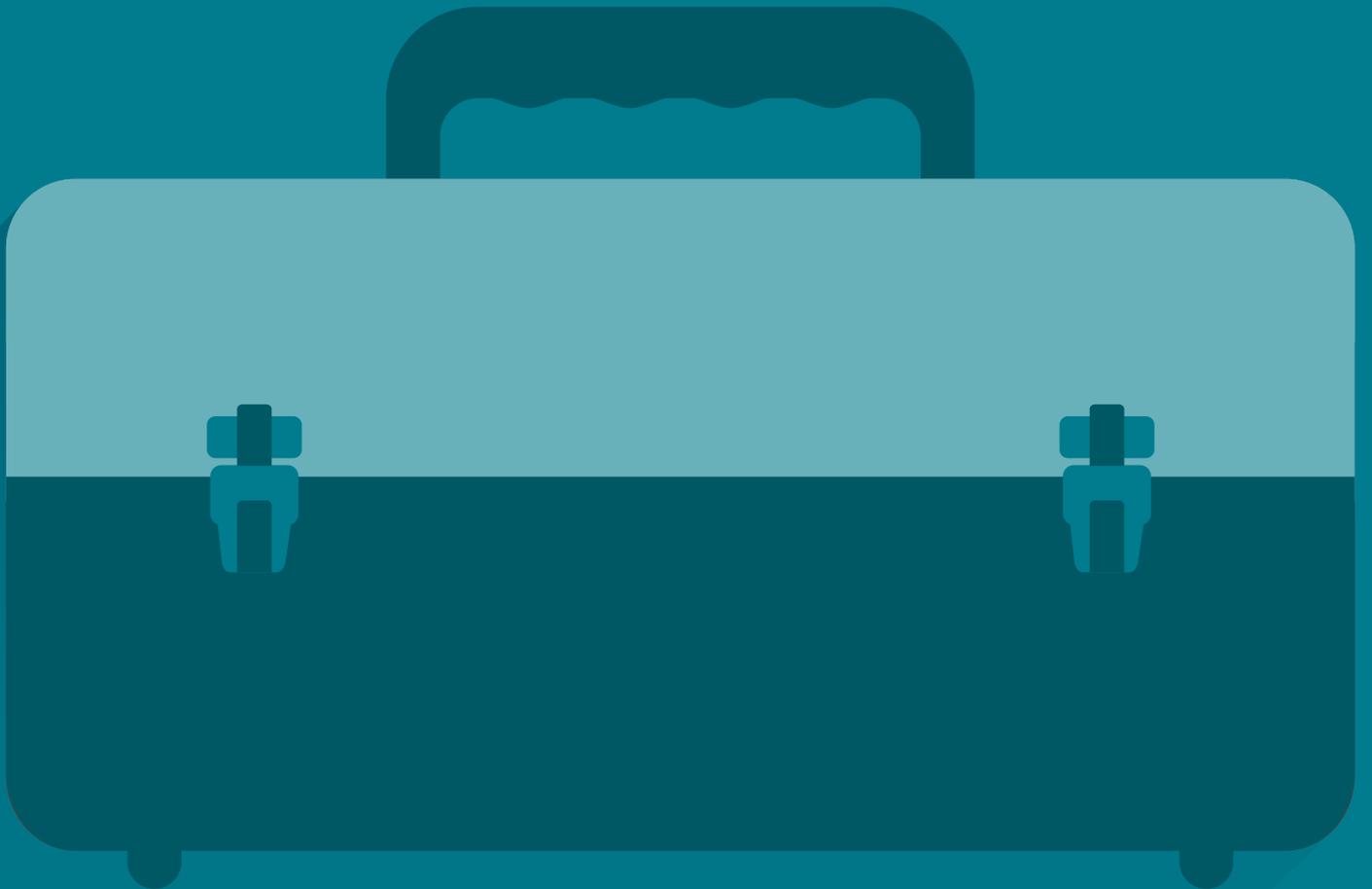




LEGAL AID ONTARIO  
AIDE JURIDIQUE ONTARIO

# Refugee case law toolkit: A starting place for practitioners



May 2017

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## 1.0 Acknowledgements

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LAO adapted the case law overview that Downtown Legal Services produced in 2011 into a *Merit Assessment Toolkit* in March 2015 with financial support from the *Osgoode Experiential Education Fund*. LAO then developed that toolkit into this resource.

## 2.0 Introduction

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This tool kit accompanies [LAO's Refugee lawyer practice manual](http://www.legalaid.on.ca/en/info/downloads/RefugeeLawyers_PracticeManual.pdf) (link: [http://www.legalaid.on.ca/en/info/downloads/RefugeeLawyers\\_PracticeManual.pdf](http://www.legalaid.on.ca/en/info/downloads/RefugeeLawyers_PracticeManual.pdf)).

It provides preliminary legal research to help legal professionals prepare for refugee hearings Pre-Removal Risk Assessments (PRRAs), and/or applications for leave and judicial review to Federal Court and appeals to the Refugee Appeal Division (RAD). It can help practitioners conduct their own case-specific research.

Part I provides an overview of common errors to watch for and answers the following questions:

- What are the legal issues in this claim or application?
- What are the legal issues and errors arising in the negative decision?

Part II examines legal topics and jurisprudence relevant to the task.

### 3.0 Acronym guide

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<b>Term</b>	<b>Acronym</b>
<b>Basis of claim</b>	BOC
<b>Designated country of origin</b>	DCO
<b>Immigration and Refugee Board</b>	IRB
<b>Immigration and Refugee Protection Act</b>	IRPA
<b>Internal flight alternative (safe refuge within one's own country)</b>	IFA
<b>Decision maker on the RAD or RPD</b>	Member
<b>Personal information form (predecessor to BOC)</b>	PIF
<b>Port of Entry claim</b>	POE claim
<b>Pre-Removal Risk Assessment</b>	PRRA
<b>Refugee Appeal Division</b>	RAD
<b>Refugee Protection Division</b>	RPD

## Part 1: Common errors to watch for

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The changes to the refugee determination system under the *Protecting Canada's Immigration System Act*, particularly the Act's vastly reduced timelines make it essential that practitioners quickly and thoroughly undertake preliminary research to support submissions to the RPD and review negative decisions.

Preparing effective legal submissions and analyzing negative decisions made by the Refugee Protection Division (RPD), Refugee Appeal Division (RAD) or a Pre-Removal Risk Assessment (PRRA) Officer requires effective drafting, sound analysis and timeliness.

### 4.0 Overview of the RPD, RAD and PRRA

The Federal Court or the RAD reviews negative decisions made by the RPD.

Only the Federal Court reviews decisions made by a PRRA Officer and the RAD.

#### 4.1 The Refugee Protection Division (RPD)

##### 4.1.1 What is it?

The Refugee Protection Division (RPD) is the division of the Immigration and Refugee Board (IRB) that hears and decides claims for refugee protection made in Canada. Refugee claimants can make these claims from inside Canada (inland claims) or upon arrival, as a Port of Entry (POE) claim.

##### 4.1.2 Who is eligible?

S. 101 (1) of IRPA sets out who is not eligible to be referred to the RPD. These include: (a) someone who already has refugee protection in Canada, (b) a refused claimant, (c) a claim that was ineligible, withdrawn or abandoned, (d) the person has been recognized as a Convention refugee by a country other than Canada, (e) the claimant came from a country designated by the regulations, i.e. the *Safe Third Country Agreement* with the U.S., though certain individuals are exempt from the agreement under s. 159.3 – s. 159.5 of the *Regulations*, including:

- family member exceptions
- unaccompanied minors exceptions

- document holder exceptions and
- public interest exceptions.

Section 101(1)(f) creates a final ground of ineligibility for those who are inadmissible to Canada for security, violating human or international rights, serious or organized criminality, except for persons inadmissible solely on para 35(1)(c) grounds.

Section 101(2) qualifies the application of s. 101(1)(f) in respect of those who are inadmissible for serious criminality. In short, serious criminality will lead to ineligibility at the Refugee Protection Division only for those convictions in Canada punishable by a maximum term of imprisonment of at least 10 years; or for foreign convictions, those that, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of at least 10 years.

S. 101 (2) of IRPA sets out a person's ineligibility to have a refugee claim adjudicated or reason of serious criminality under paragraph (1)(f), above, unless

- a) in the case of inadmissibility by reason of a conviction in Canada, the conviction is for an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
- b) in the case of inadmissibility by reason of a conviction outside Canada, the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

#### 4.1.3 What is the standard of review?

The standard used by the RAD in considering appeals that come before it depends on the circumstances. Refugee claimants can appeal negative decisions of the RPD either to the Refugee Appeal Division or the Federal Court. Go to Section 5.0 for more details.

The Federal Court is quite deferential to the RPD on findings of fact, largely because the RPD has had the opportunity to hear testimony first hand and assess claimants' credibility, and because it is assumed that RPD members are experienced with this type of determination.

The Court will, however, apply a correctness standard on issues of procedural fairness and some questions of law.

## 4.2 The Refugee Appeal Division (RAD)

### 4.2.1 What is it?

The Refugee Appeal Division (RAD) is the division of the IRB that considers appeals from some decisions of the RPD to allow or reject claims for refugee protection. In most cases, the RAD considers written submissions and documents, without an oral hearing, to make a decision.

### 4.2.2 Who is eligible for RAD?

All claimants, including DCO claimants, can appeal a negative RPD decision to the RAD, with the exception of the following. These claimants have no access to the RAD:

- claimants subject to an exception to the Safe Third Country agreement with the United States\*\*
- claimants referred to the IRB before the RAD came into force (December 2012)
- claimants who have been refused, where the finding was that either “no credible basis” exists or the claim is “manifestly unfounded”
- claimants who have withdrawn or abandoned their claim
- claimants who arrived as part of a “designated irregular arrival” and are therefore Designated Foreign Nationals
- those with claims that the IRB has “vacated” or “cessated” and
- those with claims deemed rejected because of an order of surrender under the Extradition Act.

\*\*Those who qualify under an exemption from the Safe Third Country Agreement are, at present, not permitted to appeal negative RPD decisions to the Refugee Appeal Division. This bar on RAD access is currently being challenged in the courts, the lead case being *Kreishan v. MCI*, IMM 3193-15.

### 4.2.3 *YZ v Canada* 2015 FC 892

*YZ v Canada* 2015 FC 892 ([Read full decision here](#))

On July 23, 2015, the Federal Court ruled that the Conservative government's Designated Country of Origin (DCO) scheme discriminates against refugee claimants who come from DCO countries by denying them access to the Refugee Appeal Division.

Justice Boswell struck down s. 110 (2) (d.1) of *IRPA* because it violates equality rights under section 15 of the Charter. The Department of Justice (DOJ) asked for a 12-month suspension, but Justice Boswell refused to suspend the declaration of invalidity, on the grounds that DCO claimants should not spend one more day subject to inequality.

On August 13, 2015, the motion brought by DOJ to suspend invalidity was rejected.

In January 2016, the Liberal government formally discontinued the appeal.

#### 4.2.4 What is the standard of review?

The RAD's inception spawned much litigation over the level of deference that the RAD owes to RPD decisions.

Following the decision of the Federal Court of Appeal in *Huruglica*, 2016 FCA 93, it is now settled that the RAD process, although not a hearing de novo, will, in general, employ a correctness standard in considering the appeals that come before it. As with RPD decisions, the Court reviewing a decision of the RAD will use a deferential approach.

The standard of review on questions of fact was initially unclear. One line of Federal Court jurisprudence suggested that the RAD's powers of intervention would be triggered where the RPD made a "palpable and overriding error." But the Court now adheres to a second line of reasoning—that the RAD may substitute a judgment whenever it disagrees with the RPD decision, and not only where the RAD believes a palpable error occurred.

### 4.3 Pre-Removal Risk Assessment (PRRA)

#### 4.3.1 What is it?

The PRRA is an opportunity for refused claimants who are facing removal from Canada to seek protection by asserting in writing that they are a person in need of protection (s. 96 or s. 97). Those who cannot make a claim for refugee protection or whose claims have been declared abandoned may also use the PRRA to assert a need for protection.

### 4.3.2 Who is eligible?

Subject to legislative restrictions described below, unsuccessful refugee claimants may submit a PRRA application once invited to do so by the Minister; generally such applications will only be successful on the basis of **new** evidence establishing risk. Beyond unsuccessful refugee claimants, other foreign nationals who fear return to their country may also be eligible to make a PRRA application.

The task of PRRA officers is to consider evidence that has not yet been considered and that arose since the previous refusal (s. 113 of IRPA). If the evidence existed at the time of the initial refugee hearing, claimants must provide an explanation of why it was not disclosed then.

As of December 2012, applicants who have made a refugee claim or previously applied for a PRRA and whose claim was denied, declared abandoned or withdrawn, may **not** apply for a PRRA **unless at least 12 months have passed since the date of their most recent refusal**.

**Claimants from DCOs (designated countries of origin) cannot apply for a PRRA until at least 36 months have passed** since the refugee claim or previous PRRA application was rejected, abandoned or withdrawn.

For a detailed consideration of the DCO PRRA bar, see *Atawnah*, 2016 FCA 144, leave to appeal to SCC was filed but dismissed, Court File No. 37122.

### 4.3.3 What is the standard of review?

PRRA decisions are in large part the result of a fact-driven inquiry, wherein the Federal Court has determined the minister and his delegates have a specialized expertise. PRRA decisions are reviewed on a standard of reasonableness. Procedural fairness issues are determined on a correctness standard.

## 5.0 Refugee Appeal Division vs judicial review

The chart below illustrates the important differences between an appeal to the Refugee Appeal Division and an application for leave and judicial review.

Characteristics	Refugee Appeal Division	Application for leave and judicial review
<b>Type of forum</b>	Specialized tribunal	Federal Court
<b>Leave requirement?</b>	<p>No leave requirement.</p> <p>An eligible refused claimant can apply as of right. Section 4.2.2 provides a list of excluded claimants.</p> <p>Decision usually made within 90 days of receipt of appellant's record.</p>	<p>Leave requirement.</p> <p>Must demonstrate an arguable case on the merits/serious issue to be tried: see <i>Bains v. Canada</i> (1990), 47 Admin. L.R. 317 (Fed. C.A.)</p> <p>Decision on leave can take months.</p>
<b>Scope of review</b>	<p>Appeals can be based on a question of fact, law or mixed fact and law, and can (upon application) include consideration of <b>new</b> evidence.</p>	<p>A judicial review may be brought on questions of fact, law, mixed fact and law and procedural fairness.</p> <p>It is limited to the record before the tribunal. No new evidence will be accepted, except in exceptional circumstances arising from a breach of natural justice.</p>
<b>Standard of review</b>	<p>Less deferential than Federal Court treatment of RPD decisions, since appeal "on the merits" allows for independent assessment of facts and new evidence.</p>	<p>Reasonableness (very deferential) on issues of fact or mixed fact and law.</p> <p>Correctness on some questions of law and procedural fairness (for commentary on the role of the correctness standard see <i>Agraira v Canada (MCI)</i>, 2013 SCC 36; <i>Canada (MCI) v Huruglica</i>, 2016 FCA 93).</p>
<b>Relief that can be granted</b>	<p>Can declare person a Convention refugee, substitute decision (affirm or deny RPD finding) or send the claim back to RPD for re-determination</p>	<p>Can only order a claim to be re-determined by the RPD (or RAD or PRRA officer, as the case may be).</p>

Characteristics	Refugee Appeal Division	Application for leave and judicial review
<b>Amount of time to perfect application</b>	30 days total to perfect appeal from date of receipt of written reasons Notice must be filed within 15 days of receipt of written reasons.	Up to 45 days total to perfect application for leave and judicial review <ul style="list-style-type: none"> <li>• 15 days for notice</li> <li>• 30 days to perfect</li> </ul>
<b>Statutory stay while seeking review?</b>	Yes, if file notice of appeal by deadline (within 15 days of receipt of written reasons).	No stay for claimants ineligible for RAD.  <b>Exception:</b> Legacy claims (made prior to Dec 15, 2012) do get a stay.
<b>Request for an extension of time to file notice</b>	Must file the complete appeal record with request for an extension of time.	While there is no requirement to file application record with request for extension of time, it is advantageous to do so.

