Immigration and Refugee Board of Canada
Commission de l'immigration et du statut de réfugié du Canada
Canada

WEIGHING EVIDENCE

Legal Services

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IRB·CISR

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Abbreviations

IAD	Immigration Appeal Division
IAD Rules	*Immigration Appeal Division Rules*, SOR/2002-230
ID	Immigration Division
ID Rules	*Immigration Division Rules*, SOR/2002-229
IRB	Immigration and Refugee Board of Canada
IRPA	*Immigration and Refugee Protection Act*, SC 2001, c 27
RAD	Refugee Appeal Division
RAD Rules	*Refugee Appeal Division Rules*, SOR/2012-257
Regulations	*Immigration and Refugee Protection Regulations*, SOR/2002-227
RPD	Refugee Protection Division
RPD Rules	*Refugee Protection Division Rules*, SOR/2012-256

CHAPTER 1

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1 Introduction

This paper is designed as a reference source and practical tool for all four Divisions of the Immigration and Refugee Board of Canada (IRB)[1] on issues related to weighing evidence. It includes discussions of possible factors to consider in weighing evidence, as well as relevant case law. This paper is not meant to be exhaustive, nor is the application of the factors and principles discussed herein to be considered mandatory. It is provided simply as a guide to matters that may be relevant in weighing different types of evidence.

[1] The IRB consists of the Immigration Division (ID), Immigration Appeal Division (IAD), Refugee Protection Division (RPD), and Refugee Appeal Division (RAD).

CHAPTER 2

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2 General Principles

2.1 Evidence

"Evidence" includes all the means of proving or disproving any matter (i.e. oral testimony, written records, demonstration, etc.). It does not include arguments on behalf of the parties (sometimes called "submissions" or "representations"), which are made to persuade the decision-maker to take a certain view of the evidence.[2]

2.2 Legal and Technical Rules of Evidence

When weighing evidence, decision-makers should keep in mind that the IRB is not a court of law, but an administrative tribunal which is not bound by any legal or technical rules of evidence.[3]

The rules of evidence are derived from case law and applied by the courts to ensure the evidence that is relied on to reach a decision is deserving of weight. These rules may result in the refusal to admit certain evidence into the court's record. Some rules of evidence and their rationales are set out in Appendix A to this paper.

Since the IRB is not bound by the rules of evidence, it may admit evidence which would not be admissible in a court. Nevertheless, the IRB may consider the rationales for those rules in assessing the weight of evidence. One or more rules may be relevant to any particular piece of evidence.

However, the IRB errs in law if it gives no weight to a document simply because its contents were not proved in accordance with the rules of evidence.[4]

2.3 Credible or Trustworthy Evidence

The *Immigration and Refugee Protection Act* (*IRPA*) provides that the IRB may receive and base a decision on evidence it considers credible or trustworthy in the circumstances.[5] Courts have treated "credible" and "trustworthy" as having the same

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[2] Subsection 110(3) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] distinguishes between documentary evidence and submissions. It says that, with some restrictions, the RAD "may accept documentary evidence **and** written submissions from the Minister and the person who is the subject of the appeal … [emphasis added]."

[3] *IRPA*, ss 170(g) and (h), 171(a.2) and (a.3), 173(c) and (d), 175(b) and (c).

[4] *Attorney General of Canada v Jolly* [1975] FC 216 (CA). Also see *B095 v Canada (Citizenship and Immigration)*, 2016 FC 962 at para 25. In *Suchon v Canada*, 2002 FCA 282, the Federal Court of Appeal found that evidence tendered in an informal Tax Court proceeding cannot be excluded solely because it would be inadmissible in an ordinary court proceeding, and that it would be an error to reject the evidence purely on technical legal grounds without considering whether the evidence is sufficiently reliable and probative to justify admitting it.

[5] *IRPA*, ss 170(h), 171(a.3), 173(d), and 175(1)(c).

meaning,[6] namely a piece of evidence's worthiness of belief.[7] For the purposes of this paper, credibility includes both veracity (i.e. a witness's honesty) and reliability (i.e. assuming the witness is being honest, whether the evidence provides an accurate account of the material facts).[8] For a detailed review of principles and case law relating to credibility, see Legal Services' reference paper *Assessment of Credibility in Claims for Refugee Protection*.

The wording of the relevant provisions of the *IRPA* tends to support the position that the IRB should not receive, or admit, evidence unless it is determined to be credible or trustworthy. However, this does not reflect the normal practice at the ID, IAD, or RPD. There are two reasons for this. Once evidence is excluded, it is hard to later admit it. It is much simpler to admit the evidence and subsequently give it no weight if that is warranted. Further, it is preferable to assess the credibility of the evidence based on the total evidence presented. Credibility decisions are not always easy to make, and often require careful thought and analysis. The hearing process would become very slow and tedious if a ruling regarding credibility had to be made as each piece of evidence was tendered. Nevertheless, there may be cases where the evidence should not be admitted at all, such as where the prejudicial effect of the evidence far outweighs its probative value.

However, this is not the case for the RAD, where each piece of new evidence submitted by a person who is the subject of an appeal must be assessed to determine its admissibility. Admissibility is determined by applying the criteria of subsection 110(4) of the *IRPA*. If any of those criteria are met, then the evidence must be assessed for its newness, relevance, and credibility; the evidence is only admissible if all three are satisfied.[9] Once admitted, the evidence is weighed in the context of the other evidence in the appeal record.

2.4 What It Means to Weigh Evidence

Not all evidence is equally helpful in assisting a decision-maker to make findings; each piece of evidence must be weighed. For the purposes of this paper, to "weigh" a piece of evidence means to assess its credibility and probative value. In *Magonza*,[10] Justice Grammond of the Federal Court wrote that evidentiary weight can be expressed using the following equation:

weight = (credibility) x (probative value)

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[6] *Sheikh v Canada (MEI)*, [1990] 3 FC 238; 71 DLR (4th) 604, 11 Imm LR (2d) 81 (CA); *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 16.

[7] *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 16, citing *Cooper v Cooper*, 2001 NFCA 4 at para 11.

[8] In *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14, Justice Grammond acknowledged that some authors equate "credibility" with "veracity", and treat "reliability" as being a separate issue (at para 18).

[9] *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96.

[10] *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 29.

The probative value of evidence is its capacity to establish the fact of which it is offered in proof (in other words, the degree to which the information is useful in answering a question that must be addressed).[11]

The weight of a piece of evidence should not be confused with the sufficiency of evidence. The total evidence relating to a disputed fact is considered "sufficient" if its cumulative weight warrants a finding that the fact exists. Assessing sufficiency requires the exercise of practical judgment on a case-by-case basis and will attract much deference on judicial review.[12]

It is important to remember that each piece of evidence should be weighed in light of all of the evidence in the case and the issues to be decided. Evidence may be given full weight, partial weight, more or less weight than other evidence, or no weight at all.

Ultimately, the weights of various evidence will be used to determine whether the burden of proof has been met in relation to each element of the definitions of Convention refugee or person in need of protection, or the relevant provisions of the *IRPA* or *Immigration and Refugee Protection Regulations* (the *Regulations*).[13] With respect to refugee determination, decision-makers should keep in mind that evidence which may not be probative with respect to one protection ground, and therefore should be given little weight in coming to a finding on that particular ground, may be probative for the purpose of deciding on one of the other protection grounds.

2.5 Factors to Consider in Weighing Evidence

Evidentiary weight should be determined in light of all of the circumstances and evidence of a particular case. The factors to be considered in weighing evidence are largely based on common sense.

The following are factors that may generally be considered by decision-makers when weighing evidence (note that the factors listed here and elsewhere in this paper are not intended to be exhaustive or mandatory):

- the circumstances surrounding the making of a statement;
- any information about the person who made a statement;
- the number of times information was passed on before being made known to the witness;
- whether the evidence is consistent with other credible or trustworthy evidence, including *viva voce* and documentary evidence;
- whether the witness observed the events to which they testified;

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[11] *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 21, citing *R v T(M)*, 2012 ONCA 511 at para 43.

[12] *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 32-35.

[13] SOR/2002-227.

- the circumstances surrounding the event;
- whether there is better evidence available and whether a reason was provided for not producing that evidence;
- whether the witness is drawing reasonable inferences or is simply speculating;
- whether the evidence is self-serving;
- the circumstances under which a document was created;
- whether the author of a document in evidence was made available for cross-examination, or would have been made available if required;
- whether some of the witness's other evidence has been found to be not credible;
- whether the witness is disinterested in the result;
- whether the witness is biased;
- the witness's qualifications and knowledge of the subject to which they testified;
- the witness's attitude and demeanor; and
- the date of a document.

CHAPTER 3

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3 Evidence and the Decision-Making Process

Below is an overview of the process decision-makers typically follow when assessing evidence. The purpose of this section is to help the reader situate the critical step of assigning weight to the evidence within the broader decision-making process.

3.1 Before the Hearing

3.1.1 Determine Which Party Has the Burden of Proof

In every matter that comes before any of the Divisions of the IRB, the ultimate burden of proof lies with one of the parties to the proceeding. The burden of proof may be particularly important where, after all the evidence has been assessed and weighed, it is found to be evenly balanced in terms of either proving or disproving the case. In that situation, the party with the burden of proof has not established their case.

