission on Human Rights and the Council of Europe have encouraged member States to recognize a right to conscientious objection in various reports and commentaries, no international human rights instrument currently recognizes such a right, and there is no international consensus in this regard...

<sup>74</sup> *Zolfagharkhani*, *supra*, footnote 18.

<sup>75</sup> See *Ahani*, *Roozbeh v. M.C.I.* (F.C.T.D., no. IMM-4985-93), MacKay, January 4, 1995, where the Court said that the Refugee Division was entitled to find that the detentions and any associated mistreatment were related to the claimant's failure to complete his military service, rather than to his Kurdish origin or related political views. On the other hand, see *Diab*, *Wadih Boutros v. M.E.I.* (F.C.A., no. A-688-91), Isaac, Marceau, McDonald, August 24, 1994, where the Court held that the Refugee Division erred in that it failed to consider whether the claimant's opposition to serving in a particular militia (which had press-ganged him) constituted a political opinion which could result in persecution.

frowned upon by them.

However, it would seem that the motivation of the claimant has not been completely discarded as a factor in claims concerning military service, although the cases do not make clear to which element or elements (nexus, serious harm) it may relate, and exactly how it should be worked into the consideration of a particular element. In *Zolfagharkhani* itself, the Court of Appeal focused on the claimant's reason of conscience for not wishing to serve, and laid considerable emphasis on the fact that the particular combat technique to which the claimant objected was abhorred by the international community; but the Court did not provide much explanation as to how such attending to the claimant's reason of conscience was to be reconciled with the view that the claimant's motivation is not relevant.<sup>76</sup> Furthermore, in subsequent decisions, the Court has repeatedly considered the claimant's conscience, as well as the attitude of the international community to operations criticized by the claimant. Reliance has even been placed explicitly upon the "applicant's motive".<sup>77</sup> The reader should bear in mind these ambiguities in the case law when reviewing the following observations on reasons-of-conscience claims.<sup>78</sup>

There is some debate - and some confusion - about the meaning of the term "conscientious objector". In *Popov*, the Trial Division indicated that, "in the usual sense", this term applied to a person who "was a pacifist or was against war and all militarism on the grounds of principle, either religious or philosophical."<sup>79</sup> It may be correct to reserve this particular term for persons who are opposed to all militarism; but at the same time, it must be appreciated that what is important for the determination of a claim is not whether this particular label fits.

The important question is whether a claimant's reason of conscience will be sufficiently significant only if it entails an opposition to all militarism (or is otherwise broad in scope). In *Zolfagharkhani*, the Court of Appeal indicated that a claimant's objection may be entitled to respect even if it is more specific: where the claimant did not object to military service in general or to the particular conflict, but was opposed to the use of a particular category of weapon (namely, chemical weapons), the Court found his objection to be reasonable and valid.<sup>80</sup> Similarly, the Trial Division has held that a claimant may object to serving in a particular conflict, rather than objecting to military service altogether, and may still be a Convention refugee.<sup>81</sup>

This is not to say that any narrow or limited objection of conscience will suffice. The objection may be regarded as sufficiently serious if the military actions objected to are judged by

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<sup>76</sup> *Zolfagharkhani*, *supra*, footnote 18.

<sup>77</sup> See for example *Sladoljev, Dejan v. M.E.I.* (F.C.T.D., no. IMM-3160-94), Cullen, July 4, 1995. The Court did not mention *Zolfagharkhani*, *supra*, footnote 18.

<sup>78</sup> See also paragraphs 170 to 174 of the UNHCR *Handbook*.

<sup>79</sup> *Popov*, *supra*, footnote 67. In *Lebedev, Vadim v. M.C.I.* (F.C., no. IMM-2208-06), de Montigny, July 9, 2007; 2007 FC 728, the Court described conscientious objection as "genuine convictions grounded in religious beliefs, philosophical tenets or ethical considerations".

<sup>80</sup> *Zolfagharkhani*, *supra*, footnote 18.

<sup>81</sup> *Ciric v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 65 (T.D.).



the international community to be contrary to basic rules of human conduct.<sup>82</sup> However, a military's operations are not to be characterized as contravening international standards if there are only isolated violations of those standards. Instead, there must be offending military activity by the military forces which is condoned in a general way by the state.<sup>83</sup>

The serious harm that is a requisite for persecution may be found in the forcing of the claimant to perform military service; where reasons of conscience are involved, there is also a violation of the claimant's freedom of conscience; where military actions violate international standards, the claimant might be forced into association with the wrongdoing.<sup>84</sup> One must also bear in mind that some conscription activities may be extra-legal, and may therefore lack any basis for claiming to constitute legitimate exercises of state authority. An organization may have *de facto* authority and an ability to coerce persons into performing military service, yet not be a legitimate government, and have no right to conscript.<sup>85</sup>

If a call-up for military service would not necessarily result in the claimant's being

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<sup>82</sup> *Zolfagharkhani*, *supra*, footnote 18. See also: *Ciric*, *supra*, footnote 81. It is not enough for the claimant to show that a particular conflict has been condemned by the international community; it must also be the case that his refusal to participate was based on the condemnation: *Sladoljev*, *supra*, footnote 77. And there must be a reasonable chance that the claimant would indeed be required to participate in the objectionable operations: *Zolfagharkhani*, *supra*, footnote 18;

Pronouncements from organizations such as Amnesty International, Helsinki Watch, and the Red Cross may constitute condemnation by the world community; condemnation by the United Nations is not necessary: *Ciric*, *supra*, footnote 81.

A non-defensive incursion into foreign territory is military activity that violates basic international standards, and United Nations condemnation of such an incursion is condemnation of the incursion as contrary to basic rules of human conduct: *Al-Maisri, Mohammed v. M.E.I.* (F.C.A., no. A-493-92), Stone, Robertson, McDonald, April 28, 1995.

There will also be instances where political expediency will prevent the UN or its member states from condemning the violation of international humanitarian law. This is why reports from credible non-governmental organizations, especially when they are converging and hinge on ground staff, should be accorded credit. Such reports may be sufficient evidence of unacceptable and illegal practices. See *Lebedev*, *supra*, footnote 79, cited with approval in *Tewelde, Baruch v. M.C.I.* (F.C., no. IMM-81-06), Gauthier, October 24, 2007; 2007 FC 1103.

<sup>83</sup> *Popov*, *supra*, footnote 67. There must be a probability, and not merely a possibility, that the military will engage in the offending activity: *Hashi, Haweya Abdinur v. M.C.I.* (F.C.T.D., no. IMM-2597-96), Muldoon, July 31, 1997, alluding to *Zolfagharkhani*. In *Sounitsky, Alexander v. M.C.I.* (F.C., no. IMM-2184-07), Mosley, March 14, 2008; 2008 FC 345, the PRRA officer referred to evidence acknowledging the existence of abuses and the allegations by some international organizations about Israeli Defence force practices and gave a reasoned explanation for finding that the abuses were isolated and not systemic. A similar finding was made in *Volkovitsky, Olga v. M.C.I.* (F.C., no. IMM-567-09), Shore, September 10, 2009; 2009 FC 893. In *Key, Joshua Adam v. M.C.I.* (F.C., no. IMM-5923-06), Barnes, July 4, 2008; 2008 FC 838, the issue was raised as to whether widespread violations of international law carried out by a military force but not rising to the level of war crimes or crimes against humanity can support a refugee claim by a conscientious objector. The case law does not support the idea that refugee protection is only available where the particulars of one's objection to military service would, if carried out, exclude a claim by that person to protection.

<sup>84</sup> *Zolfagharkhani*, *supra*, footnote 18.

<sup>85</sup> *Diab*, *supra*, footnote 75.

compelled to perform military service, the injury to the claimant's interests is less, and the legitimacy of the demands placed on the claimant by the state looms large. Therefore, where objections of conscience may enable the claimant to obtain an exemption from service, or assignment to alternative service (i.e., non-military service, or non-combat service, or service outside a particular theatre of operations), the conscription law may not be inherently persecutory.<sup>86</sup>

Nor is there persecution if the penalties for refusing to serve are not harsh,<sup>87</sup> except perhaps where the refusal to serve occurs in the context of a military operation condemned as contrary to basic rules of human conduct.<sup>88</sup> The Refugee Protection Division must consider the actual practice in the treatment of deserters, and not just the penalty prescribed by law.<sup>89</sup>

The Board must also consider whether the law of general application will be applied in a fair and neutral way to a particular claimant, both in regards to the prosecution and to the punishment.<sup>90</sup>

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<sup>86</sup> *Talman, Natalia v. S.G.C.* (F.C.T.D., no. IMM-5874-93), Joyal, January 11, 1995. In *Kirichenko, Andrei v. M.C.I.* (F.C., no. IMM-688-10), Russell, January 6, 2011; 2011 FC 12, the Court noted that the RPD erred by failing to mention and deal with the objective documentation on the record which said that conscientious objector status was not available to males in Israel. (*Hinzman* distinguished). The Court further noted that the evidence showed that there was no law allowing for conscientious objector status in Israel and the so-called Conscientious Objector Committee is “haphazard, secretive and difficult to access”, which is vague and arbitrary and cannot be considered an option. However, in the later case of *Graider, Emil v. M.C.I.* (F.C., no. IMM-2894-12), O’Reilly, April 29, 2013; 2013 FC 435, the Court referred to post *Kirichenko* evidence that indicated that Israel had established a “special military committee” that grants exemptions from military service to conscientious objectors, or recommends their assignment to non-combat roles. This committee was set up in response to a May 2009 judgment of the Israeli High Court of Justice that recognized the rights of conscientious objectors.

<sup>87</sup> *Frid, Mickael v. M.C.I.* (F.C.T.D., no. IMM-6694-93), Rothstein, December 15, 1994. See also *Moskvitchev, Vitalli v. M.C.I.* (F.C.T.D., no. IMM-70-95), Dubé, December 21, 1995, where the Court upheld decisions of Post-Claim Determination Officers (PCDOs). In *Moskvitchev*, the PCDO found that a sentence of six months to five years for draft evasion in Moldova would not be inhuman [*sic*] or extreme. Insults and attacks on a conscientious objector while in prison do not constitute persecution: *Treskiba, Anatoli Benilov v. M.C.I.* (F.C., no. IMM-1999-08), Pinard, January 13, 2009; 2009 FC 15.

<sup>88</sup> In *Al-Maisri, supra*, footnote 82, the claimant had deserted from an army which was participating in an operation condemned as contrary to basic rules of human conduct, and the Court noted that “the punishment for desertion which would likely be visited upon the [claimant] ..., whatever that punishment might be, would amount to persecution.” (emphasis added).

<sup>89</sup> *Moz, Saul Mejia v. M.E.I.* (F.C.T.D., no. A-54-93), Rothstein, November 12, 1993. Reported: *Moz v. Canada (Minister of Employment and Immigration)* (1993), 23 Imm. L.R. (2d) 67 (F.C.T.D.). In *Lowell, Matthew David v. M.C.I.* (F.C., no. IMM-4599-08), Zinn, June 22, 2009; 2009 FC 649, on an unsuccessful application for humanitarian and compassionate relief, the Court noted that the evidence indicated that the applicant (a U.S. deserter) would likely not serve more than 15 months (of a possible sentence of 7 years confinement or possibly the death penalty) and only then after receiving due process.

<sup>90</sup> In *Rivera, Kimberly Elaine v. M.C.I.* (F.C., no. IMM-215-09), Russell, August 10, 2009; 2009 FC 814, the Court criticized the RPD because it had failed to conduct a meaningful examination in the decision of selected and targeted prosecution by the U.S. based upon the political opinion of those deserters who have spoken out against the war in Iraq. Similarly, in *Walcott, Dean William v. M.C.I.* (F.C., no. IMM-5527-10; F.C. no. IMM-5528-08), de Montigny, April 5, 2011; 2011 FC 415, the Court found that the PRRA Officer ignored the applicant’s evidence that his fear was based not so much on being punished for having been absent from his military unit without permission, but of being treated more harshly because of the high profile of his case and his public

Somewhat akin to the idea that the claimant would not be persecuted if he would not be forced into military activity is the notion that the Refugee Protection Division should not endorse an objection to compulsory military service in the country of reference if the claimant chose to immigrate to that country, knowing that compulsory service existed there.<sup>91</sup>

The availability of state protection for deserters became the key issue in a series of cases involving U.S. servicemen during the war in Iraq. Two individuals, Hinzman and Hughey, voluntarily enlisted in the U.S. military. During their time in the military, they developed an objection to the war in Iraq, deserted, and came to Canada where they made refugee claims.

Their claims to refugee protection were rejected by the IRB. The RPD<sup>92</sup> found that the claimants would be afforded the full protection of a fair and independent military and civilian judicial process in the U.S. As a result they had not rebutted the presumption of state protection and their claims for refugee protection must fail. The RPD also found that they were not conscientious objectors because; (1) their decision to desert the U.S. military was motivated by opposition to a specific war and not by objection to war in general and (2) because the war in Iraq did not fall within the meaning of paragraph 171 of the UNHCR Handbook as being waged contrary to basic rules of human conduct. Lastly, the RPD found that the punishment they would likely receive as a result of their desertion would not be applied to them in a discriminatory way and would not be excessive or disproportionately severe.

Mactavish J., of the Federal Court<sup>93</sup> upheld the RPD decisions, finding that paragraph 171 of the Handbook referred to “on the ground” conduct of a soldier and not to the legality of the war itself

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speeches in opposition to the war in Iraq. The Officer failed to address this risk, and more particularly the risk of being court-martialed and imprisoned rather than being administratively discharged. In *Vassey, Christopher Marco v. M.C.I.* (F.C., no. IMM-5834-10), Scott, July 18, 2011; 2011 FC 899, the Court found unreasonable the RPD’s failure to assess the evidence before it concerning the application of prosecutorial discretion on the grounds of political opinion. In *R.S. v. M.C.I.* (F.C., no. IMM-6056-11), Gleason, July 6, 2012; 2012 FC 860, the Court found that the RPD erred by failing to consider the applicant’s argument that the treatment afforded to selective conscientious objectors in Israeli military prisons was harsher than that afforded to those who were jailed because they had refused to serve for other reasons and that selective conscientious objectors received longer sentences. In *Tindungan, Jules Guiniling v. M.C.I.* (F.C., no. IMM-5069-12), Russell, February 1, 2013; 2013 FC 115, the Court found that the RPD had failed to consider evidence that supported the claimant’s allegation that he would be disproportionately punished if sent back to the US because of his publicly expressed political opinions.

<sup>91</sup> *Kogan, Meri v. M.C.I.* (F.C.T.D., no. IMM-7282-93), Noël, June 5, 1995. The operative idea seems to be that the claimant should be considered bound by his own voluntary decision. The fact that the claimant chose to immigrate despite knowing of compulsory service might also raise a question as to the strength (or even genuineness) of his conviction. But note that in *Agranovski, Vladislav v. M.C.I.* (F.C.T.D., no. IMM-2709-95), Tremblay-Lamer, July 3, 1996, where at the time of immigrating to Israel, the claimant had known that there was compulsory military service, and the Refugee Division did not believe he had reasons of principle for refusing to serve, the Court overturned this conclusion, noting that the claimant had been brought to the country as a minor by his parents, and that he had thought he would be able to avail himself of alternative service.

<sup>92</sup> *Hinzman, Jeremy*, RPD TA4-01429, B. Goodman, March 16, 2005; *Hughey, Brandon David*, RPD TA4-05781, B. Goodman, August 16, 2005.

<sup>93</sup> *Hinzman, supra*, footnote 73; *Hughey, Brandon David v. M.C.I.* (F.C., no. IMM-5571-05), Mactavish, March 31, 2006; 2006 FC 421.

and that the claimants had not established that they would have been involved in unlawful acts had they gone to Iraq. Mactavish J. certified the following question:

When dealing with a refugee claim advanced by a mere foot soldier, is the question whether a given conflict may be unlawful in international law relevant to the determination which must be made by the Refugee Division under paragraph 171 of the UNHCR *Handbook*?

The Federal Court of Appeal,<sup>94</sup> in a unanimous decision, declined to answer the certified question. Evans J., writing for the Court, found that Hinzman and Hughey had not sufficiently pursued the opportunities to obtain state protection in the United States before asking for international protection. The following statements by the FCA are of interest:

- The presumption of state protection applies equally to cases where an individual claims to fear prosecution by non-state entities and to cases where the state is alleged to be a persecutor. This is particularly so where the home state is a democratic country like the United States.
- A claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status.

### 9.3.7. One-Child Policy of China

The People's Republic of China had a policy which, subject to exceptions, restricted each couple to having one child. A variety of sanctions were used in attempts to secure compliance with

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<sup>94</sup> *Hinzman, Jeremy v. M.C.I. and Hughey, Brandon David v. M.C.I.* (F.C.A., nos. A-182-06; A-185-06), Décarry, Sexton, Evans, April 30, 2007; 2007 FCA 171 (leave to appeal dismissed by the SCC on November 15, 2007, [2007] S.C.C.A. No. 321). In *Colby, Justin v. M.C.I.* (F.C., no. IMM-559-07), Beaudry, June 26, 2008; 2008 FC 805, the Court found that the claimant's claim was materially indistinguishable from the decision in *Hinzman* except that the claimant was a medic who was deployed to Iraq instead of a foot soldier who deserted after his unit had been deployed to that country. *Key, supra*, footnote 83, confirms that the *Hinzman* decision set the bar very high for deserters from the United States military seeking refuge in Canada. However, because the Board took the issue of state protection "off the table" at the hearing, Mr. Key should be given the opportunity to address fully the issue of state protection in a rehearing before the Board. *Landry, Dale Gene v. M.C.I.* (F.C., no. IMM-5148-08), Harrington, June 8, 2009; 2009 FC 594 also followed *Hinzman*. While the preceding cases following *Hinzman* were based on conscientious objection (effectively, political opinion), in *Smith, Bethany Lanae v. M.C.I.* (F.C., no. IMM-677-09), de Montigny, November 20, 2009; 2009 FC 1194, the claim was based on sexual orientation and the Court noted that the RPD failed to consider evidence that the U.S. military judicial system was unfair to, and biased, against homosexuals and that the claimant could not effectively defend herself against a charge of desertion. At the re-hearing of the claim, the RPD again rejected the claim and did not believe the claimant's allegation of having experienced persecution based on her sexual orientation. The Court upheld the decision and held, *inter alia*, that absent evidence of efforts by the applicant to avail herself of the remedies available in the United States, it was impossible for the RPD to assess the availability of state protection for her (*Hinzman*). It was reasonably open to the RPD to conclude there was adequate recourse in the US for those who felt they had been wronged in the US army. See *Smith, Bethany Lanae v. M.C.I.* (F.C., no. IMM-5699-11), Mosley, November 2, 2012; 2012 FC 1283.

the policy.<sup>95</sup> This policy was replaced in late 2015 with a two-child policy and it is unclear what sanctions are being used to enforce compliance. To the extent that similar restrictions and sanctions might be used, the law that has developed with respect to the one-child policy is still relevant.

Claims based on the one-child policy generated considerable jurisprudence. There are three leading decisions regarding this matter. In the earliest of the three, *Cheung*,<sup>96</sup> the Court of Appeal declared the claimants to be Convention refugees: they were a woman who was facing forced sterilization, and her minor daughter who had been born in violation of the policy. *Cheung* was a unanimous decision of three judges.

Next came the Court of Appeal's decision in *Chan*,<sup>97</sup> where the majority found against a man who was allegedly facing forced sterilization. Two judges (Heald and Desjardins, J.J.A.) constituted the majority; the third (Mahoney J.A.), who had also been part of the bench in *Cheung*, dissented. Each of the three Court of Appeal judges in *Chan* produced a separate set of reasons, and there were significant differences even between the two majority decisions. It should be noted that the Supreme Court's ruling in *Ward*<sup>98</sup> came out after *Cheung* but before *Chan* (F.C.A.). The Court of Appeal in *Chan* considered both *Cheung* and *Ward*.

*Chan* (F.C.A.) was appealed, yielding the third of the principal authorities, the decision of the Supreme Court in *Chan*.<sup>99</sup> Again there was a split decision: by a four-to-three majority, the Court dismissed the appeal, affirmed the decisions of the Court of Appeal and the Refugee Division, and found against the appellant (claimant).

The crux of the judgment of the Supreme Court majority (per Major J.) was that the evidence was inadequate to make out the claimant's allegations - notably, his allegation that there was a serious possibility he would be physically coerced into undergoing sterilization. Apart from recording views expressed by the Court of Appeal in *Chan* (including views concerning *Cheung* and *Ward*), Mr. Justice Major declined to discuss, or rule on, certain legal issues which had occupied that lower court in this case: e.g., whether forced sterilization constitutes persecution; whether the claim involved a particular social group; and whether the claimant's having a second child was to be construed as an act which expressed a political opinion (or an act which would be perceived by the authorities as the expression of a political opinion).

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<sup>95</sup> In both *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.), and *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, it was recognized that the fear of persecution under China's one-child policy is largely dependent on the practices of the relevant local authority. A review of the documentary evidence in *Shen, Zhi Ming v. M.C.I.* (F.C., no. IMM-313-03), Kelen, August 15, 2003; 2003 FC 983 indicated that this was still the case at the time of the hearing. In *Lau, Yei Wah v. M.C.I.* (F.C., no. IMM-2329-07), Phelan, April 17, 2008; 2008 FC 499, a PRRA officer found that payment of a fee for a breach of the one-child policy was not persecution. It was incumbent on the claimant to put forward evidence that the fee was so large as to amount to persecution, either as a general proposition or in regard to the claimant personally.

<sup>96</sup> *Cheung*, *supra*, footnote 21.

<sup>97</sup> *Chan* (F.C.A.), *supra*, footnote 23.

<sup>98</sup> *Ward*, *supra*, footnote 12.

<sup>99</sup> *Chan* (S.C.C.), *supra*, footnote 24.

The Supreme Court's dissenting minority (per La Forest J.) had a different appreciation of the evidence, and would have left it to the Refugee Division to perform a further assessment of the evidence; however, in finding that the appeal should be allowed, the minority also addressed some of the legal issues which the majority had bypassed. The minority's comments on these issues carry considerable persuasive authority, inasmuch as they were not contradicted by the majority, and represent the views of a significant number of Supreme Court justices; furthermore, insofar as these comments are an explanation of the *Ward* decision, it must be noted that the explanation was provided by the author of that decision, Mr. Justice La Forest.

Further particulars of these three leading decisions are set forth in the material that follows.

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In the context of claims involving the one-child policy, the Court of Appeal has reiterated that all elements of the Convention refugee definition must be present. Thus, it has been noted that, where the claim concerns the breach of a valid policy, abhorrence of the penalty, or the presence of a well-founded fear of persecution, does not justify a finding that the claimant is a Convention refugee; it is also necessary that the punishment be for a Convention reason.<sup>100</sup> Conversely, if a link to a Convention ground is established, the claimant must still show that he or she has a well-founded fear of persecution.<sup>101</sup>

On the issue of serious harm, both in *Cheung* and in *Chan* (F.C.A.) it was held that the anticipated mistreatment qualified. Thus, forced or strongly coerced<sup>102</sup> sterilization constitutes persecution, whether the victim is a woman<sup>103</sup> or a man.<sup>104</sup> In *Cheung*, Linden J.A. explained this

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<sup>100</sup> *Chan* (F.C.A.), *supra*, footnote 23, per Heald J.A.

<sup>101</sup> *Cheung*, *supra*, footnote 21. See also *Chan* (S.C.C.), *supra*, footnote 24, per Major J. The Supreme Court noted that, for the claim to succeed, evidence must show both that there is a subjective fear and that the fear is "objectively well-founded" (per Major J.). According to the Court, the evidence did not establish a serious possibility that certain harm would be inflicted - i.e., did not establish an objective basis (per Major J.). The Court also had doubts as to whether subjective fear was made out (per Major J.).

<sup>102</sup> "Physical compulsion is not the only mechanism for forcing a person to do something which they would not of their own free choice choose to do": *Liu, Ying Yang v. M.C.I.* (F.C.T.D., no. IMM-4316-94), Reed, May 16, 1995. The claimant had been subjected to "incredible pressure": her work unit, and she herself and her husband, would have incurred fines if she had had a second child; also, on two occasions a member of the work unit had accompanied her to a hospital where she was to undergo sterilization. Such pressure amounts to "forcing", as does denying a person 80% of his salary.

Compare *Chan* (S.C.C.), *supra*, footnote 24, per Major J.: "... the [claimant] failed to provide ... evidence to substantiate his claim that the pressure from the Chinese authorities to submit to sterilization would extend beyond psychological and financial pressure to actual physical coercion." It is unclear whether Mr. Justice Major (i) was of the view that psychological and financial pressure could not constitute forcing (and could not constitute persecution), or (ii) was simply focusing upon the specific allegation made by the appellant (namely, that he would be physically coerced), or (iii) did not think the particular psychological and financial pressures confronting this claimant would be severe enough to constitute persecution. Interpretation (i) might be a dubious one, given that Major J. did not clearly assert this view, and did not present a discussion of the issue.

<sup>103</sup> *Cheung*, *supra*, footnote 21.

<sup>104</sup> *Chan* (S.C.C.), *supra*, footnote 24, per La Forest J. (dissenting). The majority in the Supreme Court did not expressly comment on the issue, although Mr. Justice Major appeared to assume that forced sterilization would

conclusion as follows:<sup>105</sup>

Even if forced sterilization were accepted as a law of general application, that fact would not necessarily prevent a claim to Convention refugee status. Under certain circumstances, the operation of a law of general application can constitute persecution. In *Padilla* ..., the Court held that a Board must consider extra-judicial penalties which might be imposed. Similarly, in our case, the appellant's fear is not simply that she may be exposed to the economic penalties authorized by China's one child policy. That may be acceptable. Rather, the [claimant], in this case, genuinely fears forced sterilization; her fear extends beyond the consequences of the law of general application to include extraordinary treatment in her case that does not normally flow from that law ... Furthermore, if the punishment or treatment under a law of general application is so Draconian as to be completely disproportionate to the objective of the law, it may be viewed as persecutory. This is so regardless of whether the intent of the punishment or treatment is persecution. Cloaking persecution with a veneer of legality does not render it less persecutory. Brutality in furtherance of a legitimate end is still brutality.

The forced sterilization of women is a fundamental violation of basic human rights ... The forced sterilization of a woman is a serious and totally unacceptable violation of her security of the person. Forced sterilization subjects a woman to cruel, inhuman and degrading treatment... I have no doubt, then, that the threat of forced sterilization can ground a fear of persecution within the meaning of Convention refugee under the *Immigration Act*.

In *Chan* (S.C.C.), Mr. Justice La Forest, in dissent, stated:

... [W]hatever technique is employed, it is utterly beyond dispute that forced sterilization is in essence an inhuman and degrading treatment involving bodily mutilation, and constitutes the very type of fundamental violation of basic human rights that is the concern of refugee law.<sup>106</sup>

The Trial Division has held that forced abortion, being an invasion of a woman's body, is equivalent to or worse than forced sterilization and, accordingly, constitutes persecution.<sup>107</sup> The

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indeed constitute persecution. See also *Chan* (F.C.A.), *supra*, footnote 23, per Heald J.A. and per Mahoney J.A. (dissenting).

<sup>105</sup> *Cheung*, *supra*, footnote 21. For a Supreme Court response to the "legitimate end" argument - a response complementing that of Linden J.A. in *Cheung*, *supra*, footnote 21 - see the remarks of La Forest J. (dissenting), in *Chan* (S.C.C.), *supra*, footnote 24.

<sup>106</sup> *Chan* (S.C.C.), *supra*, footnote 24, per La Forest J. (dissenting).

<sup>107</sup> *Lai, Quang v. M.E.I.* (F.C.T.D., no. IMM-307-93), McKeown, May 20, 1994. See also *Xiao, Yan Liu v. M.C.I.* (F.C.T.D., no., IMM-712-15), Harrington, October 21, 2015; 2015 FC 1193, where the Court stated: "Both jurisprudence and common sense conclude that the violation of a woman's reproductive and physical integrity, such as by means of forced abortion or the forced insertion of an IUD constitutes persecution and that the victim of such acts is a member of a particular social class under section 96 of IRPA and is entitled to Canada's protection."

Court has also recognized that the forcible insertion of an IUD constitutes persecution.<sup>108</sup> However, economic sanctions as a means to enforce compliance with the law, do not amount to persecution.<sup>109</sup>

Regarding the requirement that the fear of persecution be well founded, the Trial Division observed that the issue was not whether the female claimant had been forced to undergo an abortion in the past, but instead whether there was a reasonable chance she would be forced to undergo one if returned to China.<sup>110</sup>

Nexus was the principal area of disagreement between *Cheung* and *Chan* (F.C.A.). The two cases offered quite different views on the issue of whether the feared sterilization would be inflicted by reason of a Convention ground. *Cheung* held that there was a targeted social group;<sup>111</sup> the majority in *Chan* (F.C.A.) found otherwise.<sup>112</sup> Speaking for the majority in *Chan* (S.C.C.), Mr. Justice Major chose not to address the question of whether the case involved a particular social group.<sup>113</sup> However, La Forest J. (dissenting) held that “[p]ersons such as the appellant, if persecuted on the basis of having had more than one child, would be able to allege membership in a particular social group”.<sup>114</sup> Please refer to Chapter 4 for a fuller description of the views of the Supreme Court of Canada regarding particular social group.

Political opinion is another ground which might be invoked with respect to the one-child policy. However, in *Chan* (F.C.A.), Heald J.A. ruled that the authorities’ reaction to the

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<sup>108</sup> *Zheng, Jin Xia v. M.C.I.* (F.C., no. IMM-3121-08), Barnes March 30, 2009; 2009 FC 327; and *M.C.I. v. Ye, Yanxia* (F.C., no. IMM-8797-12), Pinar, June 13, 2013; 2013 FC 634.

<sup>109</sup> This ruling is from an old decision, *Lin v. Canada (Minister of Employment and Immigration)*, (1993), 66 FTR 207, 24 Imm LR (2d) 208 (FCTD) but it has been cited with approval in various cases, including *Chen, Li Xing v. M.C.I.* (F.C., no. IMM-8158-13), Rennie, February 19, 2015; 2015 FC 225. But note that in *Huang, Wei Yao v. M.C.I.* (F.C., no. IMM-10448-12), Simpson, October 23, 2013; 2013 FC 1074, the Court commented that the RPD should have considered the argument that if fines are imposed at six times the claimants’ annual income as an alternative to sterilization, such fines are persecutory because they have a coercive impact and essentially mean that sterilization will be preferred and will occur.

<sup>110</sup> *Lai*, *supra*, footnote 107. In *Liu*, *supra*, footnote 102, the Court noted there was no evidence that the adult claimants, who had had a second child while in Canada, still objected to the family planning policy or methods of the Chinese government; on this basis, the Court held that evidence of subjective fear was lacking. See also *Cheng, Kin Ping v. M.C.I.* (F.C.T.D., no. IMM-176-97), Tremblay-Lamer, October 8, 1997, where the male claimant had no reason to fear persecution for violation of the family planning policy, since his wife had already been sterilized (following the birth of one child and a subsequent forced abortion).

<sup>111</sup> *Cheung*, *supra*, footnote 21.

<sup>112</sup> *Chan* (F.C.A.), *supra*, footnote 23, per Heald J.A., and Desjardins J.A. In his dissent, Mahoney J.A. rejected one delineation of a particular social group, but accepted another.

<sup>113</sup> *Chan* (S.C.C.), *supra*, footnote 24, per Major J.

<sup>114</sup> *Chan* (S.C.C.), *supra*, footnote 24, per La Forest J. (dissenting).



claimant's non-compliance would not be by reason of political opinion;<sup>115</sup> and Desjardins J.A. was apparently inclined toward the same conclusion.<sup>116</sup>

In *Cheng*, while the claimant pointed to a social group (“those who violated Chinese government family planning policy”), religion also figured in the story. The claimant was a Roman Catholic, and it had been his religious beliefs that had prompted him to oppose the policy.<sup>117</sup>

### 9.3.8. Religious or Cultural Mores

Every society has limits on what it regards as acceptable behaviour. In some countries, the norms of the society (or the norms laid down by some ruling group) may be more constraining than elsewhere. The norms may interfere with the exercise of human rights, and may impose limitations on certain categories of people - categories which may be defined by Convention-protected characteristics. These restrictions may be entrenched in law, and may be backed up by coercive action and penalties. A claimant who transgresses the conventions of his or her homeland (and perhaps, at the same time, violates the law) may be at risk of serious harm.

When dealing with the norms of other societies, the Refugee Protection Division should bear in mind that an application of the Convention refugee definition involves measuring the claimant's situation, and any actions visited upon the claimant, against human rights standards which are international (and which may sometimes be interpreted by reference to Canadian law).<sup>118</sup> It is not appropriate simply to defer to the notions of propriety favoured by the majority or the rulers in the claimant's homeland. In this regard, reference should be made to Chapter 3, Section 3.1.1.1.<sup>119</sup>

Among the claims which concern societal norms are those of women who face restrictions

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<sup>115</sup> *Chan* (F.C.A.), *supra*, footnote 23, per Heald J.A.

<sup>116</sup> *Chan* (F.C.A.), *supra*, footnote 23, per Desjardins J.A. Compare *Kwong, Kam Wang (Kwong, Kum Wun) v. M.C.I.* (F.C.T.D., no. IMM-3464-94), Cullen, May 1, 1995.

When *Chan* came before the Supreme Court, both the majority and the minority declined to decide whether the claimant's action of having a second child “was sufficiently expressive of a political opinion to independently found a refugee claim” (per Major J. and per La Forest J. (dissenting)). Mr. Justice La Forest thought the evidence pointed to other possible connections to political opinion (at 647-8). However, His Lordship's broaching of these possibilities and his reading of the evidence were disapproved of by Mr. Justice Major.

<sup>117</sup> *Cheng*, *supra*, footnote 110.

<sup>118</sup> This principle has been incorporated in s. 3(3)(f) of IRPA, which provides that “[t]his Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory.”

<sup>119</sup> Also see the reference to *Daghighi* in footnote 23, above.

associated with religion or tradition, and those of Ahmadis from Pakistan.

### 9.3.8.1. Restrictions upon Women

Regarding the seriousness of harm, the Trial Division has termed female circumcision a “cruel and barbaric practice”, a “horrific torture”, and an “atrocious mutilation”.<sup>120</sup>

In *Namitabar*, the Trial Division held that punishment under an Iranian law requiring women to wear the *chador* may constitute persecution. The Court noted that the penalty would be inflicted without procedural guarantees, and that the penalty was disproportionate to the offence.<sup>121</sup> In *Fathi-Rad*, another case involving the Iranian dress code, the Trial Division found that the treatment accorded the claimant for purely minor infractions of the Islamic dress code in Iran was completely disproportionate to the objective of the law.<sup>122</sup> On the other hand, in *Hazarat*,<sup>123</sup> the Trial Division upheld a finding that restrictions imposed on women by laws and practices under the Mujahadeen government in Afghanistan (including restrictions concerning dress, movement outside the home, travel, education and work) amounted to discrimination only, not persecution.

In *Vidhani*, the claim of an Asian, Moslem woman from Kenya derived from the fact that her father had arranged a marriage for her. She did not wish to marry the man in question, and feared that this man would abuse her if they did marry. She also feared being abused by her father if she refused to marry and being sexually attacked by the police if she complained to them. The Trial Division stated that women who are forced into marriages have had a basic human right violated.<sup>124</sup> It also referred to the possibility that persecution might be found in: (i) the claimant’s being forced into a marriage; (ii) spousal abuse; (iii) abuse by the father; and (iv) the reaction of the police.<sup>125</sup>

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<sup>120</sup> *Annan v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 25 (T.D.).

<sup>121</sup> *Namitabar* (T.D.), *supra*, footnote 16. In *Namitabar* (F.C.A.), *supra*, footnote 16, the Court overturned the Trial Division on the basis that the CRDD credibility findings were not ambiguous. With respect to the issue of wearing veils in Iran, the Court was of the view that “the Refugee Division may have expressed itself incorrectly [but] that has no importance in the case at bar since the female [claimant] voluntarily complied with the clothing code and did not even display reluctance to do so...”

<sup>122</sup> *Fathi-Rad*, *supra*, footnote 16. In *Rabbani, Farideh v. M.C.I.* (F.C.T.D., no. IMM-2032-96), McGillis, June 3, 1997, the Refugee Division had concluded that a violation of Iran’s Islamic dress code could not form the basis of a well-founded fear of persecution. It had noted the dress conventions applicable to various groups elsewhere, had indicated that such conventions did not involve violations of basic human rights, and had said that the same was true of the Iranian dress code. The Court observed that, in making these comparisons, the Refugee Division had “... ignored, failed to appreciate or trivialized the persecutory aspects of the Islamic dress code ...” Furthermore, the Refugee Division had failed to acknowledge documentary evidence regarding the penalties for failure to comply with the code.

<sup>123</sup> *Hazarat, Ghulam v. S.S.C.* (F.C.T.D., no. IMM-5496-93), MacKay, November 25, 1994.

<sup>124</sup> *Vidhani v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 60, (T.D.).

<sup>125</sup> *Vidhani*, *supra*, footnote 124. See also *F.I. v. M.C.I.* (F.C.T.D., no. IMM-4795-97), Muldoon, July 16, 1998 (a brute who rapes a woman is certainly not following traditional customary practices).

In *Ameri*,<sup>126</sup> the claimant, a woman who disliked the Iranian dress code, urged that women were victims of the means by which the code was enforced. In response, the Trial Division said:

There was not evidence that her activities and commitments or beliefs would challenge the policies and laws of Iran, if she were to return, in a manner that might result in retributive action by the state that would constitute persecution. Her expressed fear was thus found not to be objectively based. I am not persuaded that the tribunal's conclusion on this aspect of her claim was unreasonable.<sup>127</sup>

In the same vein, or in a very similar vein, was the *Pour* case.<sup>128</sup> There it was argued that all women residents in a state who disagree with gender-specific discriminatory rules, such as the Iranian dress code for women, suffer from persecution. The Trial Division observed that this proposition went substantially beyond its decisions in *Namitabar*<sup>129</sup> and *Fathi-Rad*,<sup>130</sup> which concerned women who had engaged in a series of acts of defiance and had suffered punishments as a result.

This would appear to mean that a claim will fail if the claimant has not demonstrated, via past conduct, a readiness to assert some right and thereby express dissent (or if the claimant's dissenting conduct has not resulted in mistreatment of the claimant). On the other hand, the Court has also considered it improper to effectively require that the claimant buy peace for herself by refraining from the exercise, or acquiescing in the denial, of one of her basic rights.<sup>131</sup>

Regarding nexus, the Trial Division has said that a law which specifically targets the manner in which women dress may not properly be characterized as a law of general application which applies to all citizens.<sup>132</sup> A woman's breach of a dress code may be perceived as a display of opposition to a theocratic regime.<sup>133</sup>

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<sup>126</sup> *Ameri, Ghulamali v. M.C.I.* (F.C.T.D., no. IMM-3745-94), MacKay, January 30, 1996.

<sup>127</sup> *Ameri, supra*, footnote 126.

<sup>128</sup> *Pour, Malek Mohammad Nagmeh Abbas v. M.C.I.* (F.C.T.D., no. IMM-3650-95), Gibson, June 6, 1996.

<sup>129</sup> *Namitabar* (T.D.), *supra*, footnote 16. In *Namitabar* (F.C.A.), *supra*, footnote 16, the Court overturned the Trial Division on the basis that the CRDD credibility findings were not ambiguous. With respect to the issue of wearing veils in Iran, the Court was of the view that "the Refugee Division may have expressed itself incorrectly [but] that has no importance in the case at bar since the female [claimant] voluntarily complied with the clothing code and did not even display reluctance to do so..."

<sup>130</sup> *Fathi-Rad, supra*, footnote 16.

<sup>131</sup> *Ali, Shaysta-Ameer, supra*, footnote 8. One of the claimants was a nine-year-old girl who could have avoided persecution only by refusing to go to school, and thus forswearing the basic human right to an education. The Court considered her to be a Convention refugee. In a rather different context, the Court again indicated that the Refugee Division must not expect a claimant to buy peace for herself with an unconscionable self-denial (namely, continuing to lie about her lack of religious inclinations): *Kazkan, Shahrokh Saeedi v. M.C.I.* (F.C.T.D., no. IMM-1313-96), Rothstein, March 20, 1997.

<sup>132</sup> *Fathi-Rad, supra*, footnote 16. See also *Namitabar* (T.D.), *supra*, footnote 16.

<sup>133</sup> *Namitabar* (T.D.), *supra*, footnote 16. In *Fathi-Rad, supra*, footnote 16, the Convention ground invoked for the part of the claim pertaining to the dress code appears to have been membership in a particular social group; the social group in question was not expressly named in the Court's reasons. In *Namitabar* (F.C.A.), *supra*, footnote

A couple of cases have dealt with a woman's breach of a dress code in a democratic, secular state. The context was a Turkish law that bans the wearing of headscarves in government places or buildings. In *Sicak*,<sup>134</sup> the Board rejected a claim based on religion and membership in a particular social group, namely, women wearing the headscarf in Turkey. The Board did not believe that the claimant was involved in any protest or that she was arrested or mistreated by the police, and found a lack of subjective fear and no persecution within the meaning of section 96 of *IRPA*. Without specifically referring to section 97 of *IRPA* the Board analyzed (and the Court appears to have agreed with the analysis) the objective basis of the claim. The Board noted that:

- (a) 98% of the Turkish population is Muslim;
- (b) the principle of secularism as it is applied in Turkey, was established 60 years ago;
- (c) the law banning headscarves in public was upheld by the Turkish Constitutional Court and the European Human Rights Commission upheld this ruling;
- (d) Turkey is a democracy with free elections;

and concluded that the claimant did not face persecution but prosecution for a violation of a law of general application.

The Court in *Kaya*<sup>135</sup> was consistent with *Sicak*. In referring to the information contained in point (c) above, the Court noted that “[l]aws must be considered in their social context... “Mrs. Kaya is entitled to practice her religion in public, and to wear her Hejab in public.” The Court went on to say that *Namitabar* and *Fathi-Rad* dealt with Iranian women who were obliged by Iranian Law to wear the Chador and that “[I]t would be simple, but wrong, to say that the right of Iranian women not to wear the Chador and the right of Turkish women to wear the Hejab everywhere is a manifestation of the same fundamental right”.<sup>136</sup>

*Kaya* was cited with approval in *Aykut*.<sup>137</sup> The Court noted, in *obiter*, that the Turkish law

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16, the Court overturned the Trial Division on the basis that the CRDD credibility findings were not ambiguous. With respect to the issue of wearing veils in Iran, the Court was of the view that "the Refugee Division may have expressed itself incorrectly [but] that has no importance in the case at bar since the female [claimant] voluntarily complied with the clothing code and did not even display reluctance to do so..."

<sup>134</sup> *Sicak, Bucak v. M.C.I.* (F.C., no. IMM-4699-02), Gauthier, December 11, 2003; 2003 FC 1457.

<sup>135</sup> *Kaya, Bedirhan Mustafa v. M.C.I.* (F.C., no. IMM-5565-03), Harrington, January 14, 2004; 2004 FC 45. See also *Abbes, Lotfi v. M.C.I.* (F.C., no. IMM-2989-06), Tremblay-Lamer, February 1, 2007; 2007 FC 112, where the Court found that the prohibition against wearing a veil in Tunisia did not constitute persecution.

<sup>136</sup> *Kaya, supra*, footnote 135, para. 18.

<sup>137</sup> *Aykut, Ibrahim v. M.C.I.* (F.C., no. IMM-5310-02), Gauthier, March 26, 2004; 2004 FC 466. See also *Karaguduk, Abdulgafur v. M.C.I.* (F.C., no. IMM-2695-03), Henegan, July 5, 2004; 2004 FC 958, where the Court affirmed the decision of the Pre-Removal Risk Assessment Officer who “found that although the Principal Applicant’s daughter experienced discrimination as a result of wearing headscarves, this discrimination did not amount of persecution.”

applies to all forms of religious dress or insignia including beards, cloaks, turbans, fez, caps, veils, and headscarves.... “In fact, there is evidence that, insofar as medical or university cards are concerned, the requirement for a photograph showing one’s full face is definitely applied to men wearing beards.” In *Vidhani*, the Trial Division found that the claimant belonged to a particular social group consisting of women forced into arranged marriages without their consent. It also referred to another alleged particular social group: “Asian women in Kenya”. The Court observed that *Ward*’s category (1) (groups defined by an innate or unchangeable characteristic) seemed applicable to the claimant’s circumstances.<sup>138</sup>

In *Ali, Shaysta-Ameer*, the Refugee Division held that an adult claimant belonged to a group consisting of educated women. The Trial Division apparently considered her nine-year-old daughter to be a member of the same - or a similar - group.<sup>139</sup>

In *Annan*, a Christian woman was faced with the possibility of being forcibly circumcised by “Moslem fanatics”, at the instigation of a Moslem man who wished to marry her. The claimant cited religion as the basis for her difficulties<sup>140</sup> and the Court held that the Refugee Division had erred in rejecting her claim, but the Court did not discuss the nexus issue.

With respect to state protection, in *Annan* the Court found that the claimant could not count on state protection against forcible circumcision: one must consider not only the state’s ability to protect but also its willingness; and while the Ghanaian government had sometimes shown an intention to make female circumcision illegal, it had not yet done this, it was still tolerating the practice, and pious vows were not reassuring. The Court also noted that the claimant would be returning to Ghana alone, as she had been unable to locate her parents.<sup>141</sup>

For additional guidance regarding claims by women who transgress conventions of their homelands, see *Women Refugee Claimants Fearing Gender-Related Persecution*.<sup>142</sup>

### **9.3.8.2. Ahmadis from Pakistan**

In Pakistan, legislation prohibits persons belonging to the Ahmadi religious group from engaging in certain activities (activities connected with the practice of their religion or with their religious identification), and establishes penalties for violations of the prohibitions. One of the statutes concerned is known as Ordinance XX.

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<sup>138</sup> *Vidhani, supra*, footnote 124. See also *Gwanzura, Unity v. M.C.I.* (F.C.T.D., no. IMM-1907-96), Heald, July 10, 1997.

<sup>139</sup> *Ali, Shaysta-Ameer, supra*, footnote 8.

<sup>140</sup> *Annan, supra*, footnote 120.

<sup>141</sup> *Annan, supra*, footnote 120. The issue of state protection was touched upon in *Vidhani, supra*, footnote 124 as well. The Court found that the Refugee Division had not dealt adequately with the issue, and in particular with the claimant’s explanation for not having sought police assistance.

<sup>142</sup> Guidelines issued by the Chairperson pursuant to section 65(3) of the *Immigration Act*, updated November 25, 1996, as continued in effect by the Chairperson on June 28, 2002 under the authority found in section 159(1)(h) of the *Immigration and Refugee Protection Act*.

Over the years, cases of Ahmadi claimants have been analyzed in different ways, as the following paragraphs show.

The Trial Division has said that mere existence of an oppressive law (Ordinance XX) which is enforced only sporadically does not by itself show that all members of the group targeted by the law (Ahmadis) have good grounds for fearing persecution.<sup>143</sup>

In *Ahmad*,<sup>144</sup> the claimant had wished to argue before the Refugee Division that, given the nature of Ordinance XX, the simple existence of that law meant the claimant was persecuted. The Court acknowledged that it would be proper for the claimant to put forward such an argument (although, based on an evidentiary consideration, the Court also cast some doubt on the argument's ability to succeed).