## 6.0 How to approach the task

Different types of negative decisions call for different considerations. This section provides checklists for RPD, RAD-eligible, RAD-ineligible and JR or RAD decisions. Part II provides a comprehensive discussion of potential legal issues in a refugee claim.

**It is essential, at the outset of every refugee hearing, to prepare legal submissions for all of the issues identified.** If the member takes some of the issues off the table before you give your submissions, you can edit your submission. LAO's [Refugee Lawyer Practice Manual](#) provides more details.

### 6.1 RPD

- a) Read the Basis of Claim (BOC) form.
- b) Read the decision, and look for legal issues (see below).
- c) Review the BOC, affidavits, and accompanying submissions, documentary evidence and personal documentation thoroughly to determine whether the member has ignored or misconstrued important evidence.

- d) Determine whether the claimant is eligible to appeal to the RAD.
- e) Plan to meet the deadline to file the notice of appeal to the RAD or notice of application for leave and judicial review to Federal Court.

It is also helpful—and especially important where credibility is a central issue—to request a copy of the CD of the hearing to listen for errors:

- Did the claimant actually say what the member states they said?
- If so, did the member take the claimant's words out of context?
- Did the member give the claimant a chance to address his/her concerns and explain?
- Did the member consider the claimant's explanation? (The member has a duty to give an opportunity to explain.)

In addition, speak to previous counsel and ask about apparent inconsistencies or matters that may be implausible, and get a copy of their notes from the hearing.

If the evidence is inconsistent, pay careful attention to what questions the claimant was asked on each occasion. Perhaps the claimant is, for instance, providing different evidence in response to two different questions.

## **6.2 Eligible for RAD**

1. Read the Basis of Claim (BOC) form.
2. Read the RPD decision looking for legal issues (see below).
3. Review the documentary evidence and personal documentation filed.
4. Identify any evidence that may support the appeal and verify whether it meets the legal test under s.110(4) *IRPA* to be considered by the RAD.

On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. Therefore:

5. Consider how the RAD might treat the evidence and how the evidence addresses the Board's issues of concern
6. Get the CD recording of the hearing and consider whether to transcribe part or all of the hearing to demonstrate errors, particularly with respect to credibility and errors of fact.

### **6.3 Ineligible for RAD**

1. Read the Basis of Claim (BOC) form.
2. Read the RPD decision looking for legal issues (see below).
3. Review the documentary evidence and personal documentation filed.
4. Get the CD recording of the hearing and consider whether to transcribe part or all of the hearing to demonstrate Board errors.
5. Consider whether there was a breach of natural justice at the RPD. If there was, an application to the RPD to re-open the claim may be warranted.
6. Note that claimants who are ineligible to appeal to the RAD (see Section 4.2.2 for a list) do not have a statutory stay of removal (with the exception of legacy claims made before Dec. 15, 2012). They will have to pursue a motion for a stay at Federal Court if removal proceedings are initiated, in conjunction with an application for leave and judicial review of the negative RPD decision.

### **6.4 JR or RAD decision**

1. Read the RAD decision looking for legal issues See Section 23.
2. Review the documentary evidence and personal documentation filed.
3. If new evidence was submitted, review how the RAD treated that evidence.
4. Determine the standard of review/intervention employed by the RAD.
5. Determine whether there was a breach of natural justice. Did the RAD make a finding about which the appellant had no notice?
6. Was there a request for an oral hearing? Was the legal analysis sound?

### **6.5 PRRA**

1. Read the PRRA decision looking for legal issues See Section 25.
2. Review the submissions, documentary evidence and personal documentation filed in support of the PRRA.
3. Review how the PRRA officer treated the new evidence submitted and whether any critical evidence was ignored or misconstrued, or whether a finding that the evidence was insufficient could be considered a veiled credibility finding that should have warranted an interview pursuant to s. 167 IRPR.
4. Review the negative RPD decision and supporting evidence.

## 7.0 Issue spotting – Federal Court and RAD

Before appearing at Federal Court or for a RAD, do a macro reading and create a summary of the Board's decision. Identify the issues in the decision, and organize them into:

- jurisdictional issues
- issues of procedural fairness/natural justice
- errors of law and
- erroneous factual findings, including credibility findings.

Analyze each issue separately: explain how the Board dealt with it, explain the law on the issue (Part II of this tool kit provides a starting point for additional research) and analyze the error(s) the Board made.

Stick to a limited number of issues, leading with those you think are the strongest, and argue them well. If you decide to include any additional issues, you can cover them by indicating how they contribute to the overall flaws in the decision maker's analysis and decision.

The issues outlined below arise frequently, and can be considered along with the case law overview provided in Part II. Neither the issues below nor the jurisprudence in Part II are exhaustive, but they provide a good starting point for case-specific research and issue analysis.

### 7.1 Common errors to look for

- Error(s) in assessing credibility (specifics and impact upon ultimate result)
- Ignoring or misconstruing relevant evidence (specifics and relevance to the ultimate result)
- Mis-statement of the applicable standard of proof
- Mis-statement of the relevant considerations under s. 96 or s.97
- Failure to review or assess relevant documentary evidence/selective reading of evidence
- Failure to apply the proper test for state protection (operational adequacy vs serious efforts)
- Failure to apply the proper test for an internal flight alternative (IFA)
- Failure to apply or properly consider the *gender guidelines*

- Breach of natural justice or procedural fairness, for instance, no notice of the actual IFA, faulty interpretation, or no opportunity to respond to contradictory evidence.

## 7.2 Credibility

Negative decisions based on credibility findings can arise from:

- perceived contradictions in testimony or evidence
- lack of corroborative evidence or
- a finding that aspects of the narrative are implausible.

It is essential to make sure that the decision demonstrates an accurate understanding of the narrative and evidence, including explanations provided for the lack of documentation or for any contradictions. For example, consider differences between the testimony at the hearing and the claimant's BOC or their Port of Entry (POE) statement when entering Canada.

More information is in Part II, Section 17

### 7.2.1 Clues to look for

- No explanation in reasons of why testimony is not credible
- Factual findings are not consistent with the testimony or evidence
- (Where the reasons refer to inconsistencies:) did the claimant have a chance to respond? do the inconsistencies actually exist or are they the result of a misunderstanding?
- (Where the reasons refer to an inconsistency between the POE notes and the BOC or oral testimony:) what is the extent of the difference? (Go to Part II, Section 17.3 for case law about the distinction)
- When a claimant swears to the truth of their testimony, it is presumed to be true unless there is a valid reason to doubt its truthfulness, Therefore, where sworn testimony was given or an affidavit was submitted as evidence—was the claimant given an opportunity to explain? Was the suspected inconsistency/implausibility put to the claimant? If so, was the claimant's explanation reasonably considered?

## 7.3 Self-serving evidence

A finding that evidence is "self-serving" can undermine the credibility of the claimant, because this finding generally means that the member suspects the evidence might be false,

biased or not reliable in some way. The member is not required to make a factual finding that the evidence actually is a forgery or in some way suspect.

In *Kimbudi*, Justice Urie stated as follows:

“While the evidence to which I have referred may be characterized as self-serving, it is difficult for me to conceive what evidence would be available to him in Canada which would not suffer from that characterization.”

*Kimbudi v Canada (MEI)* (1982), 40 NR 566, [1982] FCJ No 8

It has been found unreasonable to give little weight to evidence simply because it came from the applicants' family members, especially where the evidence goes to the heart of the claim (*Ndjuzera v Canada (MCI)*, 2013 FC 601 at paras 31-33).

Conversely, the Court has held that the absence of evidence which would likely be characterized as self-serving is a weak basis for a Board to doubt the claimant's credibility (*Vallejo v Canada*, 39 ACWS (3d) 672 at para 16, [1993] FCJ No 264).

Cases in which evidence was found to be self-serving:

- *Ghazvini v Canada (MCI)* [1994] FCJ No. 1550, 50 ACWS (3d) 1296
- *Grozdev v Canada (MCI)* [1996] FCJ No. 983, 64 ACWS (3d) 1200
- *Ali v Canada (MCI)* [1995] FCJ No. 1112, 98 FTR 238

Cases in which the Board found evidence to be self-serving, but where the Federal Court found they had erred:

- *Ndjuzera v Canada (MCI)*, 2013 FC 601
- *Cardenas v Canada (MCI)* (1998), 144 FTR 282, [1998] FCJ No 242
- *Mahmud v Canada (MCI)* (1999), 167 FTR 309, [1999] FCJ No 729

## 7.4 Implausibility

The Federal Court has recognized that implausibility findings are only appropriate in the clearest of cases, and that the member should not make them lightly. Members should only say that evidence is implausible if it is “inherently suspect or improbable” and there is evidence to support their view.

### 7.4.1 Clues to look for

- No explanation of why evidence is implausible
- The implausibility finding relies on unfounded speculation, not evidence
- Claimant was not given an opportunity at the hearing to know or respond to the member's concern that is central to the negative credibility finding
- The evidence is not inherently implausible
- The aspect that was considered implausible is not central to the basis for the claim
- Plausibility analysis was based on a member's own (western) perspective / experience
- The documentary evidence supports the plausibility of the narrative: for example, the finding was that it would be implausible that government agents would threaten the claimant but take no steps to harm him, but newspaper articles reporting this type of behaviour were submitted in evidence.

## 7.5 Treatment of documentary evidence

Although it is not essential to address every piece of documentary evidence, it is important to explore whether evidence that contradicts the member's conclusions has been ignored or misconstrued. Go to the original sources cited to read excerpts in their full context.

### 7.5.5 Clues to look for

- Claimant provided a psychological/psychiatric report that addresses memory problems; explore whether that report was adequately considered by the member (Go to Part II, Section 17.2 for case law)
- No explanation of why evidence is preferred over contrary evidence
- The reasons do not analyze important contradictory evidence
- Evidence is only partially cited and the full quotation or context is omitted
- No link is made between the documentary evidence and the conclusion reached.

## 7.6 Persecution

The member must show that they considered risk of persecution based on the claimant's stated identities (gender, marital status, political opinion, etc).

### 7.6.1 Clues to look for

- No independent analysis of section 96 as well as section 97 claims
- Failure to assess perceived profile of claimant, from the perspective of those who would engage in persecutory conduct
- Wrongfully creating an expectation that an individual should conceal an aspect of their identity to avoid persecution
- Failure to consider intersecting grounds of persecution, i.e. gender and sexual orientation
- Unfair approach to verifying claimant's identity, for example, an overly probing "test" of religious knowledge

## 7.7 State protection

A member may find that the claimant has not rebutted the presumption that their country will be able to protect them.

### 7.7.1 Clues to look for

- State authorities are the agent of persecution, or assist the agent of persecution.
- It can be an error of law to apply the presumption of state protection.
- A "serious efforts" or "notable improvements" standard is applied when assessing the state's ability to protect the claimant, rather than "effectiveness" and on-the-ground reality in the country
- Failure to properly consider evidence of similarly situated persons or gender guidelines
- Failure to consider the situation of similarly situated individuals who have not been able to access state protection mechanisms
- Selective reading of documentary evidence (refer to [Section 7.5: Treatment of documentary evidence](#), above).

## 7.8 Internal flight alternative (IFA)

A member finds that the claimant has not rebutted the presumption that their home country will be able to protect them in a particular area, town or region.

### 7.8.1 Clues to look for

- No specific IFA location was stated at the hearing or put to the claimant.
- No opportunity was afforded to address the safety or reasonableness of the IFA/
- The decision does not address both safety and reasonableness.
- There has been a failure to consider evidence that contradicts the finding on IFA.
- The member failed to consider the viability of an IFA in combination with the claimant's particular identity and circumstances, including in combination with the gender guidelines.
- The member based its IFA findings on the ability of the claimant to conceal a fundamental aspect of his/her identity.

## 7.9 Standard of proof

Under s. 96, the member must consider whether or not the claimant faces "more than a mere possibility of persecution".

### 7.9.1 Clues to look for

- The member has found that there is insufficient evidence that the claimant will be persecuted or there is not a *significant likelihood* that she will be targeted.
- The member's wording is ambiguous (For instance, "there's a slim chance," or "I am not convinced of the danger."). Flag these ambiguities and combine them with other errors in the decision.

## 7.10 Procedural fairness

There are several ways in which decision makers may violate procedural fairness in rendering negative decisions.

### 7.10.1 Clues to look for

- Anything that makes the hearing seem unfair
- Faulty or inadequate interpretation
- No opportunity to make submissions
- Restricted right to present evidence
- No opportunity to respond to concerns/contradictions

- Surprise evidence that gives the claimant the claimant no notice to prepare a response to it, including the member's use of personal or specialized knowledge
- No IFA articulated at the outset of the hearing
- Failure to identify issues that are subsequently relied upon by the decision-maker to reject the claim
- In some cases, a failure to follow IRB Chairperson's guidelines relevant to the case
- Member badgering the claimant over the objections of counsel
- Inadequate representation by counsel.

## Part II: Case law: an introduction

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Part II is a general introduction to the case law on important issues central to refugee claims and risk assessments made under sections 96 and 97 of the Immigration and Refugee Protection Act, applicable to hearings before the RPD, appeals at the RAD and PRRA applications. It is intended to be used as a starting point to research. In virtually all cases, it is important to seek out further case law on the issues involved pertinent to the facts of the case.

Although many of the legal issues are applicable to all determinations, a few specific considerations are highlighted for each type of decision.

### 8.0 Useful online resources

- UNHCR handbook: <http://www.unhcr.org/3d58e13b4.html>
- *Immigration and Refugee Protection Act*: <http://laws.justice.gc.ca/eng/acts/I-2.5/>
- *Immigration and Refugee Protection Regulations*: <http://laws-lois.justice.gc.ca/eng/regulations/sor-2002-227/>
- Immigration and Refugee Board: <http://www.irb-cisr.gc.ca/Eng/brdcom/references/Pages/index.aspx>
- Legal references of the RPD, which include papers that discuss key legal concepts and procedural matters in immigration and refugee proceedings before the Board” <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/index.aspx>
- IRB Chairperson’s Guidelines: <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/guidir/Pages/index.aspx>
- IRB National Documentation Packages: <http://www.irb-cisr.gc.ca/Eng/ResRec/NdpCnd/Pages/ndpcnd.aspx>
- IRB Decisions found on CanLII: <https://www.canlii.org/en/>
- LAO LAW: <http://www.research.legalaid.on.ca/>
- Canadian Association of Refugee Lawyers (CARL): <http://www.carl-acaadr.ca/>
- Refugee Lawyers Association: <https://rlaontario.wordpress.com/>

### 9.0 Establishing claims under s. 96 and s. 97

#### 9.1 Treatment of the evidence

There is a presumption that administrative agencies base their decisions on the entirety of evidence before them, so a member does not have to refer to every piece of evidence in the decision.