See Chapter 4 of this paper for a further discussion of burdens of proof.

3.1.2 Identify the Issues

The process of assessing evidence begins before the hearing starts, in that the record before the panel should be analyzed for the purpose of identifying the issues in the case. The panel may also consider any evidence that is before them by agreement of the parties or clearly not controversial. If the admissibility of certain evidence is being or will likely be challenged, the panel may not wish to consider that evidence until the preliminary issue of admissibility has been determined. Of course, at this stage the identification of the issues is tentative, since the issues may change as more evidence is received prior to or during the hearing.

In identifying the issues, the relevant provisions of the *IRPA* and the *Regulations* should be considered. The evidence/record should then be examined to decide which specific issues are potentially determinative of the case before the panel. Generally, it is not helpful to define the issues in broad terms (e.g., “Is the claimant a Convention refugee or a person in need of protection?” or “Is the applicant a member of the family class?”). Instead, the issues should be framed in terms that are narrow enough to help the panel to decide what evidence is relevant to the decision that is to be made (e.g., “Does the claimant have an internal flight alternative?” or “Did the adoption of the applicant by the appellant create a genuine parent and child relationship?”). Having identified the potentially determinative issues, the panel is better able to focus the hearing on evidence that is more likely to be material to the case’s outcome.

3.2 During the Hearing

3.2.1 Determine Admissibility

In a court, inadmissible evidence generally will not be marked as an exhibit or form part of the record of the proceedings. In addition, inadmissible parts of otherwise admissible

evidence (e.g., a particular passage in a document) may be struck from the record.[14] Any evidence that is not admitted or is struck from the record will not be considered by the decision-maker in reaching their decision.

As discussed in the previous chapter, the Divisions of the IRB are not bound by any legal or technical rules of evidence.[15] Unlike a court of law, most evidence presented in IRB hearings is admitted, and any deficiencies in the evidence will go towards the weight the panel assigns to it. However, in some circumstances, it may be inappropriate to admit the evidence and discount its weight; instead, the panel should refuse to admit the evidence at all. This might be the case where, for example, the evidence is not relevant to the issues, the prejudicial effect of the evidence outweighs its probative value, the evidence is protected by privilege or a statutory confidentiality provision, the evidence is unduly repetitive, or the evidence fails to satisfy applicable legislative requirements for admissibility.

In *Thanabalasingham*,[16] the IAD found that evidence of alleged criminal conduct not leading to a conviction, including KGB statements, was admissible. The IAD considered the potential prejudice to the appellant of admitting evidence suggestive of criminal activity. The panel stated that it would be unfair to augment the appellant's criminal record by attempting to show on a balance of probabilities that the appellant is guilty of more offences than those on his Canadian Police Information Centre record.[17] However, the panel recognized "the same evidence may be relevant to another issue in dispute. If the issue is peripheral to what needs to be determined, it is likely that the prejudicial effect of admitting such evidence would exceed its probative value. Thus, it would not suffice to say that the evidence goes to 'all the circumstances of the case'. The particular circumstance must be identified."[18] Based on the facts of the case, the IAD found it was permissible for the respondent Minister to rely upon the evidence to substantiate the appellant's gang membership and activities.

In *Fung,*[19] the IAD admitted into evidence sworn statements and police reports that related to criminal charges that had been withdrawn. While they did not carry the same weight as documents relating to incidents leading to convictions, they were relevant to the "circumstances of the case."

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[14] The passage may be physically redacted, or the decision-maker may simply state for the record that the passage is being struck.

[15] *IRPA*, ss 170(g) and (h), 171(a.2) and (a.3), 173(c) and (d), 175(b) and (c).

[16] *Thanabalasingham v Canada (Citizenship and Immigration)*, 2003 CanLII 54253 (CA IRB); application for judicial review dismissed: *Thanabalasingham v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 599.

[17] Also see *Bertold v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8845 (FC); *Bakchiev v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16489 (FC).

[18] *Thanabalasingham v Canada (Citizenship and Immigration)*, 2003 CanLII 54253 (CA IRB) at para 30.

[19] *Fung v Canada (Citizenship and Immigration)*, 2001 CanLII 26727 (CA IRB).

In *Balathavarajan*,[20] which dealt with similar evidentiary records related to Tamil gang activities, the Federal Court of Appeal held that although such evidence can sometimes be tenuous and include information provided by informants, it is up to the IAD to decide the weight to be given to it.

As stated above, if evidence is clearly not relevant to the case, the panel may refuse to admit it. Evidence is relevant if it tends to prove the existence or non-existence of a fact in issue (i.e. it has at least some probative value).[21] When evidence is introduced, counsel should be able to explain how and to which issue it is relevant.

However, much like credibility, the relevance of evidence may not be entirely clear early in the proceeding. Furthermore, evidence which at first appears not to be relevant may turn out to be relevant in the context of the entire evidence presented. For these reasons, panels may choose to admit evidence without determining its relevance and assign appropriate weight to that evidence according to its relevance after the hearing. Evidence that is admitted but later found to lack any relevance may be given no weight.

Evidence may be credible but not relevant. For example, evidence regarding the lack of police protection for women who face abuse from their spouses in Country A may come from a very reputable source, but would have no relevance to a refugee determination proceeding if the claimant had no connection to Country A or was a male from Country A whose claim was based on his race or ethnic background.

Relevance may depend on the determination of other issues. For example, the relevance of strong, credible evidence of a close parent-child relationship between the appellant and an adopted child may not be clear until the panel decides whether the adoption was in accordance with the laws of the place of adoption.

3.2.2 Begin to Consider Credibility

During a hearing, the panel should note factors relating to the credibility of the evidence, including each witness's demeanor and any inconsistencies or omissions concerning their evidence.[22] In non-adversarial proceedings, the panel may request explanations for such inconsistencies or omissions. In adversarial proceedings, the panel may ask the parties to explain issues concerning their evidence, or may leave it to the parties to decide whether or not to do so (keeping in mind that if the witness is not given an opportunity to explain an evidentiary issue, the panel may not be able to rely on that issue to make a negative credibility finding).

As explained previously, the panel may make a finding during a hearing that a witness's evidence is inadmissible due to a lack of credibility. However, in most cases, findings regarding credibility are made after the evidence is heard and go to weight.

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[20] *Balathavarajan v Canada (Citizenship and Immigration)*, 2006 FCA 340.

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

[22] See Legal Services' paper *Assessment of Credibility in Claims for Refugee Protection* for a comprehensive discussion of this topic.

3.3 After the Hearing

3.3.1 Make Findings on Credibility

Typically, the panel will begin its post-hearing deliberations by determining whether each piece of evidence on the record is credible in light of all the evidence.

Where the credibility of evidence makes no difference to the outcome of the case, the panel may be able to assume without finding that such evidence is credible for the purpose of its analysis. For example, an RPD panel may be able to assume without finding that a claimant's allegations of persecution in their hometown are credible but reject the claim due to the availability of a safe and reasonable internal flight alternative. This is an expeditious way of proceeding and is legally permissible if the credibility of the allegations is immaterial to the panel's findings regarding the internal flight alternative.

3.3.2 Weigh the Evidence

Weight will be assigned to the evidence according to its credibility and probative value.[23] In assigning weight, decision-makers may have regard to the various principles and factors discussed in this paper.

3.3.3 Make Findings of Fact

Once weight has been assigned to the evidence, the panel will make findings as to what facts have been proven. Findings of fact may include reasonable inferences drawn from the evidence. Unless specifically stated to be otherwise, in immigration and refugee matters, findings regarding alleged or disputed facts are made on a balance of probabilities.

3.3.3.1 Consider Legal Presumptions

In some circumstances, the law requires decision-makers to draw a particular conclusion in the absence of evidence to the contrary. This is called a rebuttable presumption.[24] For example, in refugee law, unless a state has completely broken down, it will be presumed to be able to protect its nationals. That presumption may be rebutted by clear and convincing evidence to the contrary.[25] When making findings based on the evidence, panels should consider whether the party with the burden of proof has provided sufficient evidence to counter any rebuttable legal presumptions that may apply in the circumstances and run contrary to their position.

In exceptional cases, a presumption is not rebuttable. For example, section 80 of the *IRPA* provides that a section 77 certificate that has been referred to a judge of the

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[23] *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 29.

[24] CED 4th (online), *Evidence*, "Rebuttable Presumptions" (II3(c)) at §141.

[25] *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724-726.

Federal Court and found to be reasonable under section 78 is conclusive proof that the foreign national or permanent resident named in it is inadmissible.

3.3.3.2 Consider Giving the Benefit of the Doubt

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*[26] suggests that the benefit of the doubt should be granted to refugee claimants in certain circumstances:

> 203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.
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> 204. **The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility.** The applicant's statements must be coherent and plausible, and must not run counter to generally known facts. [Emphasis added.]

Courts have held that the benefit of the doubt principle applies in a limited number of circumstances where a claimant's testimony is consistent with the documentary evidence but there is little extrinsic evidence to back up their story.[27] In *Chan*,[28] the majority of the Supreme Court of Canada held it is not appropriate to apply the benefit of the doubt where the claimant's allegations run contrary to generally known facts or the available evidence.