In *Rehan*,<sup>145</sup> the Refugee Division agreed with the following statement, taken from the judgment of the English Court of Appeal in *Ahmad and others v. Secretary of State for the Home Department*<sup>146</sup>:

... It has been accepted by ... the Secretary of State, that the Ordinance, by itself, was well capable of being regarded as discrimination against all members of the Ahmadi sect; but in my judgment the proposition that it was by itself capable of making the appellants liable to persecution simply by virtue of being members of the sect is quite unsustainable. The only members of the sect potentially liable to persecution would be those who proposed to act in contravention of its provisions. Nothing in the Ordinance prevented persons from holding the belief of the sect, without engaging in any of the specified prohibited activities.

...

It was apparent to the Secretary of State ... that most Ahmadis live ordinary lives, untroubled by the Government despite the existence of the Ordinance. In my judgment he would have been fully entitled to assume that if the appellants, on returning to Pakistan, would intend to disobey the Ordinance and such intention constituted the reason, or a predominant reason, for their stated fear, they would have said so ...

It would appear that the Trial Division held that it was reasonably open to the Refugee Division to rely on this analysis, but stopped short of holding that the analysis was correct.<sup>147</sup> Furthermore, the Trial Division indicated that if the applicant had stated or demonstrated an intention to violate Ordinance XX, and if his past conduct had been consistent with this intention,

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<sup>143</sup> *Butt, Abdul Majid (Majeed) v. S.G.C.* (F.C.T.D., no. IMM-1224-93), Rouleau, September 8, 1993.; See also *Thathaal, Sabir Hussain v. S.S.C.* (F.C.T.D., no. A-1644-92), McKeown, December 15, 1993.

<sup>144</sup> *Ahmad, Masroor v. M.E.I.* (F.C.T.D., no. A-555-92), Rothstein, June 16, 1994.

<sup>145</sup> *Rehan, Muhammad Arif v. M.C.I.* (F.C.T.D., no. A-580-92), Gibson, October 18, 1996.

<sup>146</sup> [1990] Imm. A.R. 61 (Eng.C.A.). Quoted in *Rehan, supra*, footnote 145.

<sup>147</sup> *Rehan, supra*, footnote 145.

he might very well have established a claim.<sup>148</sup>

In *Ahmed*,<sup>149</sup> the Trial Division observed that “... the Federal Court of Canada has not yet clearly decided whether the discriminatory laws of Pakistan are indeed persecutory in relation to Ahmadis. It has preferred to adopt a case-by-case analysis of refugee claimants’ prospective fears of persecution.” (Footnote omitted.) In the Trial Division, the Minister conceded that the Refugee Division had erred in finding that the episodes of mistreatment experienced by the claimant did not constitute past persecution; however, the Trial Division upheld the further conclusion that there was no reasonable chance of persecution.

In *Mehmood*,<sup>150</sup> the Trial Division found that the Refugee Division had erred in restricting its analysis to whether or not the claimant was a registered or official member of the Ahmadi religion. On the basis of the evidence before it, the Refugee Division was required to determine whether or not the claimant had a well-founded fear of persecution arising from the perception that he was a member of the Lahori Ahmadi religion.

In a different *Ahmad* case,<sup>151</sup> the Court found that the PRRA officer did not err by concluding that in order to face persecution an Ahmadi needs to be in a position of leadership or has to publicly speak out about his faith. Also, that the officer did not err in concluding that blasphemy laws are rarely enforced by the Pakistani authorities.

On July 18, 2017, the IRB Chairperson identified as a Jurisprudential Guide (JG) a decision of the RAD dealing with an Ahmadi claimant.<sup>152</sup> The JG states that where a claimant is found to be an Ahmadi, the RPD is obligated to “consider whether the treatment of Ahmadis in Pakistan ... constitutes persecution on the basis of religion”.

The JG finds that the RPD, in this and previous cases, wrongly applied a too-narrow definition of persecution. As stated in the JG:

[34] ...The RPD focused on physical violence, and appeared to conclude that the Appellant will not be harmed or killed because of her religion. However, the RPD did not undertake a serious analysis of whether restrictions faced by Ahmadis, including the Appellant, amount to a denial of the fundamental right to freedom of religion.

[35] Freedom of religion includes the right to manifest one’s religion in practice, including in public, a freedom not enjoyed by Ahmadis in Pakistan. They face measures which lead to consequences of a substantially prejudicial nature, including the prohibition against describing themselves as Muslims, difficulty in applying for documents and for entrance to educational institutions, interference in mosque attendance and prayer, and a prohibition on proselytizing. Even if Ahmadis faced no threat of physical harm – and the evidence indicates that there is indeed such danger –

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<sup>148</sup> *Rehan*, *supra*, footnote 145.

<sup>149</sup> *Ahmed, Irfan v. M.C.I.* (F.C.T.D., no. IMM-2725-96), Joyal, July 4, 1997.

<sup>150</sup> *Mehmood, Nasir v. M.C.I.* (F.C.T.D., no. IMM-2256-97), McGillis, May 14, 1998.

<sup>151</sup> *Ahmad, Tahir v. M.C.I.* (F.C., no. IMM-3148-11), Scott, January 24, 2012; 2012 FC 89.

<sup>152</sup> RAD TB0-01837, Bosveld, May 8, 2017.

there is considerable evidence to support the argument that they experience religious persecution.

[36] The RAD finds that the Appellant faces serious restrictions on the practice of her religion. She need not establish that she will be physically harmed. The evidence shows that she may not describe herself a Muslim; that she must deny her faith – choosing to either be Muslim or Ahmadi, but not both - to obtain documents or gain admission to government institutions; that she wishes to speak publicly of her faith, but is prohibited from doing so; that her prayers are deliberately interfered with by hate-spewing loudspeakers; that she could not attend a particular mosque because of the threat of violence; and that she risks prosecution under the blasphemy laws.

[38] It is not for the RPD, or the RAD, to determine whether “every Ahmadi would be a refugee,” though it is not uncommon for an entire group to be considered at risk of persecution in a particular country due to their profile, whether that be for reasons of sexual orientation, ethnicity, or religion. However, in considering claims such as that of the Appellant, the RPD is obligated to correctly apply the definition of religious persecution to the evidence, and to avoid restricting that definition to physical harm.

The RAD decision then concludes that as the State is one of the leading agents of persecution and the persecutory law and measures exist throughout the country, the Appellant could not expect adequate state protection or avail herself of an internal flight alternative.

#### **9.4. INDIRECT PERSECUTION AND FAMILY UNITY**

The concept of “indirect persecution” was described by Mr. Justice Jerome in *Bhatti*<sup>153</sup> as follows:

The concept of indirect persecution is premised on the assumption that family members are likely to suffer great harm when their close relatives are persecuted. This harm may manifest itself in many ways ranging from the loss of the victim’s economic and social support to the psychological trauma associated with witnessing the suffering of loved ones.

...

The theory is based on a recognition of the broader harm caused by persecutory acts. By recognizing that family members of persecuted persons may themselves be victims of persecution, the theory allows the granting of status to those who might otherwise be unable to individually prove a well-founded fear of persecution.

However, in *Pour-Shariati*, Mr. Justice Rothstein said that “the *Bhatti* approach to indirect persecution unjustifiably broadens the Convention refugee basis for admission to Canada, to include persons who do not have a well-founded fear of persecution in their own right.”<sup>154</sup>

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<sup>153</sup> *Bhatti, Naushaba v. S.S.C.* (F.C.T.D., no. A-89-93), Jerome, September 14, 1993. Reported: *Bhatti v. Canada (Secretary of State)*. (1994), 25 Imm. L.R. (2d) 275 (F.C.T.D.), at 278-279.

<sup>154</sup> *Pour-Shariati v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 767 (T.D.). Rothstein J. certified a question as to whether indirect persecution constitutes a basis for a claim.



Furthermore, in *Casetellanos*,<sup>155</sup> Mr. Justice Nadon noted that

... there must be a very clear link between a refugee claimant and one of the five prescribed grounds in the Convention refugee definition. However, the principal [sic] of indirect persecution does not require the claimant to have a well-founded fear of persecution or to be persecuted; indirect persecution arises out of the fact that the claimant is the unwilling spectator of some incidents of violence targeted against other members of the family or the social group to which he or she belongs, ... Jerome A.C.J. held [in *Bhatti*] that the scope of the principle was such that it could extend beyond traditional grounds of persecution to support, or economic considerations ... such an extension of the so-called principle of indirect persecution is unacceptable as lack of economic, monetary or emotional support do not constitute a ground for being found a Convention refugee

Nadon J. went on to hold that “indirect persecution does not constitute persecution within the meaning of the definition of Convention refugee.”<sup>156</sup>

The Court of Appeal dismissed the appeal in *Pour-Shariati*,<sup>157</sup> and in so doing it squarely rejected the concept of indirect persecution that was articulated in *Bhatti*:

We accordingly overrule *Bhatti*'s recognition of the concept of indirect persecution as a principle of our refugee law. In the words of Nadon, J. in *Casetellanos* ..., “since indirect persecution does not constitute persecution within the meaning of Convention refugee, a claim based on it should not be allowed.” It seems to us that the concept of indirect persecution goes directly against the decision of this Court in *Rizkallah* ..., where it was held that there had to be a personal nexus between the claimant and the alleged persecution on one of the Convention refugee grounds. One of these grounds is, of

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<sup>155</sup> *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 (T.D.).

<sup>156</sup> *Casetellanos*, *supra*, footnote 155. On the other hand, in *Nina, Razvan v. M.C.I.* (F.C.T.D., no. A-725-92), Cullen, November 24, 1994, the Court, seems to have considered the mistreatment of the child, who was kidnapped in order to put pressure on his father, to be persecution of the father. In *Hashmat, Suhil v. M.C.I.* (F.C.T.D., no. IMM-2331-96), Teitelbaum, May 9, 1997, Mr. Justice Teitelbaum noted that earlier cases had rejected the principle of indirect persecution. However, he indicated that, where the Refugee Division was dealing with “the separate issue” of whether a the claimant would undergo undue hardship in journeying to a potential internal refuge (this issue being a subset of the “reasonableness” branch of the IFA test), relevance attached to the potential hardship of the wife and daughter who would accompany him on the journey: at page 5. In two Sri Lanka IFA cases the issue of indirect persecution was considered. In *Jeyarajah, Vijayamalini v. M.C.I.* (F.C.T.D., no. IMM-2473-98), Denault, March 17, 1999, it was noted that a person is not a refugee simply because a family member (husband) is persecuted. However, in *Shen, Zhi Ming v. M.C.I.* (F.C., no. IMM-313-03), Kelen, August 15, 2003; 2003 FC 983, the Court held that “any persecution which the second child Canadian-born infant will experience in China is directly experienced by the parents, and is not ‘indirect persecution’.” But see *Dombele, Adelina v. M.C.I.* (F.C.T.D., no. IMM-988-02), Gauthier, February 26, 2003; 2003 FCT 247 where the CRDD determined the claimant’s husband to be a refugee, but not the claimant or her daughters. The Court held that the panel was right in finding that the persecution affecting the claimant’s husband and which could affect the claimant and her daughters was indirect persecution, thus not persecution within the meaning of the Convention (*Pour-Shariati*).

<sup>157</sup> *Pour-Shariati, Dolat v. M.E.I.* (F.C.A., no. A-721-94), MacGuigan, Robertson, McDonald, June 10, 1997. Reported: *Pour-Shariati v. Canada (Minister of Employment and Immigration)* (1997), 39 Imm. L.R. (2d) 103 (F.C.A.); affirming [1995] 1 F.C. 767 (T.D.).

course, a “membership in a particular social group,” a ground which allows for family concerns in on [*sic*] appropriate case.<sup>158</sup>

Following *Pour-Shariati*, Muldoon, J. rejected the concept of indirect persecution in *Cetinkaya*<sup>159</sup> and held, on the facts in that case, that there had to be a nexus between the claimant and the general situation in his country, Turkey, regarding members of the PKK. He stated as follows:

[25] ... While certain members of the PKK may face persecution, it is for the [claimant] to demonstrate that he falls within that class of individuals who may face persecution. It is not sufficient to adduce evidence that members of the PKK are being persecuted without providing the necessary link between the [claimant's] activities and the persecution feared. Even in the situation of a perceived political opinion, a link must be made between the applicant and the political opinion which may be attributed to him.

A claim based on indirect persecution may be distinguished from one based on the principle of “family unity”.<sup>160</sup> That principle is discussed in paragraphs 182 to 185 of the UNHCR *Handbook*. The family-unity claimant does not attempt to satisfy the definition’s persecution requirement by pointing to side-effects. Instead, he or she takes the position that if the directly-attacked individual meets all criteria of the Convention refugee definition, a family member may be recognized as a Convention refugee regardless of whether the family member meets the definition’s criteria (i.e., has a well-founded fear of persecution). This is a position which has been rejected as being without foundation in Canadian law.<sup>161</sup>

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<sup>158</sup> An appropriate case was found in *Tomov, Nikolay Harabam v. M.C.I.* (F.C., no. IMM-10058-04), Mosley, November 9, 2005; 2005 FC 1527. The Court held that it is not enough to point to the persecution suffered by family members if it is unlikely to affect the claimant directly. Here, as a result of his common-law relationship with his Roma spouse, the claimant would be directly at risk as long as they remain together in a marital relationship.

<sup>159</sup> *Cetinkaya, Lukman v. M.C.I.* (F.C.T.D., no. IMM-2559-97), Muldoon, July 31, 1998.

<sup>160</sup> A claim based on indirect persecution may also be distinguished from a claim based on (direct) persecution by reason of membership in a particular social group which consists of a certain family. In *Kaprolova, Elena v. M.C.I.* (F.C.T.D., no. IMM-388-97), Teitelbaum, September 25, 1997, judicial review was granted because the Refugee Division had mistaken a social-group claim for an indirect-persecution claim. In *Ndegwa, Joshua Kamau v. M.C.I.* (F.C., no. IMM-6058-05), Mosley, July 5, 2006; 2006 FC 847, the Court held that the Board erred by treating the case as one of indirect persecution. The claimant was not just an unwilling spectator of violence against other family members. He may be at personal risk due to his membership in the family. See also Chapter 4, section 4.5.

<sup>161</sup> *Pour-Shariati*, *supra*, footnote 157; *Casetellanos*, *supra*, footnote 155; and *Dawlatly, George Elias George v. M.C.I.* (F.C.T.D., no. IMM-3607-97), Tremblay-Lamer, June 16, 1998. In *Shaikh, Sarwar v. M.C.I.* (F.C.T.D., no. IMM-2489-98), Tremblay-Lamer, March 5, 1999, following *Dawlatly*, the Court held that the principle of family unity has not been incorporated in the definition of Convention refugee. There are other means in the *Immigration Act*, such as s.46.04(1) of ensuring that dependants of Convention refugees are granted permanent residence. See also *Serrano, Roberto Flores v. M.C.I.* (F.C.T.D., no. IMM-2787-98), Sharlow, April 27, 1999 where it was held that a family connection is not an attribute requiring Convention protection in the absence of an underlying Convention ground for the claimed persecution.

In *Akinfolajimi*<sup>162</sup> the Court reviewed a decision wherein the RPD had accepted the principle claimant, but had rejected the joined claims of his family. The Court stated the following about the principle of family unity:

[5] I am mindful that the effect of the RPD decision is the separation of the family. However, the IRPA objective of family unification is one of a number of objectives the IRPA seeks to advance over a wide variety of contexts. It is not a governing factor when determining if an individual claimant is a Convention refugee or person in need of protection pursuant to sections 96 and 97. Instead the IRPA provides other mechanisms that address the objective of family unification, mechanisms that might well be available to the applicants.

...

[30] As discussed at the outset of this Judgment, family unification is a stated objective of the IRPA and decisions within the IRPA context that lead to a different result are unquestionably difficult. However protection claims must be assessed individually and on their own merit on the basis of the definitions set out in sections 96 and 97 of the IRPA.

While “family unity” is not a concept recognized by Canadian refugee law,<sup>163</sup> “the family” as a “particular social group” is based on “evidence of persecution of the family as a social group and not on the principle of family unity. It requires evidence that by reason of that membership in a family, individuals may have a well-founded fear of persecution in the future if they are forced to return to their country of origin.”<sup>164</sup>

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<sup>162</sup> *Akinfolajimi, Adebimpe Joyce v. M.C.I.* (F.C. no. IMM-5067-17), Gleeson, July 12, 2018; 2018 FC 722. Also see *Douillard, Kerlange v. M.C.I.* (F.C. no. IMM-4443-18), LeBlanc, March 29, 2019; 2019 FC 390.

<sup>163</sup> *Chavez Carrillo, Diego Antonio v. M.C.I.* (F.C., no. IMM-3170-12), Noël, October 22, 2012; 2012 FC 1228. See also *El Achkar, Nasri Ibrahim v. M.C.I.* (F.C., no. IMM-5768-12), Strickland, May 6, 2013; 2013 FC 472, where the Court noted that persecution against one family member does not automatically entitle all other family members to be considered refugees.

<sup>164</sup> *Gribovskaia, Elena v. M.C.I.* (F.C., no. IMM-5848-04), Rouleau, July 11, 2005; 2005 FC 956.

## CHAPTER 9 - PARTICULAR SITUATIONS

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# CHAPTER 10

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## CHAPTER 10

### 10. EXCLUSION CLAUSES – ARTICLE 1E

#### 10.1. INTRODUCTION

According to section 98 of the *Immigration and Refugee Protection Act*, a person who is excluded under Article 1E of the Refugee Convention is neither a Convention refugee nor a person in need of protection, and cannot therefore be determined to be such a person in relation to any country.<sup>1</sup>

Section E of Article 1 of the *Convention* provides as follows:

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

For this ground of exclusion to apply, the person must have taken up residence<sup>2</sup> in a country outside the country of his or her nationality and have been recognized as having the rights and obligations which are attached to the possession of nationality of that country. The provision is not limited to a consideration of those countries in which the claimant took up residence as a refugee.<sup>3</sup>

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<sup>1</sup> *M.C.I. v. Sartaj, Asif* (F.C., no. IMM-1998-05), O’Keefe, March 14, 2006; 2006 FC 324, where the Court found that the RPD erred in finding the claimant to be a Convention refugee with respect to Pakistan where it had already ruled that he was excluded under Article 1E with respect to Costa Rica.

<sup>2</sup> In *Dawlatly, George Elias George v. M.C.I.* (F.C.T.D., no. IMM-3607-97), Tremblay-Lamer, June 16, 1998, the claimant, a citizen of Sudan, was eligible for temporary resident status in Greece, a country where he had never resided, because of his marriage to a Greek national. The Court held that the CRDD erred in excluding the claimant under Article 1E on the ground that he should have sought asylum in Greece.

<sup>3</sup> *Kroon, Victor v. M.E.I.* (F.C.T.D., no. IMM-3161-93), MacKay, January 6, 1995. The applicant urged the Court to find that “the exclusion provision under Article 1E should be strictly construed and should be confined to those cases where an applicant has moved from his or her own country of nationality to seek refugee status in another country where he or she then resides with essentially similar rights to those of nationals of the second country. It is urged the provision has no application in the circumstances of this case where the applicant, as a Russian national and a citizen of the U.S.S.R., was authorized to reside in Estonia when it was a state within the U.S.S.R., but it has since evolved to be an independent state in which the applicant has fewer rights than originally accorded to him as a resident.” The Court stated it was not persuaded that “the words of Article 1E should be so narrowly applied”.

Where the Minister (or, if the Minister does not participate in the case, where the evidence) raises a *prima facie* case that the claimant is excluded under Article 1E, the burden is on the claimant to rebut it.<sup>4</sup> See more on this in Section 10.1.3 below. Regarding the standard of proof applicable in Article 1E cases, in *Zeng*<sup>5</sup>, the Court of Appeal upheld an RPD finding, made on a balance of probabilities, that the respondents possessed status in Chile.

### 10.1.1. Test

It used to be that at a minimum, the claimant had to be able to return to (automatically or by application), and remain in,<sup>6</sup> the putative Article 1E country before this provision could be invoked to exclude the claimant from protection under the Refugee Convention. However, this requirement is now qualified by the test set out by the Federal Court of Appeal in *Zeng*.<sup>7</sup>

In *Zeng*, the Court of Appeal set out the test to be applied in 1E determinations and clarified the law regarding the relevant date for determining status in the putative Article 1E country. The Court of Appeal answered the following certified questions in the affirmative:

Is it permissible for the Refugee Division to consider an individual's status in a third country upon arrival in Canada and thereafter, up until and including the date of the hearing before the Refugee Division in order to determine whether an individual should be excluded under Article 1E of the Refugee Convention?

Is it also permissible for the Refugee Division to consider what steps the individual took or did not take to cause or fail to prevent the loss of status in a third country in assessing whether Article 1E should apply?

The Court of Appeal reformulated the test to be applied to Article 1E determinations as follows:

[28] Considering all relevant factors to the date of the hearing, does the claimant have

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<sup>4</sup> In *Lu, Yanping v. M.C.I.* (F.C., no. IMM-5083-11), Phelan, March 15, 2012; 2012 FC 311 a case regarding a Chinese national, the *prima facie* case consisted of Chilean residency documents and confirmation from the Chilean consulate that he had permanent resident status in Chile.

<sup>5</sup> *M.C.I. v. Zeng, Guanqiu* (F.C.A., no. A-275-09), Noël, Layden-Stevenson, Stratas, May 10, 2010; 2010 FCA 118. See also *M.C.I. v. Tajdini, Sima* (F.C., no. IMM-1270-06), Mactavish, March 1, 2007; 2007 FC 227. But see *Wasel, Abdulkader v. M.C.I.* (F.C., no. IMM-2288-15), Brown, December 22, 2015; 2015 FC 1409, in which the Court, relying on *Shahpari, Khadijeh v. M.C.I.* (F.C.T.D., no. IMM-2327-97), Rothstein, April 3, 1998, stated that “because it is a low threshold determination, the Minister's onus is met by virtue of the fact the Applicant has a Greek Permanent Resident Permit which *prima facie* i.e., on a basis of less than the balance of probabilities, establishes the application of the exclusion in Article 1E.”

<sup>6</sup> *Mahdi, Roon Abdikarim v. M.C.I.* (F.C.T.D., no. IMM-1600-94), Gibson, November 15, 1994. Reported: *Mahdi v. Canada (Minister of Citizenship and Immigration)* (1994), 26 Imm. L.R. (2d) 311 (F.C.T.D.), affirmed on appeal *M.C.I. v. Mahdi, Roon Abdikarim* (F.C.A., no. A-632-94), Pratte, MacGuigan, Robertson, December 1, 1995. Reported: *Canada (Minister of Citizenship and Immigration) v. Mahdi* (1995), 32 Imm. L.R. (2d) 1 (F.C.A.).

<sup>7</sup> *Zeng, supra*, footnote 5.

status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors.<sup>8</sup> These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.<sup>9</sup>

[29] It will be for the RPD to weigh the factors and arrive at a determination as to whether the exclusion will apply in the particular circumstances. [footnotes added - not part of original text]

The Court of Appeal in *Zeng* also stated:

[19] At the hearing of this appeal, the submissions of the parties evolved toward common ground. The Minister and the respondents agreed on a number of basic propositions, each of which I consider to be unassailable. Those propositions are:

- the objectives set out in subsection 3(2) of the IRPA seek, among other things, to provide protection to those who require it and, at the same time, provide a fair and efficient program that maintains the integrity of the system;
- the purpose of Article 1E is to exclude persons who do not need protection;
- asylum shopping is incompatible with the surrogate dimension of international refugee protection;
- Canada must respect its obligations under international law;
- there may be circumstances where the loss of status in the third country is through no fault of a claimant in which case the claimant need not be excluded.

The principles relating to a determination of exclusion under Article 1E do not apply to stateless claimants. In *Alsha'bi*,<sup>10</sup> the Court found it was an error to apply the reasoning in *Zeng*

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<sup>8</sup> In *Mojahed, Majid v. M.C.I.* (F.C., no. IMM-7157-14), de Montigny, May 28, 2015; 2015 FC 690, the Court considered the case of an Iranian national who had voluntarily resigned his permanent resident status in Austria, by staying outside of the country for more than one year. The Court found that the RPD had reasonably considered and weighed the various relevant factors and upheld the finding of exclusion.

<sup>9</sup> The test was applied in *Hussein Ramadan, Hanan v. M.C.I.* (F.C., no. IMM-1510-10), Tremblay-Lamer, November 5, 2010; 2010 FC 1093, with respect to a Lebanese claimant with permanent resident status in Paraguay. In *Rrotaj, Gjon v. M.C.I.* (F.C.A., no. A-79-16), Stratas, Webb, Woods, November 21, 2016; 2016 FCA 292, the Federal Court of Appeal was presented with the following certified question: "Does Article 1E of the Refugee Convention, as incorporated into IRPA, apply if a claimant's third country residency status (including the right to return) is subject to revocation at the discretion of that country's authorities?" The Court rejected the appeal on the basis that the certified question was not proper and that *Zeng* had already answered the question to the extent it can be answered. In *Su, Canxiong v. M.C.I.* (F.C. no. IMM-1949-18), Boswell, January 18, 2019; 2019 FC 75 the Court upheld an RPD decision wherein the claimants were excluded under Article 1E despite the fact their permanent resident status in Peru had elapsed. The RPD considered that they had allowed their status to lapse voluntarily and they were not genuine Falun Gong practitioners; therefore, they would not be at risk in their country of nationality, China.

<sup>10</sup> *M.C.I. v. Alsha'bi, Hanan* (F.C., no. IMM-2032-15), Strickland, December 14, 2015; 2015 FC 1381. The Court noted:

to a determination about multiple countries of former habitual residence under *Thabet* (CA). In response to the Minister’s argument that the claimants had deliberately allowed their status to expire and that *Zeng* should apply when the RPD is considering the loss of status in countries of former habitual residence, the Court found that *Thabet*, not *Zeng*, is the applicable case law. Unlike *Zeng*, *Thabet* simply requires that the tribunal ask why the claimant cannot return to the country of their former habitual residence. See Chapter 2, section 2.2.2.

In *Majebi*,<sup>11</sup> the Court of Appeal held that the RAD is required to consider the claimant’s status in the putative 1E country as of the time of the RPD hearing.

### 10.1.2. Nature of the Residency Rights

If the claimant’s status in the country where he or she has taken up residence is tentative, Article 1E does not apply. If the claimant has some sort of temporary status which must be renewed, and which may be cancelled,<sup>12</sup> or if the claimant does not have the right to return, Article 1E may not be applicable.

In *Wassiq*,<sup>13</sup> the Court pointed out that the correct test is whether the putative Article 1E

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[81] Thus, in effect, what the Minister seeks is to broaden Article 1E to exclude persons whose status is less than that of a national. However, in my view, because of the difference in status, the principles guiding exclusion under Article 1E have questionable import in the test in *Thabet*, where the question is focused only on whether the stateless claimant has a right of return to a safe country of former habitual residence.

<sup>11</sup> *Majebi, Henry v. M.C.I.* (F.C.A., no. A-52-16), Dawson, Near, Woods, November 9, 2016; 2016 FCA 274. Leave to appeal dismissed by the Supreme Court of Canada on June 1, 2017 (Court docket no. 37437).

<sup>12</sup> In *Olschewski, Alexander Nadirovich v. M.E.I.* (F.C.T.D., no. A-1424-92), McGillis, October 20, 1993, although the claimants could re-apply for Ukrainian citizenship, their applications would be dealt with on a “case-by-case” basis and it was not clear that they would be able to return to their country of birth. In *M.C.I. v. Mohamud, Layla Ali* (F.C.T.D., no. IMM-4899-94), Rothstein, May 19, 1995, the Court noted that the permit given to the Somali claimant by the Italian authorities, which was renewable annually, “does not give her rights analogous to Italian nationals. While the [claimant] had many rights, such as the right to work and travel in, and leave and return to Italy, she did not have the right to remain in Italy once the war was over and conditions [in Somalia] returned to normal.” While Justice Rothstein was “not prepared to say that section E of Article 1 of the Convention means that a person ... must have rights that are identical in every respect to those of a national,” it did, in his view, “mean that an important right such as the right to remain (in the absence of unusual circumstances such as a criminal conviction) must be afforded.” In *Kanesharan, Vijeyaratnam v. M.C.I.* (F.C.T.D., no. IMM-269-96), Heald, September 23, 1996. Reported: *Kanesharan v. Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 185 (F.C.T.D.), although the Sri Lankan claimant had been given extended permission to remain in the United Kingdom, the Court found that the CRDD erred in excluding him because the UK Home Office reserved the right to remove persons to their country of nationality “should the prevailing circumstances change significantly in a positive manner,” and their eligibility to remain in the UK indefinitely after seven years was not a certainty. The “tentative and conditional language” used by the Home Office did not entitle the CRDD to conclude as it did. See also *Hurt v. Canada (Minister of Manpower and Immigration)*, [1978] 2 F.C. 340 (C.A.), at 343, where the claimant, a Polish national, was advised by the German authorities that his temporary visa, which was soon due to expire, would not be renewed and that he would be deported.

<sup>13</sup> *Wassiq, Pashtoon v. M.C.I.* (F.C.T.D., no. IMM-2283-95), Rothstein, April 10, 1996. In this case, the claimants were from Afghanistan and had been granted refugee status in Germany. The evidence in the case indicated that their German travel documents had expired and that the Government had refused to extend them stating that

country recognizes the claimant's right to return there, even if his or her travel documents have expired, and not whether in international law, or from Canada's perspective, that country has formal or legal responsibility for the claimant.

In *Murcia Romero*,<sup>14</sup> the Court held that the RPD erred in finding that the claimants were excluded under Article 1E by virtue of their status in the United States. The principal claimant's permanent residence in the U.S. was "conditional" on the support of her estranged husband, which she stated was no longer forthcoming, and therefore she could not renew her residency card.

The Court took a rigorous approach to this issue in *Choezom*.<sup>15</sup> The claimant, who was born in India of Tibetan parents, was considered to be a citizen of China. As a Tibetan resident of India, she was issued a Registration Certificate (RC), which was renewed annually. When she travelled to the United States for the purposes of study and employment (she resided there from 1994 to 2003), she was issued an Identity Certificate (IC) by India, which she continued to renew periodically. The RPD determined that the claimant had a right of return to India, that Indian authorities would issue her a RC for Tibetans upon return to India, and that she would not be at risk of being deported to Tibet. The RPD took into account the fact that the claimant and her parents, who continued to reside in India, had no difficulties in returning to India after travelling abroad. The Court held that the RPD had erred in excluding the claimant under Article 1E. To return to reside in India, the claimant must obtain a NORI (No Objection to Return to India), a valid IC and a visa. The requirement for annual RCs, ICs, visas, NORIs and the prohibition to visit certain locations within India are all antithetical to the "basic rights of status as nationals". All of these rights are not permanent and their renewal is at the discretion of the Indian government. The fact that there is no evidence that the Indian government has so far refused to issue RCs, ICs, visas or NORIs does not mean that it has given up the right to do so. Tibetan residents of India do not enjoy the same basic rights of status as Indian citizens enjoy.<sup>16</sup>

The meaning of "withholding of removal status" in the United States has been considered in a number of cases. While the Court of Appeal in *Wangden*<sup>17</sup> has concluded that in the context of eligibility to make a claim under s. 101(1)(d) of IRPA, withholding of removal is equivalent to "being recognized as a Convention refugee", thus rendering a person with that status ineligible to make a claim in Canada, there is case law distinguishing *Wangden* in the context of exclusion. In *Molano Fonnoll*,<sup>18</sup> the Court held that the RPD had erred in concluding

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because of the applicants' extended absence from Germany and their sojourn in Canada, "responsibility under the 1951 Geneva refugee Convention had passed to Canada". The issue was whether Germany recognized that the applicants had the rights and obligations which are attached to the possession of German nationality, including the right to return and not which country was responsible for them under the Convention.

<sup>14</sup> *Murcia Romero, Ingrid Yulima v. M.C.I.* (F.C., no. IMM-3370-05), Snider, April 21, 2006; 2006 FC 506.

<sup>15</sup> *Choezom, Tenzin v. M.C.I.* (F.C., no. IMM-1420-04), von Finckenstein, September 30, 2004; 2004 FC 1329.

<sup>16</sup> The situation of claimants with connections to China, Tibet and India has been considered in the context of country of reference (rather than a possible 1E country) with India being considered either a putative country of citizenship or a country of former habitual residence. See more on this in Chapter 2.

<sup>17</sup> *Wangden, Tenzin v. M.C.I.* (F.C.A. no., A-607-08), Evans, Sharlow, Ryer, November 23, 2009; 2009 FCA 344.

<sup>18</sup> *Molano Fonnoll, German Guillermo v. M.C.I.* (F.C., no. IMM-2626-11), Scott, December 12, 2011; 2011 FC

that withholding of removal status rendered the applicants excludable under Article 1 E, as that status is not compatible with the rights and obligations which are attached to the possession of nationality.

In *Choubak*,<sup>19</sup> the RPD considered the claimant's assertion that, even though she had a German residency permit that was valid until December 2000, she lost her permanent residence status when she came to Canada on a student visa in September 1999, because she intended to remain permanently in Canada. The RPD found that the claimant was not excluded under Article 1E as her permanent residence permit had lapsed under s. 44(1) of the German *Aliens Act* (viz. "leaves the country for a reason which is inherently other than temporary"). The Court held that it was unreasonable for the Board to hold that the meaning of German law turns on the subjective desire of the claimant. The content of that provision requires proof by way of expert evidence of that foreign law. There was insufficient evidence to reasonably allow the Board to find that competent authorities in Germany would have considered the claimant to no longer be a permanent resident at the time of her admission to Canada.

### 10.1.3. Onus – *Prima facie* evidence

As indicated earlier, where there is *prima facie* evidence of permanent residence status, the Courts have imposed an onus on the claimant to establish whether or not that status was lost. The onus shifts even if the evidence emanates from the claimant and whether or not the Minister intervenes.<sup>20</sup>

Examples of cases where the claimants did not meet that onus include the following. In *Zeng*,<sup>21</sup> the claimants (spouses) were found to have permanent resident status in Chile, even though they had left Chile with the intention of settling in China and had been outside Chile for more than a year at the time of their RPD hearing. In *Parshottam*,<sup>22</sup> the claimant was found to have permanent resident status in the United States at the time of his PRRA assessment in December 2006, even though his green card had expired in June 2004. In *Li*,<sup>23</sup> the claimant was

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1461. In a different context than "withholding of removal" the Court rejected the applicant's argument based on *issue estoppel* that in a case where the Minister finds a person to be eligible to make a claim, the RPD is bound by that finding and cannot exclude the person. See *Omar, Welî Abdikadir v. M.C.I.* (F.C. no., IMM-4929-16), Mactavish, May 8, 2017; 2017 FC 458.

<sup>19</sup> *M.C.I. v. Choubak (a.k.a. Choovak), Mehrnaz Joline* (F.C., no. IMM-3462-05), Blanchard, April 26, 2006; 2006 FC 521.

<sup>20</sup> In *Obumuneme, Chinenye Evelyn v. M.C.I.* (F.C. no. IMM-995-18), Norris, January 16, 2019; 2019 FC 59 the claimant produced a copy of the resident permit "permesso di soggiorno" from Italy which stated on its face that it was of indefinite validity. The Minister did not intervene in the claim. The Court rejected the argument that the onus only shifts if the Minister has intervened and led evidence regarding the application of Article 1E. ,

<sup>21</sup> *Zeng, supra*, footnote 5. The female claimant's temporary resident status in Chile had also expired.

<sup>22</sup> *Parshottam, Karim Badrudin v. M.C.I.* (F.C.A., no. A-73-08), Evans, Ryer, Sharlow (concurring in result), November 14, 2008; 2008 FCA 355. Reported: *Parshottam v. Canada (Minister of Citizenship and Immigration)*, [2009] 3 F.C.R. 527 (F.C.A.). Affirming *Parshottam, Karim Badrudin v. M.C.I.* (F.C., no. IMM-192-07), Mosley, January 15, 2008; 2008 FC 51.

<sup>23</sup> *Li, Hong Lian v. M.C.I.* (F.C., no. IMM-585-09), Mandamin, August 24, 2009; 2009 FC 841.



found to have permanent residence in Argentina. She had acquired permanent resident status in 2003 with no expiry date. She was able to return to Argentina after an absence of almost two years and had made no inquiries as to whether she could re-enter Argentina after being in Canada. In *Mai*,<sup>24</sup> the RPD determined that it was doubtful that the claimants, nationals of China, had lost their permanent resident status in Peru but even if they had, they could easily reacquire it without going back to China. In *Mohamed*,<sup>25</sup> the claimants made refugee claims in Sweden, left for Canada while their claims were still pending, and were granted permanent residence status in Sweden one month later. The Court upheld the CRDD's exclusion finding. In *Noel*,<sup>26</sup> the Court upheld the RAD's conclusion that the following constituted *prima facie* evidence that the claimant was a permanent resident of Brazil: (i) the fact the claimant's name appeared on a list of Haitians who had been granted permanent resident status; (ii) a stamp in his passport; and (iii) a national identity card from Brazil. In *Melo Castrillon*,<sup>27</sup> the Court noted that the documentation indicated that the claimant *could* lose her PR status after a 12-month absence from Italy. It was therefore reasonable for the RPD to conclude that if the loss of permanent resident status were automatic after 12 months, the claimant should have been able to obtain this confirmation fairly easily, which she did not do.

In *Agha*,<sup>28</sup> the Court concluded that the claimant, an Iranian national, had not adduced any evidence showing that he no longer had status in the United States, aside from the suggestion that he might lose his status because of his extended absence since 1985 and the voluntary departure order he received in 1995 when he was there on his way to Canada. According to an INS official, loss of status due to an extended absence was not automatic and the claimant continued to be a permanent resident until a U.S. immigration judge determined otherwise.

The Court came to a different conclusion on loss of U.S. permanent residence in *Tajdini*.<sup>29</sup> Based on the evidence before the RPD in that case, the Court found that a ruling by a U.S. immigration court on loss of residency was not required. The Court upheld the reasonableness of the RPD's finding that the claimant had established, on a balance of probabilities, that she was no longer a permanent resident, having regard to factors considered by the U.S. authorities for abandonment of status, such as moving to another country intending to live there permanently, remaining outside the U.S. for one year without obtaining a re-entry permit or returning resident

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<sup>24</sup> *Mai, Jian v. M.C.I.* (F.C., no. IMM-1155-09), Lemieux, February 22, 2010; 2010 FC 192.

<sup>25</sup> *Mohamed, Hibo Farah v. M.C.I.* (F.C.T.D., no. IMM-2248-96), Rothstein, April 7, 1997. Although the Swedish permanent residence certificate had to be periodically renewed, there was no evidence that permanent residence in Sweden was subject to some form of arbitrary cancellation.

<sup>26</sup> *Noel, Oriol v. M.C.I.* (F.C. no. IMM-1795-18), Gagné, October 23, 2018; 2018 FC 1062. Also see *X (Re)*, 2018 CanLII 131735 (RAD MB8-01495), Roberts, November 27, 2018 wherein the RAD found that the fact the appellants' names appear in the joint ministerial act from the ministry of justice and the ministry of labour and social security is *prima facie* evidence of permanent residence status in Brazil.

<sup>27</sup> *Melo Castrillon, Ruby Amparo v. M.C.I.* (F.C. no. IMM-1617-17), Roy, May 1, 2018; 2018 FC 470.

<sup>28</sup> *Agha, Sharam Pahlevan Mir v. M.C.I.* (F.C.T.D., no. IMM-4282-99), Nadon, January 12, 2001.

<sup>29</sup> *M.C.I. v. Tajdini, Sima* (F.C., no. IMM-1270-06), Mactavish, March 1, 2007; 2007 FC 227. The Court upheld the RPD's conclusion that the claimant was not asylum shopping. She did not voluntarily renounce her status in order to seek asylum elsewhere. She had left the U.S. in 1996, returning to her native Iran, and travelled to Canada in 2004 to escape from problems that occurred in Iran several years after her return there.

visa, and failing to file income tax returns while living abroad.

#### 10.1.4. Onus to Renew Status

The case of *Shamlou*,<sup>30</sup> as well as other decisions of the Federal Court, indicate that there is an onus on the claimant to renew their status in the putative Article 1E country, if it is renewable. Moreover, recognition of permanent resident status can exist without the right of re-entry (where the person can apply for a re-entry visa).<sup>31</sup>

In *Shahpari*,<sup>32</sup> the claimant, an Iranian citizen, moved to France in 1984. In 1991, she acquired permanent residence and was issued a *carte de résident*, valid to 2001. In 1993, she returned to Iran, but in 1994, came back to France, and two months later came to Canada. At her CRDD hearing in 1997, her exit/re-entry visa for France had expired, but the panel found that Article 1E applied because that visa could be renewed. The Trial Division held that: (1) the onus is on the Minister in Article 1E cases, but once *prima facie* evidence is adduced, the onus shifts to the claimant to demonstrate why, having destroyed her *carte de résident*, she could not apply for a new one; and (2) that the evidence before the panel reasonably allowed it to conclude that the visa could be renewed. Justice Rothstein also added:

[Claimants] should also remember that actions they themselves take which are intended to result in their not being able to return to a country which has already granted them Convention refugee status may well evidence an absence of the subjective fear of persecution in their original country from which they purport to be seeking refuge.

In summary, the Federal Court has held that, once there is *prima facie* evidence that Article 1E applies, the onus shifts to the claimant to demonstrate why:

- their travel document cannot be renewed<sup>33</sup>;

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<sup>30</sup> *Shamlou, Pasha v. M.C.I.* (F.C.T.D, no. IMM-4967-94), Teitelbaum, November 15, 1995. Reported: *Shamlou v. Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm. L.R. (2d) 135 (F.C.T.D.). In that case, the claimant, a citizen of Iran, had lived in Mexico for an extended period and obtained a travel and identity document which allowed him to leave and re-enter Mexico. The claimant allowed his Mexican travel documents to lapse when he unsuccessfully sought residence in the U.S.A. before coming to Canada.

<sup>31</sup> *Nepete, Firmino Domingos v. M.C.I.* (F.C.T.D., no. IMM-4471-99), Heneghan, October 11, 2000.

<sup>32</sup> *Shahpari, Khadijeh v. M.C.I.* (F.C.T.D., no. IMM-2327-97), Rothstein, April 3, 1998. Reported: *Shahpari v. Canada (Minister of Citizenship and Immigration)* (1998), 44 Imm. L.R. (2d) 139 (F.C.T.D.). This case was applied in *Kamana, Jimmy v. M.C.I.* (F.C.T.D., no. IMM-5998-98), Tremblay-Lamer, September 24, 1999; *Nepete, supra*, footnote 31; *Juzbasevs, Rafaels v. M.C.I.* (F.C.T.D., no. IMM-3415-00), McKeown, March 30, 2001; 2001 FCT 262; *M.C.I. v. Choovak, Mehrmaz* (F.C.T.D., no. IMM-3080-01), Rouleau, May 17, 2002; 2002 FCT 573, *Hassanzadeh, Baharack v. M.C.I.* (F.C., no. IMM-3545-03), Blais, December 18, 2003; 2003 FC 1494, and *Chen, Xiangju v. M.C.I.* (F.C. no. IMM-5636-17), Barnes, July 19, 2018; 2018 FC 756 in which the Court rejected the argument that the claimant was prevented from reapplying for permanent resident status in Venezuela because Canadian authorities had seized his Chinese passport. The Court held that there was no evidence that he had requested it. Only if such a request was refused could an argument be advanced that Canada had wrongfully frustrated his good intentions.

<sup>33</sup> *Shamlou, supra*, footnote 30.

- their (destroyed or lost) residency card cannot be re-issued<sup>34</sup>;
- a re-entry visa cannot be obtained<sup>35</sup>;
- their residency status cannot be renewed.<sup>36</sup>

#### **10.1.5. Access to obtain a Status Substantially Similar to Nationals**

The second part of the *Zeng* test requires the member, in the case of claimant who does not have status at the date of the RPD hearing, to determine if the person previously had such status and lost it, or had access to such status and failed to acquire it. There is limited jurisprudence on this latter part of the test regarding access.

In *Tshiendela*,<sup>37</sup> RPD excluded the principal claimant under Article 1E because she had the opportunity to apply for permanent resident status in South Africa by virtue of the citizenship of her husband and children, but never did. She had been living in South Africa, having been granted refugee status, after which she obtained a “Relative Visa” when she married a South African citizen. They had children who were South African citizens.

The RPD found that the claimant had access to permanent residency through both her status as a spouse of a South African citizen and as mother of her South African children. That status would have been substantially similar to that of citizens. She simply failed to acquire that status because she chose not to apply for it. The RPD then assessed her allegations of persecution in South Africa, and found she had a viable IFA in Cape Town or Port Elizabeth.

The Court found the RPD correctly applied the principles from *Zeng* and *Shamlou*. The claimant had a valid Relative Visa at the time she made her refugee claim. Although it expired before the last day of the hearing, she expressly allowed it to expire, so that fact cannot avail to her benefit. This visa provided her the right to work, study, travel, and access to social services, which would have only been heightened had she sought permanent residency. In light of this, there existed *prima facie* evidence that Article 1E applied and the onus shifted to the claimant to show why she could not reapply for a visa to return to South Africa or why she would not be granted permanent residency if she applied. She did not do so. The finding that she had a viable IFA within South Africa was also reasonable.

#### **10.1.6. Rights and Obligations of a National**

It does not appear that for Article 1E to apply, a person must have the rights that are identical in every respect to those of a national of the country where the person has taken

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<sup>34</sup> *Shahpari, supra*, footnote 32.

<sup>35</sup> *Shahpari, supra*, footnote 32; *Nepete, supra*, footnote 31.

<sup>36</sup> *Kamana, supra*, footnote 32; *Hassanzadeh, supra*, footnote 32; *Chen, supra*, footnote 32.

<sup>37</sup> *Tshiendela, Nelly Nsekele v. M.C.I.* (F.C. no. IMM-3141-18), Bell, March 21, 2019; 2019 FC 344.

residence.<sup>38</sup>

In determining whether the claimant falls within the ambit of Article 1E, the Trial Division in *Kroon*<sup>39</sup> endorsed a consideration of the basic rights to which the claimant is entitled under the constitution and the laws of the putative Article 1E country and a comparison of those with the rights acknowledged for that country's nationals. The Court stated:

Here, the tribunal ... sought to assess whether the [claimant] would be recognized under the Estonian Constitution and its laws as having basic rights and obligations which attach to nationals of that country. It found, with some important exceptions, that was the case and that in certain key respects the [claimant] would enjoy, in Estonia, a status comparable to that of Estonian nationals and consistent with international conventions and treaties relating to rights and obligations of individuals. In particular, it found ... that the [claimant] could be expected to be restored to his rights of residency in Estonia as a registered non-citizen, upon his return, that within a reasonable time he would be entitled to apply for citizenship and in the meantime had a right to remain there with rights similar to most of those enjoyed by citizens.

The Court found this approach to be reasonable and one supported by legal writers such as Grahl-Madsen and Hathaway.<sup>40</sup>

The Court, in *Shamlou*,<sup>41</sup> accepted as “an accurate statement of the law” the following four criteria that the Board should follow in undertaking an analysis of the “basic rights” enjoyed by a claimant, as outlined by Lorne Waldman in *Immigration Law and Practice*:<sup>42</sup>

- (a) the right to return to the country of residence;
- (b) the right to work freely without restrictions;
- (c) the right to study, and
- (d) full access to social services in the country of residence.

If the [claimant] has some sort of temporary status which must be renewed, and which could be cancelled, or if the [claimant] does not have the right to return to the country of residence, clearly the [claimant] should not be excluded under Art. 1E.