However, the Federal Court has held that:

“if a party produces compelling evidence which goes against the agency’s conclusion, the court may draw the conclusion that the agency made its decision without regard to the evidence before it” (*Kim v Canada (MCI)*, 2010 FC 149 at para 68, [2011] 2 FCR 448 referring to *Cepeda-Gutierrez v Canada (MCI)*, (1998) 157 FTR 35 at paras 16-17, [1998] FCJ No 1425).

“The more important the evidence that is not mentioned specifically and analyzed in the agency’s reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact ‘without regard to the evidence’”(see also: *Hinzman v Canada (MCI)*, 2007 FCA 171 at para 60; *Pinto Ponce v. Canada (MCI)*, 2012 FC 181 at para 35).

## 10.0 Identity

Section 106 of the *IRPA* states that:

“The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.”

Identity, like other elements of a claim, must be proven on a balance of probabilities. The Board may rely on its knowledge of what documents look like and make judgments based on their specialized expertise (*Merja v Canada (MCI)*, 2005 FC 73 at paras 44-45; *Pushpanathan v Canada (MCI)*, 2002 FCT 867 at paras 68-69, [2002] FCJ No 1207. See also: *Canada (MCI) v Khosa*, [2009] 1 SCR 339, 2009 SCC 12) which stands for the general proposition that the IRB is presumed to have specialized expertise.

It is incumbent on the Board to base its identity determination on the totality of the evidence submitted in support of a claim (*Husein v Canada (MCI)*, [1998] FCJ No 726; *Lin v Canada (MCI)*, 2006 FC 84 at paras 10, 14).

It is an error to discount other corroborative evidence of identity on the basis of a single finding that a particular document is not genuine (*Mohmadi v Canada (MCI)*, 2012 FC 884 at paras 19-21; *Wang v Canada (MCI)*, 2011 FC 969 at paras 48-49).

Members are able to make their own assessment even where the Immigration Division has accepted the claimant's identity (for example, acceptance of the claimant's identity documentation for the purpose of a detention finding) (*Matingou-Testie v Canada (MCI)*, 2012 FC 389 at para 27).

Even if a reviewable error has been made with regard to one piece of identity evidence, the Federal Court may let the decision stand if there were other reasons for doubting credibility (*Lin v Canada (MCI)*, 2011 FC 1235).

Cases where identity not established:

- *Matingou-Testie v Canada (MCI)*, 2012 FC 389
- *Stoliarenko v Canada (MCI)*, 2004 FC 1578
- *Lin v Canada (MCI)*, 2011 FC 1235
- *Lin v Canada (MCI)*, [2005] RPDD No 318 – Chinese documents: RIC, Marriage certificate, Hukou
- *Re JCL* [2004] RPDD No 220 – DRC: lack of passport, failure to take steps to procure identity documents
- *Niyongabo v Canada (MCI)*, [2005] RPDD No 253 – Burundi: doctored identity card

Cases where identity established:

- *Selvarasu v Canada (MCI)*, 2015 FC 849
- *Yokota v Canada (MCI)*, [2003] RPDD No 481
- *Dominguez Napuri v Canada (MCI)*, [2003] RPDD No 499 - Peru: driver's license, military service book
- *Re NVO*, [2004] RPDD No 187 – Israel: passports, other documentation initially withheld

## 10.1 Civil status

Contradictory evidence regarding civil status can undermine credibility (*Camara v Canada (MCI)*, 2008 FC 362 at para 27).

### 10.1.1 Multiple nationalities

A refugee claimant must prove that he is unwilling or unable to avail himself of the protection of all of his countries of nationality (*Canada v Ward*, [1993]2 SCR 689 at 89, [1993] SCJ No 74).

Possession of a national passport or birth in a country creates a rebuttable presumption that the claimant is a national of that country.

However, the claimant can adduce evidence that the passport was obtained for the purpose of fleeing a situation of persecution (*Zidarevic v Canada (MIC)*, 90 FTR 205; [1995] FCJ No 158; *Mijatovic v Canada (MCI)*, 2006 FC 685 at para 26) or that they are not entitled to nationality (*Lugunda, Lillian v Canada (MCI)*, 2005 FC 467).

See also:

- *Re YLH*, [2006] RPDD No 238
- *RPD File No TA4-02044*, [2007] RPDD No 295

### 10.1.2 Citizenship

Passports, birth certificates and registration documents can establish citizenship. Even secondary documentation can be helpful. (Re: *RHQ*; [2003] RPDD No 99 at para 8).

Another case where nationality was at issue is *Saleem v Canada (MCI)*, 2008 FC 389.

### 10.1.3 Statelessness

In *Reza*, the claimant argued he could not be returned to Pakistan because he had no official status there, and so was “stateless” (*Reza v Canada (MCI)*, 2009 FC 606 at paras 19-22).

In *Wangchuk*, the Federal Court held that the RPD’s finding that the claimant was not stateless because he would be able to obtain status in India was unreasonable. In that case, the Tibetan claimant’s ability to obtain legal status in India was found to be outside the claimant’s control, as his obtaining legal status in India would depend on the discretion of the Indian government (*Wangchuk v Canada (MCI)*, 2014 FC 885).

However, see the recent decision of the Federal Court of Appeal in *Tretsetsang v Canada (MCI)*, 2016 FCA 175, leave to appeal to the Supreme Court of Canada dismissed, Feb.2, 2017, Court File No. No. 37178. The majority concluded that the Tibetan appellant had not sufficiently established that his status would not be recognized by India. One can only be

stateless if acquiring citizenship of the country is out of the claimant's control (*Williams v Canada (MCI)*, 2005 FCA 126 at paras 22-23).

The onus is on the claimant to establish the existence of the asserted impediment to status and to demonstrate that it deprives him/her of control over the recognition of their citizenship. Insignificant or minor impediments will not meet the onus but significant impediments may (*Tretsetsang* at para. 67).

For more on this, see:

- LAO LAW Memorandum, Nationality and Statelessness, REF 2-4:  
<https://www.research.legalaid.on.ca>
- *De Barros v Canada (MCI)*, 2005 FC 283; *Choi v Canada (SG)*, 2004 FC 291; *Thabet v Canada (MCI)*, [1998] 4 FCR 21, [1998] FCJ No 629.

## 10.2 Ethnicity

In *N.L.K.*, the court used photographic evidence showing the characteristics by which Roma are recognized in Eastern Europe in deciding that the claimant was indeed a Roma (*Re NLK*, [1998] CRDD No 67 at para 7).

The Federal Court has stated that determinations of ethnicity cannot be based on the physical appearance of the claimant if such observations are simply based on the decision-maker's observations of a claimant's appearance or on stereotypical assumptions (*Gyorgyjakab v Canada (MCI)*, 2005 FC 1119 at paras 15-16).

An applicant's sworn evidence as to his or her ethnicity is presumed to be truthful and cannot be rebutted by stereotypical assumptions (*Vodics v Canada (MCI)*, 2005 FC 783 at para 17).

## 10.3 Residency status

Determining the content of foreign law regarding residency status is a question of fact, whereas determining how it is applied is a question of law. The Board cannot make a finding regarding residency status based solely on the subjective opinions of the claimant (*Canada (MCI) v Choubak*, 2006 FC 521 at paras 40, 50).

As summarized in *Zeng*, where there is prima facie evidence of permanent resident status, the onus is on a claimant to establish whether or no, that status was lost (*Canada v Zeng (MCI)*, 2010 FCA 118, [2011] 4 FCR 3).

The determination of residency status is essential to a claim for protection because Article 1E of the United Nations *Convention Relating to the Status of Refugees* states that "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 [claimed by the Applicants]."

Therefore, if a claimant is found to have valid status elsewhere, they may not claim protection in Canada.

**For more on this, see:**

- Section 14: Exclusion 1E—protection available in a third country
- LAO LAW Memorandum, Exclusion Clause – Article 1(E), REF2-5:  
<https://www.research.legalaid.on.ca>

## **10.4 A general note about credibility and proof of affiliation – political, religious and familial**

Although often testimony will be assumed to be true and corroborating evidence will not be required, some cases suggest a higher standard in certain situations.

When an applicant swears the truth of a claim, there is a presumption that the claim is true, unless there is reason to doubt their truthfulness (*Bojaxhi v Canada (MCI)*, [1998] FCJ No 516 at para 13, 79 ACWS (3d) 797 and *Maldonado v Canada*, [1980] 2 FCR 302 at para 5, [1979] FCJ No 248).

Furthermore, the Board cannot require corroborating evidence for un-contradicted testimony. Lack of corroborating evidence cannot be used as a basis to disbelieve an applicant's claims (*Ahortor v Canada*, 65 FTR 137 at para 50, [1993] FCJ No 705).

Moreover, the Board cannot find that an applicant lacks credibility without considering the reasonableness of a claimant's explanation as to why they could not provide corroborating evidence (*Osman v Canada (MCI)*, 2008 FC 921 at paras 35-37; *Singh v Canada (MCI)*, 2004 FC 333 at para 22; *Ahortor v Canada*, 65 FTR 137, [1993] FCJ No 705).

Thus, while a failure to offer documentation may be a valid finding of fact, it cannot be related to the applicant's credibility, in the absence of evidence to contradict the allegations (*Mahmud v Canada (MCI)*, 167 FTR 309 at para 10, [1999] FCJ No 729).

“In the present case, in effect, the CRDD found the letters submitted by the applicant to be contradictory of the applicant's evidence, not for what they say, but for what they do not say. To follow established authority, the letters must be considered for what they do say. On their face they support the

applicant's evidence, and do not provide evidence contradicting that evidence" (*supra Mahmud* at para 11 - emphasis added).

The general rule that corroborating evidence is not required for un-contradicted testimony is distinguished in cases where the issue in question is a central one. For instance, if a refugee claim centers on marriage and the claimant testifies that the marriage certificate was accessible, then the Board may draw an adverse inference if the claimant fails to provide the certificate and fails to provide a reasonable explanation as to why she could not do so (*Taha v Canada (MCI)*, 2004 FC 1675 at para 9).

For more on corroboration, refer to Section 7.2, on credibility.

## 10.5 Sexual orientation

Persecution is a serious interference with a basic human right. Accordingly, being forced to hide one's sexual identity from the state and society constitutes persecution (*Sadeghi-Pari v Canada (MCI)*, 2004 FC 282 at para 29).

The Federal Court observed in *Ogunrinde* that "the acts and behaviours which establish a claimant's homosexuality are inherently private" (*Ogunrinde v Canada (MPSEP)*, 2012 FC 760 at para 42) and [a]s a result, there are often inherent difficulties in proving that a refugee claimant has engaged in same-sex sexual activities" (*Gergedava v Canada (MCI)*, 2012 FC 957 at para 10).

A lack of corroborating evidence of one's sexual orientation, without other reasons to doubt a claimant's credibility, is not enough to rebut the presumption that sworn testimony is presumed true. (*Sadeghi-Pari v Canada (MCI)*, 2004 FC 282 at para 38).

The IRB is finalizing Guidelines on Sexual Orientation/Gender Identity refugee claims.

Check the website for updated information: <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/guidir/Pages/index.aspx>

### See also:

- *Dosmakova v Canada (MCI)*, 2007 FC 1357 at 11-13: two reviewable plausibility findings where RPD did not believe the claimant's sexual orientation because she hadn't realized her same-sex attractions until she entered into a lesbian relationship in her mid-50s. The RPD had found it implausible that the claimant was happy to discover her sexuality, given the homophobic environment. The Federal Court overturned the decision, because the plausibility findings were "unsupported by the evidence and [were] patently unreasonable."

- *Hernandez v Canada (MCI)*, 2007 FC 1297
- *Re JVD*, [2003] RPDD No 237
- *Re FVH*, [2005] RPDD No 847
- See EU Common European Asylum System decision concerning assessment of facts in refugee claims based on sexual orientation in ABC

“An applicant’s averred statement of his own sexual orientation is an important element to be taken into account. By contrast, practices such as medical examinations, pseudo-medical examinations, intrusive questioning concerning an applicant’s sexual activities and accepting explicit evidence showing an applicant performing sexual acts are incompatible with Articles 3 and 7 of the *Charter*; and general questions from competent authorities based on stereotypical views of homosexuals are inconsistent with assessment of the facts relating to a particular individual required by Article 4(3)(c) of Directive 2004/83.”

## 11.0 Internal Flight Alternative

The Convention definition of a refugee requires the individual to have a well-founded fear of persecution which makes the claimant unable or unwilling to return to his or her home country. If they can find safe refuge *within* their home country, then that means they do not meet the definition of a Convention Refugee. Safe refuge within their own country is referred to in Canada as an “internal flight alternative” (IFA) (*Kaburia v Canada (MCI)*, 2002 FCT 516 at para 9).

The test for whether an IFA exists is set out in *Rasaratnam v Canada*, [1992] 1 FCR 706, [1991] FCJ No 1256 (followed in *Juhasz v Canada (MCI)*, 2015 FC 300 at para 45):

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/
2. Conditions in that part of the country must be such that it would not be unreasonable, in all circumstances, for the claimant to seek refuge there

### Further case law on this test:

Identification that an IFA exists, generally, is insufficient:

“a specified geographic location must be identified where conditions are such as to make it a realistic and attainable safe haven” (*Rudi v Canada (MCI)*, 2003 FC 957 at para 5).

The second prong of the test is an objective assessment. The onus of proof is on the claimant. The test is flexible and focused on the circumstances of the individual claimant. The question is “whether, given the persecution in the claimant’s part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of the country before seeking a haven in Canada or elsewhere.”

In other words, “would it be unduly harsh to expect this person, who is being persecuted in one part of this country, to move to another less hostile part of the country before seeking refugee status abroad?” (*Thirunavukkarasu v Canada*, [1994] 1 FC 589 at paras 12-13).

The hardship associated with dislocation and relocation is not the kind of undue hardship that renders an IFA unreasonable, unless there are “conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area” (*Ranganathan v Canada (MCI)*, [2000] FCJ No 2118 at para 15).

There is no obligation on a claimant to try and seek out an IFA within their country before coming to Canada. Therefore, the Board may not simply say that the claim should be rejected because the claimant clearly did not try and find an IFA (*Lugo v Canada (MCI)*, 2010 FC 170 at paras 32-34).

## 11.1 Other important IFA doctrine

The minister or Board member must explicitly raise the IFA issue (*Rasaratnam v Canada (MEI)*, [1992] 1 FCR 706 at para 9, [1991] FCJ No 1256). Only then does the claimant have the burden of proving, on a balance of probabilities, that the test above is not met (*Thirunavukkarasu v Canada (MCI)*, [1994] 1 FCR 589 at paras 8-10, [1993] FCJ No 1172). The failure to specifically name an IFA constitutes a breach of natural justice (see *supra Rasaratnam*).

A proposed IFA is unreasonable if it would require the applicant to live in hiding for an indefinite period of time. Justice MacTavish recently stated that “The Federal Court of Appeal was clear in *Thirunavukkarasu* that a refugee claimant cannot be expected to live in hiding in order to remain safe in an IFA location” (*Zaytoun v Canada (MCI)*, 2014 FC 939 at para 16). Similarly, an IFA is not viable if it would require concealing the Convention ground being asserted (i.e. it is unreasonable to find an IFA safe where the claimant must be discrete about his or her sexuality (*Okoli v Canada*, 2009 FC 332 at para 5)).