3.3.4 Apply the Standards of Proof

Having made findings regarding the relevant facts, the panel will apply the appropriate standards of proof to determine the determinative issues. Generally, issues in immigration and refugee legal proceedings are decided on a balance of probabilities, or whether something is more likely than not. However, there are different standards for certain issues.

3.3.5 Render the Decision

Finally, the panel will decide whether the party who bears the ultimate burden of proof has established all of the elements of their case and will render its decision.

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[26] (Geneva, 2019) at paras 203-204.

[27] *Noga v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 454 at para 12; *Canada (Public Safety and Emergency Preparedness) v Gebrewold*, 2018 FC 374 at para 28.

[28] *Chan v Canada (Minister of Employment and Immigration)*, 1995 CanLII 71 (SCC).

CHAPTER 4

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4 Standard of Proof and Burden of Proof

After the evidence has been assessed and weight assigned to it, the decision-maker determines what facts have been established on the balance of probabilities (i.e. are more likely than not to be true). They then apply the relevant rules of law to the facts as found to draw conclusions in law. In doing so, the decision-maker must apply the appropriate standard of proof for the legal issue to be decided and any applicable legal presumptions. In reaching a final decision in the matter, the decision-maker must consider which party carries the ultimate burden of proving their case.

The standards of proof for the legal issues and the ultimate burdens of proof differ in the four Divisions. However, in all four Divisions, on an application made by way of motion, the burden of proof lies with the party bringing the application.

4.1 Refugee Protection Division

In the RPD, the facts are applied to the definitions of Convention refugee and person in need of protection to determine whether the elements of the definitions have been established. A refugee claimant always has the burden of establishing their case on a balance of probabilities.[29]

To meet the definition of Convention refugee under section 96 of the *IRPA*, a claimant must establish a subjective fear of persecution and that this fear is objectively well-founded. The objective legal test requires that claimants prove a "reasonable chance", or a "serious possibility" of persecution on Convention grounds. In other words, while claimants must establish their case on a balance of probabilities, they do not have to establish that persecution would be more likely than not.[30] The Federal Court of Appeal has cautioned that the standard of proof must not be confused with the legal test.[31]

To meet the definition of person in need of protection under subsection 97(1) of the *IRPA*, a claimant must establish a danger of torture believed on substantial grounds to exist, a risk to life, or a risk of cruel and unusual treatment or punishment. The standard

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[29] *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (CA), 57 DLR (4th) 153 at p 682.

[30] *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (CA), 57 DLR (4th) 153. Also see *Németh v Canada (Justice)*, 2010 SCC 56, [2010] 3 SCR 281 at para 98; *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 at para 8; *Gebremedhin v Canada (Minister of Citizenship and Immigration)*, 2017 FC 497 at para 28; *Halder v Canada (Minister of Citizenship and Immigration)*, 2019 FC 922; *Sivagnanam v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1540.

[31] *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 10. In *Halder v Canada (Citizenship and Immigration)*, 2019 FC 922, the Federal Court held it was not correct to require a claimant to prove that their alleged persecutor would find them at a proposed internal flight alternative on a balance of probabilities. That would amount to requiring them to demonstrate a future risk of persecution on a balance of probabilities rather than the applicable serious possibility standard. Also see *Gomez Dominguez v Canada (Citizenship and Immigration)*, 2020 FC 1098 at paras 29-32. But see *Sivagnanam v Canada (Citizenship and Immigration)*, 2019 FC 1540.

of proof applicable to these definitions is "on a balance of probabilities."[32] That is to say, the requisite degree of danger of torture envisaged by the expression "believed on substantial grounds to exist" in subsection 97(1)(a) is more likely than not. Similarly, the degree of risk to life or risk of cruel or unusual treatment or punishment under subsection 97(1)(b) must be proven to be more likely than not.[33]

The standard of proof for a finding that a claim is manifestly unfounded under section 107.1 of *IRPA* is on a balance of probabilities.[34]

Where Article 1F of the Convention is applied, the standard of proof is "serious reasons for considering," which is less than the balance of probabilities.[35]

In a refugee protection claim, the ultimate burden of proof rests with the claimant, that is, it is their responsibility to establish their claim. However, where the Minister is alleging that the claimant is excluded from the definitions of Convention refugee and person in need of protection through application of Article 1E or 1F,[36] the burden of proof lies with the Minister.[37] Further, where the Minister applies to have a refugee protection determination vacated,[38] or seeks a determination that the person has ceased to be a Convention refugee or a person in need of protection,[39] the burden of proof lies with the Minister.[40]

4.2 Refugee Appeal Division

In an appeal of an RPD decision, the RAD must, after carefully considering the RPD decision, carry out an independent assessment of the record to determine whether the RPD erred.[41] Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot

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[32] *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1.

[33] *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at paras 37-39.

[34] *Balyokwabwe v Canada (Minister of Citizenship and Immigration)*, 2020 FC 623 at para 40.

[35] *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 at paras 101-102. Also see *Khachatryan v Canada (Minister of Citizenship and Immigration)*, 2020 FC 167 at paras 18-30.

[36] *IRPA*, s 98 and Schedule.

[37] *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (CA), p 314; *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 at para 29.

[38] *IRPA*, s 109.

[39] *IRPA*, s 108.

[40] *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para 42.

[41] *IRPA*, s 111(1); *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] FCR 157 at para 103.

provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination.[42]

The burden is on the appellant to establish that the RPD erred in a way that justifies the intervention of the RAD.[43] The *Refugee Appeal Division Rules* (*RAD Rules*)[44] place the onus on the appellant to identify in their submissions to the RAD the errors that form the grounds of the appeal, in addition to the location of the errors in the RPD's decision.

The same standards of proof applicable before the RPD apply to proceedings before the RAD.[45]

4.3 Immigration Division

In the ID, the panel will determine whether the elements of the allegation have been established based on its findings of fact. The applicable standard of proof is a balance of probabilities, except where another standard is prescribed by the *IRPA*. For example, section 33 specifies that the standard of proof for facts that constitute inadmissibility under sections 34-37 is "reasonable grounds to believe" unless otherwise provided. The "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters (i.e. proof on the balance of probabilities).[46] Reasonable grounds will exist where there is an objective basis for the belief supported by compelling and credible information.[47] Subsection 36(3)(d) specifies that the standard of proof for inadmissibility for serious criminality outside Canada pursuant to subsection 36(1)(c) is the balance of probabilities.

The standard of proof applicable to detention review hearings is a balance of probabilities, unless otherwise specified in the statute.

The burden of proof at an admissibility hearing is always on the Minister.[48] Pursuant to subsection 45(d) of the *IRPA*, the ID will make the applicable removal order against a foreign national who is not authorized to enter Canada if it is not satisfied that the

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[42] *IRPA*, s 111(1)(c) and 111(2); *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] FCR 157 at para 103.

[43] *Dhillon v Canada (Minister of Citizenship and Immigration)*, 2015 FC 321 at para 20.

[44] SOR/2012-257, rr 3(3)(g) and 9(2)(f).

[45] *Wasel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1409; *Hadhiri v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1284 at para 38; *Elisme v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1306; *Gokkocka v Canada (Minister of Citizenship and Immigration)*, 2020 FC 92; *Jayasinghe Arachchige v Canada (Citizenship and Immigration)*, 2020 FC 509; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1130 at para 32.

[46] *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 at para 114.

[47] *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100.

[48] *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 72. Also see *Handasamy v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1389; *Al Khayyat v Canada (Citizenship and Immigration)*, 2017 FC 175 at para 27; *Niyungeko v Canada (Citizenship and Immigration)*, 2019 FC 820 at para 50.

person is not inadmissible, or against a foreign national who is authorized to enter Canada or a permanent resident if it is satisfied that the person is inadmissible.

In detention reviews, the Minister bears the burden of establishing, on a balance of probabilities, that there are grounds for detention. The burden remains on the Minister to establish, in light of the criteria in section 248 of the *Regulations*, that detention is warranted. This burden rests on the Minister throughout the detention review and resurfaces every 30 days.[49] If the evidence establishes a ground for detention under the *IRPA* and suggests that detention is justified under section 248 of the *Regulations*, it may be in a detainee's interest to introduce evidence in favour of release. This is not a shifting of the legal burden. It is, rather, descriptive of the tactical decision whether to lead evidence to prevent a potentially unfavourable outcome.[50]

4.4 Immigration Appeal Division

In the IAD, the panel must determine whether the necessary elements of the issues in the appellant's case have been established by the facts as found. The standard of proof varies according to the legal issue before the panel. As in the ID, some provisions of the *IRPA* specify the applicable standard of proof.[51]

Generally, the burden of proof before the IAD rests with the appellant in sponsorship appeals under subsection 63(1),[52] residency obligation appeals under subsection 63(4), and assessments of humanitarian and compassionate considerations under subsection 67(1).[53] In a removal order appeal, where the underlying removal order was made by the ID under subsection 45(d) and the subject of the section 44 report is a permanent resident of Canada, the burden of proof lies on the Minister to establish that the appellant is inadmissible.[54]

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[49] *Brown v Canada (Minister of Citizenship and Immigration),* 2020 FCA 130 at para 118.