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<sup>38</sup> For example, in *Osazuwa, Steven v. M.C.I.* (F.C., no. IMM-846-15), Russell, February 8, 2016; 2016 FC 155, the Court noted that the RAD had concurred with the RPD that there is no requirement for benefits to be identical to those of nationals in order to engage Article 1E; they only need to be “substantially similar”.

<sup>39</sup> *Kroon, supra*, footnote 3, at 167.

<sup>40</sup> *Kroon, supra*, footnote 3, at 168. See Atle Grahl-Madsen, *The Status of Refugees in International Law*, (Leyden: A. W. Sijthoff, 1966), Volume 1, pages 269-270 [out of print], and James C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths, 1991), pages 211-214. The discussion of this aspect of Article 1E exclusion in the second edition of James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2014) is found at pages 500-509.

<sup>41</sup> *Shamlou, supra*, footnote 30, at 152.

<sup>42</sup> (Toronto: Butterworths, 1992), vol. 1, §8.218 at 8.204-8.205 (Issue 17/2/97).

The Court was satisfied the CRDD had come to a reasonable conclusion in determining that the claimant, an Iranian who had become a permanent resident of Mexico, enjoyed substantially the same rights as Mexican nationals. Although not entitled to vote, these rights included the ability to leave, re-enter and reside anywhere in the country, access to free health care, the right to purchase and own property, and the ability to seek, obtain and change employment.<sup>43</sup>

It does not appear that determinations under Article 1E necessarily entail a rigid consideration of all of the criteria identified in the *Shamlou* case. In *Hamdan*,<sup>44</sup> the Trial Division stated as follows:

It is not necessary to comment on whether the criteria laid out in *Shamlou* must all be satisfied for exclusion under Article 1(E), or whether other criteria may be relevant in some cases. The relevant criteria will change depending on the rights which normally accrue to citizens in the country of residence subject to scrutiny.

In *Juzbasevs*,<sup>45</sup> the Court noted that the case law is not clear as to what factors need to be considered. It would appear that determinations under Article 1E do not necessarily involve a strict consideration of all factors regarding residency, as the analysis depends on the particular nature of the case at hand. International standards and practices may allow a state to limit government employment, political participation (such as the right to vote, the right to hold office), and some property rights to nationals. In Latvia, the country in question, certain professions were also closed to non-nationals, but this did not negate the application of Article 1E.

In *Kamana*,<sup>46</sup> the claimant had acquired refugee status in Burundi. The evidence indicated that refugee status in Burundi included the right not to be deported from that country. Except for the right to vote, he had the same rights as did Burundi citizens, namely, the right to education and to work. The Court therefore upheld the CRDD's decision that Article 1E applied.

In *Ahmed*,<sup>47</sup> the Court held that the RPD did not focus on the issue of whether the claimant had the rights and responsibilities of a national in the U.A.E. The right to work and the right to a health card are attributes of the rights of a national but they are not the sole rights to consider. The RPD failed to have before it clear evidence of the rights of U.A.E. nationals, as compared to the rights of the applicant, before it made its determination.

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<sup>43</sup> *Shamlou*, *supra*, footnote 30.

<sup>44</sup> *Hamdan, Kadhom Abdul Hu v. M.C.I.* (F.C.T.D., no. IMM-1346-96), Jerome, March 27, 1997. Reported: *Hamdan v. Canada (Minister of Citizenship and Immigration)* (1997), 38 Imm. L.R. (2d) 20 (F.C.T.D.), at 23. In this case, the Court found it critical that the claimant could neither work nor access social services in the Philippines.

<sup>45</sup> *Juzbasevs*, *supra*, footnote 32.

<sup>46</sup> *Kamana*, *supra*, footnote 32.

<sup>47</sup> *Ahmed, Nadeem Imtiaz v. M.C.I.* (F.C., no. IMM-626-07), Phelan, February 15, 2008; 2008 FC 195.

### 10.1.7. Fear of Persecution and State Protection in the Article 1E Country

At one point, it was not clear whether the Board could consider if the claimant had a refugee claim in relation to the putative Article 1E country. However, a number of decisions of the Federal Court suggest that the RPD can determine whether the claimant has a well-founded fear of persecution for a Convention reason in the Article 1E country (or a risk to life or risk of cruel and unusual treatment or punishment or danger of torture) and whether state protection is available to the claimant in that country.

The first case dealing explicitly with the matter was *Kroon*. In that case, Justice MacKay, in commenting on the purpose of Article 1E, seemed to suggest that if a claimant faced a threat of persecution in the putative Article 1E country, then that country would not be an Article 1E country.

In my view, the purpose of Article 1E is to support regular immigration laws of countries in the international community, and within the *Immigration Act* of this country to support the purposes of that Act and the policies it seeks to legislate, by limiting refugee claims to those who clearly face the threat of persecution. If A faces such a threat in his own country, but is living in another country, with or without refugee status, *and there faces no threat of persecution for Convention reasons*, or put another way, A enjoys the same rights of status as nationals of the second country, the function of Article 1E is to exclude that person as a potential refugee claimant in a third country.<sup>48</sup> (emphasis added)

In *Choovak*,<sup>49</sup> the Court held that the CRDD erred in not turning its mind to the specific claim made by the claimant, an Iranian national, against Germany, where she was given asylum and had a special temporary residence status before coming to Canada. More recently, in *Omar*,<sup>50</sup> the Court held that the Board, before determining if the claimant should be excluded under Article 1E, was obliged to consider whether he would be at risk in South Africa, where he had

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<sup>48</sup> *Kroon*, *supra*, footnote 3, at 167-168. Quare whether there is an internal contradiction in the judgment or whether MacKay J. might be simply suggesting that in considering whether a country is in fact an Article 1E country, the Board should consider whether the claimant faces a threat of persecution there (as opposed to considering the issue of persecution after determining the country to be an Article 1E country). See also *Shamlou*, *supra*, footnote 30, at 142, where the Court notes that both the CRDD, in its reasons, and the respondent, in his arguments, referred to the lack of persecution in Mexico (the Article 1E country) as one of the factors taken into consideration in concluding that the claimant enjoyed most of the rights and obligations of a national in that country. The Court itself does not list this factor in its conclusions. In *Olschewski*, *supra*, footnote 12, the Court implicitly agreed that the CRDD could in fact assess a claim against the Article 1E country. As the Court put it, "...even if I am wrong in concluding that the Article does not apply, I am nevertheless of the opinion that the Board erred in the articulation of its reasons in support of its conclusion that the [claimants] failed to establish a well-founded fear of persecution in Ukraine on the basis of religion.

<sup>49</sup> *M.C.I. v. Choovak*, *supra*, footnote 32. See also *Nepete*, *supra*, footnote 31, where the Court upheld the CRDD's finding that the claimant, an Angolan national, did not establish a well-founded fear of persecution in his country of residence (the Czech Republic). A similar approach was taken by the Court in *Juzbasevs*, *supra*, footnote 32, and *Nwaeze, Jones Ernest Am v. M.C.I.* (F.C., no. IMM-1112-09), Tremblay-Lamer, November 10, 2009; 2009 FC 1151.

<sup>50</sup> *Omar*, *supra*, footnote 18.

been accepted as a refugee, including whether he could access adequate state protection.

In *Zhao*,<sup>51</sup> the Federal Court held that the RPD had properly assessed the availability of state protection from a criminal gang in Brazil, where the claimant, a Chinese national, had permanent residence status.

In *Gao*,<sup>52</sup> the claimants were Chinese citizens but had been permanent residents of Panama for 20 years. The Court agreed with the RPD that Article 1E applied to them and that with respect to their fear of harm in Panama, they had failed to rebut the presumption of state protection in that country.

In *Omorogie*,<sup>53</sup> the Court stated the following:

[61] Article 1E of the Convention arises when the claimant does not have a well-founded fear of persecution or a risk of harm under Article 97(1) in the Article 1E country.

In *Romelus*,<sup>54</sup> the Court quashed a RAD decision because the RAD had stated that Article 1E applied, and then proceeded to examine the risk in the Article 1E country. The Court found this was an error, and stated that the analysis of the risk in the Article 1E country must be done before deciding if the person should be excluded under Article 1E.

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<sup>51</sup> *Zhao, Ri Wang v. M.C.I.* (F.C., no IMM-9624-03), Blanchard, August 4, 2004; 2004 FC 1059. See also the following cases where the Court upheld the RPD's determination of the availability state protection in Article 1E countries: *Li*, supra, footnote 23; *Mai*, supra, footnote 24; *Ramadan*, supra, footnote 9; and *Dieng, Khady Kanghe et al. v. M.C.I.* (F.C., no. IMM-5029-12), de Montigny, April 30, 2013; 2013 FC 450.

<sup>52</sup> *Gao, Kun Kwan. v. M.C.I.* (F.C., no. IMM-10862-12), Shore, February 28, 2014; 2014 FC 202. In *Ramadan*, supra, footnote 9, the Court agreed with the RPD that the Lebanese claimant had permanent resident status in Paraguay and was therefore excluded and that she had not rebutted the presumption of state protection in Paraguay (with respect to the claim of spousal abuse). And in *Shen, Jintang v. M.C.I.* (F.C., no. IMM-2037-15), Phelan, January 28, 2016; 2016 FC 99, similar findings were made with respect to a Chinese claimant with status in Ecuador.

<sup>53</sup> *Omorogie, Juan v. M.C.I.* (F.C., no. IMM-2843-14), O'Keefe, November 5, 2015; 2015 FC 1255.

<sup>54</sup> *Romelus, Gast Maelo v. M.C.I.* (F.C. no. IMM-2916-18), St-Louis, February 11, 2019; 2019 FC 172.

## CHAPTER 10 - EXCLUSION CLAUSES – ARTICLE 1E

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# CHAPTER 11

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## CHAPTER 11

### 11.

### ARTICLE 1F

#### 11.1. Introduction

Section 98 of IRPA provides that a person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

Article 1F, set out in the schedule to IRPA, reads as follows:

- F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
  - (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
  - (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

#### 11.1.1. Standard of Proof - Serious Reasons to Consider

As noted in *Ezokola*,<sup>1</sup> exclusion determinations are not determinations of guilt and therefore are not based on proof beyond a reasonable doubt nor on the general civil standard of the balance of probabilities. Instead, the Supreme Court of Canada agreed with the British Courts that “serious reasons for considering imports a higher test for exclusion than would, say, an expression like “reasonable grounds for suspecting”. “Considering” approximates rather to “believing” than to “suspecting.”.... [The phrase] sets a standard above mere suspicion.” The outcome of any one particular case will depend on the facts of the case.

The applicability of the exclusion clause does not depend on whether a claimant has been charged or convicted of the acts set out in the Convention.<sup>2</sup>

In addition, the RPD is not bound by a decision of the Immigration Division (ID) to find the claimant not inadmissible nor the Minister’s opinion that the claimant should not be excluded. In *Candelario*,<sup>3</sup> the ID had found there was insufficient evidence to conclude the claimant was inadmissible for serious criminality. Later, the RPD found him excluded under Article 1F(b) on essentially the same facts for having committed a serious non-political crime. The Court upheld the decision, noting that the Minister’s counsel had proceeded with a much more complete cross-

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<sup>1</sup> *Ezokola v. Canada (Citizenship and Immigration)*, [2013] 2 S.C.R. 678. In fact, this standard has been the recognized standard in Canadian law for a long time, see for example *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.). Note that the test for complicity in *Ramirez* was held to be wrong in *Ezokola* but the two cases agree on the meaning of “serious reasons to consider”.

<sup>2</sup> *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.).

<sup>3</sup> *Candelario, Carlos Santiago Rodriguez v. M.C.I.* (F.C. no. IMM-548-18), Annis, August 28, 2018; 2018 FC 864. Similarly, in *Sarwary, Mohammad Omar v. M.C.I.* (F.C. no. IMM-3911-17), Leblanc, April 24, 2018; 2018 FC 437 the Court held that the RAD did not err in giving no weight to the fact the Minister had ultimately chosen not to refer a section 44 report to an admissibility hearing before the ID.

examination before the RPD which exposed a number of contradictions not raised before the ID. Similarly, in *Abbas*,<sup>4</sup> the Court upheld an RPD decision to exclude the claimant under article 1F(b) despite the fact that the claimant and Minister had made joint submissions before the RPD that the claimant should not be excluded in that case.

### 11.1.2. Balancing and Complicity generally

There is not only no requirement to balance the nature of the Article 1F crime with the degree of persecution feared,<sup>5</sup> but the Board errs if it does.<sup>6</sup>

The principles of complicity explained below in section 11.2.5. apply to all exclusion crimes.

## 11.2. ARTICLE 1F(a): Crimes Against Peace, War Crimes and Crimes Against Humanity

In order to define Article 1F(a) crimes, reference must be had to the international instruments<sup>7</sup> that deal with these crimes. The international instrument most frequently used to define these crimes is the *Charter of the International Military Tribunal*.<sup>8</sup> Article 1F(a) must also be interpreted so as to include the international instruments concluded since its adoption. This would include the *Statute of the International Tribunal for Rwanda*<sup>9</sup> and the *Statute of the International Tribunal for the Former Yugoslavia*<sup>10</sup> as well as the *Rome Statute of the International*

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<sup>4</sup> *Abbas, Arash Ghulam v. M.C.I.* (F.C. no. IMM-2494-18), Brown, January 7, 2019; 2019 FC 12 at paragraph 45.

<sup>5</sup> *Gonzalez v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 646 (C.A.), at 657; *M.C.I. v. Malouf, François* (F.C.A., no. A-19-95), Hugessen, Décary, Robertson, November 9, 1995; *M.C.I. v. Cadovski, Ivan* (F.C., no. IMM-1047-05), O'Reilly, March 21, 2006; 2006 FC 364; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1996] 2 F.C. 49 (C.A.). Note that this case was overturned by the SCC but not on this point. Also see *Nwobi, Felix Eberechukwu v. M.C.I.* (F.C. no. IMM-2577-17), LeBlanc, March 20, 2018; 2018 FC 317.

<sup>6</sup> *Xie, Rou Lan v. M.C.I.* (F.C.A., no. A-422-03), Décary, Létourneau, Pelletier, June 30, 2004.

<sup>7</sup> See Annex VI of the UNHCR *Handbook* for a partial list of applicable international instruments.

<sup>8</sup> 82 U.N.T.S. 279. ([http://www.ibiblio.org/pha/war.term/trib\\_02.html](http://www.ibiblio.org/pha/war.term/trib_02.html)). See Annex V of the UNHCR *Handbook*.

<sup>9</sup> Adopted by Security Council resolution 955 (1994) of 8 November 1994, as amended. (<http://www.ohchr.org/english/law/itr.htm>)

<sup>10</sup> Adopted by Security Council resolution 827 (1993) of 25 May 1993, as amended. (<http://www.ohchr.org/english/law/itfy.htm>)

*Criminal Court*.<sup>11</sup> The Supreme Court of Canada in *Ezokola*<sup>12</sup> indicated that reference should be had not only to the International Criminal Court (ICC) but also to the growing body of jurisprudence of international *ad hoc* tribunals and national courts.

### 11.2.1. Crimes Against Peace

Since a crime against peace historically may only be committed in the context of an international war, there have been no Federal Court or Board decisions involving this aspect of the exclusion clause.

### 11.2.2. War Crimes

As noted above, numerous international instruments may be referred to when defining these crimes, including, besides the ones listed above, the *Charter of the International Military Tribunal*, the *Geneva Conventions* and the *Additional Protocol*. Note that “war crimes” are defined in Canadian legislation, namely the *Crimes Against Humanity and War Crimes Act*,<sup>13</sup> an Act which is the implementation into domestic law of the *Rome Statute*.

The Supreme Court of Canada in *Finta*<sup>14</sup> set out the requisite *mens rea* (mental state) and *actus reus* (physical element) of a war crime or a crime against humanity under section 7(3.71) of the Canadian *Criminal Code*. The Court did not consider Article 1F(a). In the more recent decision of the Supreme Court of Canada in *Mugesera*,<sup>15</sup> the Court said that “insofar as *Finta* suggested that discriminatory intent was required for all crimes against humanity...it should no longer be followed on this point.<sup>16</sup> Discriminatory intent is only required for crimes against humanity that take the form of persecution.

It is not clear whether this ruling in *Mugesera* applies to war crimes. There is no Federal Court case saying that persecution can be the underlying offence for a war crime, but if it is, there

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<sup>11</sup> *Harb, Shahir v. M.C.I.* (F.C.A., no. A-309-02), Décary, Noël, Pelletier, January 27, 2003; 2003 FCA 39. The Federal Court of Appeal stated that by not identifying the “international instruments”, the authors of the Convention ensured that the definitions of crimes, the sources of exclusion, would not be fixed at any point in time. In *Ventocilla, Alex Yale v. M.C.I.* (F.C., no. IMM-4222-06), Teitelbaum, May 31, 2007; 2007 FC 575, the Court held that the definitions in the *Rome Statute* cannot be applied retroactively and in this case could not be used to determine whether the acts in question constituted war crimes because they were committed before the *Rome Statute* was part of international law. This case appears to be at odds with not only the spirit of the decision of the Federal Court of Appeal in *Harb*, but may be at odds with the decision of the Federal Court in *Bonilla, Mauricio Cervera v. M.C.I.* (F.C., no. IMM-2795-08), O’Keefe, September 9, 2009; 2009 FC 881, where the Court found that the RPD did not err in law by applying retroactively definitions of crimes against humanity from the *Rome Statute*. However, note that in *Betoukoumesou, Kalala Prince Debase v. M.C.I.*, (F.C. no., IMM-5820)-13), Mosley, June 20, 2014; 2014 FC 591, the Court noted that *Ventocilla* dealt with the definition of war crimes and is not applicable to a case dealing with crimes against humanity.

<sup>12</sup> *Ezokola, supra*, footnote 1

<sup>13</sup> S.C. 2000, c.24, section 6(3).

<sup>14</sup> *R. v. Finta*, [1994] 1 S.C.R. 701.

<sup>15</sup> *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100; 2005 SCC 40.

<sup>16</sup> See *Mugesera, supra*, footnote 15, at paragraph 44.

is no reason why the ruling would not apply.

A case that may be of assistance in interpreting what a war crime is and what its elements are is *Munyaneza*,<sup>17</sup> a decision of the Quebec Court of Appeal considering an appeal from a conviction for war crimes committed in Rwanda. The Court explained:

[188] To prove<sup>18</sup> that a war crime has been committed, in addition to the material and mental elements of the underlying offence, the following contextual elements must be established:

- an armed conflict, whether international or not;
- offences committed against persons who did not take part or who had ceased to take part in the armed conflict, or in other words, protected persons;
- a nexus between the offences committed and the armed conflict; and
- the accused's knowledge of this nexus.

In *Kamazi*,<sup>19</sup> the Federal Court noted that the recruitment of child soldiers is a war crime and upheld the decision of the RPD to exclude the claimant who had acted as an intelligence agent for the AFDL in the Democratic Republic of Congo, at a time when the AFDL was recruiting child soldiers.

### 11.2.3. Crimes Against Humanity

Crimes against humanity may be committed during a war - civil or international - as well as in times of peace. The Federal Court has often noted that crimes against humanity are defined in the *Charter of the International Military Tribunal* as “...murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population...”<sup>20</sup> Additionally, the crime in question, in order to rise to the level of a crime against humanity, must be committed in a “widespread systematic fashion”.<sup>21</sup>

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<sup>17</sup> *Munyaneza v. R.*, [2014] Q.J. No. 3059.

<sup>18</sup> In this case the Court was referring to the Crown and applying the standard “beyond a reasonable doubt”. Note that there is no reference in the case to Article 1F(a).

<sup>19</sup> *Kamazi, James Mobwano v. M.C.I.* (F.C., no. IMM-11654-12), Annis, December 18, 2013; 2013 FC 1261. While the decision of the RPD pre-dated the decision of the Supreme Court of Canada in *Ezokola* and was based on the old test for complicity, the Court upheld the decision as the facts allowed for no other result.

<sup>20</sup> *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.). The Court in *Sumaida, Hussein Ali v. M.C.I.* (F.C.T.D., no. A-94-92), Simpson, August 14, 1996. Reported: *Sumaida v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm. L.R. (2d) 315 (F.C.T.D.), questioned whether members of a terrorist organization could be considered “civilians” in the context of a crime against humanity. This was not an issue in *Rasuli, Nazir Ahmad v. M.C.I.* (F.C.T.D., no. IMM-3119-95), Heald, October 25, 1996, where the Court upheld the exclusion of a claimant for being complicit in acts of torture directed against “dangerous persons”. See also *Bamlaku, Muluaem v. M.C.I.* (F.C.T.D., no. IMM-846-97), Gibson, January 16, 1998.

<sup>21</sup> *Sivakumar, supra*, footnote 20, at 443. See also *Suliman, Shakir Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2829-96), McGillis, June 13, 1997, which held that when determining whether certain activities of the police constitute crimes against humanity, the CRDD must consider whether the victims of police abuse were “... members of a

When “barbarous cruelty” is an additional component of kidnapping, unlawful confinement, robbery and manslaughter, such offences can raise to the level of crimes against humanity.<sup>22</sup>

The Supreme Court of Canada, in *Mugesera*,<sup>23</sup> found that a criminal act rises to the level of a crime against humanity when the following four elements are made out:

- (i) An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);
- (ii) The act was committed as part of a widespread or systematic attack;
- (iii) The attack was directed against any civilian population or any identifiable group of persons; and
- (iv) The person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.

The Supreme Court of Canada found that the criminal act of “persecution” could be one of the underlying acts, which, in appropriate circumstances, may constitute a crime against humanity. Persecution as a crime against humanity must constitute a gross or blatant denial on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law. As far as the requisite mental element for persecution, the Court determined that a person must have intended to commit the persecutory acts and must have committed them with discriminatory intent. The requirement for discriminatory intent applies only to the criminal act of persecution and is not a requirement with respect to other forms of crimes against humanity, like murder.<sup>24</sup>

A single act may constitute a crime against humanity as long as the attack it forms a part of is widespread or systematic and is directed against a civilian population. The Court noted at paragraph 164 that “the existence of a widespread or systematic attack helps to ensure that purely personal crimes do not fall within the scope of provisions regarding crimes against humanity.”<sup>25</sup>

Also, the civilian population must be the primary object of the attack and not merely a collateral victim of it. The term population suggests that the attack is directed against a relatively large group of people who share distinctive features and therefore identifies them as targets of the attack.<sup>26</sup> As regards the requisite mental element of a crime against humanity, the Supreme Court of Canada found the following:

...the person committing the act need only be cognizant of the link between

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group which has been targeted systematically and in a widespread manner.” In *Blanco, Nelson Humberto Ruiz v. M.C.I.* (F.C., no. IMM-4587-05), Layden-Stevenson, May 19, 2006; 2006 FC 623 the Court found that the evidence did not support the finding that the Colombian Navy committed international crimes in a widespread systematic fashion.

<sup>22</sup> *Finta, supra*, footnote 14. In *Wajid, Rham v. M.C.I.* (F.C.T.D., no. IMM-1706-99), Pelletier, May 25, 2000 the Court held that “not every domestic crime and act of violence may be considered a crime against humanity.

<sup>23</sup> *Mugesera, supra*, footnote 15.

<sup>24</sup> *Mugesera, supra*, footnote 15.

<sup>25</sup> *Mugesera, supra*, footnote 15.

<sup>26</sup> *Mugesera, supra*, footnote 15, at paragraph 161.



his or her act and the attack. The person need not intend that the act be directed against the targeted population, and motive is irrelevant once knowledge of the attack has been established together with knowledge that the act forms a part of the attack or with recklessness in this regard...Even if the person's motive is purely personal, the act may be a crime against humanity if the relevant knowledge is made out.<sup>27</sup>

The perpetrator of a crime against humanity may be an individual acting independently of a State, especially those involved in paramilitary or armed revolutionary movements, or a person acting in conjunction with the authorities of a State.<sup>28</sup>

It is crucial that the Board, in making a decision to exclude under Article 1F(a), provide findings of fact as to specific crimes against humanity which the claimant is alleged to have committed. The Board should make findings as to: acts committed by the immediate perpetrators; the claimant's knowledge of the acts; his or her sharing in the purpose of the acts; and whether the acts constituted crimes against humanity.

The Federal Court has provided various examples of the kind of acts that may or may not constitute crimes against humanity:

- In *Cibaric*,<sup>29</sup> the Court found that the claimant's participation in certain actions during the war in the former Yugoslavia were reasonably characterized by the Refugee Division as crimes against humanity and as actions which were a regular part of the army's operation.
- In *Sungu*,<sup>30</sup> the Court affirmed that Mobutu's regime was engaged in torture and had committed international crimes, namely crimes against humanity.
- In *Yang*,<sup>31</sup> the Court found that participation in the implementation of China's one-child policy which included forced sterilization and forced abortion constituted crimes against humanity.
- In *Tilus*,<sup>32</sup> the Court found that although the RPD did not specify which part of section 1F was at issue, it was clear from the record that it was crimes against humanity that was considered. The Court held that international trafficking in drugs, although heinous, is not a crime against humanity.

The need to make finding of facts about what acts are being considered as possible crimes against humanity has been underscored in decisions of the Court that have set aside exclusion determination because the Board did not specify the crimes. For example:

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<sup>27</sup> *Mugesera, supra*, footnote 15, at paragraph 174.

<sup>28</sup> *Sivakumar, supra*, footnote 20, at 444.

<sup>29</sup> *Cibaric, Ivan v. M.C.I.* (F.C.T.D., no. IMM-1078-95), Noël, December 18, 1995.

<sup>30</sup> *Sungu v. Canada (Minister of Citizenship and Immigration)* [2003] 3 F.C. 192 (T.D.); 2002 FCT 1207.

<sup>31</sup> *Yang, Jin Xiang v. M.C.I.* (F.C.T.D., no. IMM-1372-98), Evans, February 9, 1999.

<sup>32</sup> *Tilus, Francky v. M.C.I.* (F.C., no. IMM-3426-05), Harrington, December 23, 2005; 2005 FC 1738.

- In *Baqri*,<sup>33</sup> the Court set aside the exclusion decision of the CRDD because the panel had not stated what specific crimes the claimant was complicit in and had not questioned him about the specific crimes.
- In *Muto*,<sup>34</sup> the Court held that a description of the acts committed by the organization is essential to determine the degree of participation or complicity of an individual in those acts.

#### 11.2.4. Defences

There may be circumstances where a claimant will invoke successfully certain defences which absolve him or her from criminal responsibility and thus he or she will not be excluded from refugee status, despite the claimant's commission of a war crime or crime against humanity.

##### 11.2.4.1. Duress<sup>35</sup>

The defence of duress may be used to justify participation in certain offences providing the perpetrator was in danger of imminent harm,<sup>36</sup> the evil threatened him or her was on balance greater than or equal to the evil which he or she inflicted on the victim<sup>37</sup> and he or she was not responsible

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<sup>33</sup> *Baqri, Syed Safdar Ali v. M.C.I.* (F.C.T.D., no. IMM-4211-00), Lutfy, October 9, 2001.

<sup>34</sup> *M.C.I. v. Muto, Antonio-Nesland* (F.C.T.D., no. IMM-518-01), Tremblay-Lamer, March 6, 2002; 2002 FCT 256.

<sup>35</sup> In Canadian criminal law, the leading case to assess the defence of duress is *R. v. Ryan*, 2013 SCC 3. In *Al Khayyat, Qasim Mohammed v. M.C.I.*, (F.C., no. IMM-2992-16), Strickland, February 13, 2017; 2017 FC 175, the Court found that the ID had erred in considering only the test in *Ryan* rather than the test as set out in customary international law or the Rome Statue. The Court noted:

More significantly, in *Ezokola* the Supreme Court of Canada found that voluntariness "captures" the defence of duress, and further that a full contextual analysis would "necessarily include" any viable defences, including but not limited to, the defence of duress . . . , which suggests that the assessment of voluntariness that it identified was not limited to that defence. As well, to assess the voluntariness of a contribution, other considerations such as the method of recruitment by the organization and any opportunity to leave the organization, should be considered... More importantly, these considerations were cited by way of example and were not exhaustive. In my view, the ID was required to conduct a full contextual factual analysis in the context of the Applicant's circumstances and to assess voluntariness based on that analysis.

In *Oberlander, Helmut v. A.G. Canada* (F.C.A., no. A-51-15), Dawson, Near, Boivin, February 15, 2016; 2016 FCA 52, the Federal Court of Appeal, referring to *Ryan* and *Ramirez*, noted that the defence of duress requires proportionality between the harm threatened against the person concerned and the harm inflicted by that person – whether directly or through complicity. The Court further noted that before making a determination on proportionality, there must be a finding about the extent of the contribution to the crime or criminal purpose.

<sup>36</sup> *Ramirez, supra*, footnote 1, at 327-328. In *Bermudez, Ivan Antonio v. M.C.I.* (F.C., no. IMM-233-04), Phelan, February 24, 2005; 2005 FC 286 the Court did not uphold the finding of exclusion as the panel failed to consider the defence of duress. The Court agreed with the exclusion of the claimant in *Mutumba, Fahad Huthy v. M.C.I.* (F.C., no. IMM-2668-08), Shore, January 7, 2009; 2009 FC 19 since as a member of the Internal Security Organization in Uganda, he could not invoke a defence of duress because his decision to remain in that organization was based on the fact that he did not have any other employment opportunity at the time. He was under no threat of imminent danger had he left the organization.

<sup>37</sup> *Ramirez, supra*, footnote 1, at 328.

for his own predicament.<sup>38</sup>

The law, however, does not function at the level of heroism and does not require a person to desert or disobey an order at the risk of his life.<sup>39</sup>

In one case the Court held that if the Board had found the claimant credible, it should have considered the issue of duress before finding that the claimant was guilty of a crime against humanity. The claimant had alleged that he had become a prisoner of the Shining Path and had been forced to remain with them and participate in acts of kidnapping.<sup>40</sup> In another case the Federal Court found that the Board made no error when it determined, regarding the element of proportionality, that the harm inflicted on innocent Tamils identified by the claimant was in excess of that which would have been directed at the claimant.<sup>41</sup>

#### 11.2.4.2. Superior Orders

A claimant may raise the defence that he or she was ordered to commit the offence by his military superior and that under military law, such orders must be obeyed. The Supreme Court of Canada in *Finta*, citing numerous international law decisions, held that this defence will not be successful if the military order was “manifestly unlawful” or “patently and obviously wrong”, in other words, if it “offends the conscience of every reasonable, right thinking person”.<sup>42</sup>

In *Betoukoumesou*,<sup>43</sup> the Court, relying on *Finta*, found that the officer did not err in concluding that the defence of superior orders was not available to the applicant. The defence is not available where the orders are manifestly unlawful and the person has a moral choice as to whether to follow the orders.

Section 14 of the *Crimes Against Humanity and War Crimes Act* excludes the defence of superior orders unless the accused was under a legal obligation to obey the orders, did not know that the order was unlawful and the order was not manifestly unlawful. Under section 14(2) orders to commit crimes against humanity are manifestly unlawful.

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<sup>38</sup> *Ramirez, supra*, footnote 1, at 327-328, referring to the treatment of duress in the draft *Code Of Offences Against the Peace and Security of Mankind*, in process by the International Law Commission since 1947. See also, The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (London, H.M.S.O., 1949), Volume XV, at page 132.

<sup>39</sup> *Asghedom, Yoseph v. M.C.I.* (F.C.T.D., no. IMM-5406-00), Blais, August 30, 2001.

<sup>40</sup> *Moreno Florian, Carlos Eduardo v. M.C.I.* (F.C.T.D., no. IMM-2159-01), Tremblay-Lamer, March 1, 2002; 2002 FCT 231.

<sup>41</sup> *Kathiravel, Sutharsan v. M.C.I.* (F.C.T.D., no. IMM-204-02), Lemieux, May 29, 2003; 2003 FCT 680.

<sup>42</sup> *Finta, supra*, footnote 14, at 834. Since historically the superior orders defence has only served to mitigate punishment rather than absolve the perpetrator from responsibility, the usefulness of this defence in refugee law is questionable. However, the Court in *Equizbal v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 514 (C.A.), at 524, referred to the principles relating to superior orders in *Finta* and found that “torturing “the truthout” of someone is manifestly unlawful, by any standard”.

<sup>43</sup> *Betoukoumesou, Kalala Prince Debase v. M.C.I.* (F.C., no. IMM-5820-13), Mosley, June 20, 2014; 2014 FC 591. In this case, the events in question (the abduction of people and the killing of those who resisted) did not take place in the context of war. The applicant was not a member of a military or police organization subject to the regulations or discipline of that organization. He took the job of chauffer voluntarily and there was no air of compulsion to his employment.

If this defence is raised in conjunction with the defence of duress, in that the claimant feared punishment if he or she disobeyed the order, then the principles relating to the defence of duress would apply.

#### **11.2.4.3. Military Necessity**

A claimant may raise the defence that the military action carried out was justified by the general circumstances of battle. However, if the deaths of innocent civilians are as a result of intentional, deliberate and unjustified acts of killing, such acts may constitute war crimes or crimes against humanity.<sup>44</sup>

#### **11.2.4.4. Remorse**

Remorse is immaterial in determining the culpability of a perpetrator of a war crime or a crime against humanity and is therefore not a defence to the commission of a crime.<sup>45</sup>

#### **11.2.5. Complicity**

Where a claimant has not in a “physical” sense committed a crime, but has aided, instigated or counselled a perpetrator in the commission of a war crime or crime against humanity, he or she may, as an accomplice, be held responsible for the crime and thus subject to being excluded from refugee protection. An accomplice is as culpable as the principal perpetrator.<sup>46</sup>

##### **11.2.5.1. The test for complicity**

The Supreme Court of Canada dealt extensively with the issue of complicity in the context of Article 1 F(a) in the *Ezokola*<sup>47</sup> case. The Court overturned the longstanding test of “personal and knowing participation” (sometimes overextended to exclude on the basis of complicity by association) set out in earlier jurisprudence and also discarded the presumption of culpability associated with membership in an organization with a limited and brutal purpose.<sup>48</sup> The Court explained that “individuals may be complicit in crimes without possessing the *mens rea* required by the crime itself.” The relevant factor is knowledge (of the group’s criminal purpose) rather than intent.

The Court ruled that the test expressed in the phrase “serious reasons for considering” does not justify a relaxed application of fundamental criminal law principles in order to make room for complicity by association.

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<sup>44</sup> *Gonzalez, supra*, footnote 5, (see concurring reasons of Mr. Justice Létourneau, at 661).

<sup>45</sup> *Ramirez, supra*, footnote 1, at 328.

<sup>46</sup> *Moreno, supra*, footnote 2; *Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79 (T.D.), at 84.

<sup>47</sup> *Ezokola, supra*, footnote 1.

<sup>48</sup> In *Concepcion, Orlando v. M.C.I.* (F.C., no. IIMM-626-15), O’Reilly, May 16, 2016; 2016 FC 544, the Court overturned the decision of the Officer, who found the applicant inadmissible because he had committed crimes against humanity, on the basis that the decision was based on the old test of complicity by association. The Court noted that it is an error of law not to apply the correct principles of liability. In *Suresh, Manickavasagam v. M.P.S.E.P.* (F.C., no. IMM-4483-15), Mosley, January 10, 2017; 2017 FC 28, the Court upheld the decision and found that the Immigration Division had reasonably applied the *Ezokola* complicity test.

The test for complicity was reformulated in *Ezokola* based on the modes of commission recognized under current international law, namely “common purpose liability” (Article 25 of the *Rome Statute*) and “joint criminal enterprise” (*ad hoc* jurisprudence) to include three components of contribution. The Court adopts a “significant contribution test”:

To exclude a claimant from the definition of "refugee" by virtue of art. 1F(a), there must be serious reasons for considering that the claimant has **voluntarily** made a **significant** and **knowing** contribution to the organization's crime or criminal purpose. [emphasis added]

The first component is “voluntary contribution” and the factors to consider include:

- whether the claimant had no realistic choice but to participate in the crime,
- the method of recruitment and any opportunity to leave the organization,
- whether a defence (e.g. duress) is applicable<sup>49</sup>

The second component is “significant contribution” and the factors to consider include:

- the nature of the association, i.e., mere association or passive acquiescence will not suffice,
- the nature of the activities in question, i.e., the contribution does not have to be directed to specific identifiable crimes but can be directed to wider concepts of common design, such as the accomplishment of an organization’s purpose,
- the degree of contribution (i.e., it must be significant)<sup>50</sup>

The third component is “knowing contribution” (there must be link between the person’s conduct and the criminal conduct of the group). The elements to consider include:

- The claimant’s awareness (intent, knowledge or recklessness<sup>51</sup>) of the group’s crime or criminal purpose,
  - The claimant’s awareness that his or her conduct will assist in the furtherance of the crime or criminal purpose.<sup>52</sup>

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<sup>49</sup> Note that coercion that does not rise to the level of duress may still negate voluntariness. See *Ezokola*, *supra*, footnote 1, and *Al Khayyat, Qasim Mohammed v. M.C.I.*, *supra*, note 35.

<sup>50</sup> In *Moya Pacheco, Marino Manuel v. M.C.I.* (F.C., no. IMM-603-14), Shore, October 20, 2014; 2014 FC 996, the Court agreed with the RPD that contributing two litres of acid destined to be used in the making of fatal bombs was a significant contribution to the crimes of the Shining Path in Peru.

<sup>51</sup> In *Hadhiri, Mohammed Habib v. M.C.I.* (F.C., no. IMM-130-16), LeBlanc, November 18, 2016; 2016 FC 1284, the Court upheld the exclusion decision of the RAD finding that he Board had conducted a reasonable analysis of the case based on the *Ezokola* principles. The Court addressed the difference between the concepts of “willful blindness” and recklessness.

<sup>52</sup> In a case where the Federal Court was reviewing the H&C decision of an Immigration Officer, the Court commented that while the officer was bound by the finding of fact made by the RPD, which, in a decision pre-dating the SCC decision in *Ezokola*, had excluded the applicant under Article 1 F(a), the officer was not bound by the RPD’s conclusion that the applicant was complicity in crimes against humanity. The Officer conducted his own complicity analysis but quoted and adopted the RPD finding that the applicant knew or ought to have

### 11.2.5.2. Applying the test

When determining whether a person’s conduct meets the *actus reus* and *mens rea* for complicity, the following list of non-exhaustive factors will serve as a guide in assessing whether the person has voluntarily made a significant and knowing contribution to a crime or criminal purpose:

- the size and nature of the organization;
- the part of the organization with which the refugee claimant was most directly concerned;
- the refugee claimant's duties and activities within the organization;
- the refugee claimant's position or rank in the organization;
- the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
- the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.<sup>53</sup>
- any viable defences (for example, duress).

The Court emphasizes that the analysis of the factors is highly contextual and that the weighing of the factors has one key purpose in mind: to determine whether there was a voluntary, significant, and knowing contribution to a crime or criminal purpose. The factors are intended for guidance and not all of them will be relevant in every case.<sup>54</sup>

A good illustration of the weighing of the factors is in *Sarwary*,<sup>55</sup> where the Court upheld a RAD decision in which the RAD had excluded the applicant for being complicit in crimes against humanity committed by the Afghan National Police Force (widespread torture in the prison system where the applicant worked). One of the arguments raised by the claimant was that the RAD put too much emphasis on the nature of the organisation rather than the claimant’s role in it, therefore making the error of finding the claimant complicit by association. The RAD had found that although the prison system had a legitimate purpose, criminal activity was prevalent, thereby increasing the likelihood that the claimant knew about the crimes and contributed to them. The

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known the goals of the AAF in Afghanistan. The Court found that the “knew or ought to have known” finding is very much like the sort of “guilt by association” finding that was rejected by *Ezokola*. See *Aazamyar, Homayon v. M.C.I.* (F.C., no. IMM-5514-13), Boswell, January 26, 2015; 2015 FC 99.

<sup>53</sup> *Ezokola* indicates that the list is a combination of the factors identified by Canadian, U.K. and ICC jurisprudence (see para 91). The Court elaborates on the factors at paragraphs 94-99. In *Ndikumassabo, Edouard v. M.C.I.* (F.C., no. IMM-728-14), Shore, October 8, 2014; 2014 FC 955, the Court upheld the exclusion determination of the RPD and noted that the Board had performed a methodical contribution-based analysis of complicity based on the factors set out in *Ezokola*.

<sup>54</sup> *Al Khayyat, supra*, footnote 35, referring to *Moya Pacheco, supra*, footnote 50, *M.C.I. v. Badriyah, Riyadh Basheer* (F.C., no. IMM-3172-15), Roussel, September 2, 2016; 2016 FC 1002; and *Talpur, Hina v. M.C.I.* (F.C., no. IMM-5782-15), Manson, July 19, 2016; 2016 FC 822.

<sup>55</sup> *Sarwary, supra* footnote 3.

Court found this analysis was in conformity with the principles set out in *Ezokola*. Although this factor alone does not provide reasonable grounds to believe the applicant was complicit in crimes against humanity, it contributes to the conclusion in combination with other factors, such as the length of time he remained in the organisation (24 years), his rank (promoted throughout career to a fairly high rank), as well as his duties and activities (responsible for processing paper work to ensure prisoners accounted for, questioned prisoners, trained new policemen, transferred prisoners, and lead three departments including a considerable staff).

### 11.2.6. Responsibility of Superiors

In *Sivakumar*, the Court of Appeal held that “a commander may be responsible for international crimes committed by those under his command, but only if there is knowledge or reason to know about them.”<sup>56</sup> In addition,

the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization’s purpose in committing that crime.<sup>57</sup>

In *Ezokola*,<sup>58</sup> the Supreme Court of Canada re-affirmed the principle that individuals may have, by virtue of their position or rank, effective control over those directly responsible for criminal acts and may be criminally responsible for those crimes (as contemplated by article 28 of the *Rome Statute*, which deals with the responsibility of commanders and other superiors).

In *Mohammad*,<sup>59</sup> the Court held that the claimant was complicit in Article 1F(a) crimes since, as prison director, he knew or should have known of the crimes committed against prisoners. However, in *Gonzalez*,<sup>60</sup> the Court did not agree that the claimant, who had worked for the Mexican army as an infiltrator, was complicit in crimes against humanity. The Court affirmed the principle in *Sivakumar* that the more important an individual’s position in the organization, the more his or her complicity is likely. But in this case, although from his title it seemed that he held an important position (chief petty officer, naval infantry, special operations services), in fact, he did not occupy a decision-making management position. Simply belonging to an organization that is responsible for crimes against humanity is not sufficient, in and of itself, to constitute complicity.

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<sup>56</sup> *Sivakumar, supra*, footnote 20, at 439.

<sup>57</sup> *Sivakumar, supra*, footnote 20, at 440.

<sup>58</sup> *Ezokola, supra*, footnote 1. The Court also refers to the principle in international law that criminal liability does not attach to omissions unless an individual is under a duty to act and that accordingly, “unless an individual has control or responsibility over the individuals committing international crimes, he or she cannot be complicit by simply remaining in his or her position without protest.”

<sup>59</sup> *Mohammad, Zahir v. M.C.I.* (F.C.T.D., no. IMM-4227-94), Nadon, October 25, 1995.

<sup>60</sup> *Gonzalez, Jose Carlos Hermida v. M.C.I.* (F.C., no. IMM-1299-08), Beaudry, November 18, 2008; 2008 FC 1286.

## 11.3. ARTICLE 1 F(b): Serious Non-Political Crimes

### 11.3.1. Generally

Exclusion under Article 1F(b) is not restricted to fugitives of justice or punishment.<sup>61</sup> The laying of charges, the entering of a conviction, or an extradition request are not pre-requisites to the application of the exclusion clause.<sup>62</sup> As well, the completion of an imposed sentence, the current lack of dangerousness or post-crime expiation or rehabilitation are not bars to exclusion.<sup>63</sup> The fact that the Minister refused to give a danger opinion at the eligibility stage is immaterial at the exclusion stage.<sup>64</sup>

The RPD is entitled to go behind the record of conviction to consider whether there was evidence that the claimant had actually committed a serious, non-political crime.<sup>65</sup>

### 11.3.2. No requirement for “equivalency”

In analyzing the question of exclusion under Article 1F(b), one should not look at equivalency, but rather the role of domestic law in determining what is “serious”.<sup>66</sup> The focus is on whether the acts could be considered crimes under Canadian law, i.e., the RPD must apply the facts in the crime to Canadian criminal law.<sup>67</sup>

The test for equivalency developed for the purposes of inadmissibility determinations under s. 36 of *IRPA* is not required for an exclusion determination under s. 98.<sup>68</sup> The RPD is not

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<sup>61</sup> *Febles v. Canada (Minister of Citizenship and Immigration)*, [2014] 3 SCR 431; 2014 SCC 68.

<sup>62</sup> *Zrig v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 FC 761; 2003 FCA 178.

<sup>63</sup> *Febles, supra*, footnote 61. See also *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, [2009] 4 F.C.R. 164 (F.C.A.); 2008 FCA 404.

<sup>64</sup> *Feimi, Erik v. M.C.I.* (F.C.A., no. A-90-12), Evans, Sharlow, Stratas, December 7, 2012; 2012 FCA 325.

<sup>65</sup> *M.C.I. v. Toktok, Emre* (F.C., no. IMM-11305-12), O’Reilly, November 13, 2013; 2013 FC 1150. In this case it was proper to consider if the conviction was genuine given that there was evidence that the Turkish court system was corrupt, the proceedings had taken place *in absentia*, and the claimant had had no opportunity to defend himself. In *Ching, Mo Yeung v. M.C.I.* (F.C., no. IMM-7849-14), Roy, July 15, 2015; 2015 FC 860, the Court cautioned against relying on the findings of foreign courts where the evidence shows a paucity of information to determine the justification, transparency and intelligibility of the foreign decision making process.

<sup>66</sup> *Victor, Odney Richmond v. M.C.I. and M.P.S.E.P.* (F.C., no. IMM-252-13 and No. IMM-546-13) Roy, September 25, 2013; 2013 FC 979.

<sup>67</sup> *Vlad, Anghel v. M.C.I.* (F.C., no. IMM-1800-06), Snider, February 1, 2007; 2007 FC 172; *M.C.I. v. Pulido Diaz, Paola Andrea* (F.C., no. IMM-4878-10), Phelan, June 21, 2011; 2011 FC 738; and *Radi, Spartak v. M.C.I.* (F.C., no. IMM-2928-11), Near, January 5, 2012; 2012 FC 16. In *obiter* comments in *Mustafa, Golam v. M.C.I.* (F.C., No. IMM-362-15), Phelan, February 2, 2016; 2016 FC 116, the Court observed that the RPD had based its analysis of exclusion on the incorrect offence. While the Canadian offence of using a forged passport (s 57(1)(b) of the *Criminal Code*) is subject to a maximum sentence of 14 years imprisonment, making a false statement to procure a passport (s 57(2) of the *Criminal Code*) is subject to a maximum sentence of only two years. Thus the distinction is important.