RPD guidelines provide details, [available online](#), on the factors to be considered in assessing objective hardship to accessing IFAs.

## 12.0 Well-founded subjective fear

Even where the other elements of the claim are strong, for example, there is a credible objective evidence of risk profile, the failure to prove subjective fear can be fatal to the claim. To establish subjective fear, the claimant must show both of the following:

- Subjective fear of persecution. This relates to “the existence of fear of persecution in the mind of the refugee”
- That this fear is well founded, and is “evaluated objectively to determine if there is a valid basis for that fear.” (*Rajudeen v Canada (MEI)*(1984), 55 NR 129 at para 134, [1984] FCJ No 601; see also: *Canada v Ward*, [1993] 2 SCR 689 at para 47, SCJ No 74).

A member may find a lack of subjective fear for a variety of reasons, including a delay in leaving the country of persecution, a delay in claiming protection in Canada, or a failure to claim elsewhere. This issue often arises where claimants have travelled through the USA on their way to Canada.

The subjective fear test is problematic when dealing with children or those deemed incompetent by virtue of disability. These claimants may not be able to articulate their fear, or it might be inadvisable to inform children that they face grave risks if returned to their country. Instead, it is sufficient that:

- either the designated representative of the claimant establish subjective fear or
- subjective fear can be inferred from the evidence. (*Canada v Patel*, 2008 FC 747 at paras 29-33).

Individual experiences of fear and the comprehension of risk are extremely varied:

- Hilary Evans Cameron has argued that the factors that decision makers consider do not always account for well-documented variance in human response to danger. This is an argument built on an interdisciplinary review drawing on sociology and psychology research (see: *International Journal of Refugee Law Advance Access* published Oct 31 2008, “Risk Theory and ‘Subjective Fear’: The Role of Risk Perception, Assessment, and Management in Refugee Status Determinations”).
- See *Yusuf v Canada (MEI)*, [1992] 1 FCR 629 at para 5, [1991] FCJ No 1049, where the Court noted that “the definition of a refugee is certainly not designed to exclude

brave or simply stupid persons in favour of those who are more timid or more intelligent.”

Note that a finding that a risk is generalized does not prohibit a finding of persecution on the basis of one of the Convention grounds (*Dezamau v MCI*, 2010 FC 559 at paras 23, 31; *Josile v MCI*, 2011 FC 39 at para 11).

**See also:**

- *Degaga v Canada*, 2014 FC 1043 at para 29—Subjective fear alone is insufficient. Subjective fear is not established where the RPD accepts what the applicant says but finds that her subjective fears and the personal evidence were not enough to establish risk, and the country documentary evidence supports that she does not have the profile of someone at risk.
- *Nel v Canada*, 2014 FC 842 at paras 34-36—relevance of personal experience.

Protection claims are forward looking. It is an error to reject a s. 96 claim on the basis that an applicant has not been personally persecuted in the past. A claimant’s personal experiences can be relevant to both the subjective and objective branches of the test.

*Gopalarasa v Canada* 2014 FC 1138 at para 26 – Applying a balance of probabilities standard to the possibility of persecution instead of the "serious possibility" standard is a reviewable error.

## **12.1 Subjective fear: delay in claiming**

Delay in claiming refugee status may be taken into account when assessing the statements and actions of a claimant, and thus determine in part whether the Board believes that a person has subjective fear of persecution (*Huerta v Canada*, [1993] FCJ No 271, 40 ACWS (3d) 487).

Though it is a factor, delay in claiming is not decisive in determining whether a claimant has subjective fear (*Saez v Canada*, 65 FTR 317 at para 5, [1993] FCJ No 631). Delay in claiming can suggest a lack of subjective fear, particularly if combined with the failure to claim in other countries (*Mejia v Canada*, 2011 FC 851 at paras 14-15).

In certain situations, delay must not be given much weight in determining subjective fear. In *Basak*, when the claimant arrived in Canada, she was 14 years old, spoke no English, and was entirely dependent on others. The delay in bringing the claim was mostly the fault of her sister and uncle. In that context, the FCA held that it was patently unreasonable for the Board

to find that the delay was indicative of a lack of subjective fear (*Basak v Canada (MCI)*, 2005 FC 1496 at para12).

The decision maker may also consider the individual circumstances surrounding the delay. In *Tung*, the Federal Court of Appeal found that possession of legal temporary status that prevented return to country of feared persecution was relevant to assessing subjective fear. While the claimant had his “sailor’s papers” he was not immediately exposed to return to his country and so did not necessarily lack a subjective fear.

Once the status lapses and there is further delay in claiming, the negative inferences about subjective fear become more difficult to overcome (*Tung v Canada (MEI)* (1991), 124 NR 388, [1991] FCJ No 292; see also: *Hue v Canada*, [1988] FCJ No 283; *El Balazi v Canada (MCI)*, 2006 FC 38 at paras 6-8). In *Tung*, the Court found that the Board erred in assessing the claimant’s subjective fear based on the speculation that refugee status was available to him in other countries while in transit to Canada.

While a Board may consider delay in assessing credibility, it is not usually determinative (*Brown v Canada*, 2011 FC 585 at 38).

## **12.2 Subjective fear: re-availment**

Re-availment captures a situation in which a refugee, ostensibly fleeing their country, returns to that country or has substantial interactions with its government, suggesting that they are no longer “unable or unwilling to avail himself of the protection of the country of his nationality,” as set out in the convention definition (see the UNHCR handbook, Chapter 3(B)).

Re-availment requires a certain level of intent on the part of the claimant to actually obtain protection from their country (*Abawaji v Canada (MCI)*, 2006 FC 1065 at para 15). Simply returning to one’s country is not necessarily equivalent to re-availment (*Camargo v Canada (MCI)*, 2003 FC 1434 at paras 34-35).

Re-availment is a factor which can reasonably be interpreted as undermining the claimant’s claim to subjective fear (*Ali v Canada (MCI)*, 112 FTR 9 at para 13, [1996] FCJ No 558, and *Hevia v Canada (MCI)*, 2010 FC 472 at paras 18-20).

For instance, in *Nodarse* the Board found the claimant lacked a subjective fear because she had returned to Cuba multiple times, and had failed to provide a reasonable explanation. (*Nodarse v Canada (MCI)*, 2011 FC 289 at 31-33). In *Avagyan* the court found that re-availment during five periods between 2006 and 2010, coupled with the fact he could pursue his anti-corruption activities during that period without repercussion, provided the RPD with sufficient grounds to reasonably negate subjective fear (*Avagyan v Canada*, 2014 FC 1003).

A finding of re-availment negating subjective fear must be based on inferences reasonably and logically drawn from a group of facts established by the evidence, not from some speculative process applying subjective imagination (*KK. v Canada (MCI)*, 2014 FC 78 at para 68; *Zacarias v Canada (MCI)*, 2012 FC 1155 at para 11, 419 FTR 135).

The issue of re-availment also comes up in applications by the Minister for cessation of Convention refugee status.

### **12.3 Subjective fear: failure to claim elsewhere**

The fact that a claimant failed to claim refugee status in another country when they had the opportunity may be considered when assessing whether the claimant has a subjective fear of persecution. However, the failure to claim elsewhere is not determinative. There is no presumption that a claimant must seek asylum at their first opportunity, and so there is no burden on the claimant to rebut that presumption (*Jumbe v Canada (MCI)*, 2008 FC 543 at paras 10-12).

The failure to claim elsewhere can also be interpreted as inconsistent with a well-founded fear of persecution – i.e. it also affects the objective stage of the test (*Wehbe v Canada (MCI)*, 2010 FC 312 at para 35).

A Board is not required to accept an applicant's explanation of delay (*Wehbe v Canada (MCI)*, 2010 FC 312 at para 35). However, the Board may consider a claimant's reasons for waiting to claim in Canada. Attempting to reunite with family is a valid reason for a refugee claimant not to seek protection in the first country in which they arrive en route to Canada (*Ay v Canada (MCI)*, 2010 FC 671 at paras 39-40; *Rivera Mejia v Canada (MCI)*, 2011 FC 1265 at para 9).

The Board is required to offer a considered explanation as to why it does not believe a claimant's explanation (*Pena v Canada (MCI)*, 2011 FC 326).

Furthermore, the Board must consider whether a claimant's explanation for not claiming elsewhere is reasonable. (*Mendez v Canada (MCI)*, 2005 FC 75 at 34; *Nel v Canada (MCI)*, 2014 FC 842 at paras 54-55 – a seven-hour layover should not raise doubt as to subjective fear).

#### **See also:**

- *Mendez v Canada (MCI)*, 2005 FC 75 at para 27
- *Gopalarasa v Canada (MCI)*, 2014 FC 1138 – the Federal Court overturned a finding of no subjective fear where the Board had found that the applicant did not have a

subjective fear of persecution because he could have claimed refugee status elsewhere, noting that he has a sister in Norway, and remained in the U.S. for two months. The Court reasoning: the Board had failed to consider three essential elements, as follows:

- the applicant testified it was his intention from the beginning to come to Canada
- the applicant was being detained for the majority of the time in the USA; he left for Canada at the first opportunity
- the applicant has a brother in Canada, and jurisprudence supports family reunification as an explanation for failure to claim protection at the first opportunity.

The decision not to pursue an existing claim in another country can be interpreted as undermining the claimant's subjective fear of persecution (*Re LVB*, [2005] RPDD No 906 at para 20).

It may be reasonable for the Board to question an applicant's genuine subjective fear where the applicant travelled using their own, non-fraudulent passport prior to entering Canada, and did not take the opportunity to claim protection before Canada (*Pepaj v Canada (MCI)*, 2014 FC 938 at para 18). However, it is an error for the Board member to fail to consider the reason for time spent in another country or consistent intention to claim in Canada (for instance, delayed en route to Canada) (*Gopalarasa v Canada (MCI)*, 2014 FC 1138).

## 13.0 Gender

The *IRPA* definition of a Convention refugee does not include gender as an enumerated ground for a well-founded fear of persecution. However, the RPD recognizes that gender-related persecution is a form of persecution which can be relevant and determinative of a claim. Therefore, specific guidelines have been issued to help members determine linkages between gender, the feared persecution and one or more of the grounds and in identifying unique considerations in these cases.

The *Gender guidelines* address:

- the extent to which women making a gender-related claim of fear of persecution may rely on the five enumerated grounds of the Convention refugee definition
- circumstances where prejudicial treatment of women (including sexual violence) constitutes persecution
- key evidentiary elements when considering a gender-related claim

- special problems women face when called upon to state their claim at refugee determination hearings, particularly when they have had experiences that are difficult and often humiliating to speak about

For the RPD to take the gender guidelines into account in a meaningful way, it has to assess a claimant's testimony while being alert and sensitive to her gender, the social, cultural, economic and religious norms of her community, and "to the factors which may influence the testimony of women who have been the victims of persecution" (*Newton v Canada (MCI)*, [2000] FCJ No 738 at 17, *Bennis v Canada*, 2001 FCT 968 at para 14, [2001] FCJ No 1329).

It is possible for the Court to set aside RPD decisions that fail to exhibit adequate sensitivity to the issues addressed by the *gender guidelines*. For example, decisions impugning the claimant's credibility based on a lack of corroboration or difficulty in speaking about sexual or gender-based assault may be set aside as unreasonable (see e.g. *Njeri v Canada*, 2009 FC 291 at para 16; *Sukhu v Canada*, 2008 FC 427 at paras 18-21). However, the decision-maker is not required to specifically mention the gender guidelines in a decision, provided they adequately apply the principles enshrined in the guidelines (*Tsiako v Canada*, 2012 FC 1253 at para 25).

**See also:**

- *NGM v Canada (MCI)*, 2013 FC 372: member adequately considered the gender guidelines even though they are not specifically mentioned.
- *Danelia v Canada (MCI)*, 2014 FC 707: member failed to apply the gender guidelines in assessing the claimant's efforts to obtain state protection.

## **14.0 Exclusion 1E—protection available in a third country**

Article 1E of the UN Convention relating to the status of refugees says that:

“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.”

Section 98 of the IRPA explicitly states that the type of person described by Article 1E does not qualify as a refugee.

Zeng provides the most recent statement of the test for 1E exclusion:

“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” (*Canada v Zeng*, 2010 FCA 118 at para 28).

Whether the facts give rise to an exclusion under section 98 of the *IRPA* and Article 1E of the Convention is a question of mixed fact and law, reviewable on the standard of reasonableness. The Court has emphasized that it is not appropriate to return a claimant to a third country where they face risk as per the *Zeng* test (*MCI v Zeng*, 2010 FCA 118 at paras 28-29, [2011] 4 FCR 3; *Ramirez-Osorio v Canada (MCI)*, 2013 FC 461 at para 42).

In *Shamlou*, the court outlined the criteria to be used when deciding whether a claimant qualifies as having the same “rights and obligations” as citizens. They are:

- the right to return to the country of residence
- the right to work freely without restrictions
- the right to study
- full access to social services in the country of residence  
(*Shamlou v Canada*, 103 FTR 241, [1995] FCJ No 1537)

Sometimes these “rights and obligations” may expire over time, and so there must be a standard as to the timeframe to which the court is applying the *Shamlou* test.

The Board must decide whether rights and obligations *existed at the time the applicant applied for admission to Canada* (*Mahdi v Canada (MCI)*, [1995] FCJ No 1623 at para 12). However, this is not absolute, and must be interpreted in relation to the purposes of the exclusion clause and the Act.

In *Manoharan*, the court decided that the applicant would not be excluded due to the particular facts of his case, even though the applicant was a citizen of Germany at the time his mother applied on his behalf for refugee status in Canada (*Canada (MCI) v Manoharan*, 2005 FC 1122 at paras 26-28).

As with other elements, the 1E exclusion analysis should consider individual context. The rights and obligations of nationality must have existed at the time the applicant applied for admission to Canada. Additionally, the Board should consider reasons that seemingly available nationality may not be viable. See also: *Rrotaj*, 2016 FC 152 and *Ramirez-Osorio*, 2013 FC 461.

The “third country” does not have to be a country to which the applicant has applied for refugee status. Generally, it is any country where the applicant has “the rights and obligations which are attached to the possession of the nationality of that country” (*Kroon v Canada*, 89 FTR 236 at para 6, [1995] FCJ No 11).

In *Majebi*, 2016 FCA 274, the Federal Court of Appeal considered how the RAD should consider RPD findings on exclusion under Article 1E. Pursuant to *Zeng*, it concluded that an assessment of exclusion under Article 1E is to be made at the time of the hearing before the RPD. Further, unless the RAD concludes that the RPD decision was made in error, the RAD may not reconsider on a de novo basis the issue of exclusion pursuant to Article 1E: para. 9. Leave to appeal the *Majebi* decision is currently pending before the Supreme Court of Canada: SCC Court File No. 37437.

## **15.0 Exclusion 1F—International and foreign crimes**

Section 1F of the *UN Convention relating to the status of refugees* states:

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.

The “serious reasons for considering” standard is unique to the context of exclusion under the Refugee Convention. While generally related to criminal law concepts, exclusion findings

are not predicated on proof beyond a reasonable doubt nor on the general civil standard of the balance of probabilities. Whether there are “serious reasons for considering” that an individual has committed war crimes, crimes against humanity or crimes against peace is clearly a fact-specific inquiry, but it certainly connotes a standard above mere suspicion. The Supreme Court of the United Kingdom has stated that “‘serious reasons for considering’ obviously imports a higher test for exclusion than would, say, an expression like ‘reasonable grounds for suspecting’”: see *R. (J.S. (Sri Lanka)) v. Secretary of State for the Home Department*, [2010] UKSC 15.