[50] *Brown v Canada (Minister of Citizenship and Immigration),* 2020 FCA 130 at para 121. Also see *Canada (Minister of Citizenship and Immigration) v Thanabalasingham,* 2004 FCA 4, [2004] 3 FCR 572 at para 16.

[51] *IRPA*, ss 33 and 36(3)(d).

[52] *Kahlon v Canada (Minister of Employment and Immigration)*, (1989), 7 Imm LR (2d) 91; 97 NR 349 (FCA).

[53] *Bhalru v Canada (Minister of Citizenship and Immigration)*, 2005 FC 777.

[54] *Yang v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1484.

CHAPTER 5

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5 *Viva Voce* Evidence

5.1 General Principles

Viva voce is Latin meaning "with the living voice" and refers to evidence given by a witness orally, as opposed to evidence given in a written form such as an affidavit. Evidence given by a witness under oath or affirmation is referred to as "testimony." Testimony may be either *viva voce* or in written form.

As discussed in Chapter 2, all Divisions of the Board may receive and base decisions on evidence that is considered credible or trustworthy in the circumstances. In general, it does not matter whether testimony is given under oath, given under affirmation, or unsworn: provided that it is relevant and subject to a few exceptions, testimony is generally admissible evidence.

The advantage of *viva voce* evidence over documentary evidence is that the witness is available for cross-examination, and thus the strength of the evidence may be tested. That is why credible *viva voce* evidence is sometimes given more weight than documentary evidence.[55] Jurisprudence suggests that a panel may properly believe documentary evidence over the sworn testimony of a witness provided that the panel states clearly and unmistakably why it prefers the former.[56]

In assessing its credibility, *viva voce* evidence may be compared to the documentary evidence in order to identify any discrepancies, contradictions, or inconsistencies. Generally, a witness should be given an opportunity to explain any inconsistencies in their evidence. Please refer to Legal Services' reference paper *Assessment of Credibility in Claims for Refugee Protection* for further discussion of this issue.

The IRB will generally exclude witnesses from the hearing room before they testify, so their testimony will not be tainted by hearing the evidence of other witnesses.[57] If a witness is not excluded from the hearing room, the fact that they have heard the testimony of other witnesses may affect the credibility, and therefore the weight, of their testimony.

However, there are exceptions to the general rule noted above. For example, a witness who is also a party to a proceeding will generally be present during the entirety of that proceeding as of right. In that case, the witness's testimony cannot be discounted simply because they were present when another witness testified.[58] Accordingly,

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[55] *Veres v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 124 (TD).

[56] *Hilo v MEI* [1991] FCJ no. 228; *Kuomars, Aligolian v MCI* (FCTD, no. IMM-3684-96), Heald, April 22, 1997; *Coitinho v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037; *Razzak v Canada (Minister of Citizenship and Immigration)*, 2005 FC 752.

[57] *Immigration Division Rules,* SOR/2002-229 [*ID Rules*], r 36; *Immigration Appeal Division Rules*, SOR/2002-230 [*IAD Rules*], r 41; *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*], r 48; *RAD Rules*, r 65.

[58] *Anand v Canada (MEI)* (1990), 12 Imm LR (2d) 266 (FCA).

counsel should be encouraged to lead the evidence of the claimant, appellant, or person concerned before that of the other witnesses.[59]

Similarly, it would be improper to refuse to allow a witness to testify simply because they had already heard another witness's testimony. The issue is not one of admissibility, but rather the credibility of the evidence and how much weight is to be assigned to it.[60]

In *Wysozki*,[61] the Federal Court concluded that the rules of procedural fairness were not violated when a member of the IAD asked an appellant to testify without allowing him to refer to his personal notes and his documents previously submitted into evidence, in an effort to assess the credibility of his testimony. The court noted that the appellant, who was self-represented, still had the opportunity to present his case.

Where the *viva voce* evidence of two witnesses conflicts, the testimony of one witness may be preferred over and given more weight than that of another, provided that the panel gives reasons for deciding in this manner.

Finally, in refugee determination proceedings, the panel should not refuse to hear the testimony of a potential witness simply because the witness has made a refugee claim against the same country. The witness should be allowed to testify, and then the credibility of that evidence may be assessed by the panel.[62] This principle is essentially that the evidence of witnesses should not be prejudged, and in that sense it applies to all four Divisions.

5.2 Failure or Refusal to Testify

5.2.1 Failure to Testify

In some cases where a key witness fails to testify, the decision-maker may draw an inference that the witness did not testify because the testimony would have been adverse to the interests of the party who, otherwise, would have been expected to call

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[59] See *RPD Rules*, r 10 regarding the usual order of questioning and *Chairperson Guidelines 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division* (December 15, 2006), s 5B.

[60] *Regina v Buric et. al.* (1996), 28 OR (3d) 737 (Ont CA), appeal dismissed: [1997] 1 SCR 535. Also see *Gill, Gurpal Kaur v MCI* (FCTD, no. IMM-3082-98), Evans, July 16, 1999: The IAD did not permit the applicant's wife (and sponsor) an opportunity to testify, due to the fact that she had been in the hearing room throughout the proceedings. The court held that this was an error of law. Parties to an administrative proceeding are entitled to be present throughout the proceedings and cannot be excluded because they are going to be called as a witness. The fact that the applicant's wife had been in the room throughout might have affected the weight given to her evidence, but there was no reason to exclude that evidence.

[61] *Wysozki v Canada (Public Safety and Emergency Preparedness),* 2020 FC 458.

[62] *Gonzalez v Canada (MEI)* (1991), 14 Imm LR (2d) 51 (FCA). Also see *Dolinski v Canada (Citizenship and Immigration),* 2010 FC 1121, in which the Federal Court agreed with the applicants that some of the reasons the RPD offered for dismissing the witness's testimony (i.e. his Roma background, status as a refugee, and relation to the applicants) were unreasonable.

the witness.[63] Care should be exercised in drawing such a negative inference, and the failure to testify should be weighed against all the other evidence presented. It may be that the evidence was not necessary to establish the case. If there is a reasonable explanation for the failure to testify, an adverse inference should not be made.[64]

An adverse inference may be drawn against a party who fails to call material evidence that is particularly and uniquely available to that party.[65]

Drawing an adverse inference is permissive, not mandatory.[66] The Federal Court has stated that the IRB can draw an adverse inference when evidence is available or could be made available but is not produced, or when a person can and is given the opportunity to testify but does not testify, even though the legal and technical rules of evidence do not apply.[67]

In *Okwe*,[68] the IAD had drawn adverse inferences from the failure of the appellant's wife, mother-in-law, other relatives, and friends to testify at his hearing. At the hearing of his appeal, the appellant stated that his wife had just had her tonsils out and he requested a postponement to allow his wife and mother-in-law to testify. The postponement was not granted. The panel concluded the appellant had no support from his family or the community, despite letters on file from both. In overturning the IAD's decision, the Federal Court of Appeal found that adequate explanations had been provided for the failure to testify.

In *Waqas*,[69] the applicant had sponsored her spouse's application for a permanent residence visa. The applicant's aunt had introduced her to her future husband via the internet and they began an online relationship. A visa officer denied the spousal permanent residence application and the denial was upheld by the IAD because the marriage was entered into primarily for the purpose of acquiring a status or privilege under the *IRPA*. The Federal Court confirmed the IAD's determination to draw a negative inference from the failure to have the aunt testify or provide an affidavit about the arranged marriage. According to the court, a negative inference may be drawn from

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[63] *WCC Containers Sales Ltd. v Haul-All Equipment Ltd.*, 2003 FC 962.

[64] *Omoijiade v Canada (Citizenship and Immigration),* 2019 FC 1533.

[65] *Levesqe v Comeau* [1970] SCR 1010; *Ma v Canada (Citizenship and Immigration),* 2010 FC 509: The Federal Court confirmed the IAD's determination that, in the absence of his spouse's testimony, the applicant did not meet his evidentiary burden.

[66] Also see *Milliken & Co. v Interface Flooring Systems (Canada) Inc.* (FCA, nos. A-120-98, A-121-98), Isaac, Rothstein, McDonald, January 26, 2000 at para 11; *MCI v Brar* (FCTD, no-IMM-2761-01), Dawson, April 19, 2002, 2002 FCT 442: The IAD held that it was not mandatory for a sponsored applicant to give evidence, weighed the explanation provided for the applicant's failure to testify, and did not draw an adverse inference. On judicial review, the Federal Court upheld the IAD's finding, indicating that, where there was a reasonable explanation, the IAD was not obliged to draw an adverse inference from a failure to testify.

[67] *Ma v Canada (Citizenship and Immigration),* 2010 FC 509.

[68] *Okwe v Canada (MEI)* (1991), 16 Imm LR (2d) 126 (FCA).

[69] *Waqas v Canada (Citizenship and Immigration)*, 2020 FC 152.

the failure to bring any witness who is given the opportunity to provide potentially dispositive testimony.