<sup>68</sup> *M.C.I. v. Raina, Vinod Kumar* (F.C., no. IMM-7164-11), Shore, May 23, 2012; 2012 FC 618; *Cabreja Sanchez, Domingo Antonio v. M.C.I.* (F.C., no. IMM-7113-11), O’Keefe, September 26, 2012, 2012 FC 1130; and *Ma, Like v. M.C.I.* (F. C. no. IMM-3482-17); Favel, March 6, 2018; 2018 FC 252.



required to set out and determine all of the specifics or elements of the crime committed.<sup>69</sup> It is not necessary for the RPD to look for equivalent criminal provisions to those of the foreign offence and to ensure that every element of the alleged offence be identified and particularized.<sup>70</sup>

In *Jayasekara*,<sup>71</sup> the Federal Court of Appeal did not impose a requirement of double criminality (i.e., that the crime should be a crime both in Canada and where it was committed); rather the gravity of a crime must be judged against international standards. That approach appears to be consistent with the Supreme Court's dictum in *Febles* that Article 1F(b) does not operate so as to exclude only fugitives from justice. For example, honour killing may not be punishable in some jurisdictions, but it would offend international standards and is considered a crime in most countries.<sup>72</sup>

### 11.3.3. Determination of whether a crime is serious

In *Jayasekara*,<sup>73</sup> the Federal Court of Appeal stated that when determining whether a crime committed is "serious" in the context of Article 1F(b), there must be an evaluation of the following factors:<sup>74</sup>

1. elements of the crime,
2. the mode of prosecution,
3. the penalty prescribed,
4. the facts, and
5. the mitigating and aggravating circumstances underlying the conviction.

In *Rojas Camacho*,<sup>75</sup> the Court noted that the fifth factor in *Jayasekara* does not implicitly

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<sup>69</sup> *Lai, Cheong Sing v. M.C.I.* (F.C.A., A-191-04), Malone, Richard, Sharlow, April 11, 2005; 2005 FCA 125.

<sup>70</sup> *Vlad, supra*, footnote 67 and *Zeng, Hany v. M.C.I.* (F.C., no. IMM-2319-07), O'Keefe, August 19, 2008; 2008 FC 956.

<sup>71</sup> *Jayasekara, supra*, footnote 63.

<sup>72</sup> Note that in *Reyes Rivas, Carlos Arnoldo v. M.C.I.*, (F.C., no. IMM-3255-06), Tremblay-Lamer, March 13, 2007; 2007 FC 317, the Court held that a crime must be justiciable in the country where it was committed for Article 1F(b) to apply; and in *Notario, Sebastian Maghanoy v. M.C.I.* (F.C., no. IMM-2229-13), O'Keefe, December 2, 2014; 2014 FC 1159, the Court stated, *in obiter*, that there is no hard and fast rule that the conduct must be criminal in the potential country of refuge.

<sup>73</sup> *Jayasekara, supra* footnote 63. In this case the Court noted that the claimant's conviction in the U.S. for trafficking in opium (a first offence) gave it serious reasons to believe that the claimant had committed a serious non-political crime. The analytical framework to assess seriousness set out in *Jayasekara* was not questioned by the SCC in *Febles*.

<sup>74</sup> Since Article 1F(b) does not require a conviction, the factors set out in *Jayasekara* (approved in *Febles*) to assess the seriousness of a crime will apply, with necessary modifications, to the assessment of the seriousness of a committed crime. In *Tabagua, Rusudan v. M.C.I.* (F.C., no. IMM-2549-14), Gleason, June 4, 2015; 2015 FC 709, the Court noted that the need for the type of analysis mandated by *Febles* is not lessened by the fact that the claimant was not charged and therefore not sentenced.

<sup>75</sup> *Rojas Camacho, Marcia Ines v. M.C.I.* (F.C., no. IMM-6140-10), Mosley, June 28, 2011; 2011 FC 789.

call for a balancing of the mitigating and aggravating circumstances *since* the conviction. It is not enough for an applicant to say he now regrets his behaviour and has turned his life around if his behaviour at the time the crime was committed constituted a serious non-political crime. With respect to other post-offence factors such as parole violations, there appears to be conflicting jurisprudence. In *Valdespino*,<sup>76</sup> the Court held that the RPD had improperly considered such conduct, but in *Chernikov*,<sup>77</sup> the Court held the opposite.

In *Pullido Diaz*,<sup>78</sup> the Court held that the RPD had erred with respect to its consideration of contextual matters. The Court noted that *Jayasekara* specifically rejected inclusion of personal circumstances in the serious crime analysis. Factors such as age, economic condition or tragedy may have been relevant to sentencing in the U.S. but they do not address the seriousness of the offence itself. In *Narkaj*,<sup>79</sup> the Court appears to have adopted a different approach as it faulted the RPD for not considering mitigating factors such as the claimant's youth, his lack of criminal record, his limited involvement in the crimes, the absence of violence, the absence of any use of alcohol, drugs, or paraphernalia, and his guilty plea.

Psychological harm to victims can be relied on in assessing the essential elements of the crime.<sup>80</sup> The repeated nature of the offence can be reasonably considered an aggravating factor, especially when taken together with the prior conviction for the same crime.<sup>81</sup>

*Jayasekara* provided further guidance as to various mitigating and aggravating circumstances that may be considered when determining whether the crime was "serious." The Court said that "a constraint short of the criminal law defence of duress<sup>82</sup> may be a relevant mitigating factor in assessing the seriousness of the crime committed. The harm caused to the victim or society, the use of a weapon, the fact that the crime is committed by an organized criminal group, etc. would also be relevant factors to be considered."<sup>83</sup>

The Court also noted that "Canada, like Great Britain and the United States, has a fair

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<sup>76</sup> *Valdespino Partida, Aurelio v. M.C.I.* (F.C., no. IMM-8616-11), Campbell, April 9, 2013; 2013 FC 359.

<sup>77</sup> *Chernikov, Roman Alexander v. M.C.I.* (F.C., no. IMM-9989-12), Phelan, June 13, 2013; 2013 FC 649.

<sup>78</sup> *M.C.I. v. Pulido Diaz, Paola Andrea* (F.C., no. IMM-4878-10), Phelan, June 21, 2011; 2011 FC 738. In *M.C.I. v. Nwobi, Felix Eberchuk* (F.C. no. IMM-5683-13), Martineau, May 30, 2014; 2014 FC 520 the Court stated that the fact another person who was involved in the same crime received a more severe sentence than the claimant was extraneous to the facts and circumstances underlying the claimant's crime. Similarly, in *Nwobi* (2018), *supra*, note 5 the Court held that the RPD correctly disregarded extraneous factors such as the lack of previous convictions, the fact the claimant had not reoffended, and the danger he represented to society,

<sup>79</sup> *Narkaj, Arlind v. M.C.I.* (F.C., no. IMM-1469-13), O'Reilly, January 8, 2015; 2015 FC 26.

<sup>80</sup> *Gamboa Micolta, Dawy's Raul v. M.C.I.* (F.C., no. IMM-8558-12), Shore, April 11, 2013; 2013 FC 367.

<sup>81</sup> *Poggio Guerrero, Gustavo Adolfo v. M.C.I.* (F.C., no. IMM-8733-11), Near, July 30, 2012; 2012 FC 937; *Gudima, Audrey v. M.C.I.* (F.C., no. IMM-9996-12), Phelan, April 16, 2013; 2013 FC 382.

<sup>82</sup> For a case where duress was a factor, see *Diaz, Jose Arturo Guerra v. M.C.I.* (F.C., no. IMM-3223-12), Manson, January 29, 2013; 2013 FC 88. The Court noted that the test for duress requires (a) an urgent situation of clear and imminent danger; (b) no reasonable legal alternative to breaking the law; and (c) proportionality between the harm inflicted and the harm avoided. The test for the defence of duress in criminal cases is set out in the SCC decision of *R. v. Ryan*, *supra*, footnote 35.

<sup>83</sup> *Jayasekara*, *supra*, footnote 63, at par. 45.

number of hybrid offences, that is to say offences which, depending on the mitigating or aggravating circumstances surrounding their commission, can be prosecuted either summarily or more severely as an indictable offence. In countries where such a choice is possible, the choice of the mode of prosecution is relevant to the assessment of the seriousness of a crime if there is a substantial difference between the penalty prescribed for a summary conviction offence and that provided for an indictable offence.”<sup>84</sup>

As to whether the seriousness of the crime may be measured by reference to the nature of punishment prescribed in the Criminal Code of Canada, the Court said that “while regard should be had to international standards, the perspective of the receiving state or nation cannot be ignored in determining the seriousness of the crime.”<sup>85</sup> Thus the Court noted that there is a strong indication in *IRPA* that Canada, as a receiving state, considers crimes for which an offence may be punishable by a maximum term of at least 10 years to be a “serious” crime.<sup>86</sup> However, the Court did not state that only crimes for which a sentence of 10 years or more could have been imposed is a “serious” crime in the context of this exclusion clause and therefore regard should be had to the factors already identified when determining the “seriousness” of a particular crime committed. Also, the Court noted that “whatever presumption of seriousness may attach to a crime internationally or under the legislation of the receiving state, the presumption may be rebutted by reference to the above factors”.<sup>87</sup> The SCC in *Febles* agreed that the ten-year or more yardstick is a good indication of the seriousness of the crime and creates a rebuttable presumption. However, the Court went on to note that:

...the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.<sup>88</sup>

In *Hersy*,<sup>89</sup> in the context of an application to vacate based on Article 1F(b), the RPD put no weight on an expert opinion letter filed by the respondent (protected person) in which the expert stated that the crime the respondent allegedly committed in the United States would have likely attracted a sentence of between six months and two years if committed in Canada. The RPD found that the expert had not stated on what facts he based his opinion and the cases cited in the opinion

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<sup>84</sup> *Jayasekara, supra*, footnote 63 at par. 46. In *Lopez Velasco, Jose Vicelio v. M.C.I.*, (F.C., no. IMM-3423-10), Mandamin, May 30, 2011; 2011 FC 267, the Court discussed this issue at length and concluded that the RPD had reasonably concluded that the presumption of seriousness had been rebutted. See also *A.B. and E.F. v. M.C.I.* (F.C., no. IMM-919-15), Strickland, December 16, 2016; 2016 FC 1385, where the crime in question was child abduction.

<sup>85</sup> *Jayasekara, supra*, footnote 63 at par. 43.

<sup>86</sup> *Jayasekara, supra*, footnote 63 at par. 40. See also *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390 (FCA). Note that the holding in *Chan* that Article 1 F(b) only applies to fugitives is no longer good law as per *Febles* but the comments about the ten-year rule were referred to in *Febles* with approval.

<sup>87</sup> *Jayasekara, supra*, footnote 63 at par. 44.

<sup>88</sup> In *Mohamed, Roshan Akthar Jibreel v. M.C.I.* (F.C., no. IMM-5379-14), Annis, July 28, 2015; 2015 FC 1006, the Court interpreted *Febles* as instructing that when the sentence falls towards the low end of a broad sentencing range, the individual should not be presumptively excluded, thereby leaving the onus with the Minister to persuade the RPD that the crime was serious.

<sup>89</sup> *Hersy, Abdi Elmy v. M.C.I.* (F.C. no. IMM-3085-15), Russell, February 12, 2016; 2016 FC 190 at paragraphs 67-69.

letter were distinguishable. The Court quashed the decision, finding that the RPD placed itself in the position of an expert on criminal law who had found that the cases cited by the expert were distinguishable, without citing any evidence to the contrary. In addition, the Court also stated that the Board was wrong to reject the evidence that the United States had decided not to seek the respondent's extradition. A country that observes the rule of law does not fail to prosecute serious crimes when it has the opportunity to do so and this evidence should have been weighed.

In *Sanchez*,<sup>90</sup> the Federal Court of Appeal ruled that if a change to the penalty for the Canadian equivalent offence has occurred, the assessment should be done at the time when the RPD is determining the issue of the section 1F(b) exclusion, not the time when the offence was committed.

In the much earlier case of *Brzezinski*,<sup>91</sup> the Court considered what is meant by "serious crime" within the context of Article 1 F(b). In this case the claimants acknowledged that they supported their family by stealing, namely shoplifting, both before and after coming to Canada. While the convictions in Canada are not relevant as they were not committed "outside the country of refuge", the Court, after a review of the *travaux préparatoires*, held that the intention of the Convention was not to exclude persons who committed minor crimes, even "an accumulation of petty crimes." Thus, while shoplifting was recognized by the Court as being a serious social problem, it was not a "serious" crime within the meaning of Article 1 F(b), despite evidence of the claimant's recidivism. The Court certified two questions involving the concept of habitual involvement in crimes but the appeal was not pursued.

In *Xie*,<sup>92</sup> the Federal Court of Appeal upheld the finding of the Federal Court, and concluded

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<sup>90</sup> *Sanchez, Noe Gama v. M.C.I.* (F.C.A, no. A-315-13), Nadon, Stratas, Scott, June 10, 2014; 2014 FCA 157.

<sup>91</sup> *Brzezinski, Jan v. M.C.I.* (F.C.T.D., no. IMM-1333-97), Lutfy, July 9, 1998. In *Taleb, Ali et al. v. M.C.I.* (F.C.T.D., no. 1449-98), Tremblay-Lamer, May 18, 1999 the Court found that the offence of attempted kidnapping is punishable by a maximum of 14 years imprisonment and therefore is a "serious" offence within the meaning of Article 1F(b). In *Chan, San Tong v. M.C.I.* (F.C.T.D., no. IMM-2154-98), MacKay, April 23, 1999 the Court found that a conviction in the United States for using a communication facility to facilitate trafficking in a substantial volume of narcotics was a "serious" offence (note that this case was overturned on other grounds). In *Nyari, Istvan v. M.C.I.* (F.C.T.D., no. IMM-6551-00), Kelen, September 18, 2002; 2002 FCT 979, the Court found that the CRDD was entitled to find that the claimant's escape from prison while he was serving a twenty-month sentence for causing bodily harm was not a "serious crime" in the context of 1F(b). In *Sharma, Gunanidhi v. M.C.I.* (F.C.T.D., no. IMM-1668-02), Noël, March 10, 2003; 2003 FCT 289 the Court upheld the finding of the Refugee Division that armed robbery was a "serious" non-political crime. In *Xie, Rou Lan v. M.C.I.* (F.C., no. IMM-923-03), Kelen, September 4, 2003; 2003 FCT 1023 the Court held that an economic crime not involving any violence can be a 1F(b) crime. In this case the claimant had been charged with embezzling the equivalent of 1.4 million Canadian dollars. In *Liang, Xiao Dong v. M.C.I.* (F.C., no. IMM-1286-03), Layden-Stevenson, December 19, 2003; 2003 FC 1501 the exclusion under 1F(b) of the claimant was upheld. He had been arrested in Canada on an Interpol warrant for conspiracy to commit murder, leading a criminal organization and being involved in a corruption scandal. In *Benitez Hidrovo, Jose Ramon v. M.C.I.* (F.C., no. IMM-3247-09), Lutfy, February 2, 2010; 2010 FC 111 the Court upheld the exclusion of the claimant as having committed a serious crime based on his conviction for possession of more than 200 grams of cocaine. Also see *Nwobi*, *supra* footnote 5.

<sup>92</sup> *Xie*, *supra*, footnote 6. In *Lai, Cheong Sing v. M.C.I.* (F.C., no. IMM-3194-02), MacKay, February 3, 2004; 2004 FC 179, the Court found that the smuggling of billions of dollars' worth of goods were "serious crimes" within the Article 1F(b) exclusion clause. The Court in *Lai* certified a number of questions: *Lai, Cheong Sing v. M.C.I.* (F.C., no. IMM-3194-02), MacKay, March 19, 2004. The Federal Court of Appeal dealt with the certified questions in *Lai, Cheong Sing v. M.C.I.* (F.C.A., no. A-191-04), Richard, Sharlow, Malone, April 11, 2005; 2005

that a claimant can be excluded from refugee protection by the RPD for a purely economic offence.

International kidnapping of a child may constitute a serious non-political crime,<sup>93</sup> but the Board should assess whether the presumption of seriousness has been rebutted.<sup>94</sup>

A misdemeanour probably lacks the requisite seriousness to be considered under Article 1F(b).<sup>95</sup>

#### 11.3.4. Determination of whether a crime is political

In *Gil*, the Court of Appeal held that in order for a crime to be characterized as political, and thus to fall outside the ambit of Article 1F(b), it must meet a two-pronged “incidence” test which requires first, the existence of a political disturbance related to a struggle to modify or abolish either a government or a government policy; and second, a rational nexus between the crime committed and the potential accomplishment of the political objective sought.<sup>96</sup>

The Court of Appeal considered and rejected the notion of balancing the seriousness of the persecution the claimant is likely to suffer against the gravity of the crime he committed.<sup>97</sup>

One final point. Another panel of this Court has already rejected the

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FCA 125 and upheld the finding that Article 1F(b) could apply to the crimes of bribery, smuggling, fraud and tax evasion. In *Xu, Hui Ping v. M.C.I.* (F.C., no. IMM-9503-04), Noël, July 11, 2005; 2005 FC 970 the Court upheld the exclusion of the claimant who was involved in defrauding the company for which he worked of over \$1 million. In *Noha, Augustus Charles v. M.C.I.* (F.C., no. IMM-4927-08), Shore, June 30, 2009; 2009 FC 683 the Court upheld the exclusion finding and agreed that credit card fraud totalling \$41,088 was a “serious” crime. Similarly, in *Rudyak, Korniy v. M.C.I.* (F.C., no. IMM-6743-05), Pinard, September 29, 2006; 2006 FC 1141 the Court upheld the exclusion finding based on the crime of financial fraud.

<sup>93</sup> *Kovacs, Miklosne v. M.C.I.* (F.C., no. IMM-8183-04), Snider, October 31, 2005; 2005 FC 1473. See also *Montoya, Jackeline Mari Paris v. M.C.I.* (F.C., no. IMM-2107-05), Rouleau, December 9, 2005; 2005 FC 1674.

<sup>94</sup> *A.B. and E.F.*, *supra*, footnote 84.

<sup>95</sup> *Osman, Abdirizak Said v. M.E.I.* (F.C.T.D., no. IMM-261-93), Nadon, December 22, 1993, at 4.

<sup>96</sup> *Gil v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 508 (C.A.) at 528-529 and 533. Mr. Justice Hugessen followed the evolution of the incidence test in British extradition case law, added some elements of American and other foreign jurisprudence, to form a composite test (the “incidence” test) which he applied to the case before the Courts. It is by looking at the elements of the decisions which he underlined for emphasis and the terms of his final analysis at 532 that one can deduce the formulation of the test. In *Zrig, Mohamed v. M.C.I.* (F.C.T.D., no. IMM-601-00), Tremblay-Lamer, September 24, 2001, the Court found that the act in question was so barbaric and atrocious it was difficult to describe it as a political crime. Applying the “incidence test”, the Court concluded that despite the repressive nature of the government in place, the act of violence was totally out of proportion to any legitimate political objective. Similarly in *Vergara, Marco Vinicio Marchant v. M.C.I.* (F.C.T.D., no. IMM-1818-00), Pinard, May 15, 2001, the Court upheld the finding of the CRDD that the crimes in question were “non-political crimes” as there was no relationship between the sabotage and armed robbery directed at civilians with risk of death, and the political objective. In *A.C. v. M.C.I.* (F.C., IMM-4678-02), Russell, December 19, 2003; 2003 FC 1500 the Court held that the brutal and systematic killing of the President’s family cannot be considered proportional to the objective of removing a hated political figure. See also the Court of Appeal decision in *Lai*, *supra*, footnote 69, paragraphs 62-64.

<sup>97</sup> See also the Federal Court of Appeal decision in *Malouf*, *supra*, footnote 5, where the Court noted:

...Paragraph (b) of Article 1F of the Convention should receive no different treatment than paragraphs (a) and (c) thereof: none of them requires the Board to balance the seriousness of the Applicant’s conduct against the alleged fear of persecution.

suggestion made by a number of authors that paragraph 1F(a) requires a kind of proportionality test which would weigh the persecution likely to be suffered by the refugee claimant against the gravity of this crime. Whether or not such a test may be appropriate for paragraph 1F(b) seems to me to be even more problematical. As I have already indicated, the claimant to whom the exclusion clause applies is *ex hypothesi* in danger of persecution; the crime which he has committed is by definition “serious” and will therefore carry with it a heavy penalty which at a minimum will entail a lengthy term of imprisonment and may well include death. This country is apparently prepared to extradite criminals to face the death penalty and, at least for a crime of the nature of that which the [claimant] has admitted committing, I can see no reason why we should take any different attitude to a refugee claimant. It is not in the public interest that this country should become a safe haven for mass bombers.<sup>98</sup> (footnotes omitted)

Instead, the Court noted that proportionality is a factor in the characterization of a crime. The gravity of the crime committed to effect change must be commensurate with the degree of repressiveness of the government in question for the crime to be considered a political one.

Where it is appropriate to use a proportionality test under Article 1F(b) is in the weighing of the gravity of the crime as part of the process of determining if we should brand it as “political”. A very serious crime, such as murder, may be accepted as political if the regime against which it is committed is repressive and offers no scope for freedom of expression and the peaceful change of government or government policy. Under such a regime the claimant might be found to have had no other option to bring about political change. On the other hand, if the regime is a liberal democracy with constitutional guarantees of free speech and expression (assuming that such a regime could ever produce a genuine refugee) it is very difficult to think of any crime, let alone a serious one, which we would consider to be acceptable method of political action. To put the matter in concrete terms, the plotters against Hitler might have been able to claim refugee status; the assassin of John F. Kennedy could never do so.<sup>99</sup>

#### **11.3.5. Prior to admission**

The words prior to his “admission to that country as a refugee” in article 1F(b) refer to the admission into Canada of a person intending to claim recognition as a Convention refugee.<sup>100</sup>

#### **11.3.6. “Serious Reasons for Considering”**

The existence of a valid warrant issued by a foreign country,<sup>101</sup> in the absence of allegations

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<sup>98</sup> *Gil, ibid.*, at 534-5. A subsequent decision of the Trial Division took the opposite view, without referring to this precedent; see *Malouf v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 537 (T.D.), at 556-557, but note that the Federal Court of Appeal stated in *Malouf, supra*, footnote 5, that paragraph (b) of Article 1F should receive no different treatment than paragraphs (a) and (c). None of them requires the Refugee Division to balance the seriousness of the claimant’s conduct against the alleged fear of persecution.

<sup>99</sup> *Gil, supra*, footnote 96, at 535.

<sup>100</sup> *Malouf, supra*, footnote 5, at 553.

<sup>101</sup> In *Gamboia, supra*, footnote 80, the Court held that RPD could reasonably rely on the warrant for arrest and

that the charges are trumped up, may satisfy the standard of proof in Article 1F(b), namely “serious reasons for considering.”<sup>102</sup> Further, in *Gurajena*<sup>103</sup> the Court noted that while in some cases, proof of a valid warrant may constitute “serious reasons for considering” that the claimant committed a serious non-political crime, where evidence of a warrant is the sole evidence relied upon by the RPD, the panel must go further and determine whether the claimant is credible if the claimant alleges that the charges referred to in the warrant are fabricated. If a claimant alleges that the charges against him were fabricated, the RPD must first determine the credibility of the allegations before relying on the warrant as a basis for Article 1F(b).<sup>104</sup> In addition, if a claimant alleges a serious flaw in the judicial process in the country where he faced prosecution, the RPD must consider whether the lack of due process had an impact on the claimant’s convictions.<sup>105</sup>

In *Arevalo*,<sup>106</sup> the Court noted that in a country like the U.S., the dismissal of the charges would be *prima facie* evidence that those crimes had not been committed; the Minister could not simply rely on the laying of charges without credible and trustworthy evidence that showed that, in the particular circumstances, the dismissal should not be conclusive. In *Abbas*,<sup>107</sup> the Court clarified this by stating that if the charges had been dismissed after trial in the United States, such a dismissal would be *prima facie* evidence that the crimes had not been committed by the refugee claimant. However, in this case, that did not happen. Therefore, the RPD did not act unreasonably in relying on the withdrawn and dismissed charges in combination with detailed police reports and the claimant’s testimony, including that he did not know why the charges were withdrawn and dismissed, which was not credible.

A plea of guilty to a charge of possession for the purpose of trafficking and trafficking in cocaine constitutes a sound basis for having serious reasons for considering that a person has committed a serious non-political crime.<sup>108</sup>

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indictment of the applicant issued in the US, which has a properly functioning judicial system.

<sup>102</sup> *Qazi, Musawar Hussain v. M.C.I.* (F.C., no. IMM-9182-04), von Finckenstein, September 2, 2005; 2005 FC 1204. The Court noted as follows:

[19] When, however ... the Applicant alleges that the charges are fabricated, the Board has to go further. It has to establish whether to accept the allegations or not i.e., whether the Applicant is credible. If he is found to be credible, then the mere existence of a warrant may not be enough.

<sup>103</sup> *Gurajena, George v. M.C.I.* (F.C., no. IMM-4257-07), Lutfy, June 9, 2008; 2008 FC 724.

<sup>104</sup> In *Rihan, Ahmed Abdel Hafiz Ahmed v. M.C.I.* (F.C., no. IMM-4743-08), Mandamin, February 5, 2010; 2010 FC 123, the Court held that the RPD erred in finding that the Interpol Red Notice alone sufficed as a “serious reason for considering” a serious crime was committed. It ignored testimony from the applicant’s wife and his Egyptian lawyer about the falsification of the charges against the applicant, as part of the Muslim Brotherhood’s persecution of the applicant.

<sup>105</sup> *Biro, Bela Attila v. M.C.I.* (F.C., no. IMM-590-05), Tremblay-Lamer, October 20, 2005; 2005 FC 1428.

<sup>106</sup> *Arevalo Pineda, Jose Isaias v. M.C.I.* (F.C., no. IMM-5000-09), Gauthier, April 26, 2010; 2010 FC 454. In *Betancour, Favio Solis v. M.C.I.* (F.C., no. IMM-4901-08), Russell, July 27, 2009; 2009 FC 767 the Court upheld the exclusion finding because even though there were some doubts about the warrant, the doubts were fully explored by the Member and she felt that the existence of the warrant taken together with the claimant’s admission that he had been involved with cocaine, was sufficient to meet the evidentiary burden.

<sup>107</sup> *Abbas, supra*, footnote 4 at paragraphs 34-35.

<sup>108</sup> *Malouf, supra*, footnote 98.

#### 11.4. ARTICLE 1F(C): ACTS CONTRARY TO THE PURPOSES AND PRINCIPLES OF THE UNITED NATIONS

The Supreme Court of Canada dealt with Article 1 F(c) in *Pushpanathan*.<sup>109</sup> The issue in that case was whether drug trafficking could be the basis for exclusion under Article 1F(c). The Supreme Court of Canada found no indication in international law that drug trafficking on any scale is to be considered contrary to the purposes and principles of the United Nations<sup>110</sup> and thus is not subject to exclusion under Article 1F(c).

Mr. Justice Bastarache, writing on behalf of the majority, held that:

... the purpose of Article 1F(c) can be characterized in the following terms: to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting.<sup>111</sup>

The Court noted that in dealing with Article 1 F(c),

The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations, then Article 1 F(c) will be applicable.<sup>112</sup>

The Court set out two categories of acts which fall within this exclusion clause. The **first category** is:

... where a widely accepted international agreement or United Nations resolution declares that the commission of certain acts is contrary to the purposes and principles of the United Nations.<sup>113</sup>

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<sup>109</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

<sup>110</sup> *Ibid*, at 1032.

<sup>111</sup> *Ibid*, at 1029.

<sup>112</sup> *Pushpanathan*, *supra*, footnote 109, at 1030. In *Szekely, Attila v. M.C.I.* (F.C.T.D., no. IMM-6032-98), Teitelbaum, December 15, 1999, the Court upheld the exclusion of a claimant under Article 1F(c) who, while acting as an informer for the Romanian secret police (la Securitate), had been part of an organization that committed serious, sustained and systematic violations of fundamental human rights constituting persecution. In *Chowdhury, Amit v. M.C.I.* (F.C., no. IMM-4920-05), Noël, February 7, 2006; 2006 FC 139, the Court upheld the exclusion of the claimant due to his participation in the Awami League in Bangladesh. In interpreting the scope of Article 1F(c), the Court noted its preference for the jurisprudence of the Federal Court of Appeal, rather than the UNHCR *Handbook* and other non-binding UN documents.

<sup>113</sup> *Pushpanathan*, *supra*, footnote 109, at 1030. In *Bitaraf, Babak v. M.C.I.* (F.C., no. IMM-1609-03), Phelan, June 23, 2004; 2004 FC 898, the Court found that the RPD erred when it followed the approach used for Article 1F(a) rather than for Article 1F(c) and failed to identify which purposes and principles of the United Nations were at



Enforced disappearances, torture and international terrorism were examples offered by the Court as falling in the first category as corresponding international instruments exist which specifically designate such acts as being contrary to the purposes and principles of the United Nations.<sup>114</sup> The Court noted that "other sources of international law may be relevant in a court's determination of whether an act falls within 1F(c)" and noted that "determinations by the International Court of Justice may be compelling."<sup>115</sup>

The **second category** of acts which fall within the scope of Article 1F(c) are:

those which a court is able, for itself, to characterize as serious, sustained and systemic violations of fundamental human rights constituting persecution.<sup>116</sup>

This second category was also described by the Court as including any act whereby an international instrument has indicated it is a violation of fundamental human rights.<sup>117</sup>

As a result, the Court determined that "conspiring to traffic in a narcotic is not a violation of Article 1F(c)."<sup>118</sup>

Even though international trafficking in drugs is an extremely serious problem that the United Nations has taken extraordinary measures to eradicate, in the absence of clear indications that the international community recognizes drug trafficking as a sufficiently serious and sustained violation of fundamental human rights so as to amount to persecution, either through a specific designation as an act contrary to the purposes and principles of the United Nations (the first category), or through international instruments which otherwise indicate that trafficking is a serious violation of fundamental human rights (the second category) individuals should not be deprived of the essential protections contained in the Convention for having committed those acts.<sup>119</sup>

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issue.

<sup>114</sup> *Pushpanathan, supra*, footnote 109, at 1030.

<sup>115</sup> *Pushpanathan, supra*, footnote 109, at 1032.

<sup>116</sup> *Ibid*, at 1032. In *El Hayek, Youssef Ayoub v. M.C.I. and Boulos, Laurett v. M.C.I.* (F.C., no. IMM-9356-04), Pinard, June 17, 2005; 2005 FC 835, the Court upheld the finding of the RPD that the claimant was a part of the Kataebs and the Lebanese Forces and as a result of his knowledge of the crimes committed, he was complicit in crimes against humanity and acts contrary to the purposes and principles of the United Nations. The Court upheld the exclusion of the claimant under Article 1F(a) and (c) given his membership and activities in the youth section of the Cameroon People's Democratic Movement.

<sup>117</sup> *Ibid*, at 1035.

<sup>118</sup> *Ibid*, at 1035.

<sup>119</sup> *Ibid*, at 1035.

The Court also noted that exclusion under Article 1F(c) is not limited to persons in positions of power and indicated that non-state actors may fall within the provision.<sup>120</sup>

### 11.5. BURDEN OF PROOF AND NOTICE

The burden of establishing serious reasons for considering that international offences have been committed falls on the Government.

Aside from avoiding the proving of a negative by a claimant, this also squares with the onus under paragraph 19(1)(j) of the *Immigration Act*, according to which it is the Government that must establish that it has reasonable grounds for excluding claimants. For all these reasons, the Canadian approach requires that the burden of proof be on the Government, as well as being on a basis of less than the balance of probabilities.<sup>121</sup>

The Minister does not have to be present at the hearing in order for the Refugee Division to consider exclusion clauses.<sup>122</sup>

The claimant is to be given notice of the applicable exclusion ground, as the determination

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<sup>120</sup> *Ibid*, at 1031.

<sup>121</sup> *Ramirez, supra*, footnote 1, at 314. *M.C.I. v. Bazargan, Mohammad Hassan* (F.C.A., no. A-400-95), Marceau, Décary, Chevalier, September 18, 1996, at 4. “The Minister does not have to prove the respondent’s guilt. He merely has to show - and the burden of proof resting on him is less than the balance of probabilities - that there are serious reasons for considering that the respondent is guilty.”

<sup>122</sup> Although this principle was clear from the case law even before the decision in *Arica, Jose Domingo Malaga v. M.E.I.* (F.C.A., no. A-153-92), Stone, Robertson, McDonald, May 3, 1995. Reported: *Arica v. Canada (Minister of Employment and Immigration)* (1995), 182 N.R. 34 (F.C.A.), leave to appeal to S.C.C. refused: (1995), 198 N.R. 239 (S.C.C.), the Court of Appeal therein unequivocally stated: “The fact that the Minister does not participate in the hearing, either because he does not wish to do so or because he is not entitled to notice under Rule 9(3), does not alter the right of the Board to render a decision on the issue of exclusion.” (At 6, unreported). See also *Ashari, Morteza Asna v. M.C.I.* (F.C.T.D., no. IMM-5205-97), Reed, August 21, 1998. The Federal Court of Appeal in *Ashari, Morteza Asna v. M.C.I.* (F.C.A., no. A-525-98), Decary, Robertson, Noël, October 26, 1999, confirmed the decision of the Trial Division. In *Alwan, Riad Mushen Abou v. M.C.I.* (F.C., no. IMM-8204-03), Layden-Stevenson, June 2, 2004; 2004 FC 807, the Court concluded that since the RPD has sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, non-participation of the Minister does not preclude an exclusion finding. However, in *Kanya, Kennedy Lofty v. M.C.I.* (F.C., no. IMM-2778-05), Rouleau, December 9, 2005; 2005 FC 1677 in the unusual circumstances of the case, the Court found that the RPD breached procedural fairness by not notifying the Minister in a timely fashion that there was a possibility that Article 1F(b) would apply. In *M.C.I. v. Atabaki, Roozbeh Kianpour* (F.C., no. IMM-1669-07), Lemieux, November 13, 2007; 2007 FC 1170, the Court said it was an error for the RPD to restrict the Minister to question the claimant on matters dealing only with exclusion since section 170(e) of *IRPA* states that the Minister, as well as the claimant, must be given a reasonable opportunity to present evidence and question witnesses. In *M.C.I. v. Cadovski, Ivan* (F.C., no. IMM-1047-05), O’Reilly, March 21, 2006; 2006 FC 364, the claimant alleged a fear of persecution in two countries in which he held citizenship, namely Macedonia and Croatia. The RPD found that the claimant did not have a well-founded fear of persecution in Macedonia, and therefore rejected the claim without determining the issue of exclusion regarding his actions in Croatia. The Court found that the RPD erred when it rejected the claim, without determining the exclusion issue, since the Federal Court of Appeal in *Xie* has already determined that once the RPD finds that a claimant is excluded from refugee protection, there is nothing more it can do. The Court said that if the RPD finds that a claimant is excluded, it need not decide any other issues.

cannot be made on a ground not mentioned at the hearing.<sup>123</sup> In addition, failure to give the Minister notice of possible exclusion is a basis for judicial review brought by the Minister.<sup>124</sup>

## 11.6. CONSIDERATION OF INCLUSION WHERE CLAIMANT IS EXCLUDED

As noted earlier, the Board cannot balance the risk of persecution or other harm against the exclusion. The question is whether it can consider both the inclusionary and exclusionary aspects of a claim (in the alternative). This approach has been rejected in most<sup>125</sup> of the jurisprudence.

The Court in *Xie*<sup>126</sup> stated the following:

[38] This leads to the question as to whether the decision of the Supreme Court in *Suresh* requires a different reading of the statute. I might point out that the issue of *Suresh* only arises at this point because the Board, having found that the exclusion applied, went on to consider whether the applicant was at risk of torture upon her return to China. In my view, the Board exceeded its mandate when it decided to deal with the appellant's risk of torture upon return with the result that the Minister is not bound by that finding. Once the Board found that the exclusion applied, it had done everything that it was required to do, and there was nothing more it could do, for the appellant. The appellant was now excluded from refugee protection, a matter within the Board's competence, and was limited to applying for protection, a matter within the Minister's jurisdiction. The board's conclusions as to the appellant's risk of torture were gratuitous and were an infringement upon the Minister's responsibilities.

The Federal Court of Appeal distinguished *Xie* in the *Lai*<sup>127</sup> case as follows:

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<sup>123</sup> *Aguilar, Nelson Antonio Linares v. M.C.I.* (F.C.T.D., no. IMM-3118-99), Denault, June 8, 2000.

<sup>124</sup> *M.C.I. v. Louis, Mac Edhu* (F.C., no. IMM-4936-08), Teitelbaum, June 29, 2009; 2009 FC 674. For further particulars regarding the requirement to give notice, see the RPD Rules (Rule 26). Also see *M.C.I. v. Ahmed, Maqbool* (F.C. no. IMM-1426-15), Mactavish, November 18, 2015; 2015 FC 1288 where the Court held that given that the information before the RPD was sufficient to trigger the RPD's obligation to notify the Minister of potential exclusion, it was unfair for the Board to proceed to a hearing into the merits of the applicant's claim without having first provided the Minister with the requisite notice.

<sup>125</sup> A case that put this interpretation of *Xie* into question was *Gurajena, supra*, footnote 103, where the Court said: "I do not read *Xie* as meaning that the R.P.D. should not proceed to an inclusion analysis under section 96 and 97 of the *Immigration and Refugee Protection Act* as an alternative finding in the event that its exclusion determination under section 98 is found to be in error on judicial review." However, this approach is not supported in later jurisprudence. For example, in *M.C.I. v. Singh, Binder* (F.C.A., no. A-35-16), Stratas, Webb, Woods, November 24, 2016; 2016 FCA 300, the FCA, relying on *Xie*, rejected the Minister's argument that it would advance simplicity and conservation of resources if a "no credible basis" finding could also be made where the person is excluded. Most recently, in *A.B., supra*, footnote 84, the RPD had excluded one of the applicants but had also found her not to be a Convention refugee. Without commenting on the issue of the member's jurisdiction to consider the merits of the claim (the Minister made no submission on the point), the Court held that the exclusion decision was unreasonable but the refugee determination was not. Accordingly the Court dismissed the judicial review application.

<sup>126</sup> *Xie, supra*, footnote 6.

<sup>127</sup> *Lai, supra*, footnote 92. In *Serrano Lemus, Jose Maria v. M.C.I.* (F.C., no. IMM-6954-10), Hughes, June 15, 2011; 2011 FC 702, the Court held that this ruling in *Lai* only applies in cases where there are derivative claims.

[70] Having determined that the Applications Judge did not err in finding that the Board's conclusions on the exclusionary question were reasonable, the adult appellants are excluded from the definition of Convention refugee. The recent decision of this Court in *Xie* has determined that once excluded under Article 1F(b), claimants are not entitled to have their inclusionary claims determined. However, the present facts are distinguishable from those in *Xie* because in this appeal the children's actions were not subject to Article 1F(b) and their derivative claims must be determined. Accordingly, it was proper for the Board to proceed to conduct an inclusionary analysis with respect to all five of the appellants in order to determine if the children's derivative claims could be successful.

## CHAPTER 11 - EXCLUSION CLAUSE 1F

### 11.7. TABLE OF CASES

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# CHAPTER 12

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## CHAPTER 12

### 12. APPLICATIONS TO CEASE REFUGEE PROTECTION

#### 12.1. INTRODUCTION

This chapter discusses the issues that arise in Minister's applications to cease refugee protection (referred to in this chapter as "applications to cease" or "cessation applications"). The "cessation" provisions of the *Immigration and Refugee Protection Act* (IRPA)<sup>1</sup> apply in situations when a person who was conferred Canadian refugee status no longer needs that protection or where that protection is no longer justified.<sup>2</sup> There are serious consequences to the protected person when the Refugee Protection Division (RPD) grants an application to cease.

While all the grounds for cessation apply to both the adjudication of refugee claims and Minister's applications to cease refugee protection, this chapter focuses on Minister's applications, which are made when the Minister wishes to have refugee status that was previously granted revoked.

#### 12.2. LEGISLATIVE FRAMEWORK

##### 12.2.1. Reforms to Cessation regime - 2012

The law related to cessation was significantly amended on December 15, 2012. On that date, the IRPA was amended by the *Protecting Canada's Immigration System Act*.<sup>3</sup> The amendments added sections 40.1 and 46(1)(c.1) to the IRPA. While the amendments did not change the substantive elements of cessation in section 108, the consequences became more severe.

Prior to the amendments, a protected person did not lose permanent resident status if he or she had been granted that status. The amendments changed this for four of the five grounds of cessation, meaning that with the exception of the one ground over which the protected person has no control, namely the reason for seeking protection no longer exists, a permanent resident now loses his or her permanent resident status and becomes inadmissible upon a successful application to cease refugee status by the Minister.

The impact on the number of Minister's applications to cease made to the RPD was immediate. The result is that almost the entire body of Canadian jurisprudence on applications to cease refugee status has been developed since 2012.

##### 12.2.2. Overview of Cessation Provisions in IRPA

Subsection 108(1) of the IRPA sets out five grounds for cessation of refugee protection, while subsection (4) sets out an exception to the application of paragraph 108(1)(e) – commonly referred to as change of circumstances:

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<sup>1</sup> S.C. 2001, c. 27.

<sup>2</sup> *United Nations Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*: United Nations High Commissioner for Refugees, Geneva, January 1992, reissued December, 2011 at paragraph 111.

<sup>3</sup> S.C. 2012, c. 17.

## Rejection

**108 (1)** A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

- (a) the person has voluntarily reavailed themselves of the protection of their country of nationality;
- (b) the person has voluntarily reacquired their nationality;
- (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
- (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or
- (e) the reasons for which the person sought refugee protection have ceased to exist.

...

## Exception

**(4)** Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

Subsection 108(2) of the IRPA allows the Minister to make an application to the RPD to declare that refugee protection has ceased for any of the grounds set out in subsection 108(1):

### Cessation of refugee protection

**(2)** On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

On a successful application to cease refugee protection, subsections 40.1(1), 46(1)(c.1), and 108(3) of the IRPA have the combined effect of (i) rendering the protected person inadmissible to

## Rejet

**108 (1)** Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

- a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;
- b) il recouvre volontairement sa nationalité;
- c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;
- d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;
- e) les raisons qui lui ont fait demander l'asile n'existent plus.

...

## Exception

**(4)** L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

Canada;<sup>4</sup> (ii) removing permanent resident status, if they had it; and (iii) deeming the claim of the protected person rejected. In other words, the person becomes an inadmissible foreign national.

There is an exception to becoming inadmissible and losing permanent resident status where the protected person had become a permanent resident and the only ground of cessation is paragraph 108(1)(e) - the reasons the person sought protection have ceased to exist, colloquially referred to as a change of circumstances:

**Cessation of refugee protection — foreign national**

**40.1 (1)** A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased.

**Cessation of refugee protection — permanent resident**

**(2)** A permanent resident is inadmissible on a final determination that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d).

**Permanent resident**

**46 (1)** A person loses permanent resident status

...

**(c.1)** on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d);

**Effect of decision**

**108(3)** If the application is allowed, the claim of the person is deemed to be rejected.

**Perte de l'asile — étranger**

**40.1 (1)** La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant la perte de l'asile d'un étranger emporte son interdiction de territoire.

**Perte de l'asile — résident permanent**

**(2)** La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)a) à d), la perte de l'asile d'un résident permanent emporte son interdiction de territoire.

**Résident permanent**

**46 (1)** Emportent perte du statut de résident permanent les faits suivants :

...

**c.1)** la décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)a) à d), la perte de l'asile;

**Effet de la décision**

**108(3)** Le constat est assimilé au rejet de la demande d'asile.

Finally, paragraph 110(2)(e) of the IRPA provides that neither the Minister nor the protected person who is the subject of a cessation application has the right to appeal to the Refugee Appeal Division from a decision of the RPD to allow or reject an application. Rather, the way to contest such a decision is by making an application for leave and judicial review before the Federal Court:

**Restriction on appeals**

**110(2)** No appeal may be made in respect of any of the following:

**Restriction**

**110(2)** Ne sont pas susceptibles d'appel :

...

---

<sup>4</sup> The *Immigration and Refugee Protection Regulations* were amended in 2014 to add paragraph 228(1)(b.1) giving the Minister the authority to issue a removal order. The appropriate removal order is a departure order.

...

(e) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister for a determination that refugee protection has ceased;

e) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande du ministre visant la perte de l’asile;

### 12.3. JURISDICTION TO DECIDE APPLICATIONS TO CEASE – REFUGEE STATUS CONFERRED BY S. 95(1)

Subsection 108(2) of the IRPA provides that the Minister may make an application to the RPD to determine that refugee protection “referred to in subsection 95(1)” has ceased. Subsection 95(1)<sup>5</sup> provides that refugee protection may be conferred by the RPD, by the Minister in an application for protection (pre-removal risk assessment or PRRA), or where a person has been determined to be a Convention refugee or “a person in similar circumstances” under a visa application.

Therefore, the RPD has jurisdiction to decide applications to cease refugee protection not only with respect to refugee protection conferred by the RPD following an in-Canada refugee claim, but also protection conferred by the Minister in the context of a PRRA application or by a visa officer overseas.

What is included in the phrase “a person in similar circumstances” in paragraph 95(1)(a) has been the subject of litigation before the Courts. In this respect, the Courts have examined the question of whether the RPD has jurisdiction to hear applications to cease refugee status with respect to persons selected overseas in the various refugee classes set out in Part 8 of the *Immigration and Refugee Protection Regulations* (regulations).<sup>6</sup> In particular, the Courts have discussed the jurisdiction of the RPD to hear cessation applications in the context of persons overseas selected to become permanent residences in the “Convention Refugees Abroad Class”,<sup>7</sup>

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#### <sup>5</sup> Conferral of refugee protection

**95 (1)** Refugee protection is conferred on a person when

(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;

(b) the Board determines the person to be a Convention refugee or a person in need of protection; or

(c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

#### Asile

**95 (1)** L’asile est la protection conférée à toute personne dès lors que, selon le cas :

a) sur constat qu’elle est, à la suite d’une demande de visa, un réfugié au sens de la Convention ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d’un permis de séjour délivré en vue de sa protection;

b) la Commission lui reconnaît la qualité de réfugié au sens de la Convention ou celle de personne à protéger;

c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).

<sup>6</sup> SOR/2002-227.

<sup>7</sup> Sections 144-145 of the regulations. This class relates to those who have been determined to be Convention refugees outside Canada.

the “Humanitarian-Protected Persons Abroad Class”,<sup>8</sup> and the “Protected Temporary Residents Class”.<sup>9</sup>

In *Siddiqui*,<sup>10</sup> the Federal Court of Appeal dealt with the question of whether a person who was granted permanent resident status in the “Country of Asylum Class” (now referred to as the “Humanitarian-Protected Persons Abroad Class”) was subject to the cessation provisions of section 108 of the IRPA. The Court held that the cessation provisions applied in these circumstances and that the RPD did have jurisdiction:

[17] In sum, a reading of IRPA leads to the unequivocal conclusion that the cessation provisions of section 108 apply to both Convention refugees and country of asylum or re-settlement class. Section 95 provides protection to both Convention refugees and members of the country of asylum class. What ceases under section 108 is the protection that is conferred under section 95 and Parliament expressly crafted section 108 so as to apply the cessation provisions to “protected persons,” regardless of the means by which protection is granted.

Therefore, the Court answered the following certified question in the affirmative:

[... D]o the same or substantially the same legal considerations, precedents and analysis apply to persons found to be Convention refugees as to persons found to be in need of protection as members of the Country of asylum class?

A different conclusion has been reached with respect to accompanying family members of those selected in the Convention Refugees Abroad Class. In two cases, the Court found that the RPD did not have jurisdiction to hear a cessation application regarding persons who became permanent residents in the Convention Refugee Abroad Class as accompanying family members.