## **Article 1F(a)**

Assessing exclusion under Article 1F(a) often turns on whether a person is complicit in the crimes of some organization of which they were a part. For instance, is a government employee responsible for crimes committed by the government?

Recently, in *Ezokola*, 2013 SCC 40, the Supreme Court of Canada concluded that an individual will be excluded from refugee protection under Article 1F(a) for complicity in international crimes if there are serious reasons for considering that he or she “voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime. The evidentiary burden falls on the minister as the party seeking the applicant’s exclusion”: para. 29.

Factors to be considered in assessing complicity include:

- 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.

(*Ezokola*, at paras 84-90)

In deciding exclusion, the decision maker must give weight to explanations offered by the applicant for the apparent complicity (*Jahazi v Canada (MCI)*, 2010 FC 242 at paras 62-63).

## Article 1F(b)

In *Jayasekara*, the Federal Court of Appeal adopted international jurisprudence on Article 1F(b), requiring a consideration of the following five factors:

- The elements of the crime
- The mode of prosecution
- The penalty prescribed
- The facts
- The mitigating/aggravating circumstances underlying the conviction.

*Jayasekara v Canada (MCI)*, 2008 FCA 404 at paras 4, 44)

The Supreme Court of Canada recently considered the question as to whether serving a sentence prior to coming to Canada negates the application of Article 1F(b). In *Febles v Canada (MCI)*, 2014 SCC 68:

- the Court concluded that neither serving one's sentence nor the passage of time preclude the application of Article 1F(b), so long as the crime in question was sufficiently serious at the time it was committed, taking into account the *Jayasekara* factors.
- the Court also considered the view previously established in jurisprudence that the crime will generally be considered serious if a maximum sentence of 10 years or more could have been imposed had the crime been committed in Canada. The court did not disagree with this proposition, but it further noted that this "generalization should not be understood as a rigid presumption that is impossible to rebut": *Febles* at para. 62.

Where a Criminal Code provision has a large sentencing range—an upper end being 10 years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded.

The court in *Febles* went on to note that Article 1F(b) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery: *Febles* at para. 62.

For more on this, see LAO LAW Memoranda:

- Exclusion Clause - Article 1(E), REF2-5
- Exclusion Clause - Article 1F - General, REF2-6
- Exclusion Clause - Article 1F(a) - War Crimes and Crimes Against Humanity, REF2-7

- Exclusion Clause - 1F(b) - Serious Non-Political Crimes, REF2-8
- Exclusion Clause - 1F(c) - Acts Contrary to the Purposes and Principles of the United Nations, REF2-9

## Article 1F(c)

Article 1F(c) of the Refugee Convention is rarely invoked. It was, however, considered in the decision of the Supreme Court of Canada in *Pushpanathan v. Canada (MCI)*, [1998] 1 SCR 982.

## 16.0 State protection

For a thorough overview of the current law on state protection, please see *Bari v Canada (MCI)*, 2014 FC 862.

The definition of a refugee as “unable” or “unwilling” to avail themselves of the protections of their home country often requires the Board to explicitly decide whether there is sufficient protection available in the home country.

It is assumed that the state is capable of protecting a claimant, except in cases of complete breakdown of the state apparatus. Furthermore, persecution does not have to emanate from the state itself (*Canada (AG) v Ward*, [1993] 2 SCR 689 at 19, 25, SCJ No 74). Claimants can rebut the presumption of state protection by showing “that their home state, on an objective basis, could not be expected to provide protection” (see *Hinzman v Canada (MCI)*, 2007 FCA 171 at para 37). Claimants are only required to prove that there is some clear and convincing evidence; whether a “finding is made depends on the quality of the evidence” (*Garcia v Canada (MCI)*, 2007 FC 79 at para 18).

The burden of proof that rests on a refugee protection claimant to rebut the presumption of state protection will vary according to the level of democracy in their home state. 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” (*Canada (MIC) v Kadenko* (1996) FCA, 124 FTR 160, [1996] FCJ No 1376 at para 5).

Notwithstanding, while a state might be democratic and willing to protect its citizens, there may be evidence that suggests that it is unable to do so. Decision makers must make a full assessment of state protection that includes the context of the country of origin, steps taken by the applicant and interactions with the authorities (*Zepeda v Canada (MCI)*, 2008 FC 491 at paras 19-20). This consideration is especially significant for a DCO claimant (see also: *Sow v Canada (MCI)*, 2011 FC 646 at para 10).

The standard for “clear and convincing” evidence that state protection is not available was clarified in *Ward*, where the Court held that to satisfy the standard, a claimant may advance testimony of similarly situated individuals let down by the state protection arrangement. If the claimant has shown risk of similarly situated persons, they don’t have to show personalized risk. “The Board cannot set out a multiplicity of tests,” and mis-stating a test cannot necessarily be cured by stating the test once correctly (*Gopalarasa v Canada*, 2014 FC 1138 at para 27; see also: *Sekeramayi v Canada (MCI)*, 2008 FC 845 at para 17; *Paramsothy v MCI*, 2012 FC 1000 at paras 29-32).

State protection must encompass legislative or policy efforts to stop domestic violence as well as the “capacity and will to effectively implement that framework” (*Elcock v Canada (MCI)* (1999), 175 F.T.R. 116 at para 15,[1999] FCJ No 1438). When assessing state protection, the Board should therefore focus on the practical adequacy of protection measures such as policing, not on the state’s best serious efforts in applying the legislation (*Franklyn v Canada (MC)*, 2005 FC 1249 at paras 21-25).

Although serious efforts are not enough to establish state protection according to the jurisprudence, RPD members and PRRA officers often state this as the test. Instead, the Board or officer should look at whether state protection exists at the operational level (*Kemenczei v Canada (MCI)*, 2012 FC 1349 at paras 58-60.). The focus should be on efforts which have actually translated into adequate state protection. The Court has previously accepted that state protection should be assessed on the standard of whether there is actual, effective, operational protection available (*Henguva v Canada (MCI)*, 2013 FC 912 at para 10).

The Board and PRRA officers sometimes rely on a pre-*Ward* decision that found that no state can protect citizens at all times: the fact of a terrorist attack does not make all citizens refugees (*Canada (MEI) v Villafranca* (1992), 150 NR 232, [1992] FCJ No 1189). It is important to set the context and an overview of jurisprudence concerning state protection since *Villafranca*.

Police protection can fail even in democratic states (*Zhuravljev v Canada (MCI)*, [2000] 4 FCR 3 at para 19, [2000] FCJ No 507). State protection need not be perfect and the failures of local law enforcement do not always amount to a lack of state protection (*Al-Awamleh v Canada (MCI)*, 2013 FC 925 at para 26; *Alvarez v Canada (MCI)*, 2012 FC 703 at para 19-20).

A country’s poor record in protecting women must be taken into consideration when dealing with state protection issues (*Franklyn v Canada (MCI)*, 2005 FC 1249 at para 25).

Unless there is evidence to the contrary, the police are usually the only institution mandated with the protection of a nation's citizens. Where they fail, it cannot be said that there is state protection even if there are alternate institutions that offer protection mechanisms (*Barajas v Canada (MCI)*, 2010 FC 21 at para 32, and *Zepeda v Canada (MCI)*, 2008 FC 491 at para 25. See also: *Villicana v Canada (MCI)* 2009 FC 1205, [2009] FCJ No 1499).

Whether or not a claimant sought protection from non-governmental organizations or agencies is irrelevant to state protection analysis (*Garcia v Canada (MCI)*, 2007 FC 79 at para 15). However, a single contact with one police officer cannot alone support a conclusion "that 'police are willing and able' to deliver protection" (*Varga v Canada (MCI)*, 2014 FC 1030 at para 14,). It is reasonable to draw a negative inference from approaching the ombudsman, but not the police (*Olaya v Canada (MCI)*, 2012 FC 913 at para 62).

In *Lezama*, Russell J. provides a very useful overview of the case law on state protection, as well as specific case law on Mexico. See paragraphs 82-87 for a list of cases where state protection is found not to exist and paragraphs 88-95 for a list of cases where state protection is found to exist (*Lezama v Canada (MCI)*, 2011 FC 986).

State protection for Roma in Hungary has been controversial. Russell J. sets out the controversy and finds there is inadequate protection in both *Tar v Canada (MCI)*, 2014 FC 767 and in *Kina v Canada (MCI)*, 2014 FC 284. Recently, the Federal Court has emphasized that "mere willingness by a state to address the situation of the Roma minority in Hungary cannot be 'equated to adequate state protection'" (*Canada (MCI) v Racz*, 2015 FC 217 at para 46).

In *Mudrak*, 2015 FC 188, the Federal Court engaged in a wide-ranging reassessment of the jurisprudence on state protection, with specific reference to the situation of Roma in Hungary. The court's approach in this case, however, was not endorsed by the Federal Court of Appeal: see *Mudrak v Canada (MCI)*, 2016 FCA 178).

**See also:**

- *Hercegi v Canada (MCI)*, 2012 FC 250 at para 5: serious effort is incorrect test
- *Orgona v Canada (MCI)*, 2012 FC 1438 at para 47
- *Henguva v Canada (MCI)*, 2013 FC 912 at para 10
- *Kemenczei v Canada (MCI)*, 2012 FC 1349 at paras 58-60
- *Dawidowicz v Canada (MCI)*, 2014 FC 115 at paras 29-30
- LAO LAW Memorandum, State Protection, REF2-1

## 17.0 Credibility

The Board will always assess the credibility of the claimant's testimony or evidence. If the claimant is found not to be credible, a Board is less likely to approve them as a refugee.

Credibility issues can be raised on a comparison of all aspects of evidence before the Board:

- claimant's testimony
- the documents (personal and objective country conditions)
- consistency between allegations and evidence and
- consistency between the immigration officer's notes and the claimant's Basis of Claim (BOC) and any omissions therein.

Reviewing courts are highly deferential on findings regarding credibility. For example, Judge Gleason has explained that,

“[t]he starting point in reviewing a credibility finding is the recognition that the role of this Court is a very limited one because *the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence*. Moreover, in many cases, the tribunal has expertise in the subject matter at issue that the reviewing court lacks. It is therefore much better placed to make credibility findings, including those related to implausibility” (*Rahal v Canada (MCI)*, 2012 FC 319 at para 42).

There is an expectation that claimants will gather corroborating documents prior to their RPD hearing. The failure to do so may weigh against a finding of credibility. It is unreasonable for the decision maker to sweep aside a claimant's testimony due to the absence of additional corroborating evidence without considering the evidence that is available on its merits (*Pantas v Canada (MCI)*, 2005 FC 64 at para 102). The factors that the RPD may reasonably consider in weighing the significance of a failure to obtain necessary documents prior to the hearing include:

- representation by experienced counsel
- the time available to the claimant to prepare
- the reasonable efforts that could objectively be expected on the claimant's part
- the explanation given for the claimant's failure to produce the required documents and

- the possibility that new evidence might mitigate the problems which had already been already observed in the claimant's evidence and which affected his credibility.  
*Mercado v Canada (MCI)*, 2010 FC 289 at paras 38-41.

When assessing credibility, evidence must be assessed together and not in isolation (*Lai v Canada (MCI)*, [1989] FCJ No 826, (1989) 8 Imm LR (2d) 245. There is a presumption that administrative agencies make their decisions based on the entirety of evidence before them. Therefore, there is no requirement for a decision maker to refer to every piece of evidence when writing the decision. However, “if a party produces compelling evidence which goes against the agency’s conclusion, the court may draw the conclusion that the agency made its decision without regard to the evidence before it” (*Kim v Canada (MCI)*, 2010 FC 149 at para 68, [2011] 2 FCR 448 referring to *Cepeda Gutierrez v Canada (MCI)* (1988), 157 FTR 35 at paras 16-17, [1998] FCJ No 1425).

Some confusion does not necessarily impact a witness’ credibility with respect to all aspects of a case. For example, although the applicant did not know the names of the countries that he had passed through on his way to Canada, such knowledge was “irrelevant to the central issue, which is whether or not he feared persecution upon his return to China,” according to the court in *Ni v Canada (MCI)*, 2010 FC 1239 at para 25.

Finding a claimant to not be a credible witness is not always fatal to a claim: “Even if the RPD found the applicant not to be a credible witness, that finding does not automatically mean that the applicant is not a Convention refugee. If the applicant establishes the subjective and objective components of the test for refugee status, he should be deemed a Convention refugee” (*Neupane v Canada (MCI)*, 2010 FC 1237 at para 31).

It is a decision maker’s duty to provide reasons, in clear and unmistakable terms, for a negative credibility determination. Without such reasons, a panel cannot reject a refugee claim based on credibility grounds (see *Bogus v Canada (MCI)*, 71 FTR 260 at para 4, [1993] FCJ No 1455; *Hilo v Canada (MEI)*, 130 NR 236, [1991] FCJ No 228; *Cooper v MCI*, 2012 FC 118 at para 5).

If the decision maker relies on apparent contradictions in the narrative to make a negative credibility finding, it may be a reviewable error where the member does not first put the contradictions to the claimant and then provide him or her with an opportunity to respond (*Kumara v Canada (MCI)*, [2010] FC 1172 at paras 3-5). Points of clarification should be put to the applicant to create an opportunity to respond.

Preventing applicant’s counsel from addressing a discrepancy in the evidence can also be an error. For example this may arise where there was a mistake in the BOC (or before that, the PIF) (*Tar v Canada (MCI)*, 2014 FC 767 at paras 62-64).

This can also occur where a member has concerns respecting the authenticity of a document or believes that someone has tampered with documents. The member must put concerns to applicants at the hearing: “the failure to do so and then use the suspicion that a fraudulent document has been submitted as a basis to discount it and their evidence as a whole is a breach of procedural fairness” (*Angulo v Canada (MCI)*, 2014 FC 1131 at para 36).

## 17.1 Credibility: plausibility

In assessing credibility, the Board can consider the claimant’s actions when determining whether their story is plausible or consistent (*Monteiro v Canada (MCI)*, 2002 FCT 1258 at para 18).

The Federal Court has cautioned that actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant’s social, political and personal surroundings, on the grounds that refugee claimants come from cultures different from Canada: (IRB, RPD, Legal Services, *Assessment of Credibility in Claims for Refugee Protection* (31 January 2004) at para 2.3.5; *Rajaratnam v Canada (MCI)*, 2014 FC 1071 at para 46 5; see also: *Zacarias v Canada (CIC)*, 2012 FC 1155 at para 24).

The Federal Court has held that “stereotypes and generalizations about the people of an entire nation are not an appropriate basis for making a decision. The Board is required to make credibility findings based solely on relevant considerations. Assumptions based on cultural generalizations, particularly those relating to ancillary issues, are not relevant considerations” (*Ponniiah v Canada (MCI)*, 2003 FC 1016 at para 10). This has been applied to:

- stereotypes of sexuality (for example, *Ogunrinde v Canada (MPSEP)*, 2012 FC 760 at para 46 or *Herrera v Canada (MCI)*, 2005 FC 1233 at para 12-20) and
- stereotypes about religious or cultural behaviour (*Kotkova v Canada (MCI)*, 2004 FC 1706 at para 4).

A claimant may be found to lack credibility if the member determines their narrative is implausible. Plausibility findings should be made only in the “clearest of cases,” where “facts as presented are outside the realm of what could reasonably be expected, or where documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant” (*Valtchev v Canada (MCI)*, 2001 FCT 776 at para 7).