The IRB cannot draw an unfavourable conclusion from the fact that an accused individual did not testify at their criminal trial.[70]

5.2.2 Refusal to Testify

A claimant's refusal to testify in a refugee determination proceeding may lead to an adverse inference that seriously undermines their claim. In a proceeding before the CRDD, the claimant's refusal to testify led to the panel's finding that the claimant was neither credible nor trustworthy. At the start of the hearing, the panel denied the claimant's request for an adjournment to obtain new counsel and provided a number of reasons for refusing the request. The claimant thereupon declined to give oral testimony. The panel informed him that his failure to testify might cause it to draw a negative inference, and that in the absence of his oral testimony, the sworn testimony in his Personal Information Form (PIF) and the documentary evidence would be the basis upon which the panel would determine his claim. The panel then found serious inconsistencies between the PIF and the port-of-entry notes. Finding itself with no ability to put these inconsistencies to the claimant due to his refusal to testify, the panel determined the claimant was not a Convention refugee.[71]

In *Zhang*,[72] the Federal Court upheld the RPD's determination that a claim was abandoned under subsection 168(1) of the *IRPA* because the applicant was in default in the proceedings. During the hearing, the applicant refused to answer the panel's questions both before and after an unsuccessful motion for the panel's recusal. The court found that the applicant had tried to circumvent the dismissal of her recusal motion, disregarded her obligation to answer questions, "member shopped", and delayed the process. The court stated that the circumstances of each case will determine whether the non-responsiveness of a witness or refugee protection claimant will lead to abandonment of a proceeding or a negative inference with respect to credibility. However, where non-responsiveness of a claimant so clearly has elements of both disregard for the process and lack of diligence in the pursuance of a refugee protection claim, it is not unreasonable to find that such conduct falls within the scope of subsection 168(1) of the *IRPA*.

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[70] *R. v Boss* (1988), 46 CCC (3d) 523 (ON CA); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(c).

[71] CRDD U96-00894, Joakim, Sotto, April 30, 1997, application for leave to seek judicial review dismissed (IMM-1969-97).

[72] *Zhang v Canada (Citizenship and Immigration)*, 2014 FC 882. Also see *Jele v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 24, where the Federal Court concluded that it was open to the RPD to draw a negative inference from the applicant's brother's refusal to testify, since he was in attendance at the hearing and able to testify but refused to do so. It was also open to the RPD to reject the applicant's explanation for her brother's refusal to testify.

5.2.3 Compellability of Witnesses

Sections 127 and 128 of the *IRPA* provide for an offence and punishment in cases where an individual refuses to testify. These provisions are seldom relied on to prosecute a witness. Nevertheless, it is useful to be aware that such provisions exist. When a witness refuses to testify, or counsel advises them not to testify, the panel may remind them of the existence of such provisions. If charges are laid, it would be outside of and apart from the hearing process. It is normally the Royal Canadian Mounted Police who would lay charges. It is recommended that decision-makers seek the advice of Legal Services in situations where a witness refuses to testify.[73]

In criminal proceedings, an accused person has the right to refuse to testify in recognition of the long-standing right not to be forced to incriminate oneself. In civil proceedings, there is no such general provision against being compelled to testify. The courts have long characterized immigration and refugee proceedings as being civil rather than criminal in nature.[74] Thus, even though a witness may be compelled to testify before the IRB,[75] the witness may still be extended certain protections under section 13 of the *Canadian Charter of Rights and Freedoms*[76] and section 5 of the *Canada Evidence Act*,[77] namely the right not to have compelled "incriminating" evidence used against them in subsequent proceedings.

5.3 Teleconferencing and Videoconferencing

Section 164 of the *IRPA* authorizes the four Divisions of the IRB to hold a hearing "… by a means of live telecommunication with, the person who is the subject of the proceedings." The IRB has the lawful authority to control its process and to set its own procedure, as long as the principles of natural justice and fairness are followed.[78] It thus may choose to conduct hearings and receive evidence by teleconference or videoconference for various reasons, including operational necessity.

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[73] For example, see *R. v Forrester*, 2 CCC (3d) 467 Ont CA: The person concerned refused to answer certain questions at an inquiry on the basis that her answers might tend to incriminate her. As a result of her refusal to answer, the accused was charged with an offence contrary to subsection 95(g) of the former *Immigration Act* ("every person who ... refuses to be sworn or to affirm or declare, as the case may be, or to answer a question put to him at an examination or inquiry under this Act is guilty of an offence…"). The Court of Appeal upheld the conviction.

[74] *R. v Wooten*, [1983] BCJ No. 2039.

[75] In *B095 v Canada (Citizenship and Immigration),* 2016 FC 962, which concerned the judicial review of an ID decision rendered as part of an admissibility hearing, the Federal Court stated that the IRB must be able to compel testimony to appropriately carry out its mandate, particularly from the person most likely to have the facts. To allow otherwise would be to frustrate the very purposes of the IRB's inquiry (at para 22). The court held compelling the applicant to testify did not constitute a breach of fairness.

[76] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[77] RSC, 1985, c C-5.

[78] *Prassad v Canada (Minister of Employment and Immigration),* [1989] 1 SCR 560; *Aslani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 351.

Courts have held that there is generally no denial of natural justice or fundamental justice in the use of video testimony.[79] However, in exceptional situations, hearings by teleconference or videoconference may not be appropriate.[80]

5.3.1 Teleconferencing

Teleconferencing involves taking a witness's evidence by telephone. The IAD has for many years taken evidence in this manner, especially in the case of applicants who are overseas, where it would be difficult or impossible for them to testify otherwise. In such cases, the person calling the witness makes arrangements for the telephone call through the Registrar and is generally responsible for paying the long distance charges for the call.[81] When a witness who testifies by teleconference requires the services of an interpreter, the interpreter is generally present in the hearing room.

In *Farzam*,[82] the Federal Court examined in detail the principles that apply to a judge's discretionary authority to allow witnesses to be heard via teleconference. It is up to the party requesting to call a witness to ensure that the request is made in a timely manner, the call is feasible both from a legal and technical point of view, and the evidence the witness is expected to provide is clearly relevant to the issues at stake.

In *Cookson*, the Federal Court of Appeal found that there was no breach of natural justice where the IAD allowed an appellant to testify by telephone from a remote location in B.C.[83] The Minister had argued that the IAD could not properly judge the appellant's demeanour, and that the Minister would be prejudiced in his ability to effectively cross-examine the appellant. The Court found that the IAD had properly weighed the appropriate considerations.

The RPD has used teleconferencing to hear the evidence of witnesses in other countries, including expert witnesses.[84]

The weight of the evidence taken by teleconference must be assessed in the same way as any other evidence. Although the visual cues that aid in assessing credibility are absent in teleconferencing, cross-examination of witnesses is possible, and in most situations effective questioning can be used to verify matters such as the identity of a witness. Additional controls may be required in some cases. For example, arranging for the call to be made from a specific site and/or in the presence of a government official

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[79] *Bradley v Bradley* [1999] BCJ No. 2116 (BSCS); *R. v Gibson* [2003] BCJ No. 812 (BCSC).

[80] *MCI v King, David Daniel* (IAD T98-07875), Aterman, May 27, 1999.

[81] See *Chairperson Guideline 6: Scheduling and Changing the Date or Time of a Proceeding* (April 1, 2010), s 4.

[82] *Farzam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1453. See the application of these principles in the context of an RPD proceeding in *Mohammad v Canada (Minister of Citizenship and Immigration)*, 2006 FC 352.

[83] *MEI v Cookson, Michael Edward* (FCA, no. A-715-91), Marceau, Létourneau, Robertson, February 10, 1993.

[84] For example, in *X (Re)*, 2015 CanLII 108270 (CA CISR), the claimant's uncle testified from the United States by teleconference regarding the claimant's identity.

may allay concerns like the possibility of coaching by an unseen third party during testimony. The panel should also bear in mind whether the identity of a witness appearing by telephone can somehow be verified prior to the hearing.[85]

5.3.2 Factors to Consider Regarding Teleconferencing

The following is a non-exhaustive list of factors that may be considered when determining whether to allow testimony to proceed by teleconference, and if allowed, assigning weight to that testimony:

- operational necessity;
- the reason for the request that evidence be taken by teleconference;[86]
- whether it would be more effective to take the evidence by other means (e.g., videoconferencing);
- the relevance of the anticipated evidence to the issues of the case;
- whether the witness is alone in the room from which they are testifying;
- whether there are any sounds indicating that someone else is present or is coaching the witness;
- tone of voice and pauses in the testimony, which may have greater importance than usual as other indications of demeanour are not available;
- whether the witness has been appropriately cautioned against discussing the evidence or the case during breaks;
- the setting and time at the witness's location; and
- whether the witness has been provided any necessary access to relevant documents (by electronic means or otherwise).

5.3.3 Videoconferencing

Videoconferencing involves broadcasting images and sounds of the participants in the hearing process to different locations. Often the decision-maker is in one location and

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[85] *Mohammad v Canada (Minister of Citizenship and Immigration)*, 2006 FC 352 at para 16. In *Aslani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 351, the Federal Court concluded that the requirement imposed by the RPD that the witness must prove their identity by reporting to the Canadian Embassy or in some other way is necessary to prevent refugee protection claimants from calling witnesses who are not who they say they are.

[86] See *Hussain, Manzoor v Canada (MCI)* (FCTD, no. IMM-3579-97), Reed, August 5, 1998: The applicant's counsel was outside the country, and without good explanation "had not arranged her affairs so that she could honour her responsibilities to her client and the Court." The last-minute request to have the hearing held via teleconference was denied.

the rest of the participants, including the interpreter,[87] are in another. Documents are exchanged in advance of the hearing or exchanged during the hearing by electronic means. Videoconferencing offers participants in separate locales the next-best alternative to live, on-site interaction, because the participants can be seen[88] and heard, and witnesses can be cross-examined. However, the cost of using videoconferencing should always be kept in mind.