In *Esfand*<sup>11</sup> the respondent (protected person) entered Canada on a permanent resident visa in the Convention Refugee Abroad Class as an accompanying family member of her husband. The Court noted that under the regulations, family members are considered members of the same class as the foreign national determined to be a Convention refugee, without their risk being independently assessed. Therefore, the respondent had never been “determined” to be a Convention refugee and it made “no sense” for the respondent to face negative consequences for visiting Iran, a country for which she never claimed to be at risk.

On similar facts, the Court came to the same conclusion in *Gezik*.<sup>12</sup> In both cases, the Court certified a question of general importance on this issue, but an appeal to the Federal Court of Appeal was not pursued in either case.

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<sup>8</sup> Sections 146-151 of the regulations. This class relates to persons in need of resettlement because they are outside their country(ies) of nationality or former habitual residence and have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.

<sup>9</sup> Section 151.1 of the regulations. This class relates to persons who hold a temporary resident permit under certain circumstances.

<sup>10</sup> *Siddiqui, Obaidullah v. M.C.I.* (F.C.A. no. A-205-15), Nadon, Rennie, Gleason, April 29, 2016; 2016 FCA 134.

<sup>11</sup> *M.C.I. v. Esfand, Bahareh* (F.C., no. IMM-1133-15), Locke, October 21, 2015; 2015 FC 1190 (Appeal filed by the Minister but a Notice of Discontinuance was filed on June 1, 2016; F.C.A. no. A-495-15).

<sup>12</sup> *M.C.I. v. Gezik, Misagh Heidari* (F.C. no. IMM-1742-15), Annis, November 13, 2015; 2015 FC 1268. (Appeal filed by the Minister but a Notice of Discontinuance was filed on May 5, 2016; F.C.A. no. A-532-15).

## 12.4. PROCEDURE

### 12.4.1. Responsible Minister

Subsection 4(1) of the IRPA provides that the Minister of Citizenship and Immigration (CIC)<sup>13</sup> is responsible for the administration of the Act except as otherwise provided in the section. Since section 4 does not indicate another Minister is responsible for applications under section 108, and the Governor in Council has not made an order pursuant to subsection 4(3) which would designate another Minister for the purpose of subsection 108(2), the responsible Minister making applications to cease refugee protection is the Minister of CIC.<sup>14</sup>

### 12.4.2. How an Application is Made

The process for making an application is set out in the *Refugee Protection Division Rules* (RPD Rules).<sup>15</sup>

RPD Rule 64 provides that an application to cease refugee protection must be in writing and include the following information:

- The contact information of the protected person and their counsel, if any;
- The identification number given by the department;
- The date and file number of any decision with respect to the protected person;
- In the case of a person whose application for protection was allowed abroad, the person's file number, a copy of the decision and the location of the office;
- The decision that the Minister wants the Division to make; and
- The reason why the Division should make that decision.

Rule 64(3) requires the Minister to provide a copy of the application to the protected person and the original to the Division, together with a written statement indicating how and when a copy was provided to the protected person. Where the protected person is no longer in Canada, the Minister may be permitted to serve the protected person at an address outside Canada and the person may participate by telephone or other appropriate means.<sup>16</sup>

In some circumstances, the Minister may not be able to locate the protected person to serve

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<sup>13</sup> The Minister's legal title is the "Minister of Citizenship and Immigration", while the applied title in accordance with Treasury Board policy is the "Minister of Immigration, Refugees and Citizenship."

<sup>14</sup> However, authority to make an application to cease under subsection 108(2) of the IRPA has been delegated by the Minister of CIC to Canada Border Services Agency Hearings Officers as per *Department of Citizenship and Immigration Instrument of Designation and Delegation* (May 1, 2018). While exercising that authority, the officers would be representing the Minister of CIC and not the Minister of Public Safety in the cessation proceedings.

<sup>15</sup> SOR/2012-256.

<sup>16</sup> See, for example, *Seid, Faradj Mabrouk v. M.C.I.* (F.C. no. IMM-2555-18), LeBlanc, November 21, 2018; 2018 FC 1167 at paragraph 16 (protected person served in Chad); *Starovic, Odesa v. M.C.I.* (F.C. no. IMM-2139-11), Zinn, June 28, 2012; 2012 FC 827 at paragraphs 6-7 (protected person remained in Serbia and participated in the hearing by telephone).



a copy of the application. In those circumstances, the Minister is required to make an application under RPD Rule 40 to vary or be excused from the service requirement. That rule also provides that the RPD must not allow such an application unless it is satisfied that reasonable efforts have been made to provide the document as required. In determining applications under rule 40, the RPD has considered such factors as the Minister's efforts to search internet databases, searches in the Canadian Police Information Centre database, personal attendance at the last known address, attempts to reach the protected person at the last known telephone number, and the relative quality of the Minister's evidence on the merits of the application to cease.<sup>17</sup>

Once a protected person has been served with an application, pursuant to RPD Rule 12, the onus is on that person to notify the Division and Minister of any address changes for themselves or their counsel.

### **12.4.3. Order of Questioning**

At the hearing of a cessation application, RPD Rule 10(4) provides that the Minister's counsel will begin questioning any witness, including the protected person, followed by the presiding member and then the protected person's counsel. RPD Rule 10(5) provides that the order of questioning may be varied in exceptional circumstances, including to accommodate a vulnerable person.

### **12.4.4. Language of Proceedings**

RPD Rule 18 provides that the Minister must make an application to cease in the same language as was used in the original refugee claim proceedings. The protected person may then change this language upon notice in writing no later than 10 days before the day fixed for the next proceeding.

## **12.5. INTERPRETATION OF THE GROUNDS**

### **12.5.1. Burden and Standard of Proof**

The burden of proof in an application to cease refugee status rests with the Minister on a balance of probabilities.<sup>18</sup>

### **12.5.2. General Principles**

Paragraphs 111-116 of the UNHCR Handbook<sup>19</sup> provide some general guidance on the interpretation of the cessation clauses which have been cited in Canadian jurisprudence.

In particular, paragraph 111 explains the rationale for the cessation provisions, being that refugee protection is no longer necessary or justified. However, paragraph 112 cautions against an

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<sup>17</sup> See, for example, RPD File no. MB3-04124: *X (Re)*, 2014 CanLII 99249 (November 13, 2014); RPD File no. VB4-00790: *X (Re)*, 2015 CanLII 102735 (December 3, 2015).

<sup>18</sup> See, for example, *Youssef, Sawzan El-Cheikh v. M.C.I.* (F.C. no. IMM-990-98), Teitelbaum, March 29, 1999 at paragraph 22; *Li, Peter Sum v. M.C.I.* (F.C. no. IMM-1614-14), O'Reilly, April 15, 2015; 2015 FC 459 at paragraph 42.

<sup>19</sup> UNHCR, Handbook, *supra* note 2.

overly broad application of the cessation clauses because refugees need assurance that their status will not be subject to constant review.

Paragraphs 113-115 set out the cessation clauses with reference to Article 1 C of the 1951 Convention.

Paragraph 116 of the Handbook states that the cessation provisions are exhaustive and “should be interpreted restrictively.”

The Federal Court in *Bashir*<sup>20</sup> cited these interpretative principles with approval and applied the “strict” approach in rejecting the Minister’s more expansive interpretation of the presumption that applies from obtaining a passport from the country of persecution.<sup>21</sup> Likewise, in *Gezik* ),<sup>22</sup> the Court stated that it was applying the “restrictive and well-balanced approach” that should be adopted in interpreting the cessation provisions.

### **12.5.3. Paragraph 108(1)(a) - Reavailment<sup>23</sup>**

Paragraph 108(1)(a) of the IRPA provides, in effect, that a protected person’s refugee protection ceases if he or she “has voluntarily reavailed themselves of the protection of their country of nationality.” This ground of cessation is the one most often invoked in applications to cease; therefore, most of the Canadian jurisprudence on cessation relates to this provision.

In *Kuoch*,<sup>24</sup> the Court stated that although the UNHCR handbook is not formally binding, it provides authoritative guidance as to the meaning of “reavailment.” In general, Canadian jurisprudence has adopted the analytical framework for reavailment that is set out in paragraph 119 of the UNHCR Handbook:

119. This cessation clause implies three requirements:

(a) voluntariness: the refugee must act voluntarily;

(b) intention: the refugee must intend by his action to re-avail himself of the protection of the country of his nationality;

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<sup>20</sup> *M.P.S.E.P. v. Bashir, Najeeb* (F.C. no. IMM-4732-14), Bédard, January 15, 2015; 2015 FC 51 at paragraphs 44-47.

<sup>21</sup> *Ibid.*, at paragraphs 67-68.

<sup>22</sup> *Gezik, supra*, note 12.

<sup>23</sup> Paragraph 118 of the UNHCR Handbook draws a distinction between reavailment and re-establishment, the former applying when the refugee is still outside his or her country of nationality and the latter applying when the refugee has returned to his or her country of nationality. Such a clear distinction does not seem to have been adopted in Canadian jurisprudence.

The argument was raised in *Seid, supra*, note 16 at paras 16-18 that pursuant to paragraph 118 of the Handbook, reavailment could not apply to the protected person because the application to cease was served on him in Chad, his country of nationality. The Court rejected this argument because he was not actually living in Chad; therefore, the substantive merit of the argument was not analyzed by the Court.

<sup>24</sup> *Kuoch, Bun Chou v. M.C.I.* (F.C. no. IMM-7600-14), Shore, August 18, 2015; 2015 FC 979 at paragraph 25.

(c) re-availment: the refugee must actually obtain such protection.

In *Bashir*,<sup>25</sup> the Court held that the three elements are cumulative, such that once the RPD found in that case that the protected person had no intention to reavail himself of the protection of his country of nationality, it was not an error to decline to examine the third element – actual reavailment – before dismissing the Minister’s application. However, in order for an application under paragraph 108(1)(a) to be granted, the Minister must satisfy their burden of establishing all three elements of reavailment.

Following is a discussion of the three elements. While each have been described under a separate heading for the purposes of this chapter, the analysis in the jurisprudence does not always make a clear distinction. In particular, the issues of whether or not a person had the intention to reavail and actually reavailed sometimes appear as one analysis.

### 12.5.3.1. Voluntariness

Paragraph 120 of the UNHCR Handbook provides examples of where a refugee may not be considered to be acting voluntarily, such as where the claimant obtains a passport at the request of the country of refuge or where it is necessary to pursue certain legal recourses, such as a divorce.

In *Bashir*,<sup>26</sup> the Court held that with respect to the criteria of voluntariness and intention, the same factual matrix can have a different impact depending on the criterion being assessed. In other words, “the fact the respondent voluntarily requested renewals of his Pakistani passport does not necessarily entail that, by doing so, he had the intention of reavailing himself of the protection of Pakistan.” In that case, the RPD found the protected person credible when he stated he believed a passport was required for his permanent resident application, even if that belief was mistaken. Therefore, the conclusion by the RPD that his act was voluntary was reasonable. However, the Court also upheld the RPD conclusion that the protected person did not have the intention of reavailing, and stated that “it is difficult to see how the renewal of a national passport for the purpose of submitting it to CIC to finalize the permanent residency process can be seen as indicating an intention on the part of the respondent to reavail himself of the protection of his country of nationality.”<sup>27</sup>

In *Mayell*,<sup>28</sup> although the Court quashed the decision for other reasons, it found the RPD’s conclusion that the protected person had voluntarily obtained a passport to be reasonable. He had testified that his acquisition of an Afghani passport was beyond his control because he wanted to use his Permanent Resident Card to travel to Afghanistan to get married, but could not use his card for that purpose. The RPD conclusion that there were alternatives available, such as getting married in a third-party location or a marriage by proxy, was reasonable, absent evidence to the contrary.

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<sup>25</sup> *Bashir*, *supra*, note 20. Also see *Cadena Cabrera, Sandra Luz v. M.P.S.E.P.* (F.C. no. IMM-3456-11), Shore, January 19, 2012; 2012 FC 67 at paragraph 25.

<sup>26</sup> *Ibid.*, at paragraph 50.

<sup>27</sup> *Bashir*, *supra*, note 20 at paragraph 57.

<sup>28</sup> *Mayell, Obaidullah v. M.C.I.* (F.C. no. IMM-3435-17), Zinn, February 7, 2018; 2018 FC 139.

In *Abechkhrishvili*,<sup>29</sup> the protected person argued that, because of her mental state, she was not acting rationally and thus did not voluntarily intend to re-avail herself of the protection of Georgia. The Court agreed with the RPD that the protected person's behaviour was neither irrational nor illogical, and her diagnosed anxiety disorder was not sufficient to demonstrate she acted involuntarily. Her well thought out plans and extended stay in Georgia on two occasions suggested that her trips were intentional and planned.

In *Starovic*,<sup>30</sup> the protected person returned to her country of nationality, Serbia, because her husband had a heart attack, where she stayed several years. The Court stated that although her original return when her husband had a heart attack could not be considered voluntary, her lengthy stay in Serbia after that may be seen as voluntary.

### **12.5.3.2. Intention**

In many cessation applications, the issue centres on whether or not the protected person had the intention to reavail him or herself of the protection of their country of nationality. Often this relates to whether or not the protected person has rebutted the presumption of reavailment that arises when they obtain a passport from their country of nationality. This is described in more detail below.

#### **12.5.3.2.1. Minors**

In *Cadena*,<sup>31</sup> the Court raised the issue of whether a young child could form the requisite intention to reavail within the meaning of paragraph 108(1)(a). However, on the facts of the case, the Court found that there was no evidence that the minor, who was eleven years old at the date of the cessation proceedings, had an intention that differed from that of his mother.

In *Andrade*, the Court held that the RPD should have considered whether it was necessary for the minor protected person, who was 17 years of age at the time of the cessation hearing, to testify since he “certainly had the ability to form and express an opinion about his intention to reavail...”<sup>32</sup>

#### **12.5.3.2.2. Presumption from obtaining a passport**

When looking at whether or not the protected person had the intention to reavail, Canadian jurisprudence has applied the presumption found in paragraph 121 of the UNHCR Handbook:

If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality.

The Federal Court in *Li*,<sup>33</sup> described the presumption as a “factual presumption” which

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<sup>29</sup> *Abechkhrishvili, Nana v. M.C.I.* (F.C. no. IMM-3021-18), McDonald, March 13, 2019; 2019 FC 313.

<sup>30</sup> *Starovic, supra*, note 16.

<sup>31</sup> *Cadena, supra*, note 25.

<sup>32</sup> *Andrade, Claudia Patricia Silva v. M.P.S.E.P.* (F.C. no. IMM-7383-14), LeBlanc, August 25, 2015; 2015 FC 1007 at paragraphs 9-15.

<sup>33</sup> *Li, supra*, note 18 at paragraphs 37-43.

operates such that the Minister is entitled to rely on the presumption by proving that the refugee obtained or renewed a passport from his or her country of origin. Once proved, the refugee has the burden of showing that he or she did not actually seek reavailment.

In *Cadena*,<sup>34</sup> a case where the protected persons returned to Mexico and applied for passports from within that country, the Court held the presumption did not apply as it only applied when the application is made from outside the country of nationality. However, the Court in that case upheld the RPD's finding that the protected persons' refugee protection had ceased.

### 12.5.3.2.3. Application of the presumption in the case law

Whether or not a protected person has rebutted the presumption of intention to reavail that arises when he or she obtains a passport from their country of nationality depends on the circumstances of each case. The reasons why the person obtained a passport and whether and how they used it are relevant factors.

Below are examples of how the issue of the presumption has been analyzed in the jurisprudence.

#### 1) Examples where the presumption was not rebutted

In *Maqbool*,<sup>35</sup> the Court held that the protected person necessarily intended to reavail himself of Pakistan's protection by obtaining a passport issued by Pakistani authorities since a Canadian travel document would not have allowed him to return to his country of nationality. It noted that other international travel documents were available to him, such as a Refugee Travel Document, which would have allowed him to leave Canada for all destinations, except Pakistan.

In *Maqbool*, the Court also rejected the argument that paragraph 108(1)(a) does not apply to persons who have achieved a durable form of protection, such as Canadian permanent resident status.<sup>36</sup>

In *Abadi*, the Court made the point that where the person has travelled back to their country of nationality, the presumption is "particularly strong" and that "it is only in 'exceptional circumstances' that a refugee's travel to his country of nationality on a passport issued by that country will not result in the termination of refugee status (Refugee Handbook at para 124)."<sup>37</sup> In that case, the claimant, a citizen of Iran, had arrived in Canada in 1996 at the age of 12 and was granted refugee status in 1999. He travelled back to Iran on an Iranian passport on two occasions to attend a wedding and visit his aging father for a total period of approximately three months. The Court held that it was reasonable for the RPD to have found he had reavailed himself of the

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<sup>34</sup> *Cadena, supra*, note 25.

<sup>35</sup> *Maqbool, Jahangir v. M.C.I.* (F.C. no. IMM-1102-16), Tremblay-Lamer, October 14, 2016; 2016 FC 1146.

<sup>36</sup> *Ibid.*, at paragraphs 23-30.

<sup>37</sup> *Abadi, Sajja Shamsi Kazem v. M.C.I.* (F.C. no. IMM-2680-15), Fothergill, January 8, 2016; 2016 FC 29 at paragraphs 16 and 18. *Abadi* was cited for this principle in *Norouzi, Afshin v. M.C.I.* (F.C. no. IMM-3253-16), Bell, April 18, 2017; 2017 FC 368. A question was certified by the Federal Court and an appeal was filed with the Federal Court of Appeal, but a Notice of Discontinuance was filed on June 27, 2017 (F.C.A. no. A-159-17). Also see *Seid, supra* note 16 at paragraph 20.

diplomatic protection of Iran by acquiring an Iranian passport and using it to travel to Iran on two occasions, via other countries.

In *Abadi*,<sup>38</sup> the Court also rejected the argument that since the protected person was a permanent resident, he benefited from the security of being a permanent resident of Canada. The Court stated that the protected person's permanent resident status may be relevant under paragraph 108(1)(d) (re-establishment), but does not detract from the fact he reavailed by travelling to his country of nationality.

In *Li*,<sup>39</sup> the RPD had allowed an application to cease the refugee protection of a Chinese citizen who had been granted refugee status in 1990. Since that time, he had travelled back to China on 13 occasions for lengthy periods of time for various reasons, including marriage and business. The Court found the RPD's decision reasonable, including its reasoning that Mr. Li's failure to apply for Canadian citizenship indicated his intention to avail himself of China's protection instead of Canada's. His explanation for not applying for citizenship, that he was too busy, was reasonably dismissed by the Board.

In *Norouzi*,<sup>40</sup> the protected person was a citizen of Iran. He arrived in Canada in 2001 and was granted refugee status shortly thereafter. Between 2003 and 2007, he returned to Iran seven times for a total of approximately 18 months. The RPD accepted that his mother was ill, but held that his mother's health did not justify the number or length of trips to Iran, in particular where there were other family members present to care for his mother. Therefore, the presumption was not rebutted. The Court upheld the decision and stated that the RPD appropriately undertook a contextual analysis.

In *Tung*,<sup>41</sup> the protected person had become a permanent resident in 2004 and applied for a Chinese passport one month later. She used it to travel to China on 12 occasions for at least one month on each visit. She stated that her visits were to care for her ailing mother and to support her incarcerated husband. The Federal Court found the RPD's decision that she had not rebutted the presumption to be reasonable. There was no evidence it was necessary for her to be in China as there were other family members there to care for her sick mother and support her husband and they had, in fact, done that during her absences.

In a similar case, *Jing*,<sup>42</sup> the Court held that it was reasonable for the RPD to find that the protected person had not rebutted the presumption that she intended to reavail himself of China's protection. He claimed that he returned to care for his ailing parents, but the Court noted there were other siblings present in China to care for them. The Court also considered the length of two out of the three trips to China (two months each) and the fact the protected person had travelled to other countries on vacation using his Chinese passport.

In *Sabuncu*,<sup>43</sup> the protected persons had travelled back to Turkey on several occasions to

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<sup>38</sup> *Ibid.*, at paragraph 19.

<sup>39</sup> *Li, supra*, note 18.

<sup>40</sup> *Norouzi, supra*, note 37.

<sup>41</sup> *Tung, Do Mee v. M.C.I.* (F.C. no. IMM-1186-18), McDonald, December 6, 2018; 2018 FC 1224.

<sup>42</sup> *Jing, Yuancai v. M.C.I.* (F.C. no. IMM-1692-18), Manson, January 24, 2019; 2019 FC 104.

<sup>43</sup> *Sabuncu, Fatih Beycan v. M.C.I.* (F.C. no. IMM-3254-18), Heneghan, January 16, 2019; 2019 FC 62.

receive fertility treatments. They had received such treatments in Canada but stated they could no longer afford them. The RPD allowed the application to cease, finding that while their desire to start a family was reasonable and they were entitled to pursue fertility treatments outside Canada, unlike the circumstances of a refugee returning to the country of nationality to visit a dying parent, the availability of fertility treatments was not exclusive to Turkey. The RPD found that “cost and language do not justify the risk of reavailment.” The Court found the RPD decision was reasonable.

2) Examples where the presumption was rebutted or the RPD decision was returned for redetermination

In *Cerna*,<sup>44</sup> the protected person was granted refugee status in 2009 based on his fear of persecution in Peru due to his sexual orientation. He renewed his Peruvian passport twice and travelled to Peru several times, ranging from two to seven weeks. The RPD granted the Minister’s application. The Federal Court quashed the decision, finding that the RPD had failed to take into account the fact that Mr. Cerna believed he enjoyed the security of having permanent resident status in Canada. The RPD should have considered whether the evidence relating to his subjective understanding of the benefits of his permanent resident status rebutted the presumption that he intended to obtain Peru’s protection. However, this decision should be read in light of the decisions in *Maqbool* and *Abadi* described in the previous section, where the Court rejected similar arguments based on the protected person’s permanent resident status.

In *Mayell*,<sup>45</sup> the protected person was an Afghani citizen who was granted refugee status in 2003. He was issued an Afghani passport in 2012 and used it to travel to Afghanistan four times between 2012 and 2015. His trips were to get married, visit his wife, and attend the funeral of his father-in-law. He testified that he was told by legal counsel that it would be “okay” to obtain a passport and travel back to Afghanistan. The Court held that it was clear from the record that had he received proper advice, he would not have obtained a passport and travelled to Afghanistan. The RPD should have considered whether the evidence relating to his subjective understanding of his ability to obtain and use a passport to travel to Afghanistan without jeopardizing his status in Canada rebutted the presumption that he intended to obtain Afghanistan’s protection.

In *Bashir*,<sup>46</sup> the RPD rejected the Minister’s application to cease. The protected person had renewed his Pakistani passport three times in the hope that he would be able to visit his parents in Dubai and because a friend had told him CIC would require it for his permanent residence application. The RPD held that since the protected person did not intend to use the passport to travel to Pakistan, he did not have the intention of availing himself of that country’s protection. The Federal Court upheld the decision, as “it is difficult to see how the renewal of a national passport for the purpose of submitting it to CIC to finalize the permanent residence process can be seen as indicating an intention on the part of the respondent to reavail himself of the protection of

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<sup>44</sup> *Cerna, Davis William Lezama v. M.C.I.* (F.C. no. IMM-7267-14), O’Reilly, September 15, 2015; 2015 FC 1074.

<sup>45</sup> *Mayell, supra*, note 28.

<sup>46</sup> *Bashir, supra*, note 20. See also *Nsende, Jean Claude v. M.C.I.* (F.C. no. IMM-3635-07), Lagacé, April 23, 2008; 2008 FC 531 where the RPD had granted the Minister’s application to cease. The protected person explained that he had obtained a Congolese passport with the intention of doing business in Thailand. The Federal Court quashed the decision, finding that the RPD did not explain why the protected person’s explanations were not sufficient.

his country of nationality.” The Court rejected the Minister’s argument that the fact the person wished to travel to a third country using his passport irrefutably leads to the conclusion he intended to reavail himself of the protection of that country. Each case must be decided on its facts.

In *Abechkhrishvili*,<sup>47</sup> the Federal Court distinguished *Bashir* because the protected person used her passport to return to her country. The protected person argued that since the RPD had accepted that she obtained a Georgian passport on the mistaken belief that she needed it for her permanent resident status, it was not reasonable to find she had the requisite intent to reavail herself of the protection of Georgian authorities. The Court stated that “The problem with this logic is that the Applicant has failed to distinguish between the act of obtaining her passport and the act of utilizing her passport to travel back to Georgia. Although her original intention may have been to obtain her passport for her PR application, the evidence is that she used the passport to travel to Georgia on two occasions.”<sup>48</sup>

In *Din*,<sup>49</sup> the Court found that the RPD did not adequately consider the claimant’s explanation regarding his intention when he returned to Pakistan. Although he returned to tend to matters concerning his retirement and to deal with problems with tenants at a property, he testified that, among other things, when he visited he was always in hiding, did not openly practice his Ahmadi faith, lived in constant fear, and did not tell anyone that he was coming to Pakistan. The Court held that in light of this testimony, the RPD’s reasoning that “refugee protection does not have a provision that allows one to return to a country...from where one seeks protection simply for financial reasons, property disputes or other reasons” missed the point of the protected person’s evidence that, when taken as a whole, he did not intend to reavail of the protection of Pakistan.

### 12.5.3.3. Actual Reavailment

Paragraph 121 of the UNHCR Handbook makes a distinction between actual reavailment and occasional or incidental contacts with national authorities. For example, it provides the example of obtaining a passport, which raises a presumption that the protected person intends to reavail, as opposed to obtaining other documents such as birth or marriage certificates, which would not normally be considered to constitute reavailment.

In addition, paragraph 125 of the UNHCR Handbook makes a distinction between travel with a passport issued by the refugee’s country of nationality, and travel with another document -- the latter not necessarily resulting in actual reavailment of protection. Canadian jurisprudence has also emphasized in some cases that travel with a passport from the person’s country of nationality implies that the person has availed himself or herself of the “diplomatic protection” of that country.<sup>50</sup>

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<sup>47</sup> *Abechkhrishvili*, *supra*, note 29.

<sup>48</sup> *Ibid.*, at paragraph 23.

<sup>49</sup> *Din, Ezaz Ud v. M.C.I.* (F.C. no. IMM-3118-18), Russell, April 8, 2019; 2019 FC 425 at paragraphs 34-39.

<sup>50</sup> See, for example, *Abadi*, *supra* note 37 (travel through two countries with an Iranian passport); *Maqbool*, *supra* note 35 (travel through four countries with a Pakistani passport); and *M.C.I. v. Nilam, Nisreen Ahamed Mohamed* (F.C. no. IMM-1687-15), Mactavish, October 8, 2015; 2015 FC 1154 (travel to country of nationality and India).



The Courts have examined several factors to determine if a protected person actually reavailed himself or herself of the protection of their country of nationality. As described below, use of a passport to travel, the reason for the travel, whether or not the protected person took precautions, and the length of the visit are all factors that the RPD and the Courts have considered to answer the question of whether the protected person has actually reavailed.

In *Yuan*,<sup>51</sup> the protected person had been granted refugee status in 2009 based on a fear of the Public Security Bureau in China due to his involvement in an underground Christian church. He obtained a Chinese passport and used it to return to China for a month in 2013 to arrange his mother's funeral. The RPD allowed the application to cease, finding that while he did not stay in his own home or venture out in public much, he stayed in the same urban area of which he was a native and made his presence known to relatives. The Court found the RPD's conclusion that he had actually reavailed himself of China's protection was contradicted by these factual findings. Given that the claimant was essentially in hiding, it was not justified to find that he had actually reavailed of the protection of China.

In *Jing*,<sup>52</sup> the protected person argued that his case was similar to *Yuan* because he was in hiding when he visited China. The Court found it was reasonable for the RPD to reject this argument because it would be unlikely he would be able to remain hidden in light of the fact he travelled by train in China and stayed at his cousin's house.

In *Maqbool*,<sup>53</sup> the Court found that the protected person had reavailed himself of the protection of Pakistan by obtaining that country's passport and travelling there. The Court also noted that there did not appear to be any extenuating circumstances nor did the protected person take any special precautions. He stayed at his family home where he and his family had been persecuted, visited friends, and went to medical appointments.

In *Nilam*,<sup>54</sup> the RPD dismissed the Minister's application to cease, finding that the protected person had attempted to mitigate his risk of persecution during his time in Sri Lanka. In particular, the RPD held that he had confined himself mostly to his family's home, avoided contact with neighbours and government officials, and used smaller health clinics instead of hospitals. The Court quashed this decision, finding that the RPD had come to these conclusions without regard to the evidence. In particular, the protected person's allegation that he avoided government officials was contradicted by the fact he used a Sri Lankan passport to enter Sri Lanka on two occasions, which required him to submit to security. In addition, he used the passport to travel to India to get a hair transplant, "something that could hardly have been considered to have been compelling under any definition of the term."<sup>55</sup> His trips were neither brief nor clandestine. He ate in restaurants,

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<sup>51</sup> *Yuan, Xin Li v. M.C.I.* (F.C. no. IMM-5365-14), Boswell, July 28, 2015; 2015 FC 923.

<sup>52</sup> *Jing, supra*, note 42. See also *Abechkhrishvili, supra* note 29 at paragraph 26 where the Court also distinguished *Yuan* because in *Yuan* the protected person was actively hiding while in *Abechkhrishvili* the protected person stayed at a family cottage where she could easily be located.

<sup>53</sup> *Maqbool, supra*, note 35.

<sup>54</sup> *Nilam, supra*, note 50 at paragraphs 30-36.

<sup>55</sup> *Ibid.*, at paragraph 33.

shopped, and attended wedding events which were attended by hundreds of people. The Court held that all of this raised concerns as to whether the applicant had an ongoing fear persecution in Sri Lanka and suggested he was entrusting the defence of his interests to the state of Sri Lanka.

In contrast, in *Din*,<sup>56</sup> the Court found that the RPD conflated “intention” with “actual protection” such that there was no indication that the RPD considered whether the protected person actually reavailed himself of the protection of Pakistan. The protected person was an Ahmadi and the country condition evidence that was before the RPD confirmed there was no state protection available to Ahmadi Muslims anywhere in Pakistan. This was reinforced by the IRB’s designation of a RAD decision as a jurisprudential guide which explained why there was an absence of state protection for Ahmadi Muslims in Pakistan. The Court held that even if the protected person intended to reavail and so had no subjective fear, there was still a possibility that he was at risk under section 97 which does not require subjective fear. The RPD simply did not address these issues.

#### **12.5.4. Paragraph 108(1)(b) - Voluntary acquisition of nationality**

Paragraph 108(1)(b) provides, in effect, that a person’s refugee protection ceases if they re-acquire their citizenship.

Paragraph 126 of the UNHCR Handbook indicates that this clause applies when a refugee, having lost the nationality of the country in respect of which he was recognized as having a well-founded fear of persecution, voluntarily re-acquires such nationality.

This ground has not been substantially considered in Canadian jurisprudence. Generally, a protected person in Canada would retain their original citizenship after becoming a protected person, at least until they are granted Canadian citizenship. For this reason, it would be very unlikely for this ground to be raised in an application to cease. A similar point is made in footnote 17 of paragraph 127 of the UNHCR Handbook about the non-applicability of this clause in most refugee cases.

In *Starovic*,<sup>57</sup> the protected person had claimed refugee status as a citizen of Yugoslavia of Croatian ethnicity. She later returned to Serbia. The RPD found that she had not reacquired her nationality as she had never lost it in the first place because Serbia is a successor state to Yugoslavia. This aspect of the decision was noted, but not otherwise commented upon, by the Federal Court as the decision was upheld on other grounds.

#### **12.5.5. Paragraph 108(1)(c) - Acquisition of a new nationality**

Paragraph 108(1)(c) provides, in effect, that a person’s refugee protection ceases if they acquire a new nationality and enjoy the protection of that nationality.

Only one Canadian court decision has considered this provision. In *Khalifa*,<sup>58</sup> the RPD had granted the claimant, a citizen of Egypt, refugee status in 2004. He was granted United States citizenship in 2012. The Minister filed an application to cease refugee protection, arguing that both paragraphs 108(1)(a) and (c) applied. The RPD allowed the application under paragraph 108(1)(c).

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<sup>56</sup> *Din*, *supra*, note 49 at paragraphs 40-46.

<sup>57</sup> *Starovic*, *supra*, note 16.

<sup>58</sup> *Khalifa, Abdalla v. M.C.I.* (F.C. no. IMM-1181-15), Annis, October 20, 2015; 2015 FC 1181.

The protected person raised several arguments on judicial review regarding abuse of process and the RPD's jurisdiction, which are discussed more fully below; however, with respect to the RPD's conclusion on paragraph 108(1)(c), the Court stated:

[49] It is also reasonable that Parliament would terminate the privileged status of an applicant who no longer needs the protection of Canada because he has obtained citizenship in another safe country prior to becoming a citizen of Canada. Mr. Khalifa is now, by choice, a U.S. citizen who enjoys the protection of another country, and thus no longer needs protection from Canada. It is not the intention of refugee protection legislation under the IRPA that Canada become a country of convenience for those who wish to acquire protection in any number of countries. This determination is entirely independent of a determination that the reasons for refugee protection no longer exist in his country of origin.

In *Starovic*,<sup>59</sup> the protected person had claimed refugee status as a citizen of Yugoslavia of Croatian ethnicity. She later returned to Serbia on a Serbian passport. The Board found that she had not acquired a new nationality because Serbia is a successor state to Yugoslavia. This aspect of the decision was noted, but not otherwise commented upon, by the Federal Court as the decision was upheld on other grounds.

In *Zaric*),<sup>60</sup> the Federal Court, in the context of an application to vacate under section 109 of the IRPA, briefly discussed the effect of the acquisition of Canadian citizenship on cessation. It stated that while Mr. Zaric automatically ceased to be a refugee for the purposes of the Convention the moment he acquired Canadian citizenship, this did not have the effect of revoking his protected person status under IRPA. That could only be accomplished by an application under subsection 108(2).

#### **12.5.6. Paragraph 108(1)(d) - Re-establishment<sup>61</sup>**

Paragraph 108(1)(d) provides, in effect, that a person's refugee status ceases if they voluntarily become re-established in the country in respect of which the person claimed refugee protection in Canada.

There is limited Canadian jurisprudence on the re-establishment provision in paragraph 108(1)(d). Two cases have touched on this ground of cessation.

In *Starovic*,<sup>62</sup> the Court upheld the RPD's decision in which it found that the protected person's refugee status had ceased under both paragraphs 108(1)(a) and (d). She had returned to Serbia, her country of nationality, when her husband had a heart attack. She stayed for several years before attempting to return to Canada. She was denied a visa, so her cessation hearing was heard by telephone.<sup>63</sup> The RPD found that her testimony by telephone was generally credible and that she was unable to return to Canada because she was denied a visa. However, it was unreasonable that she and her husband had not made any efforts to resettle in another country, as would be

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<sup>59</sup> *Starovic*, *supra*, note 16.

<sup>60</sup> *M.P.S.E.P. v. Zaric, Miodrag* (F.C. no. IMM-3126-14), Fothergill, July 14, 2015; 2015 FC 837. Appeal filed August 12, 2015 but discontinued April 12, 2016 (Court file number F.C.A. A-355-15).

<sup>61</sup> See footnote 23 regarding the distinction between reavailing and re-establishment.

<sup>62</sup> *Starovic*, *supra*, note 16.

<sup>63</sup> *Ibid.*, at paragraph 7.

expected if they genuinely feared persecution. The Court upheld the decision, finding that although her initial return to Serbia could be seen as involuntary, it became voluntary over her lengthy stay. It was reasonable to conclude that a genuine refugee would have sought to resettle in another country rather than remaining in Serbia while the issue of her return to Canada was sorted out.

In *Cadena*,<sup>64</sup> the RPD found the protected person's refugee protection had ceased under both paragraphs 108(1)(a) and (d). She had returned to Mexico shortly after having been granted status and stayed four years. Her explanation was that she was trying to bring her husband to Canada. While most of the Federal Court decision focuses on the analysis under paragraph (a), it did make the point that no presumption of reavilment or re-establishment arises from the acquisition of a passport when the person is already in their country of nationality. Because of the weight the RPD put on this passport acquisition, the Court stated that it should have elaborated its reasoning under paragraph 108(1)(d). However, the Court still upheld the decision under paragraph (a).

### **12.5.7. Paragraph 108(1)(e) - Change of Circumstances**

Paragraph 108(1)(e) provides, in effect, that a person's refugee protection ceases if the reasons for which the person sought refugee protection have ceased to exist. This is also colloquially referred to as a change of circumstances. While the other grounds of cessation relate to actions the protected person has taken, this ground relates to circumstances over which the protected person generally has no control.

Please refer to the discussion of this topic in chapter 7 regarding the interpretation of this section. However, the interplay of paragraph (e) with the other paragraphs of subsection 108(1) are discussed in the next section.

## **12.6. OTHER ISSUES**

### **12.6.1. Discretion to consider which grounds apply**

An issue which has been discussed in the jurisprudence is whether, and to what degree, the RPD has discretion to apply grounds not raised in the Minister's application or to select which ground(s) to apply from among those raised. The issue usually arises in the context where the protected person argues that the RPD should allow the application only under paragraph 108(1)(e) due to a change of circumstances, rather than the other paragraphs of subsection 108(1). This argument is made because a person will lose their permanent resident status where their refugee protection is found to have ceased under paragraphs (a) to (d).

This issue has been considered in three decisions. In *Al-Obeidi*,<sup>65</sup> the protected person was granted refugee status in 2002, fearing the regime of Saddam Hussein in Iraq. Following the fall of the Hussein regime, he travelled back to Iraq on six occasions. When he applied for citizenship, his travels became known to the Minister and they made an application to cease his refugee protection pursuant to paragraph 108(1)(a), arguing that he had reaviled himself of the protection of Iraq.

At the hearing, the RPD raised, on its own initiative, the possibility of deciding the application under paragraph 108(1)(e), since the country conditions in Iraq had changed. The

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<sup>64</sup> *Cadena, supra*, note 25.

<sup>65</sup> *M.C.I. v. Al-Obeidi, Mazin Helmy Ismael* (F.C. no. IMM-7389-14), O'Reilly, September 8, 2015; 2015 FC 1041.

Minister argued that the RPD must consider the grounds raised by the Minister in the application. The RPD declined to do so, and allowed the application to cease, but only under paragraph 108(1)(e).

Before the Court, the Minister argued the member had erred in adopting this approach. The Court disagreed. It held that IRPA gives the Board broad discretion in cessation matters. The fact that the Minister did not achieve the ultimate objective of the cessation application under paragraph 108(1)(a) does not justify a finding that the Board's approach was unreasonable. The Court held that had Parliament wished to impose a duty on the Board to consider the specific ground raised in the Minister's application, it clearly could have done so.

The Minister also argued that the RPD's decision in *Al-Obeidi* was inconsistent with at least one previous RPD decision which had gone on to decide the cessation application under grounds other than paragraph 108(1)(e), despite a concession by the protected person that his status had ceased under paragraph (e). The court rejected this argument and stated:

[21] The Minister also contends that the Board's decision in this case is inconsistent with the decision of another Board member (TB3-05609, 12 August 2014). There, the Board found that the respondent's concession that her refugee status had ceased under s 108(1)(e) did not deprive the Board of jurisdiction to consider other potential grounds of cessation. Again, I do not see a contradiction. As mentioned, IRPA permits the Board to consider any grounds of cessation set out in s 108(1). A respondent's concession that one ground has been satisfied would not prevent the Board from considering another. In the circumstances of that case, the Board felt obliged to consider other grounds of cessation that had been put forward by the Minister. The fact that the Board considered those other grounds does not suggest that the Board erred in not doing so in this case.

[22] In sum, on a cessation application by the Minister, the Board can consider any ground set out in s 108(1) of IRPA. If the respondent refugee persuades the Board, or concedes, that his or her status has ceased by virtue of a change of country conditions (s 108(1)(e)), the Board has discretion to consider other grounds. It is neither compelled to do so, nor prevented from doing so. However, where there is uncontradicted and undisputed evidence that the refugee's status has ceased under another ground (e.g., acquisition of citizenship in a country capable of protection), the Board should consider it.

The Court in *Tung*<sup>66</sup> cited *Al-Obeidi* with approval while dealing with a similar argument. However, in this case, the Minister and the protected person had provided joint submissions to the RPD that the application should have been allowed under paragraph 108(1)(e), but the RPD decided to allow the application under both paragraphs (a) and (e).

In that case, the protected person was granted refugee status in 2002 on the basis of her practise of Falun Gong and became a permanent resident in 2004. She applied for two Chinese passports and travelled to China twelve times between 2004 and 2014 for one month each time. She alleged that the reasons for which she claimed refugee status had ceased because she had stopped practising Falun Gong.

The RPD informed the parties before the hearing that it would be considering grounds not raised by the parties (i.e. paragraph 108(1)(a)). It found that the actions of applying for a Chinese passport, renewing the passport, voluntarily travelling to China twelve times for extended periods,

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<sup>66</sup> *Tung*, *supra* note 41.

and her interactions with Chinese authorities at the border and at her husband’s detention facility did not rebut the presumption that she intended to reavail herself of Chinese protection. With respect to the changed circumstances, the RPD agreed that it applied, but that it was unclear when the protected person stopped practising Falun Gong. As such, the RPD concluded that it could consider any of the cessation grounds.

The Court found that even though the protected person conceded that refugee status had ceased due to a change of circumstances, the RPD was within its discretion to consider other applicable grounds. The RPD did not err not following the joint recommendation. The discretion in IRPA cannot be fettered or controlled by the submission of parties. In addition, the RPD did not reject the joint submissions, but exercised its prerogative to consider other grounds and gave notice in advance of the hearing of its intent to do so. This was a reasonable approach. The Court stated:

[24] The Applicant argues that the RPD was required to make a definitive finding on when cessation occurred because, she contends, cessation can only occur once. However, this argument is not supported by the wording of section 108(1), which contemplates various circumstances that can give rise to cessation. In essence, what the Applicant is arguing is that the RPD cannot find more than one ground of cessation. For the reasons outlined below, this argument is without merit.

...

[28] Prior to the hearing, the RPD advised the parties that despite the conceded cessation ground, it would consider any other applicable cessation grounds. This approach is in keeping with the broad discretion the RPD has under the *IRPA* as noted by Justice O’Reilly in *Canada (Citizenship and Immigration) v Al-Obeidi*, 2015 FC 1041 at paragraphs 21 and 22 as follows:

...

[29] Similarly, although the Applicant conceded cessation of refugee status under the singular ground of changed circumstances, the RPD was within its discretion to consider other applicable grounds of cessation. The fact that the RPD also considered the ground of re-availment does not suggest that the RPD failed to consider the change of circumstances.

[30] As noted, the Applicant does not take issue with the RPD finding of cessation on the basis of changed circumstances. Presumably, the Applicant assumed that by conceding this ground and having the agreement of the Minister, the RPD would restrict its consideration to the conceded ground. However, that is not how the RPD approached its assessment, nor was it compelled to do so. The Applicant further argues that the RPD erred by not providing its reasons for not following the joint submission of counsel.

[31] In my view, the argument that the RPD did not follow counsels joint submission is without merit and fails to acknowledge the discretion afforded to the RPD under the *IRPA*. It cannot be presumed that the drafters of the *IRPA* intended to allow the delegated discretion to be fettered or controlled by the submissions of parties or their legal counsel. I agree with the comment of Justice Zinn in *Fong v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1134 [*Fong*] where he states at paragraph 31, “... the IAD is entitled to reject a joint submission so long as it provides reasons for so doing [citations omitted].” While the facts in *Fong* are different the principle applies.

[32] However here the RPD did not reject the joint submissions, but instead exercised its prerogative to consider other grounds of cessation under section 108(1) of the *IRPA*. Further, the RPD advised the parties in advance of the hearing that it would consider additional grounds of cessation and by doing so the RPD provided the necessary reasons for going

beyond recommendations of legal counsel.

[33] Overall, the RPD's assessment of cessation was reasonable and the RPD did not err in its approach to considering cessation under section 108(1).

The Federal Court decision in *Khalifa*<sup>67</sup> was issued approximately one month after *Al-Obeidi* but did not cite that decision. The RPD found the protected person's refugee protection had ceased pursuant to paragraph 108(1)(c) [acquisition of a new nationality – United States] despite also finding that it had ceased pursuant to paragraph (e) [change of circumstances]. The protected person argued before the RPD that the application should only be allowed pursuant to paragraph 108(1)(e). He argued that the RPD exceeded its jurisdiction by determining that his status had ceased under paragraph (c) once the Board had already determined his protection had ceased pursuant to paragraph (e). The reasoning of this argument was that (i) it was contrary to the intention of Parliament when they created an exemption to the loss of permanent residence for a change in circumstances and (ii) it would lead to absurd results.

The Court disagreed. It found that the protected person's interpretation contradicted the mandatory language of subsection 108(1). Also, it is reasonable that Parliament would terminate the privileged status of an applicant who no longer needs the protection of Canada because he has obtained citizenship in another safe country. This determination is entirely independent of a determination that the reasons for refugee protection no longer exist in the applicant's country of origin. The Court concluded as follows on this issue:

[48] I disagree. This interpretation contradicts the clear mandatory language of the section that “a claim for refugee protection shall be rejected ... in any of the following circumstances” [paragraphs (a) to (e)]. Mr. Khalifa offers no jurisprudence or citations from texts on interpretive principles to support his argument limiting the discretion of the Minister under section 108.

[49] It is also reasonable that Parliament would terminate the privileged status of an applicant who no longer needs the protection of Canada because he has obtained citizenship in another safe country prior to becoming a citizen of Canada. Mr. Khalifa is now, by choice, a U.S. citizen who enjoys the protection of another country, and thus no longer needs protection from Canada. It is not the intention of refugee protection legislation under the IRPA that Canada become a country of convenience for those who wish to acquire protection in any number of countries. This determination is entirely independent of a determination that the reasons for refugee protection no longer exist in his country of origin.

The Court declined to certify a question of general importance in any of these cases, which precluded the possibility of an appeal to the Federal Court of Appeal. However, the issue was briefly dealt with by the Court of Appeal in *Siddiqui*,<sup>68</sup> where the protected person argued that the RPD erred by not considering whether it could have made its decision under paragraph 108(1)(e). The Court noted that the issue was not raised before the RPD, and declined to consider the argument, only stating that “no error arises in the decision of the RPD not to entertain a ground of cessation which was neither advanced by the Minister or the appellant.”

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<sup>67</sup> *Khalifa, supra*, note 58.

<sup>68</sup> *Siddiqui, supra*, note 10 at paragraph 27.

### 12.6.2. Relevance of future risk

When examining cessation under paragraph 108(1)(e), a change in circumstances is examined to determine if there is a current risk of return to the protected person. However, is the risk of return relevant when assessing cessation under paragraphs (a) to (d) of subsection 108(1)? The Court has found that the answer to this question is “no”.

In *Balouch*,<sup>69</sup> the protected person, a citizen of Iran, was granted refugee status in 2008 on the basis of risk due to her religion, being a Christian. She applied for an Iranian passport in 2010 and travelled to Iran that year to visit her grandmother. She stayed six months. In 2013, she returned to Iran for 34 days. During both visits, she received medical care. The RPD granted the Minister’s application to cease, finding that she had reavailed herself of the protection of Iran within the meaning of paragraph 108(1)(a) of the IRPA. The Court rejected the argument that the RPD should have examined the issue of continuing risk at the time of the cessation hearing. It stated:

[19] Although the Applicant submits that the Board erred in not considering the issue of a continuing risk at the time of the cessation hearing, no authority was cited to support this argument. While I acknowledge that the existence of risk is a primary concern when protection is sought, I am not persuaded that the issue of risk is relevant in a cessation hearing.