When making a finding of implausibility, members are required to provide some evidentiary basis for conclusions aside from subjective perceptions: Board members must “provide a

reliable and verifiable evidentiary base against which the plausibility of the Applicant's evidence might be judged" (*Gjelaj v Canada (MCI)*, 2010 FC 37 at para 4).

## **17.2 Credibility: testimony consistent with the Basis of Claim (BOC) form**

Amendments to the BOC form (or its predecessor, the PIF) may raise questions around a claimant's credibility. The omission of a significant fact from a claimant's PIF or BOC can be the basis for an adverse credibility finding. For example, when a claimant who wrote on his PIF that he was beaten "at least five times" and then testified he was beaten exactly five times, an adverse credibility finding was upheld (*Gulal v Canada (MCI)*, 2014 FC 1151 at para 16).

Adding to an already submitted PIF or BOC can be problematic, as a finding that a claimant has embellished their narrative can also lead to adverse credibility findings (*Ivaneishvili v Canada (MCI)*, 2014 FC 1056 at paras 8-9, 25-27).

However, if the applicant gives an explanation for the amendment, the RPD cannot reject the explanation out of hand without providing a reason (*Celal v Canada (MCI)*, 2011 FC 1043 at para 4, where a claimant initially did not disclose his homosexuality due to internalized homophobia).

Another explanation for amending a BOC can be the receipt of updated information after the BOC was filed: see *Singh v Canada (CI)*, 2015 FC 1415, where the claimant amended his BOC after receiving the results from his U.S. Biometrics check.

There is a distinction between embellishment and elaboration. A negative credibility inference may be drawn if a claimant does not amend their PIF (now BOC) with important information directly connected to their claim (*Prak v. Canada*, 2006 FC 1516 at para 4).

Failure to provide a reasonable explanation for delayed amendments can contribute to a negative credibility finding (*Lahocsinsky v Canada*, 2004 FC 275 at para 10).

Negative inferences flowing from inconsistencies with the BOC may be compounded where they arise at the hearing and after the claimant has again affirmed the contents of the forms. In *Delthalawe v Canada (MCI)*, 2011 FC 1188, the Federal Court found (at para 17) that "the Board was not incorrect, in the circumstances, to draw negative inferences from the applicants' failure to include such information, especially after they affirmed at the beginning of the hearing that the PIFs were complete and true." Plausible explanations for omissions or amendments to the PIF (or BOC) should not be rejected by the Board (*Ali v Canada (MCI)*, 2007 FC 1350 at paras 8-10, 13; *Sanaei v Canada (MCI)*, 2014 FC 402 at para 24).

Making a negative credibility finding based on the fact that the PIF or BOC was amended may be a reviewable error (*Ameir v Canada (MCI)*, 2005 FC 876 at paras 21, 32). An individual's credibility should not be impugned on the basis of PIF or BOC amendments, where such amendments are reasonably and plausibly explained. Reasonable explanations may touch upon:

- the circumstances under which the original PIF was prepared
- the psychological condition of the claimant
- whether he or she has been represented by counsel throughout the process
- whether the amendments provide new or expanded information, as opposed to contradictory information.

A finding of inconsistency which ignores amendments may also amount to a reviewable error (*Weng v Canada (MCI)*, 2011 FC 1483 at para 31).

**See also:**

- *Ors v Canada (MCI)*, 2014 FC 1103– impairment plus confused testimony. The member's conclusion that a psychiatric report indicating the claimant suffered from dementia and severe cognitive impairment did not explain the claimant's confusion and contradictions in his testimony was found to be unreasonable by the Court.
- *Kuar Raina v Canada (MCI)* [2003] FCT 684– impairment diagnosis plus credibility. As long as the Board demonstrates an awareness of the report, it is reasonable for the Board to accept the psychiatrist's diagnosis, but still find that the applicant's condition did not result from the incidents alleged in her claim.
- *Rajaratnam v Canada (MCI)*, 2014 FC 1071– demeanor plus credibility. Rejecting the applicant's testimony based only on his demeanor was unreasonable.
- *Dabaa v Canada (MCI)*, 2014 FC 907 – omissions plus credibility. Significant omissions in the applicant's evidence found in the PIF (now BOC) can undermine credibility.

### **17.3 Credibility: consistency of testimony with POE information**

Credibility issues can arise when inconsistencies are identified between a claimant's testimony and the information the claimant provided at the point of entry (POE) when entering Canada. If a claimant mentions an incident for the first time in their BOC, the member may conclude that this is a serious inconsistency, because the claimant "failed" to disclose it at the POE.

The failure to consider a claimant's explanation for such inconsistencies can amount to a reviewable error (*Sawyer v Canada (MCI)*, 2004 FC 935). The Federal Court has recognized that reasonable explanations for inconsistencies between the POE notes and the BOC or PIF may include "fear upon arrival, incompetent counsel and memory problems": *Okoli v Canada (MCI)*, 2009 FC 332 at paras 11.

However, members are entitled to consider POE omissions of key details or important information when assessing credibility (*Lin v Canada (MCI)*, 2008 FC 1052 at para 17).

The Court has held that Board should be careful not to place undue reliance on the POE statements because "[t]he circumstances surrounding the taking of those statements is far from ideal and questions about their reliability will often arise" (*Wu v Canada (MCI)*, 2010 FC 1102 at para 16).

The caution against placing too much weight on information collected at the POE is particularly necessary where interpretation is required at the interview (*Neto v Canada (MCI)*, 2004 FC 565 at para 6; *Park v Canada (MCI)*, 2010 FC 1269 at paras 43-44).

**See also:**

- *Samarakkodige v Canada (MCI)*, 2005 FC 301: Board erred in failing to consider claimant's explanation.
- *Khan v Canada (MCI)*, 2012 FC 1124: affirms the Board's entitlement to take into account omissions, differences and inconsistencies in the BOCs, POE notes and the oral testimony, and to draw negative credibility findings.

See also: LAO LAW Memorandum, Errors of Facts – Assessing Credibility, JR1-5.

## **18.0 Convention refugee definition: s 96**

### **18.1 s 96: Nexus**

In order for any refugee claim to succeed, the claimant must show a link or "nexus" between their persecution and one of the five grounds enumerated in s 96:

- race
- religion
- nationality
- membership in a particular social group
- political opinion

(*Castro v Canada (MCI)*, 2008 FC 1282 at para 25; *Canada v Ward*, [1993] 2 SCR 689 at para 61, SCJ No 74).

It is possible for acts of persecution to be motivated by both a protected ground and by other intents. For example, an attack can be both criminal and racial.

The Board should consider all of the evidence submitted by the applicant in its assessment of whether mixed motives are sufficient to establish a nexus to a Convention ground (*Kutaladze v Canada (MCI)*, 2012 FC 627 at para 22).

A mixed motive analysis can also establish a nexus ground where the claimant's circumstances are grounded in overlapping elements of identity, some of which are protected (*Canada (MCI) v B377*), 2013 FC 320 at para 20-21).

Whether or not a nexus is found often depends on how the court defines the particular enumerated ground in question. For instance, in *Gonzalez*, the Board used a narrow definition of "political opinion" which resulted in a finding of no nexus between the claimant's situation and the enumerated ground (*Gonzalez v Canada (MCI)*, 2011 FC 389 at para 58).

In determining nexus, the Board must consider the cumulative nature of the applicant's activities in relation to the perception of their membership in a particular social group by the agent of persecution (for example, the perception that one was a political activist) (*Lara v Canada (MCI)*, 2014 FC 378 at para 21).

There may be a reviewable error where the member considered the fear only under section 97 and deemed it a generalized risk, instead of considering the applicant's nexus to Convention grounds (i.e. perceived political opinion) (for example, *Gopalarasa v Canada (MCI)*, 2014 FC 1138).

Rape has a nexus with gender. It cannot be brought under generalized violence (*Dezameau v Canada (MCI)*, 2010 FC 559 at paras 34-35) because the "real test is whether the claimant is subject to persecution by reason of his or her membership in that particular social group" (*Josile v Canada (MCI)*, 2011 FC 39 at para 31).

See also LAO LAW Memorandum, Persecution - Definition, REF1-1.

## **18.2 s 96: persecution versus discrimination/harassment**

Sometimes, treatment of an individual might not rise to the level of persecution, and may instead merely be discrimination or harassment.

When the evidence shows a series of events, and where each of these events is only discrimination and not persecution, the Board must examine the evidence and events in totality, as they may together amount to persecution (*Munderere v Canada (MCI)*, 2008 FCA 84 at para 42; *Bali v Canada (MCI)*, 2013 FC 414 at para 10).

Failing to consider the cumulative effects of discrimination can be an error in law, reviewable on a correctness standard (*Savas v Canada (MCI)*, 2013 FC 598 at para 10).

In examining a series of harassing events, the Board may consider whether the incidents gave rise to subjective fear, including whether they occurred over a long period of time during which the applicants had considered their options (*Savas v Canada (MCI)*, 2013 FC 598 at paras 3, 12, [2013] FCJ No 617).

Where such cumulative evidence is provided, the Board cannot simply list them all and state that it has considered the evidence as a whole. It is incumbent upon the Board to explain why these collected instances of discrimination do not amount, cumulatively, to persecution (*JB v Canada (MCI)*, 2011 FC 210).

### 18.2.1 Persecution vs prosecution

Being accused and prosecuted for a crime committed in another country is not necessarily persecution.

In *Musial v Canada (MEI)*, (1982) 1 FCR 289 at paras 6-7, [1981] FCJ No 93, the Court considered a case involving a claimant who had fled the draft. The Court held that when a person is punished for violating a law, the Court is not necessarily punishing that person for the political opinion which led them to violate that law. Their prosecution, therefore, does not necessarily establish that they are being persecuted for their political opinions.

It has further been affirmed that being a conscientious objector is not in itself a basis for a refugee claim, and being prosecuted on that basis under a law of general application is not persecution (*Sahin v Canada (MCI)*, 2013 FC 664 at paras 51-52).

However, prosecution along with other factors can amount to persecution. In *K (XO)*, the claimant was a conscientious objector who had been drafted into the El Salvadoran army—into the same battalion that had, apparently, previously killed his brother. Additionally, as a member of the army, there was a serious risk that he would be forced to participate in war crimes, and there was evidence that the punishment for evading military service was overly severe (*Re K(XO)*, [1990] CRDD No 8).

In *Lai*, the court found that being prosecuted for crimes in China did not necessarily constitute persecution (*Lai v Canada (MCI)*, 2004 FC 179).

**See also:**

- The UNHCR handbook, at paras 56-60, is particularly helpful on this point.

### 18.2.2 Agent of persecution

This refers to the entity or person—such as a government, terrorist group and/or a police officer—that is persecuting the claimant.

The identity of the agent of persecution is not relevant when assessing the prevalence of risk or the nexus between their persecution and an enumerated ground (*Diaz v Canada (MCI)*, 2010 FC 797).

In *Diaz*, the Board erred when it found that, because the claimant was inconsistent about the identity of the agent of persecution, her evidence was not credible.

### 18.2.3 Victim of a crime

A claimant may be the victim of crime—such as theft, assault, extortion—but not meet the refugee definition. Some cases distinguish between the victims of ordinary crime and those whose situation amounts to persecution with a link to an enumerated ground. This issue may overlap with whether the s. 97 risk faced by the applicant is general or personalized. For example see, *Melendez v Canada (MCI)*, 2014 FC 700.

In *Gonzalez*, the claimant had refused to engage in corruption. After being fired, the claimant reported the corruption to the government complaints hotline. Shortly afterwards, he was threatened and assaulted. The Board held that he had simply been the victim of a crime. The Federal Court held that this was an error of law, as opposition to corruption amounts to an expression of political opinion following *Ward* (*Gonzalez v Canada (MCI)*, 2011 FC 389).

In *DFR*, the court upheld the tribunal's finding that the claimant was only a victim of a crime and therefore unable to identify a nexus between their situation and a Convention ground (*DFR v Canada (MCI)*, 2011 FC 772 at paras 5-8).

**See also the following LAO LAW Memoranda:**

- Persecution – Definition, REF1-1
- Gender-Related Persecution, REF1-2
- Ground of Persecution – Religion, REF1-3
- Ground of Persecution – Political Opinion, REF1-4.

## 19.0 Danger of torture: s. 97(1)

The *IRPA* also protects persons who would face a risk of torture if they were removed to another country. There is no need to link the risk of torture to one of the enumerated grounds. The sole question is whether there is a substantial and objective risk of torture or risk to life or risk of cruel and unusual treatment or punishment, regardless of whether it is based on any of the grounds specified in the definition of refugee.

Note that a negative credibility finding is sufficient to dispose a claim under both sections 96 and 97, unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim (*Lopez v Canada (MCI)*, 2014 FC 102 at para 40).

Some decisions suggest that failure to conduct a section 97 analysis is an error, if some credible evidence establishes a risk profile. However, the failure to set out a separate section 97 analysis is not fatal in every case. Where there is no evidence supporting a finding that the claimant is a person in need of protection and the applicant's s. 97 claim would be based on the same fact scenario as the s. 96 claim, this analysis will not be required (see, for example, *Ndegwa v Canada (MCI)*, 2006 FC 847; *Soleimanian v Canada (MCI)*, 2004 FC 1660).

Further, some circumstances are assumed to warrant a s. 97 analysis (for example, see the cases of MDC involvement for claimants from Zimbabwe *Taruvunga v Canada (MCI)*, 2007 FC 1264). See also *Jama*, where the Federal Court held that in the case of a young Somali male returning to or through al-Shabaab held territory after living in the West for many years, the officer should have been aware of an alarming risk that required assessment (*Jama v Canada (MCI)*, 2014 FC 668).

Deporting a refugee to a country where they face a risk of torture is contrary to section 7 of the Charter, when there is a sufficient causal connection between Canada's actions and the deprivations of life, liberty or security that the claimant will face. However, the court must balance these concerns against Canadians' safety interests (*Suresh v Canada (MCI)*, 2002 SCC 1, [2002] 1 SCR 3).

Section 97(1)(a) provides that a person in need of protection is someone whose removal would subject them to a danger, "believed on substantial grounds to exist, of torture." This means that the danger of torture must be more likely than not. This is more than a minimal risk, but less than "probable" (*Li v Canada* 2005 FCA 1 at 36, [2005] 3 FCR 239). The degree of risk under paragraph 97(1)(b) is that the risk is more likely than not (*Li v Canada (MCI)*, 2005 FCA 1). Note that this analysis is different than the test for persecution under s. 96.

The standard of proof used is a balance of probabilities (*Li v Canada* 2005 FCA 1 at para 14, [2005] 3 FCR 239).

### **19.1 s. 97(1) Torture: state complicity**

*IRPA* defines torture with reference to Article 1 of the Convention against torture (CAT), which states that torture is pain or suffering “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Therefore, according to the CAT, torture for the purposes of s. 97 requires some element of state complicity.

However, in *Ward*, the Supreme Court held that state complicity is not a necessary component in persecution (*Canada v Ward*, [1993] 2 SCR 689 at para 52, SCJ No 74).

### **19.2 s. 97(1) Torture: purpose of harm**

Article 1 of the CAT defines torture as pain or suffering inflicted on a person “for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.”

### **19.3 97(1) Torture: severe pain/suffering**

Article 1 of the CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.”