In *Sundaram*,[89] the Federal Court concluded that the RPD was not required to inform the applicant that his claim could be heard by videoconference, but should have considered its own discretionary powers to hold hearings in person or by videoconference.

5.3.4 Factors to Consider Regarding Videoconferencing

The following is a non-exhaustive list of factors that may be considered when determining whether to allow testimony to proceed by videoconference, and if allowed, assigning weight to that testimony:

- operational necessity;[90]
- the relevance of the anticipated evidence to the issues of the case;
- whether it is necessary or merely preferable to be able to see the witness. If credibility is not in issue, the decision-maker may not need to see the witness (e.g., in the case of an expert witness), in which case teleconferencing may be a better option. If it is merely a matter of preference, the use of videoconferencing should be subjected to a cost/benefit analysis;
- the monetary cost of arranging a videoconference should be compared to the cost of alternative means to obtain that same evidence (e.g., having the witness transported to the hearing site, or holding the hearing where the witness is located);
- availability of facilities for videoconferencing;

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[87] In *Mantilla Cortes v Canada (Citizenship and Immigration)*, 2008 FC 254, the Federal Court stated that although it is a preferred practice to co-locate an interpreter with the witnesses during the hearing, the IRB's policies do allow for exceptions.

[88] In *Kengkarasa v Canada (Citizenship and Immigration)*, 2007 FC 714, the Federal Court concluded that no error arose from the RPD's finding that the picture on an identity card was not that of the applicant, even although the hearing was held by videoconference, as the RPD was able to zoom in on the applicant to see his face.

[89] *Sundaram v Canada (Minister of Citizenship and Immigration)*, 2006 FC 291.

[90] Regarding the exceptional circumstances of the COVID-19 pandemic, see *Law Society of Ontario v Regan*, 2020 ONLSTA 15, where the Law Society Tribunal Appeal Division denied the appellant's request to adjourn until the hearing could be held in person. The tribunal held that the administration of justice should not wait for the pandemic to be over.

- whether a request to have the hearing held by videoconference is reasonable in all the circumstances, in that communication would be effective, and the hearing would be full, fair, and expeditious;[91] and
- whether this measure is necessary to accommodate a vulnerable person.[92]

5.4 General Factors to Consider Regarding *Viva Voce* Evidence

The following is a non-exhaustive list of factors that may be considered when assigning weight to *viva voce* evidence generally:

- the opportunity of the witness to observe the events;
- whether the witness's testimony is based on hearsay;
- the witness's ability to recall events accurately;
- the witness's relationship to the parties;
- whether the witness has any interest in the outcome of the hearing;
- whether the witness was present during the testimony of any other witness;
- whether the witness had seen other evidence prior to testifying;
- whether the witness's testimony was elicited through leading questions;
- whether any part of the witness's testimony has been found to be not credible;
- the witness's demeanour;
- whether the witness appears to have a bias;
- the extent to which the witness's testimony is based on opinion and inference;
- whether the facts upon which the witness relied in forming their opinion have been established; and
- any other evidence which supports or contradicts the testimony of the witness.

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[91] *MCI v King, David Daniel* (IAD T98-07875), Aterman, May 27, 1999: A motion to have an appeal heard by videoconference was denied because of a concern that videoconferencing would further impede communications with a respondent suffering from a mental illness. In *Ferdinands v Canada (Citizenship and Immigration)*, 2007 FC 1084, the court rejected the applicants' argument that faulty videoconferencing equipment had compromised their right to a fair hearing.

[92] *Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB* (December 25, 2012), s 4.

CHAPTER 6

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6 Documentary Evidence

Documentary evidence includes a broad range of materials, such as extracts from newspapers, books, websites, social media, and magazines; photographs; video recordings; passports and other travel documents; records of voice and text conversations; statutory declarations and affidavits; business records (e.g., bank and credit card records); birth, school, and marriage certificates; driver's licences; records from judicial proceedings (e.g., transcripts, warrants, and judgments); records of landing; letters; police reports; medical and psychological reports; reports from probation officers; and application forms. It includes both originals and copies of documents.

6.1 General Lack of Credibility and Documentary Evidence

Under certain circumstances, the IRB may make a general finding of a lack of credibility on the part of a claimant or appellant.[93] In some circumstances, such a finding can extend to affect the weight placed on all documentary evidence the claimant or appellant has submitted to corroborate their version of the facts.[94]

Even where a general finding of a lack of credibility is reached without error, the panel may be required to separately assess certain documentary evidence on the record. As the Federal Court of Appeal held in *Sellan*,[95] "where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim."

One type of independent documentary evidence that may require assessment under *Sellan*, even in the face of a general negative credibility finding, is country documentation speaking to the risk of certain profile characteristics that are not in dispute. For instance, in *Pathmanathan*,[96] the RPD had accepted the applicant was a 38-year-old, unmarried Tamil male with significant scarring. The Federal Court found the RPD was required to assess objective documentary evidence addressing the risk associated with returning to Sri Lanka with such a profile, even if it disbelieved the claimant's narrative of past persecution.

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[93] See Legal Services' reference paper *Assessment of Credibility in Claims for Refugee Protection* for a more detailed discussion of this issue.

[94] *Hohol v Canada (Citizenship and Immigration)*, 2017 FC 870 at para 19, citing *Lawal v Canada (Citizenship and Immigration)*, 2010 FC 558 at para 22; *Rahman v Canada (Citizenship and Immigration)*, 2019 FC 71 at para 28. However, see *Liu v Canada (Citizenship and Immigration)*, 2020 FC 576 at paras 89-90 for a discussion of the need to avoid applying circular reasoning when extending general credibility concerns to potentially corroborative documentary evidence.

[95] *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at para 3.

[96] *Pathmanathan v Canada (Citizenship and Immigration)*, 2012 FC 519 at paras 51-56. Also see *Thevarajah v Canada (Citizenship and Immigration)*, 2018 FC 458 at para 11.

6.2 Authenticity Concerns

When assessing the weight to be given to documentary evidence, an issue may arise as to the authenticity of the document. Unreliable documents may be genuine, but contain alterations; alternatively, they may be fraudulent or they may be copies of documents that have been altered. It may also be alleged that a genuine document was issued illegally by corrupt officials (evidence would be required to support such an allegation).

The Federal Court has held that if a panel is not convinced of the authenticity of a document, then this should be stated clearly and the document should be given no weight.[97] Where panels have instead attributed "little weight" or "little probative value" to documents with questionable authenticity, the Federal Court has found them to be "hedg[ing] their bets" and held they erred in law.[98]

6.3 Obligation to Consider All the Evidence

In deciding on any particular issue before it, such as identity,[99] state protection,[100] or the genuineness of a marriage,[101] the IRB must consider all the relevant evidence. Because refugee determination requires a forward-looking assessment of risk, the RPD and the RAD are to consider the most recent country documentation.[102]

6.4 No Obligation to Refer to All the Evidence

The IRB is not obliged to explicitly mention every piece of evidence in the record,[103] and failure to mention a particular piece of evidence does not necessarily mean it has been ignored or discounted.[104] Rather, the panel is presumed on judicial review to have

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[97] *Osikoya v Canada (Citizenship and Immigration)*, 2018 FC 720 at para 53, citing *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20 and *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 27. Also see *Liu v Canada (Citizenship and Immigration)*, 2020 FC 576 at para 91.

[98] *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 27, citing *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20.

[99] *Li v Canada (Citizenship and Immigration)*, 2019 FC 537 at paras 19-20, citing *Jiang v Canada (Citizenship and Immigration)*, 2007 FC 1292 at para 3.

[100] *Kahyaoglu v Canada (Citizenship and Immigration)*, 2011 FC 1361 at paras 14-16. Also see *Tacda v Canada (Citizenship and Immigration)*, 2006 FC 706 at paras 4-7; *Quinatzin v Canada (Citizenship and Immigration)*, 2008 FC 937 at para 30.

[101] *Abdi v Canada (Citizenship and Immigration)*, 2018 FC 475 at paras 38-39.

[102] IRB, *Policy on National Documentation Packages in Refugee Determination Proceedings* (June 5, 2019), s 5(II). Also see *Zhang v Canada (Citizenship and Immigration)*, 2015 FC 1031 at para 54.

[103] *Kauhonina v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 1300 at para 15. Also see *Kahumba v Canada (Citizenship and Immigration)*, 2018 FC 551 at para 42, citing *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA).

[104] *Senat v Canada (Public Safety and Emergency Protection)*, 2020 FC 353 at para 34.

weighed and considered all of the evidence before it, unless the contrary is established.[105]

6.5 Obligation to Refer to Critical Contradictory Evidence

The presumption a panel has considered all the evidence before it may be rebutted when its reasons are silent on evidence squarely contradicting its findings of fact. In such instances, the court may intervene and infer that the panel overlooked the contradictory evidence when making the decision.[106] As the Federal Court stated in *Cepeda-Gutierrez*:[107]

> The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency.