[20] Pursuant to section 96 of the Act, Convention refugee status is conferred on individuals who, by reason of a well-founded fear of persecution, are unwilling or unable to avail themselves of the protection of their country of nationality. A refugee claimant’s voluntary reavailment indicates that the individual is no longer either unable or unwilling to avail himself or herself of the protection of their country of nationality.

[21] In any event, the issue of risk will be assessed if the Applicant seeks a Pre-Removal Risk Assessment (“PRRA”) pursuant to section 112 of the Act. The fact that a PRRA is subject to certain temporal limits does not mean that a PRRA is unavailable.

The Court in *Yuan*<sup>70</sup> came to a similar conclusion. It explained that the rationale for this is that once the conditions are present and paragraphs (a) to (d) apply, the element of subjective fear no longer exists such that it is appropriate that refugee protection should then expire. Any concerns about refolement due to future risk can be addressed by other processes, such as seeking deferral of removal or an application for a PRRA.

### 12.6.3. Relevance of humanitarian and compassionate considerations

In *Abadi*,<sup>71</sup> the protected person argued that the RPD should have considered humanitarian and compassionate (H&C) factors such as his degree of establishment in Canada and the best interests of his Canadian-born children. The Court held that “I cannot fault the RPD for declining

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<sup>69</sup> *Balouch, Lida Bandarian v. M.P.S.E.P.* (F.C. no. IMM-4174-14), Heneghan, June 17, 2015; 2015 FC 765. A question was certified in this case, and an appeal was filed with the Federal Court of Appeal, but a Notice of Discontinuance was filed on February 2, 2016 (F.C.A. no. A-320-15). The Court in *Abadi, supra*, note 37 at paragraph 20 cited *Balouch* in coming to the same conclusion regarding future risk. See also, *Seid, supra*, note 16 at paragraph 27.

<sup>70</sup> *Yuan, supra*, note 51 at paragraphs 17-25. Also see *Jing, supra* note 42 at paragraphs 32-34.

<sup>71</sup> *Abadi, supra* note 37.



to consider H&C factors in this case. In my opinion, these factors are properly the subject of a separate application under s. 25 of the IRPA.”<sup>72</sup>

In *Seid*,<sup>73</sup> the RPD ruled in 2018 that it was not bound by an Immigration Appeal Division (IAD) decision from 2011 in which the IAD had allowed the respondent’s residency obligation appeal. The IAD had found that there were compelling reasons for the respondent to have returned to Chad. The Court agreed with the RPD. The analytical framework used by the IAD was different than that imposed on the RPD in the context of cessation. The RPD had no jurisdiction to consider H&C factors.

The Federal Court of Appeal has also confirmed that humanitarian and compassionate considerations are not relevant in cessation proceedings in the context of an officer’s decision to make an application. In *Bermudez*,<sup>74</sup> the Court of Appeal was examining the question of whether a CIC hearings officer, in deciding whether an application should be filed with the RPD, has the discretion to consider circumstances or factors that are not explicitly listed in section 108 such as H&C factors and the best interests of the child. The Federal Court had granted the judicial review, finding that the hearings officer had some discretion to consider H&C factors and to not make a cessation application for these reasons.

The Federal Court of Appeal allowed the appeal, finding that the officer had no discretion to consider H&C factors. The Court held that H&C is considered principally under section 25 of the IRPA, and there is a limited class of individuals to which the Minister has delegated authority to consider H&C applications. Further, Parliament’s intent, as reflected in section 108 of the IRPA, is clear and unambiguous in that a claim for refugee protection *shall* be rejected if one or more of the circumstances in section 108 occur. There is little room for discretion in terms of the circumstances that trigger the application of section 108.<sup>75</sup>

#### 12.6.4. Abuse of process and similar arguments

In *Khalifa*,<sup>76</sup> the respondent before the RPD argued that the cessation application was an abuse of process because the Minister had exceeded his powers by suspending his citizenship application pending the outcome of the cessation application. The RPD declined to consider if the suspension of the citizenship application was an abuse of process. The Court agreed with the RPD. It found that the appropriate venue to challenge the Minister’s suspension of the respondent’s citizenship application was through an application in the nature of *mandamus*.<sup>77</sup> Therefore, the

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<sup>72</sup> *Ibid.*, at paragraph 24.

<sup>73</sup> *Seid*, *supra* note 16 at paragraphs 23 and 27.

<sup>74</sup> *M.C.I. v. Bermudez, Jose de Jesus*, (F.C.A. no. A-280-15), Boivin, Ryer, Near, April 27, 2016; 2016 FCA 131.

<sup>75</sup> The Court answered the certified question as follows:

**Question:** Does the CBSA Hearings Officer, or the Hearings Officer as the Minister’s delegate, have the discretion to consider H&C factors and the best interests of a child, when deciding whether to make a cessation application pursuant to subsection 108(2) in respect of a permanent resident?

**Answer:** No.

<sup>76</sup> *Khalifa*, *supra*, note 58.

<sup>77</sup> *M.C.I. v. Nilam, Nisreen Ahamed Mohamed* (F.C.A. no. A-283-16), Near, Boivin, Rennie, March 7, 2017; 2017 FCA 44, leave to appeal to the Supreme Court of Canada denied: *Nilam, Nisreen Ahamed Mohamed v. M.C.I.*

RPD did not err in refusing to determine whether the Minister engaged in an abuse of process by suspending Mr. Khalifa's citizenship application.<sup>78</sup>

Several arguments were raised in *Li*<sup>79</sup> concerning the legality of the proceedings. First, the protected person argued that since a visa officer overseas had issued him a travel document and permanent resident card to return to Canada, the issue of cessation had already been decided (*res judicata*). Alternatively, he argued that the Minister had waived the opportunity to bring the cessation application. The Court rejected these arguments, finding the issue of cessation had not been decided nor had the Minister waived the opportunity to make a cessation application. While there were common factual issues between the decision to issue a permanent resident card and the question of cessation, the two issues were legally distinct.

Another argument in *Li* was that the cessation application constituted an abuse of process due to delay and the fact the cessation provisions were being applied retroactively in an effort to remove the claimant because of his criminality. The Court rejected these arguments. There was no evidence of prejudice due to the delay. The provisions were not being applied retroactively and there was nothing improper about the Minister pursuing admissibility proceedings and cessation proceedings concurrently.

A different abuse of process argument was raised in *Abadi*.<sup>80</sup> It concerned the fact that the claimant's original refugee claim file had been destroyed according to the applicable retention and disposal authority. In light of this, the protected person argued that the cessation application was an abuse of process because of the uncertainty around why he was granted refugee status almost 20 years earlier, which would result in difficulty assessing whether country conditions had changed or if he took reasonable precautions when he returned to Iran. The Court rejected this argument since there was no serious dispute that he obtained refugee status as a child based on his mother's gender-based persecution. The Court held that the protected person failed to demonstrate that the disposal of the original refugee determination file compromised his ability to respond to the application, or that it was one of the clearest of cases justifying a stay of proceedings.

In *Seid*,<sup>81</sup> the protected person argued that the application to cease constituted an abuse of process because the Minister knew since 2009 that he had returned to Chad, but only made the application to cease in 2016. The Court rejected this argument. It held that in assessing whether there was an abuse of process, the RPD could only consider the delay related to the administrative procedures before the RPD. The delay of approximately two years between the filing of the

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(SCC docket number 37556), August 10, 2017.

<sup>78</sup> There is considerable jurisprudence on the authority of the Minister to suspend citizenship proceedings pending a cessation application. This topic is outside the scope of this chapter; however, in *Nilam*, the Federal Court of Appeal dealt the following certified question and answered it thusly:

**Question:** Can the Minister suspend the processing of an application for citizenship pursuant to his authority under s. 13.1 of the *Citizenship Act*, to await the results of cessation proceedings in respect of the applicant under s. 108(2) of the *Immigration and Refugee Protection Act*?

**Answer:** Yes.

<sup>79</sup> *Li*, *supra*, note 18.

<sup>80</sup> *Abadi*, *supra*, note 37.

<sup>81</sup> *Seid*, *supra* note 16 at paragraphs 28-32.

application with the RPD and the RPD's decision did not constitute an abuse of process.

Finally, in *Maqbool*,<sup>82</sup> the RPD rejected an abuse of process argument even though it found the protected person had been questioned beyond the scope allowed by legislation at the port of entry and that he should have been informed of his right to counsel. The RPD found that although the interviews were problematic, they did not amount to an abuse of process and the situation was remedied by excluding the interview notes from evidence. The Court noted this issue but did not comment on it; however, it did uphold the RPD decision.

### 12.6.5. Constitutionality of Cessation Provisions

The constitutionality of the cessation regime, and in particular the automatic loss of permanent resident status set out in paragraph 46(1)(c.1) of the IRPA, has been the subject of litigation. The constitutional validity of this section was first raised in *Yuan*.<sup>83</sup> However, the Court declined to entertain the constitutional arguments as they had not been first raised before the RPD. The Court stated that even though the RPD may not have jurisdiction to decide this issue, and in fact had declined jurisdiction in other decisions, this did not relieve the party contesting the validity of the section from raising it before the RPD.

In *Norouzi*,<sup>84</sup> the Federal Court did address the question of whether the cumulative effect of the cessation provisions breached sections 7, 12, and 15 of the *Charter*. The questions had been raised before the RPD, but the RPD held that it did not have jurisdiction to decide this constitutional question. The Court did not comment on the jurisdictional question, but did examine the merits of the constitutional arguments.

With respect to the application of section 7 of the *Charter* (the right to life, liberty, and security of the person) and section 12 (the right not to be subjected to cruel and unusual treatment or punishment), the Court found that both of these arguments were premature and that neither section was engaged. At the cessation stage, even though the consequence was loss of permanent resident status and inadmissibility, no removal order would be issued until an officer prepared a section 44 report and it was determined to be well-founded. In addition, there were other avenues open to the person, including seeking a deferral of removal.

With respect to section 15 (equality before the law; equal protection and equal benefit of the law), the Court held that the cessation provisions did not create a distinction based on one of the enumerated characteristics, or an analogous characteristic. Since this was a requirement to find a breach of this section, the constitutional arguments failed.

~ End ~

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<sup>82</sup> *Maqbool*, *supra* note 35 at paragraphs 11-13.

<sup>83</sup> *Yuan*, *supra*, note 51.

<sup>84</sup> *Norouzi*, *supra*, note 37.

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## CHAPTER 13

### 13. APPLICATIONS TO VACATE REFUGEE DECISIONS

#### 13.1. INTRODUCTION

This chapter discusses the issues that arise in Minister's applications to vacate refugee protection decisions.

Pursuant to section 109 of the *Immigration and Refugee Protection Act (IRPA)*<sup>1</sup>, the Minister may make an application to the Refugee Protection Division (RPD) to vacate a positive decision for refugee protection in the circumstances where a protected person (formerly, a refugee claimant) obtained that decision by "directly or indirectly misrepresenting or withholding material facts relating to a relevant matter."<sup>2</sup>

The RPD may reject the Minister's application to vacate if it is satisfied that other sufficient evidence was "considered at the time of the first determination" to justify refugee protection.<sup>3</sup>

If the RPD allows the Minister's application to vacate, the claim is deemed to be rejected and the decision that led to refugee protection being conferred is nullified.<sup>4</sup>

#### 13.2. LEGISLATIVE FRAMEWORK

##### 13.2.1. Historical Context

In order to appreciate some of the older jurisprudence, it is useful to understand the legislative framework that existed prior to the coming into force of the IRPA in 2002.

The IRPA replaced the previous applicable legislative framework, the *Immigration Act* ("former Act")<sup>5</sup>. Under the former Act, subsections 69.2(2) and 69.3(5)<sup>6</sup> set out the legal test to apply in an application to vacate which is, in most respects, substantively similar to subsections

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<sup>1</sup> S.C. 2001, c. 27.

<sup>2</sup> *Ibid.*, s. 109(1).

<sup>3</sup> *Ibid.*, s. 109(2).

<sup>4</sup> *Ibid.*, s. 109(3).

<sup>5</sup> R.C.S. 1985, c. I-2.

<sup>6</sup> **Application to vacate**

**69.2 (2)** The Minister may, with leave of the Chairperson, make an application to the Refugee Division to reconsider and vacate any determination under this Act or the regulations that a person is a Convention refugee on the ground that the determination was obtained by fraudulent means or misrepresentation, suppression or concealment of any material fact, whether exercised or made by that person or any other person.

##### **Rejection of application**

**69.3 (5)** The Refugee Division may reject an application under subsection 69.2(2) that is otherwise established if it is of the opinion that, notwithstanding that the determination was obtained by fraudulent means or misrepresentation, suppression or concealment of any material fact, there was other sufficient evidence on which the determination was or could have been based.

109(1) and (2) of the IRPA.

In *Wahab*,<sup>7</sup> the Court found itself “bound” by the decisions pertaining to the former Act because the provisions were “essentially the same” as subsection 109(1) and subsection 109(2) of the IRPA.<sup>8</sup> Therefore, despite the different wording of the provisions, the analysis remains substantially similar and case law decided under the former Act is binding.

Even though the legal tests to apply on applications to vacate are substantively similar under the former Act and the IRPA, two differences should be noted.

The first difference is that the former Act imposed a leave requirement on applications to vacate, which is not present in the IRPA. Under the former Act, the Minister was required to obtain leave from the Chairperson to make an application to vacate.<sup>9</sup>

The second difference is that the former Act required the constitution of a quorum of three members for the purposes of a vacation hearing<sup>10</sup>, whereas there is no similar requirement in the IRPA.

### 13.2.2. Current Legislation

Subsection 109(1) of the IRPA sets out the general framework for an application to vacate refugee protection:

#### Vacation of refugee protection

**109(1)** The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

#### Demande d’annulation

**109(1)** La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d’asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

Subsection 109(2) of the IRPA allows the RPD to reject the Minister’s application to vacate in the following circumstances:

#### Rejection of application

**109(2)** The Refugee Protection Division may reject the application if it is satisfied that other

#### Rejet de la demande

**109(2)** Elle peut rejeter la demande si elle estime qu’il reste suffisamment d’éléments

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<sup>7</sup> *M.C.I. v. Wahab, Birout* (F.C., no. IMM-1265-06), Gauthier, December 22, 2006; 2006 FC 1554.

<sup>8</sup> *Ibid.*, at para 27.

<sup>9</sup> **Leave to apply**

**69.2 (3)** An application to the Chairperson for leave to apply to the Refugee Division under subsection (2) shall be made *ex parte* and in writing and the Chairperson may grant that leave if the Chairperson is satisfied that evidence exists that, if it had been known to the Refugee Division, could have resulted in a different determination.

<sup>10</sup> **Quorum**

**69.3 (3)** Three members constitute a quorum of the Refugee Division for the purposes of a hearing under this section.



sufficient evidence was considered at the time of the first determination to justify refugee protection. de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.

Further, subsection 109(3) of the IRPA provides for the consequences of a successful application to vacate:

**Allowance of application**

**109(3)** If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

**Effet de la décision**

**109(3)** La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

On a successful application to vacate refugee status, paragraphs 40(1)(c), 40(2)(a), 46(1)(d), and 109(3) of the IRPA have the combined effect of (i) rendering the protected person inadmissible to Canada for a period of five years;<sup>11</sup> (ii) removing permanent resident status, if they had it; and (iii) deeming the claim of the protected person rejected and the decision that led to the conferral of refugee protection nullified.

Finally, paragraph 110(2)(f) of the IRPA provides that neither the Minister nor the protected person who is the subject of a vacation application has the right to appeal to the Refugee Appeal Division (RAD) from a decision of the RPD to allow or reject the application. Rather, the decision may be contested by making an application for leave and judicial review before the Federal Court:

**Restriction on appeals**

**110(2)** No appeal may be made in respect of any of the following:

...

(f) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister to vacate a decision to allow a claim for refugee protection.

**Restriction**

**110(2)** Ne sont pas susceptibles d'appel :

...

f) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande du ministre visant l'annulation d'une décision ayant accueilli la demande d'asile.

**13.3. JURISDICTION OF THE REFUGEE PROTECTION DIVISION**

Subsection 99(1) of the IRPA provides that a claim for refugee protection may be made in or outside of Canada. Subsection 109(1) of the IRPA grants the RPD the jurisdiction to hear an application to vacate a decision to allow a claim for refugee protection, without specifying that the claim for refugee protection must have been made in Canada. Accordingly, subsection 99(1) and 109(1) of the IRPA together give the RPD the jurisdiction to hear applications to vacate relating to

<sup>11</sup> According to paragraph 40(2)(a) of the IRPA, the permanent resident or foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection 40(1) of the IRPA or, in the case of a determination in Canada, the date the removal order is enforced. As per paragraph 228(1)(b) of the *Immigration and Refugee Protection Regulations*, the applicable removal order is a deportation order.

claims for refugee protection made outside Canada as per subsection 99(2) and claims for refugee protection made inside Canada as per subsection 99(3) of the IRPA.

In *Zaric*,<sup>12</sup> the Minister made an application to vacate the refugee protection of a person who had since become a Canadian citizen. The RPD dismissed the application for lack of jurisdiction, finding that the application to vacate was moot because the person had automatically ceased to be a Convention refugee at the moment he had become a Canadian citizen.<sup>13</sup> The Court disagreed with the RPD. The Court was of the view that the application to vacate was not moot and that the RPD had the jurisdiction to decide the application to vacate on its merits.<sup>14</sup>

## **13.4. PROCEDURE**

### **13.4.1. Responsible Minister**

Subsection 4(1) of the IRPA provides that the Minister of Citizenship and Immigration (CIC)<sup>15</sup> is responsible for the administration of the IRPA except as otherwise provided for in the section.

Subsection 4(3) of the IRPA provides that the Governor in Council may, by order, specify the Minister of Public Safety and Emergency Preparedness (PSEP) responsible for the purposes of any provision of the IRPA.

The Governor in Council issued such an order in 2015 designating the Minister of PSEP as responsible for applications to vacate refugee protection.<sup>16</sup>

### **13.4.2. How the Application is Made**

The procedures for making the application are set out in the *Refugee Protection Division Rules* (RPD Rules).<sup>17</sup>

RPD Rule 64 provides that an application to vacate refugee protection must be in writing and include the following information:

- The contact information of the protected person and of their counsel, if any;
- The identification number given by the Department of Citizenship and Immigration to the protected person;

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<sup>12</sup> *M.P.S.E.P. v. Zaric, Miodrag* (F.C., no. IMM-3126-14), Fothergill, July 14, 2015; 2015 FC 837. The following question was certified by the Court: “Does refugee protection conferred pursuant to s 95(1) of the *Immigration and Refugee Protection Act* automatically cease by operation of s 108(1)(c) when a Convention refugee becomes a Canadian citizen, thereby preventing the Minister of Public Safety and Emergency Preparedness from applying to the Immigration and Refugee Board pursuant to s 109(1) to vacate the Board’s previous decision to confer refugee protection?”. An appeal was filed but discontinued (F.C.A., no. A-355-15).

<sup>13</sup> *Ibid.*, at paras 11-12.

<sup>14</sup> *Ibid.*, at para 32.

<sup>15</sup> The Minister’s legal title is the “Minister of Citizenship and Immigration”, while the applied title in accordance with Treasury Board policy is the “Minister of Immigration, Refugees and Citizenship.”

<sup>16</sup> *Ministerial Responsibilities Under the Immigration and Refugee Protection Act Order*, SI/2015-52: <https://laws-lois.justice.gc.ca/eng/regulations/SI-2015-52/page-1.html>.

<sup>17</sup> SOR/2012-256.

- The date and file number of any Division decision with respect to the protected person;
- In the case of a person whose application for protection was allowed abroad, the person's file number, a copy of the decision and the location of the office;
- The decision that the Minister wants the Division to make; and
- The reason why the Division should make that decision.

Rule 64(3) requires the Minister to provide a copy of the application to the protected person and the original to the Division, together with a written statement indicating how and when a copy was provided to the protected person.

In some circumstances, the Minister may not be able to locate the protected person to serve a copy of the application. In those circumstances, the Minister is required to make an application under RPD Rule 40 to vary or be excused from the service requirement. That rule also provides that the RPD must not allow such an application unless it is satisfied that reasonable efforts have been made to serve the protected person with the document as required. In determining applications under Rule 40, the RPD has considered such factors as the Minister's efforts to locate the protected person through consular authorities in Canada and abroad.<sup>18</sup> For additional examples of how the RPD treats such applications, please refer to section 12.4.2 in chapter 12 on applications to cease refugee protection.

Before proceeding in the absence of the protected person, they should be given a reasonable opportunity to participate in the hearing and not be treated unfairly by proceeding in their absence.<sup>19</sup>

Once a protected person has been served with an application, pursuant to RPD Rule 12, the onus is on that person to notify the Division and Minister in writing of any contact information changes for themselves or their counsel.

### **13.4.3. Order of Questioning**

At the hearing of the application to vacate, RPD Rule 10(4) provides that the Minister's counsel will begin questioning any witness, including the protected person, followed by the presiding member and then the protected person's counsel. RPD Rule 10(5) provides that the order of questioning may be varied in exceptional circumstances, including to accommodate a vulnerable person.

### **13.4.4. Language of Proceedings**

RPD Rule 18 provides that the Minister must make an application to vacate in the same language as was used in the original refugee claim proceedings. The protected person may then change this language upon notice in writing no later than 10 days before the day fixed for the next proceeding.

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<sup>18</sup> CRDD File no. T98-04486: *X (Re)*, 1999 CanLII 14660 (October 20, 1999).

<sup>19</sup> *Daqa, Muhammad v. M.C.I.* (F.C., no. IMM-7895-12), O'Reilly, May 24, 2013; 2013 FC 541.

#### 13.4.5. Protected Person as Witness

The RPD has the authority to question witnesses, including the person who is the subject of the proceeding, per paragraph 170(d.1) of the IRPA.

In *Daqa*,<sup>20</sup> the Court held that the RPD did not treat the male protected person unfairly by proceeding in his absence since he had been given a “reasonable opportunity to participate” in the hearing and that there was “no evidence” before the Court about the testimony he might have given or any prejudice that resulted from the RPD’s decision to proceed in his absence.<sup>21</sup>

#### 13.4.6. Member as Witness

RPD members are not competent or compellable to appear as a witness in any civil proceedings by reason of paragraph 156(b) of the IRPA. In *Ermina*,<sup>22</sup> the application to vacate panel refused to allow a tribunal member who heard the claim for refugee protection to provide oral or affidavit evidence. The Court held that under the doctrine of judicial immunity, tribunal members are neither compellable nor competent to testify about matters that have come before them.<sup>23</sup>

#### 13.4.7. Rule Requirements

In *Cohen*,<sup>24</sup> the Court quashed an RPD decision to allow a Minister’s application to vacate. The Minister had originally made an application to vacate in 2007 which it withdrew in 2009. The Minister filed a new application in 2013 after obtaining further information.

The RPD was of the view that the Minister should have filed an application to reinstate the original vacation application pursuant to RPD Rule 61 rather than filing a new application. Therefore, it allowed the Minister to make the reinstatement application in its submissions. It subsequently reinstated and allowed the application to vacate.

Before the Court, the Minister argued that the RPD was permitted to accept the application to reinstate in the manner that it did in light of RPD Rule 70. The Court disagreed that Rule 70 was engaged because the RPD ignored the mandatory requirements of RPD Rules 50 and 61(2) for filing a reinstatement application without explaining why it was waiving those requirements or providing notice to the protected person and an opportunity to object.<sup>25</sup>

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<sup>20</sup> *Ibid.*

<sup>21</sup> However, the Court found the RPD had failed to give sufficient attention to the female protected person’s separate circumstances since the misrepresentations by the male protected person had little effect on her claim. The Court recognized her claim was indeed based on her husband’s narrative but that there was “little or nothing in that narrative” that was affected by her husband’s misrepresentations. In the view of the Court, the Board was “obliged” to consider whether the evidence unaffected by her husband’s misrepresentations supported her refugee claim.

<sup>22</sup> *Ermina, Natalia v. M.C.I.* (F.C.T.D., no. IMM-954-98), Tremblay-Lamer, December 7, 1998; 1998 CanLII 8969.

<sup>23</sup> *Ibid.*, at paras 8-10.

<sup>24</sup> *Cohen, Eliezer v. M.P.S.E.P.* (F.C., no. IMM-954-18), Campbell, November 1, 2018; 2018 FC 1101.

<sup>25</sup> RPD Rule 61(2) states that the application to reinstate is to be made in accordance with Rule 50 which requires the application be made in writing with reasons provided.

## 13.5. INTERPRETATION OF SECTION 109

### 13.5.1. Burden and Standard of Proof

In *Begum*,<sup>26</sup> the Court indicated that the Minister has the burden of proof on an application to vacate refugee status. Since the Minister is the one requesting that the status be vacated, it is the Minister's responsibility to prove this is justified. The standard of proof is on a balance of probabilities.<sup>27</sup>

In *Bhatia*,<sup>28</sup> the Court stated that the RPD is not required to explicitly set out that the burden of proof is on the Minister and that the Minister must satisfy the RPD based on the balance of probabilities. Rather, the applicable onus and standard of proof must be "clear" and "implicit" from the RPD's decision. Similarly, in *Nur*,<sup>29</sup> the Court stated that it has to be able to infer from the RPD's reasons that it was "guided by and adhered to these principles regarding the onus and standard of proof in its decision." Sufficient detail should be provided in the decision to allow the Court to conclude, simply from reading the decision, that the RPD was aware of these parameters.<sup>30</sup>

In *Pearce*,<sup>31</sup> the Court held that a protected person has an obligation to make known all material facts relevant to their refugee claim at the original determination hearing. In considering an application to vacate, the Court found that the RPD acted unreasonably in shifting this burden to the Minister. The RPD had faulted the Minister for not informing the original determination panel of the protected person's trip to Jamaica and her subsequent arrest for importing cocaine into Canada, when this information came to the Minister's attention about 25 days before the original determination panel issued its decision. In the view of the Court, while it may have been desirable for the Minister to communicate this information to the panel, this did not excuse the protected person from her obligation to do so. The Court held that the RPD was "wrong in effectively shifting the onus away" from the respondent and onto the Minister.<sup>32</sup>

### 13.5.2. Overview of Analytical Framework – Two-Step Analysis

The approach to an application to vacate a decision granting refugee status involves two steps:

- 1) First, the RPD must find that the decision granting refugee protection was obtained as a result of a direct or indirect misrepresentation, or a withholding of material facts relating to a relevant matter; and
- 2) Second, the RPD should consider whether there remains sufficient evidence that was

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<sup>26</sup> *Begum, Rume v. M.P.S.E.P.* (F.C., no. IMM-724-05), Shore, August 30, 2005; 2005 FC 1182 at para 8.

<sup>27</sup> *Nur, Khadra Okiye v. M.C.I.* (F.C., no. IMM-6207-04), de Montigny, May 6, 2005; 2005 FC 636 at para 21.

<sup>28</sup> *Bhatia, Varinder Pal Singh v. M.C.I.* (F.C.T.D., no. IMM-4959-01), Layden-Stevenson, November 25, 2002; 2002 FCT 2010.

<sup>29</sup> *Nur, supra*, note 27.

<sup>30</sup> *Ibid.*, at paras 22-25.

<sup>31</sup> *M.C.I. v. Pearce, Jennifer Juliet* (F.C., no. IMM-3826-05), Blanchard, April 18, 2006; 2006 FC 492.

<sup>32</sup> *Ibid.*, at paras 15, 37.

considered at the time of the positive determination to justify refugee protection and, if so, the RPD may reject the application to vacate, notwithstanding the misrepresentation.<sup>33</sup>

If the RPD determines that the requirements of subsection 109(1) of the IRPA are not met, the analysis stops at that point and there is no need to consider the second step under subsection 109(2).<sup>34</sup>

However, if the RPD determines that the requirements of subsection 109(1) of the IRPA are met, the RPD cannot reject an application to vacate without first considering under subsection 109(2) of the IRPA whether “other sufficient evidence” before the first panel supported the refugee claim.<sup>35</sup>

It is “simply not sufficient” for the RPD to say there is no evidence left to support the determination made by the original panel when there remain allegations, found to be credible at the first hearing, that have not been shown to be misrepresentations.<sup>36</sup> The RPD must consider whether there was untainted evidence considered at the time of the first determination which would have justified granting refugee protection.

For a discussion about the interrelation between subsections 109(1) and (2) when issues of exclusion are raised in vacation proceedings, see section 13.5.5.2.

### **13.5.3. What Evidence Is Admissible at Each Step of the Analysis?**

In *Coomaraswamy*,<sup>37</sup> the Court of Appeal discussed the issue of what evidence is admissible when examining an application to vacate under the former Act. The Court held that with respect to the first branch of the test (whether or not the protected person made misrepresentations or withheld material facts at the determination hearing) the Minister may adduce new evidence that was not before the RPD when it decided the refugee claim.<sup>38</sup> Similarly, a protected person may adduce new evidence at the vacation hearing in an attempt to persuade the RPD that they did not make the

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<sup>33</sup> *Abdi, Deeq Munye v. M.C.I.* (F.C., no. IMM-2811-14), Kane, May 19, 2015; 2015 FC 643 at para 36. The Court noted in *obiter* at para 44 that the RPD has discretionary power and is not required to reject the application to vacate even if it is satisfied that there remains other evidence to justify refugee protection. However, this is the only case expressing such a view.

<sup>34</sup> *M.P.S.E.P. v. Lin, Xiao Ling* (F.C., no. IMM-3680-10), Near, April 7, 2011; 2011 FC 431 at paras 23-25.

<sup>35</sup> *Pearce, supra*, note 31 at para 38; See also *M.C.I. v. Singh Gondara, Ajitpal* (F.C., no. IMM-1433-10), Heneghan, March 22, 2011; 2011 FC 352 at para 35. In *Singh Gondara*, the Minister applied for judicial review arguing that section 109 of the IRPA *allows* the Board to conduct a two-stage inquiry but does not *require* a two-stage inquiry. The Minister submitted that after finding a misrepresentation, the Board was not required to conduct an analysis pursuant to subsection 109(2) of the IRPA. The Court rejected this submission in upholding the Board’s interpretation of s. 109(2). The Board had interpreted s. 109(2) as requiring it to consider whether, after setting aside the tainted evidence, there remained credible evidence upon which a Convention refugee claim could succeed.

<sup>36</sup> *Mansoor, Kashif v. M.C.I.* (F.C., no. IMM-5238-06), de Montigny, April 20, 2007; 2007 FC 420 at para 32.

<sup>37</sup> *Coomaraswamy, Ranjan v. M.C.I.* (F.C.A., no. A-104-01), Rothstein, Sexton, Evans, April 26, 2002; 2002 FCA 153.

<sup>38</sup> *Ibid.*, at para 17.

misrepresentations or withholding of material facts alleged by the Minister.<sup>39</sup>

At the time that *Coomaraswamy* was decided, there was debate about the meaning of the former Act regarding what evidence was admissible for the purpose of the second branch of the test (whether there remains sufficient evidence on which a positive decision could have been based). The Court held that with respect to this part of the analysis, the RPD was restricted to looking only at the original evidence. Therefore, for the purpose of the second part of the analysis, the RPD must determine if the remaining untainted evidence, which was presented at the first hearing, would have been sufficient to support a positive decision. For this part of the analysis, neither the protected person nor the Minister may supplement the record from the first hearing.<sup>40</sup>

The admissibility of evidence for the second prong of the test has since been codified in the IRPA through the addition of the words “at the time of the first determination” in subsection 109(2).

Nonetheless, the Court has allowed the RPD some discretion to allow new evidence for the purpose of the analysis under subsection 109(2) where the record from the first hearing is deficient. For example, in *Selvakumaran*,<sup>41</sup> the claim had been decided without a hearing pursuant to the RPD’s *Expedited Policy* in force at the time, and therefore the usual country condition information from the Board’s information package was not part of the record. The protected person argued that in the absence of proper records it was impossible to know what evidence was before the original decision-maker in her case and thus the Board could not possibly know what evidence was considered at the time of the first determination. “Out of caution,” the Board allowed the protected person to compile a package of documents that represented a facsimile of the evidence that supported her original refugee claim. The Court neither endorsed nor criticized the procedure followed but found there was no procedural unfairness in this case.

In *Aleman*,<sup>42</sup> the protected person argued that the vacation panel was not entitled to consider the new evidence regarding the alleged crimes against humanity that was not before the original panel in determining whether it would vacate his refugee status. The Court expressed the view that

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<sup>39</sup> *Ibid.*

<sup>40</sup> In answering the certified question at paragraph 42, the Court of Appeal, in *Coomaraswamy*, described the admissibility of evidence at the second prong of the analysis as follows:

**Question:** In considering whether there was “other sufficient evidence on which (a positive Convention refugee determination) was or could have been based” under subsection 69.3(5), can the Refugee Division take into account evidence submitted by the Minister under an application to reconsider and vacate under subsection 69.2(2)? If so, can the Refugee Division take into account evidence which the individual whose Convention refugee status is at issue wishes to submit to respond to the Minister’s evidence?

**Answer:** In considering whether there was “other sufficient evidence on which a positive Convention refugee determination was or could have been based” under subsection 69.3(5), the Refugee Division can take into account evidence submitted by the Minister on an application to reconsider and vacate under subsection 69.2(2) for the purpose of identifying and discounting evidence that was tainted by the misrepresentations. The individual concerned may not submit evidence at a vacation hearing that was not before the Board at the determination hearing, for the purpose of establishing under subsection 69.3(5) that there was “other sufficient evidence on which a positive Convention refugee determination was or could have been based.”

<sup>41</sup> *Selvakumaran, Eugene Jayanthini v. M.C.I.* (F.C., no. IMM-3854-03), O’Reilly, December 11, 2003; 2003 FC 1445 at paras 18-22.

<sup>42</sup> *Aleman, Jose Ricardo Sandoval v. M.C.I.* (F.C.T.D., no. IMM-2821-01), Rouleau, June 25, 2002; 2002 FCT 710.

this argument was a “total misrepresentation of the jurisprudence”. The vacation panel in its reasons referred to the evidence which the Minister had submitted for the purpose of establishing that the protected person's evidence at his original hearing was tainted by misrepresentation or concealment. The Court found that the panel was “clearly entitled” to consider the new evidence regarding the protected person’s alleged crimes against humanity that was not before the original panel. Otherwise, it could not have established whether the protected person would have been excluded from Convention refugee status under Article 1F(a) had he not failed to reveal such evidence at the original hearing.

In *Waraich (2)*,<sup>43</sup> the protected person had submitted two First Information Reports at her original refugee hearing to corroborate the allegation that she was sought by police. After being granted refugee protection, she returned to Pakistan twice with her children, despite the fact she alleged she was sought by the police. At the vacation hearing, the RPD considered the returns to Pakistan in determining whether the protected person had made misrepresentations in submitting false First Information Reports. The protected person argued that the RPD could not consider the returns to Pakistan. The Court held that the RPD may consider the fact the protected persons had returned to Pakistan at the first step of the analysis in determining whether misrepresentations were made at the first hearing.

In *Nasreen (1)*,<sup>44</sup> the central issue was the identity of the protected persons. The original panel granted refugee protection after finding that the identity of the protected persons was satisfied based on several documents presented. Shortly after their arrival in Canada, however, the protected persons disclosed to the authorities that they had travelled on false documentation. The RPD granted the vacation application but never referred to the documents submitted by the protected persons to the original panel to corroborate their identity, nor, for that matter, to the evidence that the protected persons disclosed to the authorities indicating that they had travelled on false documentation. The Court found the RPD decision lacked the “features of intelligibility and justification required in the decision-making process” and therefore concluded that the decision was unreasonable.

In *Nasreen (2)*,<sup>45</sup> the identity of the protected persons allegedly from Pakistan was again the central issue before the RPD vacation panel on redetermination. The Court in *Nasreen (1)* instructed the Minister to make “a more systematic attempt at explaining the identification discrepancies” in the identification documents. Thereafter, the RPD disclosed to the parties the most recent National Documentation Package (NDP) on Pakistan for the purpose of assessing the identity documents provided by the protected persons, and not for the merits of the claim. The Court found the RPD’s decision reasonable. It held that due notice of the disclosure was given to the parties and the RPD explained how the information would be used and applied it in a “transparent manner” throughout the course of the hearing.

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<sup>43</sup> *Waraich, Fakhra Tanveer v. M.C.I.* (F.C., no. IMM-171-10), Shore, December 9, 2010; 2010 FC 1257.

<sup>44</sup> *Imtiaz, Nasreen v. M.C.I. and M.P.S.E.P.* (F.C., no. IMM-10936-12), Roy, April 16, 2014; 2014 FC 366.

<sup>45</sup> *Nasreen, Imtiaz v. M.P.S.E.P.* (F.C., no. IMM-8286-14), Campbell, May 6, 2016; 2016 FC 515.



### 13.5.4. Issues Related to Subsection 109(1) – Misrepresentation

#### 13.5.4.1. Materiality

Subsection 109(1) requires that a misrepresentation or withholding must be with respect to a *material* fact related to a relevant matter. In other words, the misrepresentation must be with respect to something that would have impacted the original refugee protection decision.

In *Olutu*,<sup>46</sup> the Minister had successfully vacated the protected person’s refugee status by submitting evidence to the effect that the individual had used three different names in order to obtain welfare assistance. There was no evidence, however, that the protected person filed two other immigration applications under different names. The Court granted the protected person’s application for judicial review because the Court held that “misrepresentations in other matters do not constitute misrepresentations for the purposes of a Convention refugee status.”<sup>47</sup> The Minister must show misrepresentation leading to the determination of the refugee status.

In *Holubova*,<sup>48</sup> the protected person argued that the vacation panel made a number of serious errors in the course of arriving at its conclusion that she had misled the original panel by failing to disclose her criminal convictions in the Czech Republic. The protected person maintained that she was not aware of her robbery conviction at the time of the determination hearing. The vacation panel found it was unlikely she was unaware of such convictions given she was still living in the Czech Republic at the time and an appeal was launched of those convictions. The protected person argued that the panel did not consider the fact that her robbery conviction had since been erased and that the Czech Republic was no longer seeking her extradition. The Court rejected the argument and reiterated that the main question was not whether there was any live issue about her criminality, but rather, whether there was a factual foundation for the Minister’s claim that the protected person misled the Board.

In *Wahab*,<sup>49</sup> the protected person, allegedly a citizen of Iraq, admitted that he had withheld information about family in Russia and efforts to procure fraudulent Russian documents, including a passport which he had used to travel; however, he alleged that he had never lied about being a citizen of Iraq. The RPD found that the Minister had presented a *prima facie* case that the protected person’s misrepresentations had led to his conferral of refugee status. However, the RPD went on to reject the Minister’s application under subsection 109(2). The Court quashed the decision, finding that the RPD failed to identify the nature of the misrepresentation(s) put forth by the Minister and the extent to which the misrepresentation(s) may have been material. Only after doing this could the RPD have embarked on its analysis under subsection 109(2).

#### 13.5.4.2. Direct versus Indirect Misrepresentation or Omission

Subsection 109(1) provides that the misrepresentation or withholding of a fact may be direct or indirect. The jurisprudence in the context of a vacation application has not specifically addressed the difference between a direct or indirect misrepresentation. Nonetheless, it is helpful to consider

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<sup>46</sup> *Olutu, Charles v. M.C.I.* (F.C.T.D., no. IMM-834-96), Dubé, December 31, 1996; [1996] F.C.J. No. 1704.

<sup>47</sup> *Ibid.*, at para 5.

<sup>48</sup> *Holubova, Drahomira v. M.C.I.* (F.C., no. IMM-3781-02), O’Reilly, November 26, 2003; 2003 FC 1386.

<sup>49</sup> *Wahab, supra*, note 7.

paragraph 40(1)(a) of the IRPA, dealing with inadmissibility for misrepresentation, since it uses similar language to subsection 109(1). In that context, the Courts have found an indirect misrepresentation to be when a third person provides, or fails to disclose, information relevant to the person's case, with or without the subject of the proceedings' knowledge.<sup>50</sup>

This view is consistent with *Coomaraswamy*<sup>51</sup> where the parents of the appellant children failed to disclose to the Board that they had in fact lived in Germany at the time the events of persecution were allegedly taking place in Sri Lanka. Although originating from the parents, the Court of Appeal held the misrepresentation affected the children's claim. While *Coomaraswamy* was decided under the former Act and the applicable legislative provisions at the time did not distinguish between a direct or indirect misrepresentation, this example aligns with the interpretation the Courts have given to an indirect misrepresentation under paragraph 40(1)(a).

### 13.5.4.3. Intention

In *Zheng*, the applicant argued that the RPD failed to address the issue of intent. The Court explained that a misrepresentation or the withholding of a material fact does not need to be deliberate nor does it require an inquiry as to the intention of the protected person.<sup>52</sup> In other words, the misrepresentation need not be intentional. The facts of *Zheng* involved a protected person who misrepresented his original entry into Canada utilizing a valid passport issued by the Commonwealth of Dominica and bearing his likeness and date of birth. He argued that the RPD should have considered that he was under the control of smugglers and under duress; therefore, he could not form the intent to withhold the true facts about the passport. The Court held that it was not necessary for the panel to consider the protected person's intent.

In *Pearce*,<sup>53</sup> the Court allowed the Minister's application for judicial review because it was irrelevant for the RPD to consider the intellectual capacity or the intention of the protected person to misrepresent or withhold material facts. The Court held that subsection 109(1) does not warrant consideration of the protected person's "motives, intention, negligence or *mens rea*". Furthermore, the Court agreed with the Minister that it is the behaviour of the protected person in withholding material facts that is relevant to the determination of the vacation application. In that regard, the Court found that the protected person had an "obligation" to make known all material facts relevant to her refugee claim to the determination panel.

In *Frias*,<sup>54</sup> the protected person did not disclose her dated criminal record in the United States at the time of the determination hearing. At the vacation hearing, the protected person

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<sup>50</sup> See, for example, *Wang, Xiao Qiong v. M.C.I.* (F.C., no. IMM-5815-04), O'Keefe, August 3, 2005; 2005 FC 1059; *Jiang, Lian Bo v. M.C.I.* (F.C., no. IMM-5323-10), Russell, July 27, 2011; 2011 FC 942; and *Wang, Feng Qing v. M.C.I.* (F.C., no. IMM-6163-13), Diner, May 19, 2015; 2015 FC 647.

<sup>51</sup> *Coomaraswamy*, *supra*, note 37.

<sup>52</sup> *Zheng, Yi Hui v. M.C.I.* (F.C., no. IMM-2739-04), Russell, May 4, 2005; 2005 FC 619 at para 27. See also *Singh Chahil, Harpreet v. M.C.I.* (F.C., no. IMM-1209-07), Blanchard, November 20, 2007; 2007 FC 1214 at paras 24-26 where the Court found the RPD did not breach the principles of natural justice by refusing the protected person's request to admit evidence at the vacation hearing which was intended to explain why he made misrepresentations and omissions at the initial hearing.

<sup>53</sup> *Pearce*, *supra*, note 31.

<sup>54</sup> *Frias, Gladys Mejia v. M.C.I.* (F.C., no. IMM-7186-13), Martineau, July 28, 2014; 2014 FC 753.

admitted to having used an alias and to having been arrested in the United States, but claimed that she sincerely replied to the questions asked in the course of her refugee claim and part of entry interview because they only referred to crimes committed in the past 10 years. The vacation panel found these explanations not credible. On judicial review, the protected person argued that the vacation panel had failed to take into account the presumption of good faith. The Court rejected such an argument qualifying it as “irrelevant” since section 109 of the IRPA does not require that the protected person intended to misrepresent the facts.<sup>55</sup>

In *Coomaraswamy*,<sup>56</sup> the Court of Appeal recognized that the appellant children “may have been badly served by their parents as designated representatives” when the parents lied to the determination panel about their experiences of persecution. However, the Court refused to recognize this as a reason for concluding that the children were denied a fair hearing of their refugee claim. In the Court’s view, the principle that clients generally cannot impeach a tribunal’s decision on the ground that their lawyer made mistakes applies also to errors made by a parent, or some other person, who has been designated to act as a child’s representative in refugee proceedings. The fact that a child claimant may have been badly served by their parent who acted as designated representative and lied to the Board at the hearing of their claim does not mean the child was denied a fair hearing.

#### 13.5.4.4. Credibility and Weighing Evidence

In determining whether or not there was a misrepresentation at the time of the initial refugee status determination, the RPD must assess the credibility of the new evidence as well as, sometimes, reassess the credibility of the evidence considered at the first hearing.<sup>57</sup>

In *Naqvi*,<sup>58</sup> the protected persons admitted to fabricating and misrepresenting facts in their original hearing; however, they argued that there remained sufficient evidence to justify their refugee protection once the fraudulent evidence was set aside. They argued that the RPD was not entitled to re-weigh the remaining evidence. The Court rejected this argument. The RPD may re-weigh the evidence which was presented to the original panel in light of the misrepresentations. The Court stated:

Why should a prevaricator have the advantage of keeping the weight accorded to his evidence when the tribunal was still under the impression that he was an honest claimant? He simply should not; that is why it is in the interest of justice to allow the current tribunal

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<sup>55</sup> *Ibid.*, at para 12.

<sup>56</sup> *Coomaraswamy*, *supra*, note 37, at para 25.

<sup>57</sup> See, for example, *Ahmad, Imtiaz v. M.C.I.* (F.C., no. IMM-9578-04), Pinard, June 17, 2005; 2005 FC 847 at para 10. The protected person admitted to having fabricated certain parts of his claim and even wrote that “[o]ne lie leads to another”. The Court found these admissions “on their own” were sufficient to find that the applicant misrepresented or withheld material facts; See also *Ghorban, Ferydon v. M.C.I.* (F.C., no. IMM-559-10), Martineau, August 30, 2010; 2010 FC 861 at para 10 where the Court stated that “even if the Board were to believe the applicant, the fact that the concocted story provided by the applicant in 1997 contained some kernels of truth does not mitigate against the numerous misrepresentations noted above and which were conceded by the applicant.”

<sup>58</sup> *Naqvi, Nassem v. M.C.I.* (F.C., no. IMM-1167-04), Blais, November 16, 2004; 2004 FC 1605. The comments made by the Court in *Naqvi* are in the context of subsection 109(2) of the IRPA.

to re-weigh the evidence which was presented to the original panel.<sup>59</sup>

In refusing to certify a question of general importance in this case, the Court stated that it is “settled law that the Board may reassess evidence at the vacating hearing.”<sup>60</sup>

In *Bhatia*,<sup>61</sup> the Court found that the Board’s reasons in the vacation application were “flawed and insufficient” to support the conclusion that the protected person’s wife was not credible. At the vacation hearing, the Minister had presented evidence that the protected person’s wife told a visa officer information inconsistent with the protected person’s narrative that he feared the police. The protected person’s wife testified that she had lied to the visa officer because she was afraid that the information she gave the officer would make its way to the Punjab police. The vacation panel rejected this explanation as not credible. In the Court’s view, the failure of the wife to inform the visa officer of her fear of the Punjab police was an important factor in the negative credibility determination of the vacation panel. The Court identified two areas of concern in this respect with the panel’s credibility determination. First, a panel should not infer that an individual with a real fear of persecution will necessarily indicate such fear to a visa officer when seeking a visa. Second, there was no indication or suggestion that the panel considered the wife’s evidence within its proper cultural and socio-political context before drawing conclusions as to the plausibility of that evidence. After having reviewed the decision, the Court was “unable to conclude that the [panel] did not impose western concepts on a non-western culture.”<sup>62</sup>

In *Babar*,<sup>63</sup> the Court granted the protected person’s application for judicial review because the “type of careful and cautious evaluation required was not conducted” by the vacation panel. Rather, the vacation panel is required to fairly determine what evidence is not tainted, whether it be the independent evidence and, indeed, related evidence given by the protected person. In this case, the panel did not show how the protected person’s misrepresentations tainted the independent evidence he produced to support his claim.