### **19.4 s. 97(1) Torture: lawful sanctions**

Article 1 of the CAT states that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

## **20.0 Risk to life or of cruel and unusual treatment or punishment**

The risk to life or of cruel and unusual treatment or punishment are objective questions of fact to be determined by the Board. They must be determined on a balance of probabilities (*Lawal v Canada (MCI)*, 2010 FC 558 at 14); *Li v Canada (MCI)*, 2005 FCA 1 at para 29).

In order for punishment to amount to cruel and unusual, “the punishment must be so excessive so as to outrage standards of decency and surpass all rational bounds of

punishment” (*Ioan v Canada (MCI)*, [2004] RPDD No 532 at para 86) or it must be “punishment or treatment that shocks the conscience” (*ibid* at para 87).

The Federal Court has held that harsh prison conditions which are not in accordance with international standards may amount to cruel and unusual treatment or punishment within the meaning of s. 97(1)(b): *Kilic v Canada (MCI)*, 2004 FC 84 at paras 27-28.

## 20.1 Agent of harm

The risk does not have to be harm at the hands of a state agent (*Re WCZ* [2003] RPDD No 425 at para 14).

## 20.2 Generalized risk

Section 97 (1)(b)(ii) says that a claimant is only a “person in need of protection” if the risk they face is present in all parts of the country and that this risk is “**not faced generally by other individuals in or from that country.**” In other words, a “generalized risk” will not be enough.

For example, suicide bombings in Israel were found to be a generalized risk in *Re UFQ*, [2005] RPDD No 78 at 8.

There are diverging lines of reasoning on the difference between “generalized” and “personalized” risk. The Federal Court has attempted clarify how a section 97 analysis should be conducted. However, it is worth exploring multiple perspectives, as RPD decisions remain inconsistent.

Kane J. adopted the following analysis in *Lopez v Canada (MCI)*, 2014 FC 102 at para 43-44:

“First, the RPD must correctly characterize the nature of the risk faced by the claimant. This requires the Board to consider whether there is an ongoing future risk, and if so, whether the risk is one of cruel or unusual treatment or punishment. Most importantly, the Board must determine what precisely the risk is. ... after the risk has been appropriately characterized, [the next step] is the comparison of the correctly-described risk faced by the claimant to that faced by a significant group in the country to determine whether the risks are of the same nature and degree. If the risk is not the same, then the claimant will be entitled to protection under section 97 of *IRPA*.”

Under this formulation, a risk faced by the population in general is not sufficient, and is a “generalized risk.” However, in certain circumstances there may be evidence that although a risk is generally faced by the entire population, the claimant is at particular risk. For instance, in *Martinez Pineda*, Justice de Montigny held that, while all citizens of El Salvador face a risk of being recruited into a gang, the case before him provided evidence that the claimant had actually been targeted by a gang for recruitment and therefore faced a particular risk (*Martinez Pineda v Canada* (MCI), 2007 FC 365 at para 15. See also: *Osorio v Canada* (MCI), 2005 FC 1459 and *Cius v Canada* (MCI), 2008 FC 1).

This issue frequently arises in the context of gang-based fear. The Federal Court has recognized that it is an error to treat threats and violent reprisals for failure to comply with gang demands as merely an “extension of” or “consequential harm” arising from the generalized risk of extortion experienced by large segments of the population, such as those perceived as having wealth (*Melendez v Canada* (MCI), 2014 FC 700 at para 52). The Board should seriously consider whether the claimant faces the same risk as others who are perceived to be wealthy, or whether there is a different risk because of the pattern of personal targeting (*supra Melendez* at para 62). However, it is also an error to over-extend the valid observation made in *Gabriel v Canada* (MCI), 2009 FC 1170 that “a generalized risk could be one experienced by a subset of a nation’s population” (*Correa v Canada* (MCI), 2014 FC 252 at para 64).

Although the practice seems to have declined in use at the Federal Court, it is worth noting that some previous case law approached “generalized risk” as a *category* of risk that should always be excluded from consideration. For instance, in *Carias v Canada* (MCI), a wealthy family had been the target of harassment, violence, assault, kidnapping and arson, due to their perceived economic status and one family member’s previous investigation into corrupt police officers. The Board held that this was a generalized risk, caused by rising crime rates. The Board’s decision was upheld by the Federal Court, as the applicants were at risk merely because they faced the generalized risk of being targeted as wealthy (*Carias v Canada* (MCI), 2007 FC 602 at para 25). Other cases following this line of reasoning include (*Prophète v Canada* (MCI), 2009 FCA 31 and *Acosta v Canada* (MCI), 2009 FC 213).

Rape does not become a gender-neutral crime just because all people in the country face a risk of violence (*Nel v Canada* (MCI), 2014 FC 842).

### **20.3 Medical exemption s. 97 (1)(b)(iv)**

*IRPA* Section 97 (1)(b)(iv) excludes risk that is caused by “the inability of that country to provide adequate health or medical care.”

This exclusion also includes cases where a country is *unwilling* to provide adequate health care, in the sense that the country decides to allocate its funds in a way that may not provide adequate care for all (*Covarrubias v Canada (MCI)*, 2006 FCA 365 at para 38. See also *Re GDG*, [2009] RPDD no 99.).

However, this exclusion is not so broad that it bars any claim related to health care. For instance, a claimant could avoid the exclusion in theory by showing that he faces a “personalized risk to life on account of his country’s unjustified unwillingness to provide him with adequate medical care, where the financial ability is present” or “that there is an illegitimate reason for denying the care [...] such as persecutorial reasons.” (*Covarrubias v Canada (MCI)*, 2006 FCA 365 at para 39).

**See also:**

- *Laidlow v. Canada (MCI)*, 2012 FCA 256
- *Mazuryk v Canada (MCI)*, 2002 FCT 257
- *Singh v Canada (MCI)*, 2004 FC 288
- *Jasiel v Canada (MCI)*, 2005 FC 1234

## 20.4 Lawful sanctions

*IRPA* Section 97 (1)(b)(iii) excludes cases where the risk is inherent or incidental to lawful sanctions, unless it is imposed in disregard of accepted international standards.

**See also:**

- *Kubby v Canada (MCI)*, [2003] RPDD no 647
- *Ates v Canada (MCI)*, [2003] RPDD No 496
- LAO LAW Memorandum, *Persons in Need of Protection – IRPA s.97, REF1-5*

## 21.0 Refugees sur place

A “refugee *sur place*” is someone who was not a refugee when they left their country of origin but has become one due to intervening events. These intervening events can include actions by the claimant since leaving their country (*Win v Canada (MCI)*, 2008 FC 398 at para 27).

The IRB must consider credible evidence of the claimant’s activities in Canada which might show that they would be at risk if returned, even if the motivation behind those actions was insincere (*Ejtehadian v Canada (MCI)*, 2007 FC 158 at para 11).

When it is evident that activities taking place in Canada could place the claimant at risk if returned, then a sur place claim must be considered even if the claimant does not specifically ask the Board to do so (*Mohajery v Canada (MCI)*, 2007 FC 185 at para 31).

However, where the applicant specifically advises the Board that they need only consider a single basis for the refugee claim, the Board will not be required to then consider a sur place claim in addition (*Kyambadde v Canada (MCI)*, 2008 FC 1307 at para 19).

Consideration of a particular applicant's risk profile in assessing their sur place claim includes consideration of the risks the claimant faced before they left and the risks they would face based on events which occurred after they left (*B198 v Canada (MCI)*, 2013 FC 1106 at para 52). This examination of increased risk after fleeing the country has been applied in many Sun Sea sur place claims as well as in claims by Chinese claimants who have demonstrated religious practice (ie. Falun Gong) in Canada (see *Jia v Canada (MCI)*, 2016 FC 33; *Chen v Canada (MCI)*, 2014 FC 749; *Jin v Canada (MCI)*, 2012 FC 595).

**See also:**

- *Girmaeyesus v Canada (MCI)*, 2010 FC 53
- *Kammoun v Canada (MCI)*, 2006 FC 128

## **22.0 Cessation, vacation and change of circumstances**

Refugee protection can cease when circumstances change such that the danger to the claimant no longer exists. When circumstances change while a claim is under consideration, these new circumstances can properly form the basis for a finding that the person is not a refugee. When circumstances change after a positive refugee decision, refugee status may be revoked through cessation proceedings (*Nemeth v Canada*, 2010 SCC 56 at para 107, [2010] 3 SCR 281).

**See also:**

- *Mileva v Canada (MEI)*, [1991] 3 FCR 398 at paras 25, 32, [1991] FCJ No 79.

As noted above, where an individual voluntarily returns to their country of origin and re-avails herself of the protection of that state, this may (and frequently does) signal to authorities that the need for refugee protection may have ceased (See s. 108(1)(a) of the *IRPA*). Protected persons should therefore always be advised of the risk to their status (in addition to their safety) should they wish to return to their country of origin.

Claimants can also jeopardize their refugee status simply by applying for a passport, with no intention of returning to their country. "When a person applies for a passport from her country

there is a (rebuttable) presumption that she has re-availed herself of the protection of that country.” (See *Yuan v Canada*, 2015 FC 923; *Li v Canada* 2015 FC 459).

In deciding whether obtaining a passport from one’s country constitutes re-availment, “the motivation of the refugee applying for the passport must be taken into account” See *Canada v Bashir* 2015 FC 51, and *Chandrakumar v Canada*, [1997] F.C.J. No. 615.

Cessation proceedings that follow granting of refugee status are heard by the RPD, on application by the Minister of Public Safety and Emergency Preparedness. The proceedings are governed by s.108 of the *IRPA* and s.64 of the *Refugee Protection Division Rules*. Until recently, protected persons who became permanent residents and who were then subject to cessation findings maintained their permanent resident status. This changed, however, with changes brought about by the *Protecting Canada’s Immigration System Act* S.C. 2012, c. 17 [PCISA]. Perhaps as a result of these changes, the Minister has referred a sharply increased number of cessation proceedings to the Immigration and Refugee Board in recent years. For in depth analysis of the jurisprudence that has developed as a result of these increases, see LAOLAW Memorandum: REF2-10 Cessation and Vacation of Refugee Status.

**Consequences of a cessation finding:**

- Inadmissibility – s. 40.1 *IRPA*
- Refugee claim deemed to be rejected – s. 108(3) *IRPA*
- Loss of permanent resident status – s. 46(1)(c.1) *IRPA*
- No right of appeal to RAD or IAD – s. 110(2)(e), s. 63(3) *IRPA*

**More collateral consequences of cessation finding:**

- H&C bar for one year under s. 25 (1.2) (b)(c), unless the claimant meets one of the exceptions – s. 25 (1.21)(a)(b)
- No TRP for 12 months after cessation decision – s. 24(4) *IRPA*
- No statutory stay of removal pending judicial review of cessation decision – s. 231(1) *IRPA*
- No PRRA for one or three years (in the case of persons from DCOs) – s. 112(2) (b.1) *IRPA*
- Removal from Canada “as soon as possible” – s. 48(2) *IRPA*
- Cessation will apply to children unless they can demonstrate a different intention (and are old enough to do so) See: *Cabrera Cadena v Canada* 2012 FC 67 at para 31

## 22.1 Vacation

The minister may apply to the RPD to “vacate” refugee determination where it is alleged that refugee protection was granted as a result of directly or *indirectly* misrepresenting or withholding material facts under s. 109 of *IRPA*.

Common grounds:

- Not in country at time of alleged persecution
- Inconsistent info on subsequent applications, i.e. application for permanent residence
- False documentation
- Failure to reveal criminal conviction(s).

The onus is on the minister to show (a) that the person concerned misrepresented or withheld material facts relating to a relevant matter (s. 109(1) *IRPA*).

The RPD 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 (s. 109(2) *IRPA*).

If the RPD grants the minister’s application, the refugee claim is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified (s. 109(3) *IRPA*).

For more, see LAOLAW Memorandum: REF2-10 Cessation and Vacation of Refugee Status

## 22.2 Compelling reasons

Section 108(4) of the *IRPA* states that even if the reasons for refugee protection have ceased, a person can retain refugee status when:

“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.”

This was interpreted in *Obstoj* to include “those who have suffered such appalling persecution that their experience alone is a compelling reason not to return them” (*Canada (MEI) v Obstoj*, [1992] 2 FCR 739 at para 19, [1992] FCJ No 422).

However, “compelling reasons” must be considered on a case by case basis, each on its own merit, based on the totality of the evidence, so there can be no rigid test (*Suleiman v Canada (MCI)*, 2004 FC 1125 at para 16).

The compelling reasons exception only applies to those who would have been entitled to refugee protection, but the reasons for that refugee claim have since ceased to exist (*Nadjat v Canada (MCI)*, 2006 FC 302 at para 50). The Court has affirmed that a compelling reasons analysis does not need to be undertaken where the Board has determined that an applicant did not qualify as a refugee at any point (*JKM v Canada (MCI)*, 2013 FC 1060). It is not sufficient to find that the applicant had been persecuted at any point (*Henry v Canada (MCI)*, 2014 FC 1017).

However, where a claimant experienced previous torture or persecution, the Board is required to consider subsection 108(4), whether or not the claimant raised the issue: *Yamba v Canada (MCI)* (2000), 254 NR 388 at para 6, [2000] FCJ No 457; *Kumarasamy v Canada (MCI)*, 2012 FC 290; *Sivapathasuntharam v Canada (MCI)*, 2012 FC 486 at paras 25. The Board cannot avoid its statutory obligation to consider compelling reasons by not addressing the question of past persecution: *Buterwa v Canada (MCI)*, 2011 FC 1181 at para 11.

For more on this, see LAO LAW Memorandum, Change of Circumstances, REF2-3.

## **23.0 Issues specific to the Refugee Appeal Division (RAD)**

The RAD came into force on December 15, 2012. It provides a new right of appeal for some claims heard by the Refugee Protection Division (RPD).

*IRPA* s. 110(1) states that “a person or the minister may appeal, in accordance with the rules of the Board, on a question of law, of fact, or of mixed law and fact, to the RAD against a decision of the RPD to allow or reject the person’s claim for refugee protection.”

RAD appeals are generally expected to be paper-based processes, and have no obligation to hold an oral hearing (*IRPA* s. 110(6)). However, oral hearings may be held if there is documentary evidence that:

- raises a serious issue with respect to credibility
- is central to the decision with respect to the refugee protection claim
- if accepted, would justify allowing or rejecting the refugee protection claim.

After considering an appeal, the RAD can:

- confirm the determination of the RPD
- substitute a decision or
- refer the matter to the RPD for re-determination (*IRPA* s. 111(1)).

As the RAD is such a new body, the issues discussed below are evolving. Note that *IRPA* s 171(c) provides that a decision of a three-member RAD panel has precedential value for the RPD and for single-member RAD panels.

## 23.1 Notice

It is a principle of natural justice that claimants have to be given notice of all the relevant issues in order to know the case to be made against them. The RAD has the authority to perform an independent analysis of all evidence to assess a refugee claim. So, although an appellant can identify errors made by the RPD as grounds for an appeal, the RAD can independently assess the claim based on the record before the RPD and may refuse the appeal on findings not contemplated or addressed by the appellant in their memorandum, even if it agrees with the errors stated by the appellant. Whether a claimant has a right to notice where the RAD departs from RPD findings will be context-specific. But it is arguable that if the RAD makes a finding that the appellant had no notice of at either the RPD or the RAD, this constitutes a breach of natural justice and would justify either an application to re-open at the RAD or an application for leave and judicial review of the RAD decision.