The failure to mention a particular piece of evidence must be assessed in context, and may result in the decision being reversed only where the evidence was "critical and contradicts the decision maker's conclusion, and where the reviewing court determines that its omission means that the tribunal disregarded the material before it."[108] The importance of any given item of non-mentioned evidence is often discussed along a sliding scale, and the panel's "burden of explanation" will be seen to increase with the relevance of the evidence in question to the disputed facts.[109]

Whether and to what extent the IRB's obligation to address specific contradictory evidence applies to general country documentation remains "somewhat divided."[110] On one hand, the Federal Court has held that the RPD's "duty to expressly refer to evidence that contradicts its key findings does not apply where the contrary evidence in question is only general country documentary evidence."[111] On the other hand, it has

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[105] *Senat v Canada (Public Safety and Emergency Protection)*, 2020 FC 353 at para 34. Also see *Pabla v Canada (Citizenship and Immigration)*, 2018 FC 1141 at para 32, citing *Sing v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at para 90.

[106] *Randhawa v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 905 at para 42, citing *Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-10; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 at para 17.

[107] *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 at para 15.

[108] *Tsigehana v Canada (Citizenship and Immigration)*, 2020 FC 426 at para 33. Also see *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 39.

[109] *Khadra v Canada (Citizenship and Immigration)*, 2019 FC 1150 at para 22, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 at para 17.

[110] *Koppalapillai v Canada (Citizenship and Immigration)*, 2018 FC 235 at para 21.

[111] *Csiklya v Canada (Citizenship and Immigration)*, 2019 FC 1276 at para 22. Also see *Shen v Canada (Citizenship and Immigration)*, 2007 FC 1001 at para 6; *Camacho Pena v Canada (Citizenship and Immigration)*, 2011 FC 746 at para 34; *Salazar v Canada (Citizenship and Immigration)*, 2013 FC 466 at paras 59-60; *Canada (Citizenship and Immigration) v Balogh*, 2014 FC 932 at para 25.

also held that "nothing in *Cepeda-Gutierrez* supports such a narrow reading so as to constrain its precedent to evidence regarding the Applicant's personal situation."[112]

In *Koppalapillai*,[113] Justice Boswell wrote of the "pragmatic approach" to this issue that had emerged from other cases:

> Justice O'Keefe did not subscribe to the notion that unmentioned country documentation can never support an inference that it was overlooked, but he acknowledged that it would often be administratively impractical for the RPD to specifically discuss every conflicting source of information. Consequently, "if the board explains what documentary evidence it relies on and that evidence is reliable and reasonably supports its conclusions, then finding a few contrary quotations that it did not specifically explain away will not make the decision unreasonable" (*Vargas Bustos* [2014 FC 114] at para 39; see also *Hernandez Montoya v Canada (Citizenship and Immigration)*, 2014 FC 808 at paras 35-36, 50-51, 462 FTR 73). To similar effect, the Court in *Kakurova v Canada (Citizenship and Immigration)*, 2013 FC 929 at para 18, [2013] FCJ No 1026, stated that: "It would be overwhelmingly burdensome for the Board to specifically cite every point in the evidence that runs contrary to its determinations. All it was required to do was to review the evidence and reasonably ground its findings in the materials before it … .

It is worth noting that a number of those Federal Court decisions extending the IRB's "burden of explanation" to apply to general country documentation have involved instances where the court found panels selectively relied upon other parts of the general country documentation (discussed in the following section), in some cases within the very same document.[114]

6.6 Selective Reliance ("Picking and Choosing")

Where there is a conflict in the record, the IRB is entitled to choose, within the range of reasonableness, the evidence it prefers, and it is not the role of a reviewing court to re-weigh the evidence.[115]

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[112] *Ponniah v Canada (Citizenship and Immigration)*, 2014 FC 190 at para 16. Also see *Gonzalo Vallenilla v Canada (Citizenship and Immigration)*, 2010 FC 433 at paras 13-15; *Gonzalez v Canada (Citizenship and Immigration)*, 2014 FC 750 at para 56.

[113] *Koppalapillai v Canada (Citizenship and Immigration)*, 2018 FC 235 at para 23. Also see *Canada (Citizenship and Immigration) v Kornienko*, 2015 FC 85 at para 18.

[114] See, for example, *Gonzalo Vallenilla v Canada (Citizenship and Immigration)*, 2010 FC 433 at paras 13-15, citing *Sinnasamy v Canada (Citizenship and Immigration)*, 2008 FC 67 at para 33 and *Prekaj v Canada (Citizenship and Immigration)*, 2009 FC 1047 at para 26. Also see *Botros v Canada (Citizenship and Immigration)*, 2013 FC 1046 at paras 23-30.

[115] *Mason v Canada (Citizenship and Immigration)*, 2019 FC 1251 at para 26, citing *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 92; *Thamban v Canada (Citizenship and Immigration)*, 2019 FC 1621 at para 24. Also see *Agastra v Canada (Minister of Citizenship and Immigration)*, 2006 FC 548 at para 43.

That being said, a reviewing court may intervene where, as discussed in the preceding section, specific contradictory evidence on an essential point is not addressed.[116] For example, in *Castillo Garcia*,[117] the RAD had "relied heavily" in its IFA analysis on a particular NDP document to establish that the cartel feared by the appellant had lost influence in the Cancun area, and that another cartel was dominant there. Absent from the RAD's discussion, however, was material from the same document indicating that the feared cartel still held national reach and at least some influence in the area in question.

6.7 Non-Application of the Strict Rules of Evidence

As discussed in Chapter 2, none of the four Divisions of the IRB is "bound by any legal or technical rules of evidence",[118] and each "may receive and base a decision on evidence" adduced in the proceedings and considered "credible or trustworthy in the circumstances."[119]

As a result, a panel errs in law if it rejects documentary evidence as not having been proven in accordance with the strict rules of evidence, as opposed to finding that, in the circumstances of the case, the evidence was not credible or trustworthy.[120]

For instance, a panel may err where it requires the parties to respect the best evidence rule.[121] In the courts, if the original document is available, a strict application of the best evidence rule requires that it be produced. The IRB may accept copies of documents as

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[116] *Mason v Canada (Citizenship and Immigration)*, 2019 FC 1251 at para 26; *Thamban v Canada (Citizenship and Immigration)*, 2019 FC 1621 at para 24. Also see *Mohammed v Canada (Citizenship and Immigration)*, 2013 FC 1268 at para 36.

[117] *Castillo Garcia v Canada (Citizenship and Immigration)*, 2019 FC 347. Also see *Gonzalo Vallenilla v Canada (Citizenship and Immigration)*, 2010 FC 433 at paras 13-15, citing *Prekaj v Canada (Citizenship and Immigration)*, 2009 FC 1047 at para 26 and *Sinnasamy v Canada (Citizenship and Immigration)*, 2008 FC 67 at para 33; *Botros v Canada (Citizenship and Immigration)*, 2013 FC 1046 at paras 23-30; *Mohammed v Canada (Citizenship and Immigration)*, 2013 FC 1268 at para 36.

[118] See Appendix A of this paper for a detailed discussion of some legal rules of evidence.

[119] *IRPA*, ss 170(g) and (h), 171(a.2) and (a.3), 173(c) and (d), 175(b) and (c).

[120] *Attorney General of Canada v Jolly*, [1975] FC 216 (CA): The Federal Court of Appeal ruled that the IRB erred in rejecting the record of a hearing held before a United States government subcommittee if it did so because the record's contents were not proven in accordance with the rules of evidence in civil actions, rather than because the IRB did not regard its contents as credible or trustworthy in the circumstances. In *Legault v Canada (Secretary of State)*, [1997] FCJ 1272 (CA), the Federal Court of Appeal overturned the decision of the Federal Court - Trial Division, ruling that the adjudicator was entitled to base their decision on an indictment returned by a United States grand jury even though the document would have been excluded as hearsay evidence in the context of a criminal proceeding.

[121] In *Canada v Dan-Ash (1988)*, 5 Imm LR (2d) 78 (FCA, no. A-655-86), Marceau, Hugessen, Lacombe, June 21, 1988, the panel erred in applying the best evidence rule to refuse to consider an expert report on the grounds that the author was not called to testify and his absence was not explained.

evidence,[122] although failure to produce the original document when it is readily available may result in the copy being given little or no weight. Decision-makers should request an explanation for the party's failure to produce the original document.[123] In addition, when the original is readily available, the panel may suggest the party make efforts to produce the original and that otherwise, the copy may be given little weight.

Writing in the context of admissibility proceedings before the ID and IAD, the Federal Court of Appeal has repeatedly held that evidence surrounding withdrawn or dismissed charges is admissible before the IRB, provided that the panel is satisfied that the evidence is credible and trustworthy.[124]

The Federal Court has stressed that a provision specifying that a Division is not bound by the strict rules of evidence does not relieve the Division of complying with its own Rules.[125]

6.8 Opportunity to cross-examine

The IRB is entitled to admit documentary evidence even if the author is not called or is unavailable to testify, as long as the evidence is considered credible or trustworthy in the circumstances.

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[122] In *Wang v Canada (Citizenship and Immigration)*, 2016 FC 184, the Federal Court rejected the argument that rule 42 of the *RPD Rules* requires the RPD to rely only on original documents, observing among other things that this would contradict section 170 of the *IRPA* (at para 46).