In *Holubova*,<sup>64</sup> the protected person argued that the vacation panel made a number of serious errors in the course of arriving at its conclusion that she had misled the original panel by failing to disclose her criminal convictions in the Czech Republic. The protected person maintained that she was not aware of her robbery conviction at the time of the determination hearing. The vacation panel found it was unlikely she was unaware of such convictions given she was still living in the Czech Republic at the time and an appeal was launched of those convictions. The Court upheld the panel’s finding that the protected person may have come to Canada to avoid having to serve her sentence.

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<sup>59</sup> *Ibid.*, at para 10.

<sup>60</sup> *Ibid.*, at para 23; See also *Oukacine, Hacène v. M.C.I.* (F.C., no. IMM-2868-06), Shore, November 16, 2006; 2006 FC 1376 at para 32 where the Court found that the RPD was justified in concluding that the protected person’s lack of credibility affected the weight of the residual evidence, which was to a large extent based on his testimony.

<sup>61</sup> *Bhatia, supra*, note 28.

<sup>62</sup> *Ibid.*, at para 16.

<sup>63</sup> *Babar, Muhammad v. M.C.I.* (F.C.T.D., no. IMM-2853-02), Campbell, February 24, 2003; 2003 FCT 216.

<sup>64</sup> *Holubova, supra*, note 48.

In *Masuki*,<sup>65</sup> the Minister sought to vacate the protected person's refugee status after having seized from her son's car documents that showed her having different identities in addition to an alternative death certificate for her husband. At the vacation hearing, the Board had two incompatible death certificates for the protected person's husband and since the circumstances surrounding the death of her husband were the central elements of her basis of claim and testimony, the Court found this misrepresentation was sufficient for the Board to vacate the decision that granted the protected person's refugee status.

In *Nur*,<sup>66</sup> the protected person had claimed before the original panel to be from Somalia. At the vacation hearing, the Minister argued the protected person misled the original panel and was instead a citizen of Djibouti. The Board granted the Minister's application on this basis, but the Court found the Board's reasons for finding that the protected person was a citizen of Djibouti to be problematic because the Board used its specialized knowledge to make the determination. The Court impugned this approach because it held that determining nationality is a matter of foreign law, in that it is governed by the law of the country and, therefore, cannot be within the Board's specialized knowledge. The Court contrasted knowledge of foreign law with knowledge of culture and ethnicity, which in some cases could fall into the realm of specialized knowledge; however, if this was the case, notice of reliance on such specialized knowledge would have to be given to the protected person, as well as an opportunity to respond to it. The Court noted that once the protected person's Djiboutian nationality had been ruled out, the only ground left to find that she was not Somali was the vacation panel's determination that she lacked credibility. However, the Court concluded that the vacation panel would not have found the protected person's version of the facts not credible had it not made erroneous findings with respect to her Djiboutian nationality and her testimony.<sup>67</sup>

The Court came to a different result in *Al-Maari*<sup>68</sup> when the RPD used its specialized knowledge to identify citizenship requirements in foreign countries. The Court stated "there [was] nothing wrong with doing so", although it found that the protected person should have been given the opportunity to respond to the RPD's findings.<sup>69</sup>

In *Bortey*,<sup>70</sup> the protected person was granted refugee status on the basis that she was a single woman who would be forced into marriage. After being granted status, she married a man in Canada who had previously claimed refugee status. In her husband's refugee documents, a person with the same name and same hometown as the protected person had been listed as his wife. The protected person alleged that this amounted to a coincidence in that her husband had previously been married to a woman with the same name. The Court upheld the RPD's decision to grant the Minister's application based on a finding that this was implausible.

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<sup>65</sup> *Masuki, Claudine Moseka v. M.C.I.* (F.C., no. IMM-3047-04), Shore, January 25, 2005; 2005 FC 101.

<sup>66</sup> *Nur, supra*, note 27.

<sup>67</sup> *Ibid.*, at paras 31-32.

<sup>68</sup> *Al-Maari, Chahnaz v. M.C.I.* (F.C., no. IMM-345-12), Manson, October 11, 2013; 2013 FC 1037.

<sup>69</sup> *Ibid.*, at para 16.

<sup>70</sup> *Bortey, Mary v. M.C.I.* (F.C., no. IMM-4175-05), Martineau, February 13, 2006; 2006 FC 190.

In *Aluyi*,<sup>71</sup> the protected person admitted he had misrepresented the fact he had spent 10 years in the United States and had criminal convictions there. He further admitted that everything in his Personal Information Form was false, except for his sexual orientation. The RPD found that the protected person was not trustworthy but reviewed the evidence to determine if there was any independent corroboration of the protected person's sexual orientation, independent from his testimony, and found there was none. The protected person argued that the RPD erred by first finding his testimony not credible, and then reviewing the other evidence, rather than analyzing them together. The Court upheld the decision, finding that "[I]n a case such as this one, where there is nothing to give the Board any reason to accept the credibility of the Applicant, this is the appropriate procedure to be followed."<sup>72</sup>

In *Pires Santana*,<sup>73</sup> Canadian authorities had granted refugee status to the protected person based on her sexual orientation. However, the Minister successfully applied to vacate that status after submitting evidence to the effect that once the protected person arrived in Canada, she became involved in a romantic relationship with a man, which led to marriage and a child born of this union. The protected person admitted all of these allegations but maintained the truthfulness of her submissions at the refugee determination hearing. She alleged that she had been in conflict, confused and unhappy, as she wanted to have a child and had attempted to change her sexual orientation on that basis. Following this experience, the marriage failed. Given the complexity of the human race in relation to sexuality, the Court found that the RPD's decision was patently unreasonable. The fact that the protected person had a heterosexual relationship with a man in Canada as such did not establish that she committed a direct or indirect misrepresentation or withholding of material facts.<sup>74</sup>

In *Singh Chahil*,<sup>75</sup> the protected person argued that by not having before it the first panel's reasons for decision, the Board acted outside its jurisdiction by essentially conducting its own assessment of the facts and substituted the first panel's appreciation of the evidence with its own. The Court rejected the argument because the Board had before it the tribunal record of the first hearing which included the evidence which was adduced before the first panel and thus the Board was in a position to assess the evidence adduced before the first panel against the evidence produced at the vacation hearing.

In *Waraich (I)*,<sup>76</sup> the protected persons had presented First Information Reports in support of their claims of persecution in Pakistan. The Minister subsequently had the reports verified and when the verification indicated they were fraudulent, the Minister filed an application to vacate. The RPD recognized that the First Information Reports were fraudulent, but dismissed the application, finding there was other sufficient evidence under subsection 109(2) to justify the claim. However, the Court quashed the decision, in part because the RPD failed to assess the consequences

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<sup>71</sup> *Aluyi, Taiye Paddy v. M.C.I.* (F.C., no. IMM-326-06), von Finckenstein, August 25, 2006; 2006 FC 1028.

<sup>72</sup> *Ibid.*, at para 12.

<sup>73</sup> *Pires Santana, Ariete Alexandra v. M.C.I.* (F.C., no. IMM-5872-06), Harrington, May 15, 2007; 2007 FC 519.

<sup>74</sup> *Ibid.*, at paras 8-9.

<sup>75</sup> *Singh Chahil, supra*, note 52.

<sup>76</sup> *M.P.S.E.P. and M.C.I. v. Waraich, Fakera Tanveer* (F.C., no. IMM-3352-08), Frenette, February 12, 2009; 2009 FC 139.

of the misrepresentations on the remaining evidence.

In *Lin*,<sup>77</sup> the protected person had been accepted as a refugee on the basis of persecution at the hands of the Chinese authorities. The Minister sent certain documents to Chinese authorities for verification and, based on the results, the Minister filed an application to vacate. The RPD dismissed the application citing concerns about the Minister sending the documents to the agent of persecution for verification without taking precautions to protect the identity of the protected person. The Minister argued that instead of engaging in the analysis required by section 109 of the IRPA, the Board focused on the “entirely extraneous and irrelevant consideration” of how the Minister obtained the evidence.<sup>78</sup> Furthermore, the Minister posited that by focusing on the protected person’s privacy rights, the Board examined an issue that was not before it and was not within the scope of the Board’s duty at the vacation hearing. The Court disagreed and found it was “obvious” that the Board concluded the Minister’s evidence was insufficient to meet the requirements of section 109.<sup>79</sup> Contrary to the Minister’s submissions, the Board made it “quite clear” that it was concerned with the credibility of the Minister’s evidence, given its provenance.<sup>80</sup> The Court found that the source of the evidence “clearly has an impact” on the probative value that may be assigned to it.<sup>81</sup>

In *Nasreen (2)*,<sup>82</sup> the Court reviewed a second RPD decision to vacate the protected persons’ refugee status after the first decision was quashed and returned for redetermination. In returning the matter back to the RPD in *Nasreen (1)*, the Court had specifically directed that “a more systematic attempt at explaining the identification discrepancies” should be made. The Court noted that the central issue on the redetermination was the identity of the protected persons and therefore the identification documents tendered by the protected persons in making their claim for protection were relevant and required careful attention by the RPD. The Court was satisfied that the RPD gave the required careful attention to the identity documents and dismissed the application for judicial review.

### **13.5.5. Issues Related to Subsection 109(2) – Other Evidence Considered at the First Determination Justifying Protection**

#### **13.5.5.1. Assessing the Remaining Evidence**

Once the RPD concludes that the protected person made a misrepresentation or withheld material facts at the first determination, the RPD must then move on to the second step which is to assess the other, untainted evidence, considered at the time of the first determination to determine if sufficient evidence remains that justify protection.

For a discussion of this step where exclusion is raised, see the next section.

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<sup>77</sup> *Lin, supra*, note 34.

<sup>78</sup> *Ibid.*, at para 16.

<sup>79</sup> *Ibid.*, at para 19.

<sup>80</sup> *Ibid.*, at para 21.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Nasreen (2), supra*, note 45.

Without evidence indicating that the person’s particular circumstances or profile put them at risk, the RPD cannot justify allowing the refugee claim. The existence of documentary evidence concerning a country’s general situation is not enough in itself to justify the granting of refugee protection.

For instance, in *Naqvi*,<sup>83</sup> the protected persons admitted to fabricating and misrepresenting facts in their original hearing; however, they argued that there remained sufficient evidence to justify their refugee protection once the fraudulent evidence was set aside. The Court noted that when there is “no remaining credible evidence upon which a panel can make a positive determination that a person is a Convention refugee, it can certainly be inferred that an applicant is not a Convention refugee.”<sup>84</sup> The Court reiterated that documentary evidence alone is not sufficient to allow the RPD to reject the Minister’s application to vacate.

Similarly, in *Fouodji*,<sup>85</sup> the Minister applied for judicial review of the RPD’s vacation decision that found there remained relevant evidence to justify the refugee status of the protected person despite misrepresentations. The Court held that the RPD provided “no analysis of the evidence filed by the Minister” nor was there any “reference to the most significant misleading statements or misrepresentations.”<sup>86</sup> The Court was of the view that the RPD did not identify the contradictions nor did it weigh the evidence or analyze the credibility of the protected person. In addition, the Minister had argued that the RPD erred in finding that there was sufficient remaining evidence to justify the refugee status of the protected person. The Court agreed with the Minister and held that the existence of documentary evidence regarding the general situation of a country is not in itself sufficient to justify a person’s refugee protection.<sup>87</sup>

In *Sethi*,<sup>88</sup> the protected person had been granted refugee status based on allegations of domestic violence at the hands of her husband. The Court found that there was “no question” that misrepresentations were made and that the Board did not err in finding that the original decision was obtained as a result of misrepresenting or withholding material facts relating to a relevant matter.<sup>89</sup> In particular, the misrepresentations related to the whereabouts of the protected person’s husband, whom she only saw occasionally due to his travels, in contrast to her evidence at the original hearing that she had been residing with him in Pakistan. The “critical issue”, however, related to whether there remained other sufficient evidence to justify refugee protection.<sup>90</sup> At her original hearing, the protected person had filed medical reports from Pakistan describing the injuries suffered as a result of domestic violence as well as pictures depicting the injuries. According to the Court, this evidence showed “clearly” that domestic violence had occurred and

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<sup>83</sup> *Naqvi*, *supra*, note 58.

<sup>84</sup> *Ibid.*, at paras 11-12, citing *Ray, Samir Chandra* (F.C., no. IMM-2818-99), Tremblay-Lamer, June 9, 2000; 2000 CanLII 15647 (F.C.) at para 13.

<sup>85</sup> *M.C.I. v. Fouodji, Marie Thérèse* (F.C., no. IMM-1673-05), Pinard, September 30, 2005; 2005 FC 1327.

<sup>86</sup> *Ibid.*, at para 17.

<sup>87</sup> *Ibid.*, at para 20. See also *Coomaraswamy*, *supra*, note 37, at para 41.

<sup>88</sup> *Sethi, Fauzia Wazir v. M.C.I.* (F.C., no. IMM-1032-05), Tremblay-Lamer, August 29, 2005; 2005 FC 1178.

<sup>89</sup> *Ibid.*, at para 21.

<sup>90</sup> *Ibid.*, at para 23.



none of the misrepresentations undermined this evidence, nor did any of the evidence filed by the Minister contradict these findings.<sup>91</sup> The Court concluded that the RPD failed to meaningfully assess whether this constituted sufficient untainted evidence to support the original determination, despite the misrepresentations.

In *Arumugam*,<sup>92</sup> the Court recognized that, once the misrepresented and withheld evidence relating to the persecution experienced by the protected person was discounted, the only evidence that was before the original panel that granted refugee protection related to general country conditions, the protected person's gender, marital status and age and the fact that she was a Tamil from Sri Lanka who had at one time lived in the northern part of that country. While the Court noted that it would "undoubtedly" have been preferable for the vacation panel to be "more fulsome" in its dealing with the remaining evidence, it found that the panel did not commit a reviewable error in summarily rejecting this evidence as a sufficient basis to justify granting refugee protection.<sup>93</sup>

In *Oukacine*,<sup>94</sup> the protected person was a Berber with Algerian citizenship who had been granted refugee protection because he was a conscientious objector to military service. The protected person later admitted to having provided misleading facts to the Board. The Minister successfully vacated the protected person's refugee status. On judicial review, the protected person contested the vacation panel's conclusion that there was no other sufficient evidence to justify refugee protection. Specifically, he argued that by virtue of the residual fact that he was a Berber, he faced risk of persecution in the Algerian Army. In the Court's view, the panel was entitled to find that lack of credibility of the protected person affected the weight of the other evidence submitted, other evidence which was to a large extent based on his testimony. Further, the Court accepted that the documentation did not support the protected person's claims regarding the treatment of Berbers.

In *Davidthamby Chery*,<sup>95</sup> the Minister demonstrated that the protected person had made misrepresentations, as he was in Switzerland during some of the alleged incidents in Sri Lanka. However, the RPD dismissed the vacation application, finding that there was sufficient evidence remaining justifying protection, due to a history of earlier, uncontradicted incidents that had been found credible by the first panel. The Minister contested the decision but the Court noted that it was clear that the Board "considered the misrepresentation, placed it in the context of the whole statement and still found enough material that was considered by the first [panel] to grant refugee protection."<sup>96</sup>

In *Shahzad*,<sup>97</sup> the protected person presented a First Information Report (FIR) from Pakistan at his determination hearing to support his allegations of persecution in Pakistan. The RPD

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<sup>91</sup> *Ibid.*, at para 25.

<sup>92</sup> *Arumugam, Samalavathy Amma v. M.C.I.* (F.C., no. IMM-10334-04), Gibson, October 25, 2005; 2005 FC 1449.

<sup>93</sup> *Ibid.*, at para 10.

<sup>94</sup> *Oukacine, supra*, note 60.

<sup>95</sup> *M.C.I. and M.P.S.E.P. v. Davidthamby Chery, Cherynold* (F.C., no. IMM-600-08), Shore, September 9, 2008; 2008 FC 1001.

<sup>96</sup> *Ibid.*, at para 26.

<sup>97</sup> *Shahzad, Khoram v. M.C.I.* (F.C., no. IMM-7563-10), Bédard, July 19, 2011; 2011 FC 905.

accepted the claim, but in doing so stated that while generally there is adequate state protection in Pakistan, it would “award the benefit of the doubt” to the claimant “especially in the absence of any major discrepancies in his testimony.”<sup>98</sup> An employee from the Canadian embassy in Pakistan subsequently made verifications and determined the FIR was fraudulent. On this basis, the RPD allowed the Minister’s application to vacate, finding that had the original panel known about the fraudulent documents, it would have evaluated his credibility differently. The Court upheld the decision and reiterated that within the context of subsection 109(2) of the IRPA, it is up to the Board to assess the credibility of residual evidence. In addition, the fraudulent documents could have impacted the RPD’s analysis of the availability of state protection. The only evidence remaining before the initial panel was the objective country conditions evidence showing sectarian violence between Sunni and Shia groups. In the Court’s view, the Board correctly found that the existence of objective country conditions evidence is not by itself sufficient to justify a person’s claim for refugee protection.

In *Mansoor*,<sup>99</sup> the protected person admitted to having made misrepresentations about the time he spent in the United States; however, he argued that the Board did not properly analyze the remaining uncontradicted evidence which in his view was sufficient to support the original panel’s determination. After having identified the misrepresentations, the Board did not conduct any specific analysis pursuant to subsection 109(2) of the IRPA. The Court considered this insufficient as there were still material elements that could support the determination made by the original panel. In particular, there was evidence of arrests and detention prior to his coming to the United States, as well as evidence of membership in the *Pakistan Peoples Party*. The RPD should have explained why the remaining evidence was not sufficient. The Court restated that it is “not sufficient to simply say there is no evidence left to support the determination made by the original panel when there remain allegations, found to be credible at the first hearing, that have not been shown to be misrepresentations.”<sup>100</sup>

In *Gunasingam*,<sup>101</sup> the RPD had found that the protected person misrepresented his presence in Sri Lanka during the period he was allegedly persecuted. Nevertheless, the RPD accepted his testimony at the vacation hearing that the incidents happened as alleged on different dates and held there was sufficient untainted evidence to let the original decision stand. The Court quashed the decision on review. In the Court’s view, the new dates were irrelevant and the incidents could not be considered once it was established they could not have happened on the dates alleged. The Court found that the RPD erred in allowing the protected person to present a “corrected” version of events, contrary to the bar on the admissibility of new evidence under subsection 109(2) of the IRPA.<sup>102</sup>

In *Waraich (1)*,<sup>103</sup> the protected persons had presented First Information Reports in support

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<sup>98</sup> *Ibid.*, at para 7.

<sup>99</sup> *Mansoor*, *supra*, note 36.

<sup>100</sup> *Ibid.*, at para 32.

<sup>101</sup> *M.P.S.E.P. v. Gunasingam, Umasangar* (F.C., no. IMM-2283-07), Harrington, February 13, 2008; 2008 FC 181.

<sup>102</sup> See also *M.P.S.E.P. v. Begum, Sahara* (F.C., no. IMM-3034, 18), Crampton, March 21, 2019; 2019 FC 356 where the Court held the RPD erred in relying on the new evidence of Ms. Begum’s alleged divorce from Mr. Islam at the subsection 109(2) of its assessment.

<sup>103</sup> *Waraich (1)*, *supra*, note 76.

of their claims of persecution in Pakistan. The Minister subsequently had them verified and when the verification indicated they were fraudulent, the Minister filed an application to vacate. The RPD accepted that the First Information Reports were fraudulent, but dismissed the application, finding there was other sufficient evidence under subsection 109(2) to justify the claim. The RPD declined to consider the fact that the protected person had returned twice to Pakistan, since it was not before the first determination panel. The Court quashed the decision. It found the RPD erred by not indicating what remaining evidence supported the claim and by not analyzing the consequences of the false information on the protected persons' credibility. Additionally, the Court seemed to accept the Minister's submissions that the RPD should have considered the credibility of the protected person's original claim that she was being sought by the army and police, in light of the fact that she returned to Pakistan for lengthy visits. Finally, the Court held that insofar as the RPD may have taken a negative view of the length of time it took to verify the documents, this was an error as the "Court does not impose a time limit and the discovery of fraud depends on many imponderable factors beyond the applicants' control."<sup>104</sup>

When the matter was returned to the RPD for redetermination, the RPD allowed the Minister's application. In *Waraich (2)*,<sup>105</sup> the Court upheld that decision and found that the RPD may consider the fact the protected persons had returned to Pakistan as part of the first step of the analysis – i.e. whether there was a misrepresentation made at the first hearing. Due to the principal protected person's "unsatisfactory explanations" when confronted with the fact that she had submitted false documents, in addition to the fact that the protected persons had later returned to Pakistan twice without being bothered by the authorities, the RPD could reasonably conclude that the decision to grant the protected persons refugee status was the direct result of the misrepresentation or withholding of material facts relating to a relevant matter.<sup>106</sup>

In *Singh Gondara*,<sup>107</sup> the Court dismissed the Minister's application for judicial review finding that the Board reasonably applied section 109 of the IRPA. The protected person had been granted refugee protection pursuant to the RPD's *Expedited Policy* in force at the time. The Minister applied to vacate his refugee status arguing that two of the identification documents submitted by the protected person were fraudulent. The RPD found those documents were indeed fraudulent and that there was in fact a misrepresentation by the protected person. However, the RPD dismissed the application to vacate concluding that there remained sufficient identification documents from the first determination panel to establish the protected person's identity. In particular, the RPD considered whether the evidence relative to the fraudulent documents undermined the authenticity of the remaining identity documents but found that the remaining identity documents were not misrepresentations. The Court held the RPD did not err by declining to reweigh the other identification documents as those did not arise from misrepresentations.

#### 13.5.5.2. Exclusion

The Courts have held that where the misrepresentation or withholding of a material fact

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<sup>104</sup> *Ibid.*, at para 33.

<sup>105</sup> *Waraich (2)*, *supra*, note 43.

<sup>106</sup> *Ibid.*, at para 32.

<sup>107</sup> *Singh Gondara*, *supra*, note 35.

relates to exclusion such that the protected person would have been excluded at the original determination, it is not necessary to proceed to the analysis under subsection 109(2).

In *Parvanta*,<sup>108</sup> the protected person withheld information regarding his status in Germany where he had been living since 1981 and where he was granted refugee status in 1996. The Board was of the view that if the determination panel had this evidence before it, the protected person would not have been granted refugee status because he would have been excluded under Article 1E of the Refugee Convention. The Court held that once the Board concluded that the protected person was excluded under Article 1E, it did not have to examine the remaining evidence with regard to the application of subsection 109(2) of the IRPA since it could not, pursuant to section 98, grant him refugee status or determine that he is a person in need of protection.

In the Court's view, it would be "entirely nonsensical and clearly unnecessary for the Board to engage in an analysis of a claim for refugee protection once it has determined that the claimant is excluded from the Convention refugee or person in need of protection definitions."<sup>109</sup>

Where Article 1E forms the basis for exclusion at the vacation hearing, earlier decisions of the Court indicated that the time at which to determine the person's status and whether they would have been excluded is at the time of their admission to Canada or application for refugee status.<sup>110</sup> However, these cases should be read in light of the reformulated test set out in the Court of Appeal decision of *Zeng*.<sup>111</sup>

In *Sajid*,<sup>112</sup> the Court concurred with the RPD that the protected person misrepresented or withheld material facts relevant to his refugee protection claim, namely, facts directly related to alleged criminal activities in the United States. The RPD held that the outcome of the refugee protection claim might have been different had these omissions been known since they were "directly related to an exclusion" for refugee protection pursuant to section 98 of the IRPA. In particular, the RPD found that there were serious reasons for considering the protected person had committed serious non-political crimes in the United States and that had the initial panel been aware of the investigation, it would have found in favour of an exclusion pursuant to Article 1F(b). As a result, the RPD concluded that it was not necessary to proceed to an analysis under subsection 109(2) of the IRPA. The Court upheld the RPD's analysis.

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<sup>108</sup> *Parvanta, Mohammad Wakil v. M.C.I.* (F.C., no. IMM-266-06), Tremblay-Lamer, September 27, 2006; 2006 FC 1146.

<sup>109</sup> *Ibid.*, at para 24.

<sup>110</sup> *Ibid.*

<sup>111</sup> *M.C.I. v. Zeng, Guanqiu* (F.C.A., no. A-275-09), Layden-Stevenson, Noël, Stratas, May 10, 2010; 2010 FCA 118 at para 28. The Court reformulated the test as follows:

Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.

<sup>112</sup> *Sajid, Mahmood v. M.C.I.* (F.C., no. IMM-963-16), Shore, August 30, 2016; 2016 FC 981.

In *Omar*,<sup>113</sup> the protected person misrepresented her alleged persecution in Somalia as she was instead living in the United States at the time the events allegedly occurred. While in the United States, the protected person was convicted of an offense not disclosed to the Canadian authorities when she later sought refugee status. The Minister argued that the protected person was not a Convention refugee or person in need of protection because the offense committed in the United States was a serious non-political crime pursuant to Article 1F(b) and excluded her by application of section 98 of the IRPA. The RPD concurred with the Minister and declined to consider if there would be other sufficient evidence before the determination panel to justify refugee protection as per subsection 109(2) of the IRPA.

The Court shared the view of the RPD and found “one never reaches subsection 109(2) if the person cannot claim to be a Convention refugee or a person in need of protection.”<sup>114</sup> The consideration of whether there is sufficient evidence at the time of the first determination to justify refugee protection simply does not arise. Therefore, the Court said there was “no need to consider whether being a Somali woman is sufficient to grant refugee status as the applicant was disqualified by the operation of section 98.”<sup>115</sup>

In *Thambipillai*,<sup>116</sup> the vacation panel looked at the evidence and determined that there were serious reasons for considering that the protected person had committed a crime against humanity pursuant to Article 1F(a). Therefore, the Court stated the vacation panel was not required to engage in an assessment of the evidence as it applied to the inclusionary aspects of the Convention refugee definition.

In *Yaqoob*,<sup>117</sup> the Court dismissed the Minister’s application for judicial review and confirmed the RPD’s findings that there was sufficient evidence to justify the refugee protection of the protected person despite him having misrepresented his knowledge of violent acts committed by the organization of which he was a member. The Minister argued that once the RPD found the protected person misrepresented material facts, it was bound to consider “all of the evidence available” to determine the issue of exclusion.<sup>118</sup> The Court held that the RPD considered the new

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<sup>113</sup> *Omar, Ubah Ibrahim v. M.C.I.* (F.C., no. IMM-3457-15), Roy, May 30, 2016; 2016 FC 602.

<sup>114</sup> *Ibid.*, at para 49.

<sup>115</sup> *Ibid.* See also *M.C.I. v. Lopez Velasco, Jose Vicelio* (F.C., no. IMM-3423-10), Mandamin, May 30, 2011; 2011 FC 627 where the RPD had accepted that the protected person made misrepresentations or omissions to the original panel in relation to his conviction in the United States, but found that – had the evidence regarding his conviction been known to the original panel – he would not have been excluded because the crime was not a “serious” crime for the purposes of determining exclusion under Article 1F(b). As a result, the RPD dismissed the Minister’s application to vacate. The RPD’s decision was upheld by the Court. Similarly, in *Usckarya, Hzzm Abraham v. M.C.I.* (F.C., no. IMM-7783-12), Tremblay-Lamer, May 7, 2013; 2013 FC 476 the Minister had applied before the Board to vacate the applicant’s refugee status on the basis that the protected person misrepresented his criminal history in the United States. The Board found that the applicant withheld information about the offences when filing his refugee claim and then misled immigration officials in an attempt to obtain refugee protection. Had the withheld information been before the original panel, the Board found that the original panel would have had serious reasons for considering that the protected person had committed a serious political crime and would have excluded him from refugee protection. The Court upheld the Board’s decision.

<sup>116</sup> *Thambipillai, Thamby Indrarajah v. M.C.I.* (F.C.T.D., no. IMM-5279-98), McKeown, July 22, 1999.

<sup>117</sup> *M.C.I. v. Yaqoob, Raja Muzamal Kiani* (F.C., no. IMM-7634-04), Mosley, July 22, 2005; 2005 FC 1017.

<sup>118</sup> *Ibid.*, at para 13.

evidence adduced by the Minister and relied upon it to establish the protected person's misrepresentation of material facts at the original hearing. In making the determination that there was other sufficient evidence to justify a positive refugee determination, the RPD was restricted by the terms of subsection 109(2) of the IRPA to the evidence that was before the original tribunal. The Court was of the view that the RPD did not err in referring solely to that evidence and not to the new evidence adduced by the Minister in making that finding.

In *Holubova*,<sup>119</sup> the protected person argued that the vacation panel made a number of serious errors in the course of arriving at its conclusion that she had misled the original panel by failing to disclose her criminal convictions in the Czech Republic. The protected person maintained that she was not aware of her robbery conviction at the time of the determination hearing. The vacation panel found it was unlikely she was unaware of such convictions given she was still living in the Czech Republic at the time and an appeal was launched of those convictions. The Court upheld the vacation panel's conclusion that had the Minister been made aware of her convictions, they might well have sought to exclude her from the refugee claim process under Article 1F(b) for having committed a serious non-political crime.

### 13.5.5.3. Which Law Should Apply

In *Duraisamy*,<sup>120</sup> the Convention Refugee Determination Division (CRDD) granted in 1999 the Minister's application to vacate wherein the Minister alleged that the protected persons misrepresented their circumstances when applying for and ultimately receiving Convention refugee status in Canada in 1993. The Board found that at the time that they were claiming to be victims of persecution in Sri Lanka, the protected persons were living in Switzerland as permanent residents, and therefore that the protected persons would have been excluded under Article 1E at the time their claims were decided. In so doing, the Board applied the jurisprudence as it was on the date of the original hearing. The protected persons argued that the Board erred by limiting its consideration of the exclusion clause to the legal landscape which existed in 1993-1994. The Court agreed, finding that the Board erred by considering only the case law that existed at the time of the original hearing and ignoring subsequent jurisprudence. The Court wrote that there is "no impediment to the Board considering current law which has developed since the initial hearing."<sup>121</sup>

In determining whether to allow or reject the Minister's application to vacate when exercising its discretion under section 109(2) of the IRPA, the RPD should consider the grounds in both section 96 and 97 of the IRPA, regardless of whether protection was conferred only under section 96, provided evidence relevant to section 97 was presented at the hearing of the claim.

For example, in *Selvakumaran*,<sup>122</sup> the claims were accepted by the CRDD in 1997 under the former Act. At the time, the Board only had jurisdiction to determine if a claimant was a Convention refugee (the equivalent to section 96 of the IRPA) and not whether the claimant was a person in need of protection (the equivalent to section 97 of the IRPA). The Minister made an application to vacate that decision after the IRPA came into force in 2002. At the judicial review of the Board's decision to vacate, the protected persons argued that they were denied an opportunity

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<sup>119</sup> *Holubova*, *supra*, note 48.

<sup>120</sup> *Duraisamy, Mylvaganam v. M.C.I.* (F.C.T.D., no. IMM-6216-99), Heneghan, November 24, 2000; 197 FTR 232.

<sup>121</sup> *Ibid.*, at para 9.

<sup>122</sup> *Selvakumaran*, *supra*, note 41.

to put forth evidence under section 97. The Court held that when the Board is considering the second branch of the test under subsection 109(2), it may consider all of the grounds on which refugee protection may be granted. However, also pursuant to section 109(2), it cannot receive new evidence; it must base its decision on the evidence that was considered at the time of the first determination. Therefore, the Court rejected the protected person's argument, reiterating that the Board may consider if section 97 applies, but cannot receive new evidence in doing so.

## 13.6. OTHER ISSUES

### 13.6.1. Section 7 of the Charter

Courts have found that the rights under section 7 of the *Canadian Charter of Rights and Freedoms*<sup>123</sup>—the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice—are not engaged in vacation proceedings based on a risk of removal to their country of nationality.

In *Coomaraswamy*,<sup>124</sup> the Court of Appeal found there is no authority for the proposition that section 7 guarantees a second *de novo* RPD hearing to those who had obtained a favourable determination of their refugee claims as a result of their misrepresentations. The RPD's decision to vacate does not necessarily mean that the protected person will be deported; accordingly, their section 7 rights are not yet engaged. The person will have other opportunities to satisfy the Minister, on the basis of new evidence, that they will be at risk if returned to their country.

In *Annalingam*,<sup>125</sup> based on incidents of persecution in Sri Lanka, the protected persons were declared refugees without a hearing pursuant to the CRDD's *Expedited Policy* in force at the time. At the judicial review of the CRDD decision granting vacation of their refugee status, the Court of Appeal cited *Coomaraswamy* for the proposition that section 7 did not mandate a new hearing. The Court was of the view that if the protected persons had disclosed the truth about their stay in Germany, it is likely that they would not have been eligible for the expedited process. Since they were then spared the necessity of an oral hearing on the strength of their dishonest stories, the Court found they could not now claim that they had a right to the hearing they would have received had they told the truth.

### 13.6.2. Res Judicata/Second Application

The concept of *res judicata* is comprised of cause of action estoppel and issue estoppel. These two estoppels, while identical in policy, have separate applications. Cause of action estoppel precludes a person from bringing an action against another where the cause of action was the subject of a final decision of a court of competent jurisdiction. Issue estoppel is wider, and applies to separate causes of action.

The Supreme Court of Canada explained the concept of issue estoppel in *C.U.P.E., Local 79*<sup>126</sup>:

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<sup>123</sup> Part 1 of the *Constitution Act, 1982*.

<sup>124</sup> *Coomaraswamy*, *supra*, note 37, at para 24.

<sup>125</sup> *Annalingam, Thanaluxmy v. M.C.I.* (F.C.A., no. A-453-00), Pelletier, Desjardins, Linden, July 3, 2002; 2002 FCA 281.

<sup>126</sup> *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63; [2003] 3 S.C.R. 77 at para 23 *per* Arbour J., majority.

Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies.

In *Logeswaren*,<sup>127</sup> the protected person argued that the Minister could not make more than one application to vacate. The Court found that the IRPA does not prevent more than one application to vacate by the Minister. However, in the event that the Minister were to bring a second application to vacate, it is evident that the defense of *res judicata* would be available to the protected person if it could be proven. The existence of a right to bring further applications (pursuant to the IRPA) does not preclude this common law principle from operating in the appropriate circumstances.

In *Thambiturai*,<sup>128</sup> the protected person had been subsequently found to have misrepresented facts about a crime he committed overseas prior to his arrival in Canada. The Immigration Division found him inadmissible and ordered him deported. The appeal from that decision was still pending when the refugee vacation decision was made. The protected person argued *res judicata*, but the Court disagreed. It held cause of action estoppel to be inapplicable because the causes of action were different. The cause of action before the RPD, namely, the application to vacate the protected person's status, was not the same as the one that was before the Immigration Division, namely, a decision about whether the protected person was inadmissible to Canada because of serious criminality and misrepresentation pursuant to paragraphs 36(1)(c) and 40(1)(a) of the IRPA. Indeed, neither the Immigration Division nor the Immigration Appeal Division have the authority to vacate Convention refugee status.

The Court also found that issue estoppel was inapplicable. In this case, the prior decision was that of the Immigration Division, which found that the protected person was inadmissible for serious criminality and misrepresentation. That decision had been appealed to the Immigration Appeal Division by the protected person and the appeal was still pending at the time the vacation decision by the RPD was made. Since the prior judicial decision was still pending, and not final, the Court held that issue estoppel was not applicable.

### 13.6.3. Abuse of Process Arguments

The test set out by the Supreme Court of Canada in *Blencoe*<sup>129</sup> requires the person alleging an abuse of process based on the passage of time to show that, because of the delay, they have suffered a prejudice of "sufficient magnitude" to impact on the fairness of the hearing; where, however, there is no prejudice to hearing fairness, the delay must be "clearly unacceptable" and have "directly caused a significant prejudice" which brings the administrative system into disrepute

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<sup>127</sup> *Logeswaren, Thamaraichelvy v. M.C.I.* (F.C., no. IMM-2970-04), Snider, March 29, 2005; 2005 FC 419 at para 16.

<sup>128</sup> *Thambiturai, Puviraj v. Sol. Gen.* (F.C., no. IMM-3579-05), Pinard, June 20, 2006; 2006 FC 750.

<sup>129</sup> *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44; [2000] 2 SCR 307.



to amount to an abuse of process.<sup>130</sup>

In *Lata*,<sup>131</sup> the protected person argued that the Minister's delay in making the application to vacate constituted an abuse of process. The Minister interviewed the protected person's former spouse in 2002 and 2003 during which he contradicted the allegations she had made in her refugee claim. The Minister then interviewed the protected person in 2005 for her response, and only made the application to vacate in 2009. The protected person alleged that she had suffered psychologically due to the delay and could not adequately testify or participate meaningfully in her vacation hearing. The Court found it was reasonably open to the RPD to conclude that the immigration and refugee protection system had not been tainted because of how the protected person suffered. The harm suffered by the protected person was not of such a magnitude that the refugee system would be brought into disrepute because the public's sense of decency would be affected. Given the harm suffered by the protected person, in the Court's view the facts of the case did not meet the very high threshold of prejudice required to meet the test in *Blencoe*.

In *Cortez*,<sup>132</sup> the Court indicated that there is no limitation period for applications to vacate. The Court was of the view that to dismiss an application "by reason of the delay alone would be to impose a judicially created limitation period."<sup>133</sup> Likewise, the Court expressed that it is "clear that the mere fact of a delay is not enough to establish a violation of section 7" of the *Charter*.<sup>134</sup> The Court found the delay in bringing forth the application to vacate did not constitute an abuse of process because the protected person did not demonstrate "evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing."<sup>135</sup>

In *Zobeto*,<sup>136</sup> the Court rejected the argument raised by the protected person to the effect that it would be an abuse of process to accept the Minister's evidence because such evidence was already available to the Minister at the time of the determination hearing. The evidence related to the protected person's marital status, number of siblings, and whereabouts at relevant times. The protected person had argued that if he could not subsequently introduce evidence which was available at the time of the determination hearing, then in fairness the Minister likewise should be prohibited from doing so. The RPD found that issue estoppel did not apply since the true facts were not before the RPD at the initial determination hearing. Furthermore, the RPD concluded the argument was inapplicable on the basis that a vacation hearing was different from the first determination hearing. The RPD considered the issue of *res judicata* and found the doctrine did

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<sup>130</sup> *Ibid.*, at paras 104, 115, *per* Bastarache J., majority.

<sup>131</sup> *Lata, Sureel v. M.C.I.* (F.C., no. IMM-4887-10), Blanchard, April 14, 2011; 2011 FC 459.

<sup>132</sup> *M.C.I. v. Cortez, Manuel de Jesus* (F.C.T.D., no. IMM-231-99), Pinard, January 21, 2000; 181 FTR 96.

<sup>133</sup> *Ibid.*, at para 19.

<sup>134</sup> *Ibid.*, at para 17.

<sup>135</sup> *Ibid.*, at para 21. More recent jurisprudence may suggest that the only time period relevant for the RPD in assessing an abuse of process allegation based on delay is the time between the making of the application and the decision. For example, in another context, the Court held that in determining if there was an abuse of process with respect to a Minister's application to cease refugee status, the only relevant delay was the delay between the filing of the application and the decision. (see *Seid, Faradj Mabrouk v. M.C.I.* (F.C., no. IMM-2555-18), LeBlanc, November 21, 2018; 2018 FC 1167 at paras 28-32).

<sup>136</sup> *Zobeto, Kabuiko v. M.C.I.* (F.C.T.D., no. IMM-908-00), Heneghan, November 2, 2000.

not apply to a vacation hearing because it was different from a repeat claim. The Court found the RPD's decision to accept the challenged evidence was not unreasonable because it was known and available to the protected person at the time of the determination hearing, and he had an opportunity to present it and may well have had an obligation to do so.

The RPD likewise considered the period of delay between the granting of leave on the vacation application (as per the leave requirement under the former Act) and the commencement of that application. The delay was a period of more than three years. The Court concurred with the RPD and found no prejudice resulted to the protected person from this delay and furthermore, that there is no time limit for the commencement of an application to vacate once leave has been granted.

In *Thambiturai*,<sup>137</sup> the protected person argued that the application to vacate constituted a collateral attack upon the decision previously rendered by the Immigration Division that found him inadmissible to Canada for serious criminality and misrepresentation. The Supreme Court of Canada in *Danyluk*<sup>138</sup> described the rule against collateral attack: "a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it." The Court in *Thambiturai* found the concept of collateral attack was not an accurate portrayal of the action brought forth by the Minister since the decision of the Immigration Division was not being contested. However, the Court was of the view that the Immigration Division had already concluded that the protected person had directly or indirectly misrepresented or withheld material facts relating to a relevant matter that induced or could induce an error in the administration of the IRPA. By re-litigating the matter, the vacation proceedings therefore constituted an abuse of process. As a result, the RPD erred in finding it had jurisdiction, and in not preventing the abuse of process.

In *Thambipillai*,<sup>139</sup> the Court found that the absence of counsel did not constitute a breach of natural justice or procedural fairness. The protected person had been properly notified of his right to counsel and was sent three notices to appear at the vacation hearing. In each notice, it specifically stated that the protected person had a right to be represented by counsel at his own expense. The protected person was asked at the beginning of the hearing if he intended to have counsel, and he stated that he did not and that he was ready to proceed. Since the protected person had ample opportunity to obtain and instruct counsel and failed to do so without any reasonable excuse, the absence of counsel did not amount to a denial of a fair hearing.

~ End ~

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<sup>137</sup> *Thambiturai*, *supra*, note 128.

<sup>138</sup> *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44; [2001] 2 S.C.R. 460 at para 20.

<sup>139</sup> *Thambipillai*, *supra*, note 116.

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# INTERPRETATION OF THE CONVENTION REFUGEE DEFINITION IN THE CASE LAW

# KEY POINTS

(Based on the March 31, 2019 paper)

Legal Services  
Immigration and Refugee Board of Canada  
March 31, 2019

## Chapter 2

### COUNTRY OF PERSECUTION

1. The claimant must establish that he or she is a Convention refugee from the country of his or her nationality (or the country of his former habitual residence, if the claimant is not recognized as a citizen of any country). Nationality means citizenship of a particular country. [section 2.1.]

*IRPA*, s. 96

*Canada (Attorney General) v. Ward*,  
[1993] 2 S.C.R. 689.

2. If a claimant is a national of more than one country, the claimant must show that he or she is a Convention refugee with respect to all such countries. [section 2.1.1.]

*IRPA*, s. 96

*Ward, supra.*

3. A claimant may be considered to be a national of a country where the evidence establishes that it is within his or her control to acquire the citizenship of a country: for example, where the application for citizenship is a mere formality and the authorities of that country do not have any discretion to refuse the application. [section 2.1.3.]

*Bouianova, Tatiana v. M.E.I.*  
(F.C.T.D., no. 92-T-1437), Rothstein, June 11, 1993.

*Williams v. Canada (Minister of Citizenship and Immigration)*,  
[2005] 3 F.C.R. 429 (F.C.A.); 2005 FCA 126.

*Tretsetsang, Chime v. M.C.I.*  
(F.C.A., no. A-260-15), Ryer, Webb, Rennie (dissenting), June 9, 2016; 2016 FCA 175.

4. There is conflicting case law of the Federal Court as to whether or not an adverse inference regarding credibility and/or subjective fear can be drawn from the failure to access possible protection or status in a third country, in cases where there is no automatic right to citizenship. [section 2.1.5.]
5. The concept “former habitual residence” is only relevant where the claimant is stateless, i.e. he or she does not have a country of nationality. [section 2.2.]
6. Former habitual residence implies a situation where a stateless person was admitted to a country with a view to enjoying a period of continuing residence of some duration. The claimant does not have to be legally able to return to a country of former habitual residence for it to be so described. The claimant must, however, have established a significant period of *de facto* residence in the country in question. [section 2.2.1.]

*Maarouf v. Canada (Minister of Employment and Immigration),*  
[1994] 1 F.C. 723 (T.D.).

7. Where the stateless claimant has more than one country of former habitual residence, he or she must show that, on a balance of probabilities there is a serious possibility of persecution in any country of former habitual residence, and that he or she cannot return to any of his or her other countries of former habitual residence. This test may be termed “any country plus the *Ward* factor”. [section 2.2.2.]

*Thabet v. Canada (Minister of Citizenship and Immigration),*  
[1998] 4 F.C. 21 (C.A.).

8. Statelessness *per se* does not give rise to a claim to refugee status: the claimant must demonstrate a well-founded fear of persecution based on a Convention ground. [section 2.2.4.]

*Arafa v. Canada (Minister of Employment and Immigration),*  
(F.C.T.D., no. A-663-92)

9. A denial of a right to return may constitute an act of persecution by the state; however, for it to be the basis of a claim, the refusal must be based on a Convention ground. [section 2.2.5.]

*Maarouf, supra*

10. According to paragraph 101 of the UNHCR Handbook, stateless claimants need not avail themselves of state protection since there is no duty on the state to provide protection. The decisions of the Federal Court on this topic are not consistent. [section 2.2.6.]



## Chapter 3

### PERSECUTION

1. To be considered persecution, the mistreatment suffered or anticipated must be serious, i.e., it must constitute a key denial of a core human right. [section 3.1.1.1.]

*Canada (Attorney General) v. Ward*,  
[1993] 2 S.C.R. 689.

*Chan v. Canada (Minister of Employment and Immigration)*,  
[1995] 3 S.C.R. 593 (dissenting opinion).

2. What constitutes a basic human right is determined by the international community, not by any one country. At the same time, in determining whether anticipated actions would constitute fundamental violations of basic human rights, it is acceptable to consider Canadian law. [section 3.1.1.1.]

*Chan, supra.*

3. The second criterion is that, generally, the mistreatment must be repetitive and persistent, or systematic. However, there should not be an exaggerated emphasis on the need for repetition and persistence. The RPD should analyze the quality of incidents in terms of whether they constitute “a fundamental violation of human dignity.” [section 3.1.1.2. ]

*Rajudeen, Zahirdeen v. M.E.I.*  
(F.C.A., no. A-1779-83), Heald, Hugessen, Stone, July 4, 1984.

*Ranjha, Muhammad Zulfiq v. M.C.I.*  
(F.C.T.D., no. IMM-5566-01), Lemieux, May 21, 2003; 2003 FCT 637.

4. For the claim to succeed, the persecution must be linked to a Convention ground, in other words, there must be a nexus. [section 3.1.1.3.]

*Ward, supra*

5. While most acts of persecution can be characterized as criminal, not all criminal acts constitute persecution. [section 3.1.1.4.]

*Cortez, Delmy Isabel v. S.S.C.*  
(F.C.T.D., no. IMM-2482-93), McKeown, December 15, 1993.

6. It is not necessary, in order for persecution to exist, that the perpetrators of the harm belong to a certain category or hold a certain kind of position. In particular, persecution may exist even if state authorities are neither the immediate inflictors of the harm, nor complicit in the infliction. [section 3.1.1.5.]

*Ward, supra;*

*Chan, supra.*

7. The claimant may be subject to a number of discriminatory or harassing acts. While these acts may individually not be serious enough to constitute persecution, they may cumulatively amount to persecution. [section 3.1.2.]

*Madelat, Firouzeh v. M.E.I., Mirzabeglui, Maryam v. M.E.I.*  
(F.C.A., nos. A-537-89 and A-538-89),  
MacGuigan, Mahoney, Linden, January 28, 1991.