For recent jurisprudence on this point, see *Ching v. Canada (MCI)*, 2015 FC 725, *Ghamooshi v. Canada (MCI)*, 2016 FC 225 and *Husian v. Canada (MCI)*, 2015 FC 684.

## 23.2 Level of deference owed to the RPD by RAD

Although the *IRPA* sets out grounds for appeal as well as possible remedies, it does not specify the standard of review to be applied by the RAD. The level of deference owed by the RAD to decisions from the RPD is evolving. It does seem to be settled that although the RAD is not a hearing *de novo*, the RAD does not need to show the same level of deference as mandated upon judicial review.

In 2014, the Federal Court released a number of decisions attempting to clarify the standard of review. These decisions clarified that the RAD process is not equivalent to a judicial review at the Federal Court and should not apply the deferential standard of reasonableness as is the practice in a judicial review. Instead, the RAD must weigh the evidence itself and conduct its own assessment. Otherwise, there would seem to be no rationale for the existence of a merit-based appeal.

### See, for example:

- *Alvarez v Canada (MCI)*, 2014 FC 702
- *Eng v Canada (MCI)*, 2014 FC 711
- *Huruglica v Canada (MCI)*, 2014 FC 799.

In *Huruglica*, 2016 FCA 93, the Federal Court of Appeal considered the matter and determined that:

“the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law. This translates into an application of the correctness standard of review. If there is an error, the RAD can still confirm the decision of the RPD on another basis. It can also set it aside, substituting its own determination of the claim, unless it is satisfied that it cannot do either without hearing the evidence presented to the RPD”: *Huruglica*, at para 78; see also: *Canada (MCI) v Singh*, 2016 FCA 96 at para 23.

The *Huruglica* decision confirms that the RAD must carry out its own analysis of the record when hearing appeals, to determine whether the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision, or by setting it aside and substituting its own determination of the merits of the refugee claim.

Where the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD, it should refer the matter back to the RPD for redetermination.

### **23.3 New evidence at the RAD**

In order to submit new evidence, it must be considered under both Rule 29 and *IRPA* subsection 110(4).

Section 29(4) of the RAD rules states that, in deciding whether to allow an application, the RAD must consider any relevant factors, including:

- the document's relevance and probative value
- any new evidence the document brings to the appeal and
- whether the person who is the subject of the appeal, with reasonable effort, could have provided the document or written submissions with the appellant's record, respondent's record or reply record.

In *Canada (MCI) v Singh*, 2016 FCA 96, the Federal Court of Appeal concluded that the factors for determining the admissibility of new evidence in the PRRA context (as discussed in *Raza*, 2007 FCA 385) are, for the most part, relevant to the RAD's evaluation of evidence pursuant to subsection 110(4).

In *Singh*, the Court noted that the statutory language used to describe admissible evidence is virtually identical in the PRRA and RAD contexts. This being the case, there should be a presumption that Parliament intended both sections to have similar meanings: para. 40.

The court further observed that the criteria used in *Raza* are consistent with tests generally adopted by courts and administrative bodies, which are designed to preserve the integrity of the judicial process. The criteria are, with minor changes, related to the materiality criterion described in *Raza*, equally applicable to the RAD: para. 49. The *Raza* criteria are:

- Credibility
- Relevance
- Newness and
- Materiality.

The Court in *Singh* concluded its decision by answering the certified question as follows (at para. 74):

To determine the admissibility of evidence under subsection 110(4) of the IRPA, the RAD must always ensure compliance with the explicit requirements set out in this provision. It was also reasonable for the RAD to be guided, subject to the necessary adaptations, by the considerations made by this Court in *Raza*. However, the requirement concerning the materiality of the new evidence must be assessed in the context of subsection 110(6), for the sole purpose of determining whether the RAD may hold a hearing.

## **23.4 Right to an oral hearing**

In general, proceedings before the RAD are paper-based, and there is no right to an oral hearing. Oral hearings are held only if the criteria set out in subsection 110(6) of *IRPA* are met. That is, the RAD may hold a hearing where there is specified documentary evidence that:

- raises a serious issue with respect to the credibility of the person who is the subject of the appeal
- is central to the decision with respect to the refugee protection claim
- if accepted, would justify allowing or rejecting the refugee protection claim.

These standards are similar to *IRPR* s. 167 for PRRA applications. See Section 25.8 below on PRRA – oral hearings for case law which may be relevant by analogy.

There has been little judicial consideration of the RAD's determinations with respect to oral hearings. Some recent decisions include: *Tchangoue v Canada (MCI)* 2016 FC 334 and *Sow v Canada (MCI)*, 2016 FC 584.

## 24.0 Identity

As previously discussed, a claim must be dismissed if the Board determines that identity has not been proven (*Ipala v Canada (MCI)*, 2005 FC 472 at para 33,). Therefore, if identity is not proven, the RAD does not proceed to consider the merits of the claim (*RAD File No TB3-08073*, [2014] RADD No 41).

However, it is possible to introduce additional evidence regarding identity to overcome concerns set out by the RPD. In *RAD File No TB3-03364*, [2013] RADD No 6, the RPD rejected a birth registry entry and gave a voter registration card little weight. However, the RAD allowed the claim with additional evidence: a student card, an affidavit from an uncle, and verification of a birth certificate letter from a Registry.

## 25.0 Issues Specific to Pre-Removal Risk Assessments (PRRAs)

The statutory authority for a PRRA is set out in s 112 – 116 of *IRPA* and s. 160 – 174 of *IRPR*. These provisions enable a delegate of the minister to determine whether a person who faces a removal order is in need of protection. This determination is conducted on the grounds set out in s 96 and s 97 of the *Act*. Therefore, many of the issues already outlined above will be relevant to reviewing a PRRA.

A person seeking Canada's protection bears the onus of establishing that he or she meets the conditions set out in s 96 or s 97 of the *Act* (*Adetunji v Canada (MCI)*, 2012 FC 708 at para 19).

Applicants whose claims are denied by the RPD currently are subject to a 12-month bar before they can make a PRRA application. Justice Annis of the Federal Court recently denied a section 7 challenge to the 12-month bar, holding that the 12-month bar is not arbitrary, overbroad or grossly disproportionate. Justice Annis found that there would be minimal occasions for changes in country conditions in 12 months (*Peter v Canada (MPSEP)*, 2014 FC 1073 at para 122).

Two questions were certified in *Peter* concerning the constitutionality of the 12-month bar and the removals process when a deferral of removal is sought.

## 25.1 Standard of review

Decisions on PRRAs, including on state protection issues, attract deference.

PRRA decisions are in large part the result of a fact-driven inquiry for which the Courts have determined the minister and his delegates have a specialized expertise. PRRA determinations based on findings of fact and a PRRA officer's interpretation of the IRPA are therefore reviewed on a standard of reasonableness (*Pozos Martinez v Canada (MCI)*, 2010 FC 31 at para 18; *Navarro Canseco v Canada (MCI)*, 2007 FC 73 at para 11).

The weighing of the evidence lies within the purview of the minister and his delegates and does not normally give rise to judicial review (*Raza v Canada (MCI)*, 2007 FCA 385).

This said, the courts will employ the correctness standard in assessing the fairness of a PRRA proceeding or in considering certain questions of law.

## 25.2 Reliance on RPD decision

In *Raza v Canada (MCI)*, 2007 FCA 385, the court stated that:

“A PRRA application by a failed refugee claimant is not an appeal or reconsideration of the decision of the RPD to reject a claim for refugee protection. Nevertheless, it may require consideration of some or all of the same factual and legal issues as a claim for refugee protection. In such cases, there is an obvious risk of wasteful and potentially abusive re-litigation. The *IRPA* mitigates that risk by limiting the evidence that may be presented to the officer. The limitation is found in paragraph 113(a) of the *IRPA*” (at para 12).

The officer cannot re-visit or find errors with the reasons and findings of the RPD: *HK v Canada (MCI)*, 2004 FC 1612 and *Kaybaki v Canada (Solicitor General of Canada)*, 2004 FC 32. For example, “an IFA finding by the RPD precludes a positive PRRA finding unless new evidence shows a material change in circumstances has occurred” (*Ikechi v Canada (MCI)*, 2013 FC 361).

However, where the RPD never considered the specific issue at hand, claiming to rely on the reasons of the RPD is a reviewable error (*Bastamie v Canada (MCI)*, 2014 FC 251).

## 25.3 Rebutting IFA finding of the RPD

A PRRA officer is required to respect the RPD's IFA finding unless there is new evidence showing a material change in circumstances since the RPD decision (*Ikechi v Canada (MCI)*, 2013 FC 361 at para 30). The PRRA officer must consider new evidence in the context of the risks asserted in the PRRA application. For example, the applicants provided evidence establishing barriers to treatment in India, so the finding that the applicants had provided little evidence that medical treatment would not be available in Mumbai was unreasonable (*Chandidas v Canada (MCI)*, 2013 FC 257 at paras, 20, 48).

## 25.4 Consideration of new evidence only

*IRPA* s. 113 requires that only new evidence can be raised once a refugee claim has been rejected. This "new evidence" must be evidence:

- that arose after the rejection of the refugee claim or
- that was not reasonably available at that time, or
- that the refugee claimant could not have been expected in the circumstances to have presented

(*Yousef v MCI*), 2006 FC 864 at para 20).

*IRPR* subsection 161(2) provides that the person who makes written submissions must identify the evidence that meets the requirements of paragraph 113(a) of the Act and show how that evidence is relevant to them.

Evidence of changes in the country of origin will only be considered as new evidence if it is relevant to the risks faced by the applicant (*Ayikeze v Canada (MCI)*, 2012 FC 1395 at paras 23-24). If evidence provided is not sufficiently relevant, the PRRA officer may find that the applicant based the application on the same facts as those already analyzed at the RPD. The Courts have been clear that the PRRA is not an appeal of the RPD decision (*Abdollahzadeh v Canada (MCI)*, 2007 FC 1310 at paras 26-27, [2007] FCJ No 1703).

In *Raza*, the Federal Court of Appeal set out factors to be considered in assessing "new" evidence in the PRRA context. Paragraph 13 of that decision describes the factors—newness, materiality, credibility, reliability and statutory purpose).

## 25.5 Scope of consideration

A PRRA officer does not need to continue their assessment once they have determined that the claimant does not meet the definition of s 96 or s 97. Once an officer determines that the claimants are not persons in need of protection within the meaning of s 96 and s 97 for the purposes of their PRRA request, the decision is determined. Where the decision goes on to look at other considerations, such as current country conditions, the failure to do so reasonably “cannot and should not, alter the validity of his primary finding which, again, [is] dispositive of the applicants' request” (*Teofilio v Canada (MCI)*, 2014 FC 783 at para 33).

Even where a negative credibility finding has been made, failing to consider evidence relevant to the risk based on accepted facts goes to the heart of the PRRA process. The omission can render the officer's decision unreasonable (*Rathnavel v Canada (MCI)*, 2013 FC 564 at para 21).

## 25.6 Health care upon return

*IRPA* s 97(1)(b)(iv) states that the inability of a country of origin to provide health care to the applicant cannot be grounds to find the applicant in need of protection. However, protection may be required where the harm that the applicant apprehends is not that inability to access health care will itself cause a risk to his life or cruel and unusual treatment, but rather that manifestations of the symptoms of illness will attract cruel and unusual treatment or result in the deprivation of necessities of life (for example due to imprisonment). For example see *Lemika v Canada (MCI)*, 2012 FC 467 or *Level v Canada (MCI)*, 2013 FC 1226).

A political decision not to provide a certain level of health care does not necessarily mean that the country is "unwilling" to provide that care to its nationals. The onus will be met where an applicant can show a personalized risk to life on account of the country's unjustified (that is, discriminatory or persecutory) unwillingness to provide him with adequate medical care, where the financial ability is present (*Covarrubias v Canada (MCI)*, 2006 FCA 365).

## 25.7 Cruel and unusual treatment

The PRRA manual describes the procedure for assessing risk to life and cruel and unusual treatment or punishment:

“The risk must be personalized to the individual. The assessment may be based on past events but is forward looking: the issue to be determined is whether events related by the applicant, together with all the other evidence, including country conditions at the time of the decision, show that the

applicant, if returned, would be subjected to a risk to life or of cruel and unusual treatment or punishment” (*Lai v Canada (MCI)*, 2007 FC 361 at para 115).

The PRRA officer has the right and the duty to examine recent sources of information regarding the country situation beyond the information provided by the applicant (*Hassaballa v Canada (MCI)*, 2007 FC 489 at para 33).

## 25.8 Requirement for an oral hearing

An oral hearing will only be held in exceptional circumstances, when all factors set out in IRPR 167 are present. These factors are whether:

- there is evidence related to s 96 or s 97 that raise a serious issue of the applicant's credibility
- evidence is central to the decision and
- the evidence, if accepted, would justify allowing the application for protection.

A hearing may be required where the decision is entirely based on a credibility finding. Courts are reluctant to determine that there has been a veiled credibility finding (for example see: *Pil v Canada (MCI)*, 2013 FC 345). Finding that the applicant has not provided sufficient evidence to establish assertions may not be equivalent to finding them not credible (*Gao v Canada (MCI)*, 2014 FC 59 at para 32).

The Federal Court has accepted that a PRRA officer may assess evidence for its probative value without considering whether the evidence is credible. If the officer determines that the evidence is insufficiently probative to influence the decision, then a credibility assessment is unnecessary (*Ferguson v Canada (MCI)*, 2008 FC 1067 at para 27). Unfortunately, this creates an avenue for veiled credibility findings under the guise of insufficient evidence. This is important, because an interview is not required when the issue is the sufficiency of the evidence. In the supra *Ferguson* case, for instance, the applicant had not provided evidence of her sexual orientation through an affidavit, which would have carried more weight than her counsel's reference to it in submissions.

On many occasions, however, the Federal Court has found that an Officer's finding of insufficient evidence is, in reality, a veiled credibility finding. In *Strachn*, Rennie J wrote:

“while the Court has acknowledged that there is a difference between an adverse credibility finding and a finding of insufficient evidence, the Court has sometimes found an officer to have improperly framed true credibility findings as findings regarding sufficiency of evidence and therefore an oral hearing should have been granted” (*Strachn v Canada (MCI)*, 2012 FC 984 at para 34).

Other cases where a veiled credibility finding was identified:

- *Chekroun v Canada (MCI)*, 2013 FC 737 at paras 66 – 69
- *Zokai v Canada (MCI)*, 2005 FC 1103 at para 12
- *Liban v Canada (MCI)*, 2008 FC 1252 at para 14
- *Haji v Canada (MCI)*, 2009 FC 889 at paras 14-16.

The failure to consider a written request for an oral hearing may be unreasonable where the officer has made a veiled credibility finding (*Zokai v Canada (MCI)*, 2005 FC 1103 at paras 11-12). Noting the presumption of truthfulness associated with refugee claims, the Court in *Whudne v. Canada (MCI)* 2016 FC 1033 recently stated (at para. 20):

In those circumstances, the officer erred by making credibility findings without calling a hearing. An applicant’s testimony is presumed to be true unless there is a valid reason to doubt its truthfulness...However, the officer essentially found Ms. Knowei to lack credibility...While the officer couched this finding in terms of the weight to be given to the evidence, “the Court must look beyond the express wording of the officer’s decision to determine whether, in fact, the applicant’s credibility was in issue” (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 16). Findings based on contradictions in sworn evidence should be defined as credibility issues...[some citations omitted]