## Chapter 4

### GROUNDS OF PERSECUTION

1. A claimant's fear of persecution must be by reason of one of the five grounds enumerated in the definition of Convention refugee - race, religion, nationality, membership in a particular social group and political opinion. There must be a link between the fear of persecution and one of the five grounds. [section 4.1.]

*Canada (Attorney General) v. Ward*,  
[1993] 2 S.C.R. 689.

2. When determining the applicable grounds, the relevant consideration is the perception of the persecutor. This perception need not necessarily conform to the claimant's true beliefs. [section 4.1.]

*Ward, supra.*

3. Claimants cannot be asked to renounce their deeply held beliefs or refrain from exercising their fundamental rights to avoid persecution and as a price to live in security. [section 4.1.]

*Gur, Irem v. M.C.I.*  
(F.C., no. IMM-6294-11), de Montigny, August 14, 2012; 2012 FC 992

*Colmenares, Jimmy Sinohe Pimentel v. M.C.I.*  
(F.C., no. IMM-5417-05), Barnes, June 14, 2006, 2006 FC 749

4. Freedom of religion includes the right to manifest the religion in public, or private, in teaching, practices, worship and observance. [section 4.4.]

*Fosu, Monsieur Kwaku v. M.E.I.*  
(F.C.T.D., no. A-35-93), Denault, November 16, 1994.

5. The meaning assigned to "particular social group" should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for international refugee protection. [section 4.5.]

*Ward, supra.*

6. As a working rule to achieve the above result, the Supreme Court of Canada in *Ward* identified three possible categories of particular social groups:

- (i) Groups defined by an innate or unchangeable characteristic;
- (ii) Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and

- (iii) Groups associated by a former voluntary status, unalterable due to its historic permanence. [section 4.5.]

*Ward, supra.*

7. A particular social group cannot be defined solely by the fact that a group of persons are objects of persecution, since the Convention refugee definition requires that the persecution be “by reason of” one of the grounds. [section 4.5.]

*Ward, supra.*

8. In the context of the Convention refugee definition, political opinion is any opinion on any matter in which the machinery of state, government and policy may be engaged; however this does not mean that only political opinions regarding the state will be relevant. [section 4.6.]

*Ward, supra.*

*Klinko v. Canada (Minister of Citizenship and Immigration),*  
[2000] 3 F.C. 327 (C.A.)

9. The political opinion at issue need not have been expressed outright, it can be perceived or imputed. As well, it need not necessarily conform to the claimant’s true beliefs. What is relevant is the perception of the persecutor. A victim of politically motivated persecution is not required to abandon his commitment to political activism in order to live safely in his country. [section 4.6.]

*Ward, supra.*

*Colmenares, Jimmy Sinohe Pimentel v. M.C.I.*  
(F.C., no. IMM-5417-05), Barnes, June 14, 2006; 2006 FC 749.

10. Victims of crime, corruption or vendettas may, in certain circumstances, establish a link between their fear of persecution and one of the five grounds in the definition. A link to political opinion will be established if the actual or perceived expression of the opinion involves matters in which the machinery of the state may be engaged. [section 4.7.]

*Ward, supra;*

*Klinko, supra.*

11. The making of a public complaint about widespread corrupt conduct by government officials to a government authority, and thereafter, the complainant suffering persecution on this account, when the corrupt conduct is not officially sanctioned, condoned or supported by the state, constitutes an expression of political opinion and therefore there is nexus to a Convention refugee ground. However, an opinion

expressed in opposition to a criminal organization will not provide a nexus on the basis of political opinion unless the disagreement is rooted in political conviction. [section 4.7.]

*Ward, supra;*

*Klinko, supra.*

12. Rape and other forms of sexual violence are crimes grounded in the status of women in society and can provide a basis for a claim based on the ground of particular social group.

*Dezameau, Elmancia v. M.C.I.*  
(F.C. no., IMM-4396-09), Pinard, May 27, 2010; 2010 FC 559.

*Josile, Duleine v. M.C.I.*  
(F.C., no. IMM-3623-10, Martineau, January 17, 2011; 2011 FC 39.

## Chapter 5

### WELL-FOUNDED FEAR

1. The definition of Convention refugee is forward-looking, that is, the inquiry concerns what might happen to a claimant if he or she were to return to their country of origin. [section 5.1.]
2. The claimant does not have to establish that he or she was persecuted in the past or that he or she would or will be persecuted in the future. [section 5.1.]

*Salibian v. Canada (Minister of Employment and Immigration)*,  
[1990] 3 F.C. 250 (C.A.).

3. Claimants must establish their case on a balance of probabilities, but this does not mean they have to prove that persecution (on return) would be more likely than not. What they have to establish is that there are “good grounds” for fearing persecution. This may also be stated as a “reasonable” or even a “serious possibility” as opposed to a mere possibility that the claimant would be persecuted if returned to the country of origin. [section 5.2.] The test, which has become known as the “Adjei test”, asks the following question: is there a reasonable chance that persecution would take place if the claimant returned to his or her country of origin?

*Adjei v. Canada (Minister of Employment and Immigration)*,  
[1989] 2 F.C. 680 (C.A.).

4. The “standard of proof” and the “legal test to be met” must not be confused. The standard of proof refers to the standard the panel will apply in assessing the evidence adduced for the purpose of making factual findings, whereas the legal test is the test that is required to establish the refugee claim is well founded. [section 5.2.]

*Li, Yi Mei v. M.C.I.* (F.C.A., no. A-31-04),  
Rothstein, Noël, Malone, January 5, 2005; 2005 FCA 1.

5. A claimant’s subjective fear of persecution must have an objective basis. The subjective fear relates to the existence of a fear of persecution in the mind of the claimant. The objective basis requires that there be a valid basis for this fear. [section 5.3.]

*Rajudeen, Zahirdeen v. M.C.I.* (F.C.A., no. A-1779-83),  
Heald, Hugessen, Stone, July 4, 1984.

6. The assessment of whether a claimant has a subjective fear is inter-twined with an assessment of the claimant’s credibility and it often relates to some behaviours which are considered to be inconsistent with such a fear. These behaviours include: [section 5.3.1.; 5.4.]

- delay in leaving the country of origin; [section 5.4.1.]

- failure to seek protection in other countries *en route* to Canada; [section 5.4.2.]
  - delay in making a claim upon arrival in Canada; [section 5.4.3.]
  - returning to the country of alleged persecution (re-avilment); [section 5.5.] and
  - self-endangering actions after making a claim. [section 5.6.]
7. Generally, delay in making a claim for refugee protection or in leaving the country of persecution is not in itself a decisive factor, however it is a relevant and potentially important consideration. [section. 5.4.]

*Huerta, Martha Laura Sanchez v. M.E.I.*  
(F.C.A., no. A-448-91), Hugessen, Desjardins, Létourneau, March 17, 1993.

8. Delay may constitute sufficient grounds upon which to reject a claim where the delay is inordinate and there is no satisfactory explanation for it. [section 5.4.]

*Velez, Liliana v. M.C.I.*  
(F.C. no. IMM-5660-09), Crampton, September 15, 2010; 2010 FC 923.

9. The claimant's explanations for the behaviours that are inconsistent with a fear of persecution must be considered and assessed carefully. Decision-makers must express clearly their findings on the credibility of a claimant's explanation for behaving in a particular manner.

*Beltran, Luis Fernando Berrio v. M.C.I.*  
(F.C.T.D., no. IMM-829-96), Dubé, October 29, 1996.

## Chapter 6

### PROTECTION

1. The responsibility to provide international protection only becomes engaged when national or state protection is unavailable to the claimant (international protection is surrogate). [section 6.1.1.]

*Canada (Attorney General) v. Ward*,  
[1993] 2 S.C.R. 689.

2. State protection cannot be considered in a vacuum. The RPD must consider many factors, including:
  - a. The nature of the human rights violation;
  - b. The profile of the alleged human rights abuser;
  - c. The efforts that the victim took to seek protection from authorities;
  - d. The response of the authorities to requests for their assistance, and
  - e. The available documentary evidence.

*Gonzalez Torres, Luis Felipe v. M.C.I.*  
(F.C., no. IMM-1351-09), Zinn, March 1, 2010; 2010 F.C. 234.

3. In the case of multiple nationalities (citizenship), the claimant is expected to avail him or herself of the protection of all the countries of citizenship. [section 6.1.2.]

*Ward, supra.*

4. The availability of national protection forms part of the analysis of whether the claimant's fear is well founded. [section 6.1.3.]

*Ward, supra.*

5. Two presumptions are at play in refugee determination: (a) if the fear of persecution is credible (legitimate) and there is an absence of state protection, one can presume that persecution will be likely and the fear well founded; (b) absent a complete breakdown of state apparatus, states are presumed to be capable of protecting their citizens. [section 6.1.5.]

*Ward, supra*

6. The presumption of state protection applies equally to cases where the state is alleged to be the agent of persecution.

*Hinzman, Jeremy v. M.C.I. and Hughey, Brandon David v. M.C.I.*  
(F.C.A, no. A-182-06; A-185-06). Décar, Sexton, Evans, April 30, 2007; 2007 FCA 171



7. A refugee who claims that the state protection is inadequate or non-existent bears the evidentiary burden of adducing evidence to that effect and the legal burden of persuading the trier of fact that his or her claim in this respect is founded. The standard of proof applicable is the balance of probabilities. The presumption of state protection is rebutted by clear and convincing evidence. [section 6.1.7.]

*Flores Carrillo: M.C.I. v. Flores Carrillo, Maria del Rosario*  
(F.C.A., no. A-225-07), Letourneau, Nadon, Sharlow, March 12, 2008; 2008 FCA 94.

*Ward, supra.*

8. The claimant must approach his or her state for protection, if state protection might reasonably be forthcoming. [sections 6.1.1. and 6.1.7.1.]

*Ward, supra.*

9. Simply asserting a subjective belief that state protection is not available is not enough to rebut the presumption. [section 6.1.]

*M.C.I. v. Olah, Bernadett*  
(F.C.T.D., no. IMM-2763-01), McKeown, May 24, 2002; 2002 FCT 595.

10. Control of the claimant's country may be divided – geographically or otherwise – among several *de facto* authorities. Protection from any one of these authorities, or from a combination of them, will suffice. [section 6.1.7.1.1.]

*Zalzali v. Canada (Minister of Employment and Immigration)*,  
[1991] 3 F.C. 605 (C.A.).

11. A guarantee of protection for all citizens at all times is not to be expected. Nor is perfect protection. Where a state is in effective control of its territory, has military, police and civil authority in place and makes serious efforts to protect its citizens, the mere fact that it is not always successful will not justify a claim that the state is not providing protection. [section 6.1.7.3.2.]

*M.E.I. v. Villafranca, Ignacio*  
(F.C.A., no. A-69-90), Hugessen, Marceau, Décary, December 18, 1992.

12. Protection that is adequate is protection that works at the operational level. Each case will turn on its own facts. [section 6.1.7.3.2.]

*Mudrak, Zsolt Jozsef v. M.C.I.*  
(F.C.A., no. A-147-15), Stratas, Webb, Scott, June 14, 2016; 2016 FCA 178.

13. The more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her. However, democracy alone does not guarantee effective state protection and there must be an assessment of the quality of the institutions that provide state protection. [section 6.1.7.3.1.]

*M.C.I. v. Kadenko, Ninal*  
(F.C.A., no. A-388-95), Hugessen, Décary, Chevalier, October 15, 1996.

*Katwaru, Shivanand Kumar v. M.C.I.*  
(F.C., no. IMM-3368-06), Teitelbaum, June 8, 2007; 2007 FC 612.

14. Protection must be from the state, not from non-state sources. The availability of protection from non-state sources may be relevant to the issue of the objective basis for the claim. State-funded agencies are part and parcel of the protection network. When the Board considers alternative avenues of recourse, it should explain how these alternatives will result in adequate state protection for the claimant. [section 6.1.8.]

*Flores Zepeda, Rosario Adriana v. M.C.I.*  
(F.C., no. IMM-3452-07), Tremblay-Lamer, April 16, 2008

15. While paragraph 101 of the UNHCR Handbook states that stateless claimants need not avail themselves of state protection since there is no duty on the state to provide protection to non-citizens, Federal Court jurisprudence provides that the presumption of state protection applies to stateless individuals. [section 6.2.]

*Popov, Alexander v. M.C.I.*  
(F.C., no. IMM-841-09), Beaudry, September 10, 2009; 2009 FC 898

*Khatrr, Amani Khzaee v. M.C.I.*  
(F.C., no. IMM-3249-15), Zinn, March 22, 2016; 2016 FC 341.

## Chapter 7

### CHANGE OF CIRCUMSTANCES, COMPELLING REASONS AND *SUR PLACE* CLAIMS

1. A change in country conditions (or in the personal circumstances of the claimant) is relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant would be persecuted in the event of return to his or her country of origin. [section 7.1.]

*Yusuf, Sofia Mohamed v. M.E.I.*  
(F.C.A., no. A-130-92), Hugessen, Strayer, Décary, January 9, 1995.

2. The assessment of whether there are “changed circumstances” in a country is a factual determination. The key consideration is whether the changes are effective and durable, as opposed to merely transitory, and what, if any bearing, these changes have on a claimant’s specific situation. [section 7.1.1.]

*Yusuf, supra.*

3. Whether a change of circumstances is sufficient for a fear of persecution to be no longer well founded must be determined in relation to the basis of the particular claim. [section 7.1.1.]

*Rahman, Faizur v. M.E.I.*  
(F.C.A., no. A-1244-91), Marceau, Desjardins, Létourneau, May 14, 1993.

4. If a change in circumstances is to be relied on to make a decision in the case, fairness would seem to require that notice should be given to the claimant and it is probably sufficient if “objective basis” is identified as an issue. [section 7.1.]
5. There is no obligation on the Refugee Protection Division to consider post-hearing evidence relating to changes in country conditions unless that evidence has been accepted by the panel before the panel renders a final decision on the claim. The Refugee Protection Division may, on its own motion, provide additional documents and reconvene a hearing into a claim that has not been concluded with a final decision to hear evidence relating to changes in country conditions. [section 7.1.3.]
6. The issue of compelling reasons, the exception found in section 108(4) of IRPA (section 2(3) of the former *Immigration Act*) applies only where the claimant had a well-founded fear of persecution when he or she left his or her country of nationality and the reasons for the fear of persecution have ceased to exist. The RPD is not required to consider whether past persecution constitutes compelling reasons where it determines that the claimant was not a Convention refugee at the time of departure from the country of nationality.

*Cihal, Pavla v. M.C.I.*  
(F.C.A., A-54-97), Stone, Evans, Malone, May 4, 2000

7. The jurisprudence that developed with respect to section 2(3) of the *Immigration Act* may be used as guidance in the interpretation of section 108(4) of the IRPA.
8. In applying sections 96 and 97 of the *Immigration and Refugee Protection Act*, the compelling reasons exception only applies when there has been a determination that the person was a Convention refugee or a person in need of protection, and also that the conditions that led to that finding no longer exist. However, for section 108(4) to apply, there is no requirement that refugee protection has actually been conferred. [section 7.2.1.]

*Cihal, supra.*

9. In order for the “compelling reasons” exception to apply the claimant does not need to show a subsisting well-founded fear of persecution or an ongoing subjective fear of persecution. However, the claimant must first establish that he or she, at some point, would have met the definition of Convention refugee or person in need of protection.

*Canada (Minister of Employment and Immigration v. Obstoj*,  
[1992] 2 F.C. 739 (C.A.)

*Najdat, Parviz v. M.C.I.*  
(F.C., no. IMM-3995-05), Russell, March 9, 2006; 2006 FC 302.

10. In every case in which the RPD concludes that a claimant has suffered past persecution, but there has been a change of country conditions under section 108(1)(e) of IRPA (section 2(2)(e) of the *Immigration Act*), the RPD is obligated to consider whether the evidence presented establishes that there are “compelling reasons”. This obligation arises whether or not the claimant expressly invokes the exception. The evidentiary burden rests on the claimant to adduce the necessary evidence to establish entitlement to the benefit of the “compelling reasons” provision.

*M.C.I. v. Yamba, Yamba Odette Wa*  
(F.C.A., no. A-686-98), Isaac, Robertson, Sexton, April, 6, 2000.

11. It follows that where the RPD does not find that the claimant has suffered past persecution, or finds the claimant’s factual evidence not credible, or finds the claimant would have had an internal flight alternative (IFA), the compelling reasons exception does not apply and the RPD is under no obligation to consider the issue. [section 7.2.2].
12. A claimant will be entitled to Convention refugee status based on compelling reasons if he or she has suffered such appalling past persecution that their experience alone is compelling reason not to return the claimant, even though he or she may not have any reason to fear further persecution. [section 7.2.3.]

*Obstoj, supra.*

13. The case law indicates that the threshold necessary to demonstrate “compelling reasons” is a high one. The provision applies to extraordinary cases in which the

persecution is relatively so exceptional, that even in the wake of changed circumstances, it would be wrong to return refugee claimants.

*Hassan, Nimo Ali v. M.E.I.*  
(F.C.T.D., no. A-653-92), Rothstein, May 4, 1994.

14. While the delineation of the concept of “compelling reasons” is a question of law, the issue of whether “compelling reasons” exist in a given case is a question of fact. [section 7.2.3.]
15. The level or severity of the harm required has been the subject of varying approaches in the jurisprudence. At one extreme is the *Obstoj* approach which imposes the atrocious and appalling threshold and at the other is *Suleiman* which calls for a consideration of the totality of the situation. [section 7.2.5.]

*Obstoj, supra.*

*Suleiman, Jama Khamis v. M.C.I.*, 2004 FC 1125

16. Past acts of torture and extreme acts of mental abuse, alone, in view of their gravity and seriousness, can be considered “compelling reasons” despite the fact that these acts have occurred many years before. [section 7.2.5.]

*Suleiman, supra.*

17. Evidence of continuing psychological after-effects is relevant to a determination of the issue but is not a separate requirement that has to be met. [section 7.2.6]

*Mwaura, Anne v. M.C.I.*  
(F.C., no. IMM-7462-14), Brown, July 16, 2015; 2015 FC 874.

18. There is conflicting case law from the Federal Court as to whether persecution of a family member can of itself be sufficient to constitute compelling reasons. [section 7.2.7.]
19. A claimant may be a Convention refugee as a consequence of events which have occurred in his or her country of origin since his or her departure or as a result of activities of the claimant since leaving his or her country. In these circumstances, the claimant is said to have a *sur place* claim. [section 7.3.]
20. A key issues in *sur place* claims is whether the claimant’s actions or activities since leaving his or her country have come to the attention of the authorities of the claimant’s country of origin and how they are likely to be viewed by those authorities. While it is relevant to examine the motives underlying a claimant’s participation in activities against his government in Canada in order to determine the claimant’s subjective fear, it would be an error for the RPD to stop the analysis there as it is also necessary to examine whether or not the fear has an objective basis. Even if the motives are not genuine, the consequential imputation of religious or political beliefs to the claimant

by the authorities of their country may be sufficient to bring the claimant within the scope of the Convention refugee definition. [section 7.3.1.]

*Asfaw, Napoleon v. M.C.I.*  
(F.C.T.D., no. IMM-5552-99), Hugessen, July 18, 2000.

*Ejtehadian, Mostafa v. M.C.I.*  
(F.C., no. IMM-2930-06), Blanchard, February 12, 2007; 2007 FC 158.

21. Evidence of political activities in Canada should be considered by the panel whether or not the claimant specifically raises a *sur place* claim. [section 7.3.1.]

## Chapter 8

### INTERNAL FLIGHT ALTERNATIVE (IFA)

1. IFA arises when a claimant who has a well-founded fear of persecution in his or her home area of the country is not a Convention refugee because he or she has an internal flight alternative elsewhere in that country. [section 8.1.]

*Rasaratnam v. Canada (Minister of Employment and Immigration),*  
[1992] 1 F.C. 706 (C.A.).

2. The test to be applied in determining whether there is an IFA is two-pronged:

- (i) “...the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists.”
- (ii) Conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for him to seek refuge there. [section 8.1.]

*Rasaratnam, supra.*

3. To satisfy the notice requirement, the issue of IFA must be raised by the RPD or the Minister before or during the hearing. Once the issue is raised, the onus is on the claimant to show that he or she does not have an IFA. [section 8.2.]
4. There is some debate as to whether a specific location or region must be identified as the potential IFA, but more recent case law suggests that the RPD must identify the specific IFA location. [section 8.2.]
5. The second prong of the IFA test may be stated as follows: would it be unduly harsh to expect the claimant to move to another, less hostile part of the country before seeking refugee status abroad? *Thirunavukkarasu* sets a very high threshold for the “unreasonable test”. The hardship associated with dislocation and relocation is not the kind of undue hardship that renders an IFA unreasonable. There is a distinction between the reasonableness of an IFA and humanitarian and compassionate considerations. [section 8.3.2.]

*Thirunavukkarasu v. Canada (Minister of Employment and Immigration),*  
[1994] 1 F.C. 589 (C.A.).

*Ranganathan v. Canada (Minister of Citizenship and Immigration),*  
[2001] 2 F.C. 164 (C.A.).

6. The claimant cannot be required to encounter great physical danger or undergo undue hardship in travelling to the IFA or staying there.

*Thirunavukkarasu, supra*

7. Nor is a claimant required to personally test the viability of an IFA before seeking protection in Canada.  
[section 8.3.2.]

*Ramirez Martinez, Jorge Armando v. M.C.I.*  
(F.C., no. IMM-1284-09), Snider, June 1, 2010; 2010 FC 600



## Chapter 9

### PARTICULAR SITUATIONS

#### I. Civil war

1. The claimant is not barred from being considered a Convention refugee by the mere fact that the circumstances which he or she relies upon derive from, or are related to, a civil war. Equally, the mere fact that a civil war is underway in the claimant's country of origin, or that the claimant has a fear related to the civil war, is not sufficient to make the claimant a Convention refugee. [section 9.2.]

*Salibian v. Canada (Minister of Employment and Immigration)*,  
[1990] 3 F.C. 250 (C.A.);

IRB Chairperson's Guidelines,  
"Civilian Non-Combatants Fearing Persecution in Civil War Situations",  
March 7, 1996 (as continued under s. 159(1)(h) of IRPA).

2. Refugee claimants must establish a link between themselves and persecution for a Convention reason; they must be targeted for persecution in some way, either personally or collectively. [section 9.2.]

*Rizkallah, Bader Fouad v. M.E.I.*  
(F.C.A., no. A-606-90), Marceau, MacGuigan, Desjardins, May 6, 1992.

3. The issue is not a comparison between the claimant's risk and the risk faced by other individuals or groups at risk for a Convention reason, but whether the claimant's risk is a risk of sufficiently serious harm and is linked to a Convention reason as opposed to the general, indiscriminate consequences of civil war. If one of the warring parties singles out a person or group of persons for reasons of race, political opinion or one of the other elements enumerated in the refugee definition and subjects the person or group to serious human rights violations, this clearly constitutes persecution. [section 9.2.1.2.]

IRB Chairperson's Guidelines,  
"Civilian Non-Combatants Fearing Persecution in Civil War Situations",  
March 7, 1996; (as continued under s. 159(1)(h) of IRPA).

*Ali, Shaysta-Ameer v. M.C.I.*  
(F.C.A., no. A-772-96), Décary, Stone, Strayer, January 12, 1999.

*Fi, Saleh Omar Osama v. M.C.I.*  
(F.C., no. IMM-2091-06), Martineau, September 19, 2006; 2006 FC 1125.

## II. Persecution vs. prosecution

1. The issue is to distinguish between a situation where a claimant has violated a law of general application and what he or she fears is prosecution and punishment for that violation and a situation where the violation relates to a law which is persecutory in either its application or its punishment. [section 9.3.1.]
2. As to whether there would be a nexus between application of the law to the claimant and a Convention ground, the following propositions are relevant:
  - (i) A presumption of neutrality attaches to any law of general application. The onus is on the claimant to show that there is adverse differentiation.
  - (ii) The law may be inherently non-neutral. The neutrality of the law is to be judged objectively.
  - (iii) It is the intent and any principal effect of the law of general application which must be considered, not the claimant's motivation. If either the intent or a principal effect is to harm the rights of some person or category, then the law is not neutral. [section 9.3.2.]

*Zolfagharkhani v. Canada (Minister of Employment and Immigration),*  
[1993] 3 F.C. 540 (C.A.).

3. Regarding the seriousness of harm, the following must be considered:
  - Is the penalty disproportionate to either the objective of the law or the offence?
  - The means by which the law is enforced. "Brutality in furtherance of a legitimate end is still brutality."
  - Is the prosecution and enforcement of the law within legal bounds?

[section 9.3.2.]

*Cheung v. Canada (Minister of Employment and Immigration),*  
[1993] 2 F.C. 314 (C.A.);

*Chan v. Canada (Minister of Employment and Immigration),*  
[1995] 3 S.C.R. 593 (per La Forest J. (dissenting))

4. Certain emergency situations such as those which threaten national security or terrorism, may allow states to institute measures which, while violative of certain civil rights, may not amount to persecution. However, certain types of violations such as beatings and torture of suspects or other brutal treatment will more appropriately be termed persecution. [section 9.3.3.]

*Cheung, supra;*

*Thirunavukkarasu, supra.*

### III. Exit laws

1. A person who, having been subjected to no persecution in the past, violates an exit law applicable to all citizens and thereby exposes him or herself to punishment for the violation, is not a Convention refugee. [section 9.3.5.]

*Valentin v. Canada (Minister of Employment and Immigration),*  
[1991] 3 F.C. 390 (C.A.).

2. Repercussions beyond the statutory sentence may suggest that the actions of the authorities are persecutory. [section 9.3.5.]

### IV. Military service

1. It is not persecution for a country to have compulsory military service.  
[section 9.3.6.]

*Popov, Leonid Anatolievich v. M.E.I.*  
(F.C.T.D., no. IMM-2567-93), Reed, April 11, 1994.

2. An aversion to military service or a fear of combat is not in itself sufficient to support a well-founded fear of persecution. [section 9.3.6.]

*Garcia, Marvin Balmory Salvador v. S.S.C.*  
(F.C.T.D., no. IMM-2521-93), Pinard, February 4, 1994.

3. The *Zolfagharkhani* principles relating to laws of general application (noted above) apply to military-service situations. [sections 9.3.2. and 9.3.6]

*Zolfagharkhani, supra.*

4. Where the claimant invokes reasons of conscience for objecting to military service, it is necessary to determine whether the particular reasons are genuine and of sufficient significance. [section 9.3.6.]
5. The Federal Court of Appeal in *Ates* answered the following certified question in the negative, without any analysis:

In a country where military service is compulsory, and there is no alternative thereto, do repeated prosecutions and incarcerations of a conscientious objector for the offence of refusing to do his military service, constitute persecution based on a Convention refugee ground?

*Ates, Erkan v. M.C.I.*  
(F.C.A., no. A-592-04), Linden, Nadon, Sharlow, October 5, 2005; 2005 FCA 322.

6. A claimant may object to serving in a particular conflict, or to the use of a particular category of weapon, rather than objecting to military service altogether, and may be found to be a Convention refugee if the military actions objected to are judged by the international community to be contrary to basic rules of human conduct. It is appropriate to consider paragraph 171 of the UNHCR Handbook to determine whether the war being waged is contrary to basic rules of human conduct. [section 9.3.6.]

*Zolfagharkhani, supra;*

*Ciric v. Canada (Minister of Employment and Immigration),*  
[1994] 2 F.C. 65 (T.D.).

*Hinzman, Jeremy v. M.C.I.*  
(F.C., no. IMM-2168-05), Mactavish, March 31, 2006; 2006 FC 420.

7. In determining whether the claimant would face serious harm for failing to serve in the military, one must consider whether the claimant might be able to perform alternative service or obtain an exemption from service. One must also consider the harshness of the actual penalty for refusing to serve. It is important to consider whether the claimant has pursued opportunities to obtain state protection in his or her country before asking for international protection. [section 9.3.6.]

*Hinzman and Hughey, Brandon David v. M.C.I.*  
(F.C.A., nos. A-182-06; A-185-06), Décary, Sexton, Evans, April 30, 2007;  
2007 FCA 171.

## V. One-child policy

1. The one-child policy was replaced in late 2015 with a two-child policy. It is unclear what sanctions are being used to enforce compliance. To the extent that similar restrictions and sanctions might be used, the law that has developed with respect to the one-child policy is still relevant.
2. Forced or strongly coerced sterilization constitutes persecution, whether the victim is a woman or a man. Forced abortion and the forced insertion of an IUD also constitute persecution. [section 9.3.7.]

*Cheung, supra;*

*Lai, Quang v. M.E.I.*  
(F.C.T.D., no. IMM-307-93), McKeown, May 20, 1994.

*M.C.I. v. Ye, Yanxia*  
(F.C., no. IMM-8797-12), Pinard, June 13, 2013; 2013 FC 634.

3. The applicable Convention grounds, depending on the circumstances of the case, may be membership in a particular social group, religion and/or political opinion. [sections 4.4., 4.5., 4.6. and 9.3.7.]

*Cheung, supra;*

*Chan (SCC, dissenting opinion), supra.*

## **VI. Religious or cultural mores**

### **1. Restrictions upon women.** [section 9.3.8.1.]

- (i) Restrictions imposed upon the dress and conduct of women may, in certain circumstances, constitute persecution. The breach of those restrictions may be perceived as political opinion but a claim may also be based on membership in a particular social group.
- (ii) Examples of gender-based persecution (based on religious or cultural mores) include female circumcision and being forced into a marriage.

### **2. Ahmadis from Pakistan.** [section 9.3.8.2.]

- (i) There is case law which says that the mere existence of the laws targeting Ahmadis does not give an Ahmadi claimant good grounds for fearing persecution; however, the point is not altogether free from doubt. Some of the factors that have been considered by the Courts are whether the claimant engaged or is likely to engage in any of the prohibited activities and the likelihood that the law will actually be enforced.
- (ii) On July 18, 2017, the IRB Chairperson identified as a Jurisprudential Guide (JG) a decision of the RAD. The JG states that the RPD is obligated to consider whether the treatment of Ahmadis in Pakistan constitutes persecution on the basis of religion. The JG also provides that the definition of religious persecution should not be restricted to physical harm. The JG further states that where the State is one of the leading agents of persecution and persecutory laws and measures exist throughout the country, the claimant cannot expect state protection or avail him or herself of an internal flight alternative.

RAD TB0-01837, Bosveld, May 8, 2017.

## **VII. Indirect Persecution and Family Unity**

1. Indirect persecution (a concept premised on the assumption that family members are likely to suffer great harm, such as loss of the victim's economic or social support, when their close relative is persecuted) does not constitute persecution within the definition of Convention refugee. For a claim to be successful there must be a personal

nexus between the claimant and the alleged persecution on one of the Convention grounds. In certain circumstances the nexus will be membership in the particular social group “family”. [section 9.4.]

*Pour-Shariati, Dolat v. M.E.I.*

(F.C.A., no. A-721-94), MacGuigan, Robertson, McDonald, June 10, 1997.

2. The concept of “family unity” (included in the UNHCR Handbook) has been rejected in Canadian law. This concept holds that if the directly-affected person meets the criteria in the definition, then family members may be recognized as Convention refugees even if they do not meet individually the definition’s criteria. However, “the family” as a particular social group is based on evidence of persecution of the family as a social group. The evidence must establish that by reason of membership in the family, individuals may themselves have a well-founded fear of persecution. [section 9.4.]

*M.C.I. v. Khan, Azmat Ali*

(F.C., no. IMM-7232-04), Gauthier, March 22, 2005; 2005 FC 398.

## Chapter 10

### EXCLUSION CLAUSES – ARTICLE 1E

#### I. Article 1E

1. The Convention refugee definition does not apply to a person who is recognized by the authorities of a country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country. Under section 98 of the *Immigration and Refugee Protection Act*, a person who is found to be excluded by Article 1E is neither a Convention refugee nor a person in need of protection, and cannot therefore be determined to be such a person in relation to any country. [section 10.1.]

Article 1 E of the *Convention Relating to the Status of Refugees*,  
Schedule to the *Immigration and Refugee Protection Act* (formerly the *Immigration Act*)

*M.C.I. v. Sartaj, Asif*  
(F.C., no. IMM-1998-05), O’Keefe, March 14, 2006; 2006 FC 324.

2. At a minimum, the claimant must be able to return to and remain in the putative Article 1E country before he or she may be excluded from the Convention refugee definition. [section 10.1.1.] This requirement is now qualified by the test set out in *Zeng* (see next point).

*M.C.I. v. Mahdi, Roon Abdikarim*  
(F.C.A., no. A-632-94), Pratte, MacGuigan, Robertson, December 1, 1995.

3. The test to be applied in Article 1E determinations is: considering all relevant factors to the date of the hearing:
    - i. Does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded.
    - ii. If the answer is no, did the claimant previously have such status and lost it, or had access to such status and failed to acquire it? If the answer is no, the claimant is not excluded.
    - iii. If the answer is yes, various factors must be considered and balanced, including (but not limited to),
      - (a) the reasons for the loss of status (voluntary or not),
      - (b) whether the claimant can return to the third country,
      - (c) the risk the claimant would face in the home country,
      - (d) Canada’s international obligations,
      - (e) Any other relevant factors.
- [section 10.1.1.]

*M.C.I. v. Zeng, Guanqiu*  
(F.C.A., no. A-275-09), Noël, Layden-Stevenson, Stratas, May 10, 2010; 2010 FCA 118.

4. If the claimant's status in the third country is tentative, Article 1E does not apply. [section 10.1.2.]

5. If the status in the third country is renewable, there is an onus on the claimant to renew it. The claimant must demonstrate why:

- their travel document cannot be renewed;
- their (destroyed or lost) residency card cannot be re-issued;
- a re-entry visa cannot be obtained;
- their residency status cannot be renewed.

[section 10.1.3.]

6. In determining whether the claimant enjoys the rights and obligations of a national, the following criteria are useful:

- (i) the right to return to the country of residence,
- (ii) the right to work freely without restrictions,
- (iii) the right to study, and
- (iv) full access to social services in the country of residence.

[section 1.1.4.]

*Shamlou, Pasha v. M.C.I.*

(F.C.T.D., no. IMM-4967-94), Teitelbaum, November 15, 1995.

7. It would appear that determinations under Article 1E do not necessarily involve the strict consideration of all factors regarding residency, as the analysis depends on the particular nature of the case at hand and the rights which normally accrue to citizens in the country of residence. A person need not possess rights that are identical in every respect to those of a national of the country. [section 10.1.4.]

*Juzbasevs, Rafaels v. M.C.I.*

(F.C.T.D., no. IMM-3415-00), McKeown March 30, 2001;

*Hamdan, Kadhom Abdul Hu v. M.C.I.*

(F.C.T.D., no. IMM-1346-96), Jerome, March 27, 1997.

8. A number of decisions of the Federal Court suggest that the RPD can determine whether the claimant has a well-founded fear of persecution for a Convention reason in the Article 1E country (or a risk to life or risk of cruel and unusual treatment or punishment or danger of torture) and whether state protection is available to the claimant in that country [section 10.1.5.]



## Chapter 11

### EXCLUSION CLAUSES – ARTICLE 1F

#### II. Article 1F

1. If there are “serious reasons for considering” that a claimant has committed an Article 1F crime (crime against peace, war crime, crime against humanity, serious non-political crime, act contrary to the purposes and principles of the United Nations), he or she is excluded from the Convention refugee definition.

Article 1 F of the *Convention Relating to the Status of Refugees*,  
Schedule to the *Immigration and Refugee Protection Act* (formerly the *Immigration Act*)

2. The standard of proof denoted by the phrase “serious reasons for considering” is a standard above mere suspicion but below beyond a reasonable doubt or the balance of probabilities. [section 11.1.1.]

*Ezokola v. Canada (Citizenship and Immigration)*,  
[2013] 2 S.C.R. 678; 2013 SCC 40

3. There is no requirement to balance the nature of the Article 1 F crime with the degree of persecution feared. [section 11.1.2.]

*Xie, Rou Lan v. M.C.I.*  
(F.C.A. no. A-422-03), Décary, Létourneau, Pelletier, June 30, 2004; 2004 FCA 250

#### Article 1F(a)

4. Article 1F(a) must be interpreted by reference to the international instruments that deal with these crimes, including the *Charter of the International Military Tribunal* and other international instruments concluded since its adoption. This would include the *Statute of the International Tribunal for Rwanda* and the *Statute of the International Tribunal for the Former Yugoslavia* as well as the *Rome Statute of the International Criminal Court*. [section 11.2.]

*Harb, Shahir v. M.C.I.*  
(F.C.A., no. A-309-02), Decary, Noël, Pelletier, January 27, 2003; 2003 FCA 39.

5. For a crime to be a crime against humanity, it must be committed in a widespread, systematic fashion either during a civil or international war or in times of peace. (section 11.2.3.)

*Sivakumar v. Canada (Minister of Employment and Immigration)*,  
[1994] 1 F.C. 433 (C.A.).

*Mugesera v. Canada (Minister of Citizenship and Immigration)*,  
[2005] 2 S.C.R. 100; 2005 SCC 40

6. A criminal act rises to the level of a crime against humanity where the following four elements are made out:
- (i) An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);
  - (ii) The act was committed as part of a widespread or systematic attack;
  - (iii) The attack was directed against any civilian population or any identifiable group of persons; and
  - (iv) The person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of the attack. [section 11.2.3.]

*Mugesera, supra*

7. In making a decision under Article 1 F(a), the Board must make clear findings of fact regarding: the specific crimes against humanity which the claimant is alleged to have committed; the acts committed by the immediate perpetrators; the claimant's knowledge of the acts; his or her sharing in the purpose of the acts, and whether the acts constitute crimes against humanity. [section 11.2.3.]
8. There may be circumstances where a claimant will successfully invoke certain defences, such as duress and superior orders, which absolve him or her from responsibility and thus the claimant will not be excluded from refugee status. [section 11.2.4.]
9. Where a claimant has not in a "physical" sense committed a crime, but has aided, instigated or counselled a perpetrator in the commission of a war crime or a crime against humanity, he or she may, as an accomplice, be held responsible for the crime and thus be subject to being excluded from refugee protection. An accomplice is as culpable as the principal perpetrator. [section 11.2.5.]

*Moreno v. Canada (Minister of Employment and Immigration),*  
(1994) 1 F.C. 298 (C.A.).

*Penate v. Canada (Minister of Employment and Immigration),*  
[1994] 2 F.C. 79 (T.D.)

10. The test for complicity in international crimes adopted by the Supreme Court of Canada is the "significant contribution test". The test is comprised of three components: 1) voluntary contribution; 2) significant contribution; and 3) knowing contribution. [section 11.2.5.1.]

*Ezokola, supra*

11. When determining whether a person’s conduct meets the test, the following non-exhaustive factors serve as a guide:

- size and nature of the organization;
- the part of the organization with which the claimant was most directly concerned;
- the claimant’s duties and activities;
- the claimant’s position or rank;
- the length of time with the organization;
- the method of recruitment and the opportunity to leave the organization;
- any viable defences.

*Ezokola, supra.*

### **Article 1F(b)**

12. Exclusion under Article 1F(b) is not restricted to fugitives of justice or punishment.

*Febles v. Canada (Minister of Citizenship and Immigration),*  
2014 SCC 68

13. The laying of charges, the entering of a conviction, or an extradition request are not pre-requisites to the application of the exclusion clause. As well, the completion of an imposed sentence, the current lack of dangerousness or post-crime expiation or rehabilitation are not bars to exclusion. [section 11.3.1.]

*Zrig v. Canada (Minister of Citizenship and Immigration)*  
[2003] 3 FC 761; 2003 FCA 178.

14. To determine whether a crime is “serious”, there must be an evaluation of the following factors:

- the elements of the crime,
- the mode of prosecution, (summary or indictment)
- the penalty prescribed,
- the facts, and
- the mitigating and aggravating circumstances underlying a conviction. [section 11.3.1.]

*Jayasekara v. Canada (Minister of Citizenship and Immigration)*  
[2009] 4 F.C.R. 164 (F.C.A.); 2008 FCA 404

15. While a potential sentence of 10 years or more if the crime had been committed in Canada creates a presumption of seriousness, the presumption is rebuttable. However,

the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner. [section 11.3.3.]

*Jayasekara, supra*

*Febles, supra*

16. A claimant can be excluded under Article 1F(b) for purely economic crimes. [section 11.3.1.]

*Xie v. Canada (Minister of Citizenship and Immigration)*,  
[2005] 1 F.C.R. 304; 2004 FCA 250

*Lai, Cheong Sing v. M.C.I.*  
(F.C.A., no. A-191-04), Malone, Richard, Sharlow, April 11, 2005; 2005 FCA 125

17. In order for a crime to be characterized as “political”, thus falling outside the ambit of Article 1F(b) (serious *non-political* crimes), both aspects of a two-pronged test must be satisfied:

- (i) the existence of a political disturbance related to a struggle to modify or abolish a government or government policy;
- (ii) a rational nexus between the crime committed and the accomplishment of the political objective sought. [section 10.3.4.]

In addition, the gravity of the crime must be proportionate to the degree of repressiveness of the regime in question.

*Gil v. Canada (Minister of Employment and Immigration)*,  
[1995] 1 F.C. 508 (C.A.).

18. A very serious crime may be accepted as “political” if the regime against which it is committed is repressive and offers no scope for freedom of expression and the peaceful change of government or government policy. [section 10.3.4.]

*Gil, supra.*

### **Article 1F(c)**

19. The purpose of Article 1 F(c) is to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war situation. [section 10.4.]

*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*,  
[1998] 1 S.C.R. 982.

20. The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations, then Article 1 F(c) will be applicable. [section 10.4.]

*Pushpanathan, supra.*

21. Two categories of acts fall within Article 1 F(c):

- (i) where a widely accepted international agreement or United Nations resolution declares that the commission of certain acts is contrary to the purposes and principles of the United Nations;
- (ii) those acts which a court is able, for itself, to characterize as serious, sustained and systematic violations of fundamental human rights constituting persecution. [section 10.4.]

*Pushpanathan, supra.*

22. The application of Article 1F(c) is not limited to persons in power. Non-state actors may fall within the provision. [section 10.4.]

*Pushpanathan, supra.*

### **Burden of Proof**

23. The burden of establishing that exclusion applies to a claimant falls on the government. However, since the RPD has sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, non-participation of the Minister does not preclude an exclusion finding. It is an error to restrict the Minister to question the claimant on matters dealing only with exclusion since section 170(e) of *IRPA* states that the Minister, as well as the claimant, must be given a reasonable opportunity to present evidence and question witnesses. [section 11.5.]

*Arica, Jose Domingo Malaga v. M.E.I.*  
(F.C.A., no. A-153-92), Stone, Robertson, McDonald, May 3, 1995.

*Atabaki: M.C.I. v. Atabaki, Roozbeh Kianpour*  
(F.C., no. IMM-1669-07, Lemieux, November 13, 2007; 2007 FC 1170.

## Chapter 12

### APPLICATIONS TO CEASE

1. Subsection 108(1) of the IRPA sets out five grounds for cessation of refugee protection:

**108 (1)** A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

- (a) the person has voluntarily reavailed themselves of the protection of their country of nationality;
- (b) the person has voluntarily reacquired their nationality;
- (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
- (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or
- (e) the reasons for which the person sought refugee protection have ceased to exist

...

#### Exception

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment

2. The Minister of Citizenship and Immigration may make an application to the RPD to declare a protected person's refugee status has ceased for any of the grounds listed in subsection 108(1). [section 12.4.1]

IRPA, subsection 108(2)

3. The burden of proof in an application to cease refugee status rests with the Minister on a balance of probabilities. [section 12.5.1]

*Li*, 2015 FC 459

4. The framework of analysis for paragraph 108(1)(a) – reavailment, - consists of three elements:

(a) voluntariness: the refugee must act voluntarily;

(b) intention: the refugee must intend by his action to re-avail himself of the protection of the country of his nationality;

(c) re-availment: the refugee must actually obtain such protection. [section 12.5.3]

5. When looking at whether or not the protected person had the intention to reavail, Canadian jurisprudence has applied the presumption found in paragraph 121 of the UNHCR Handbook:

If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality.

[section 12.5.3.2.2]

*Li, supra*

6. There is limited jurisprudence concerning the cessation grounds found in paragraphs (b), (c), and (d). Jurisprudence concerning paragraph (e) [change of circumstances], is discussed in chapter 7.
7. Future risk of persecution in the protected person's country of nationality is not relevant when examining cessation under paragraphs (a) to (d). [section 12.6.2]

*Balouche*, 2015 FC 765

8. The RPD may not consider humanitarian and compassionate grounds when deciding an application to cease. [section 12.6.3]

*Abadi*, 2016 FC 29

9. The RPD may have discretion regarding which ground of cessation to apply, regardless of the grounds raised by the Minister. This is important because the protected person only loses his or her permanent resident status and becomes inadmissible if an application to cease is granted under paragraphs (a) to (d), not (e). [section 12.6.1]

*Al-Obeidi*, 2015 FC 1041  
*Tung*, 2018 FC 1224

## Chapter 13

### APPLICATIONS TO VACATE A REFUGEE DECISION

1. Section 109 of the IRPA sets out the general framework for an application to vacate refugee protection as well as the effect of a decision to allow an application:

#### **Vacation of refugee protection**

**109(1)** The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

#### **Rejection of application**

**109(2)** The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

#### **Allowance of application**

**109(3)** If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

2. The Minister has the burden of proof on an application to vacate refugee status. Since the Minister is the one requesting that the status be vacated, it is the Minister's responsibility to prove this is justified. The standard of proof is on a balance of probabilities. [section 13.5]

*Begum*, 2005 FC 118

3. The approach to an application to vacate a decision granting refugee status involves two steps:

**First**, the RPD must find that the decision granting refugee protection was obtained as a result of a direct or indirect misrepresentation, or a withholding of material facts relating to a relevant matter; and

**Second**, the RPD should consider whether there remains sufficient evidence that was considered at the time of the positive determination to justify refugee protection and, if so, the RPD may reject the application to vacate, notwithstanding the misrepresentation.

[section 13.5.2]

*IRPA*, subsections 109(1) and (2)



4. With respect to the first branch of the test (whether or not the protected person made misrepresentations or withheld material facts at the determination hearing) the Minister and the protected person may adduce new evidence that was not before the RPD when it decided the refugee claim. [section 13.5.3]

*Coomaraswamy*, 2002 FCA 153

5. However, regarding what evidence is admissible for the purpose of the second branch of the test (whether there remains sufficient evidence on which a positive decision could have been based), the RPD must determine if the remaining untainted evidence, which was presented at the first hearing, would have been sufficient to support a positive decision. For this part of the analysis, neither the protected person nor the Minister may supplement the record from the first. [section 13.5.3]

*Coomaraswamy*, 2002 FCA 153  
*IRPA*, subsection 109(2)

6. In determining whether or not there was a misrepresentation at the time of the initial refugee status determination, the RPD must assess the credibility of the new evidence as well as, sometimes, reassess the credibility of the evidence considered at the first hearing. Therefore, the RPD may re-weigh the evidence which was presented to the original panel in light of the misrepresentations. [section 13.5.4.4]

*Naqvi*, 2004 FC 1605

7. Where the misrepresentation or withholding of a material fact relates to exclusion such that the protected person would have been excluded at the original determination, it is not necessary to proceed to the analysis under subsection 109(2). [section 13.5.5.2]

*Parvanta*, 2006 FC 1146  
*Omar*, 2016 FC 602