[123] Although the wording of rule 42 of the *RPD Rules* appears to require a claimant who has provided the Division with a copy of a document to provide the original at some point in the proceeding, the Federal Court has read this rule as allowing the claimant to reasonably explain their inability to provide the original (*Denis v Canada (Citizenship and Immigration)*, 2018 FC 1182 at para 74, citing *Flores v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1138 at paras 7-8 and *Diallo v Canada (Citizenship and Immigration)*, 2014 FC 878 at para 10).

[124] In *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, the appellant argued police reports that were not substantiated by any convictions could not be given weight as evidence of criminal activity. The Federal Court of Appeal held that "[i]n admissibility hearings the Board is not bound by the strict rules of evidence. Once the tribunal determines that the evidence is credible and trustworthy then it is admissible, and the question of how the evidence was obtained becomes relevant merely as to the weight attached to the evidence: section 173 of the *IRPA*." While confirming that evidence surrounding withdrawn or dismissed charges could be taken into account, the court stressed that any such charges cannot be used, in and of themselves, as evidence of a person's criminality. This approach was affirmed in *Canada (Citoyenneté et Immigration) c Solmaz*, 2020 CAF 126, in which the Federal Court of Appeal allowed an appeal from a decision on judicial review. The Federal Court had found the IAD erred in considering evidence related to withdrawn criminal charges when it declined to exercise its humanitarian and compassionate jurisdiction to grant special relief (at para 86).

[125] In *Torishta v Canada (Citizenship and Immigration)*, 2011 FC 362, the RPD had relied upon its specialized knowledge to impugn a letter before it as fraudulent, and did so without giving the claimant notice. On judicial review, the court acknowledged that the RPD was not bound by the strict rules of evidence and was entitled to take into account information within its specialized knowledge (*IRPA*, s 170(i)), but found the RPD's failure to give notice had still breached the requirements of procedural fairness and the *RPD Rules*.

In *Le*,[126] the panel admitted into evidence a letter from a Canadian doctor despite an objection based on the fact that she was not available to be cross-examined on it. In *Amaya*,[127] the Federal Court took a similar approach with regard to responses to information requests that were prepared by the IRB's Research Directorate.

In *Fajardo*,[128] the Federal Court of Appeal held that the Convention Refugee Determination Division was wrong to discount an affidavit produced by "patently respectable deponents as to facts within their knowledge" because they were not available for cross-examination, due to the nature of the process. The panel had given little weight to the affidavit of a nun that supported the claimant's testimony because it had been signed at the request of the claimant and the nun was not available for cross-examination.

In *Oria-Arebun*,[129] the RAD had lowered the weight accorded to corroborative letters from the appellant's friends and family because their authors had not been available to testify. The Federal Court found that this was unreasonable, as their attendance was not required. A similar holding by the RAD was found to be unreasonable in *Mohamed*.[130]

In other cases, the Federal Court has upheld the IRB's reliance in determining a document's weight on the inability to cross-examine its author. In *Trako*,[131] the RPD had rejected a letter from a family member provided by the claimant to support his claim regarding an alleged blood feud. In explaining why it preferred the preponderance of remaining evidence to the letter, the RPD observed, among other things, that the author

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[126] *Le, Hong Ngoc v MEI* (IAB 86-9204), Eglington, Bell, Durand, November 25, 1986.

[127] *Amaya, Mariano Vasquez v MCI* (FCTD, no. IMM-166-98), Teitelbaum, January 8, 1999: The court ruled that the Refugee Division did not err in admitting into evidence a response to information request containing information that was obtained from the personnel director of the hotel where the claimant worked. Because the information in question was general (i.e. the date of the union's formation) and not the claimant's personal information, the court found that the evidence was admissible even though the claimant did not have an opportunity to cross-examine the personnel director. In *Veres v Canada (Minister of Citizenship and Immigration),* [2001] 2 FC 124 (TD), the Federal Court stated that an individual's response to a request for information does not have the same "circumstantial guarantee of trustworthiness" as documents prepared by independent agencies that are published and disseminated. Also see *Ahmed v MCI* (FC, no. IMM-5683-02), Campbell, May 6, 2003, 2003 FCTD 564; *Wahba v MCI* (FC, no. IMM-553-02), O'Keefe, August 8, 2003, 2003 FCTD 964.

[128] *Fajardo, Mercedes v MCI* (FCA, no. A-1238-91), Mahoney, Robertson, McDonald, September 15, 1993. Also see *Siad v Canada*, [1997] 1 FC 608 (FCA): The Federal Court of Appeal ruled that the Refugee Division was entitled to admit an affidavit in which the author reported his interviews with informants. The court found that, in the circumstances of the case, the opportunity to cross-examine was not essential to the fairness of the hearing since the deponent alleged no prior statements made by the claimant. The court also took into consideration the fact that the claimant did not raise objections to the admission of the affidavit before the hearing, did not request that the author be called for cross-examination, did not call rebuttal evidence, and did not make submissions regarding the weight the panel should attach to the affidavit.

[129] *Oria-Arebun v Canada (Citizenship and Immigration)*, 2019 FC 1457 at paras 49-52.

[130] *Mohamed v Canada (Citizenship and Immigration)*, 2020 FC 1145 at paras 71-73.

[131] *Trako v Canada (Citizenship and Immigration)*, 2011 FC 1063 at para 30.

had not been made available for cross-examination, and the Federal Court found that this was reasonable in the circumstances. In *Ashofteh Yazdi*,[132] the RPD had disbelieved the claimants' narrative of persecution in Iran, noting among other things that the author of a corroborating letter had not been made available for cross-examination. The Federal Court found that this was not patently unreasonable.

However, when an affiant is available to strengthen the evidence given in an affidavit, the burden is on the claimant to call the affiant as a witness.[133] In *Pu*,[134] the Federal Court rejected the argument that it was the IAD's onus to summon the authors of a set of support letters before affording them little weight on the grounds that the authors were not presented for questioning. Rather, the court held that, with respect to evidence that would speak to her character in the context of seeking humanitarian and compassionate relief, "it was the Applicant's case to make, not the IAD's."

In *Ali*,[135] as part of its justification for disbelieving the claimant's alleged bisexuality, the RPD had lowered the weight placed on an affidavit from the claimant's partner on the basis that the partner could not be cross-examined. On judicial review, the applicant argued that the RPD could have adjourned the proceedings and requested that the applicant bring his partner to testify. The Federal Court rejected this argument, holding "[w]here the Board establishes that cross-examination is necessary to appreciate an affidavit, it is the responsibility of the Applicant's counsel, not of the Board, to request leave to call the witness for cross-examination."

6.9 Bias of Author

In *Rahman*,[136] the Federal Court stated in the context of reviewing a PRRA decision that:

> Self-interest is not a binary concept. The importance of an author's potential self-interest or bias as against the credibility and weight to be afforded their evidence will vary with such considerations as: the role the author played in the events recounted - were they a witness or did the applicant merely recount the events in

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[132] *Ashofteh Yazdi v Canada (Citizenship and Immigration)*, 2007 FC 886 at para 11. In this case, the applicants had relied on *Fajardo, Mercedes v MCI* (FCA, no. A-1238-91), Mahoney, Robertson, McDonald, September 15, 1993 to argue that this factor did not entitle the panel to disregard the evidence. The Federal Court found that the panel had not disregarded the evidence, but rather had taken it into consideration, assessing what it did and did not contain, and that this weighing of the evidence was within its discretion.

[133] *Ndombele v MCI* (FCTD, no. IMM-6514-00), Gibson, November 9, 2001, 2001 FCTD 1211. In *Rani, Neelam et al. v MCI* (FCTD, no. IMM-5627-01), Blais, September 25, 2002, 2002 FCTD 1002, the Federal Court found that the Refugee Division did not violate the rules of natural justice by allowing into evidence the results of the investigation done with the hotel's night manager, as the claimant did not formally ask to cross-examine the persons involved in preparing the response to the information request or request a postponement of the hearing in order to do so.

[134] *Pu v Canada (Citizenship and Immigration)*, 2018 FC 600 at para 27.

[135] *Ali v Canada (Citizenship and Immigration)*, 2018 FC 1178 at paras 68-69.

[136] *Rahman v Canada (Citizenship and Immigration)*, 2019 FC 71 at para 28.

question to the author; the relationship of the author to the applicant - is the author a close family member but, as a witness, nonetheless able to speak independently to the events; the content of the witness statement - does it merely parrot the applicant's evidence or does it have a degree of independence based on the author's own vantage point, and what was that vantage point; any inconsistencies between their statements and other objective evidence in the case, etc.

6.10 POE Notes and Other Minister's Information[137]

In *Siete*,[138] the Federal Court rejected the applicant's argument that he was entitled to request the presence of a lawyer upon his arrival at the port of entry, and that his inability to exercise that right violated the rules of fundamental justice. However, statements obtained in violation of the *Charter* must be excluded if it is established that, having regard to all the circumstances, their admission would constitute a breach of procedural fairness.[139]

6.11 News reports and newspaper articles

The documentary evidence produced before the RPD often includes newspaper and magazine articles. The RPD errs in law if it declines to admit these documents into evidence or take them into consideration for the sole reason that they are press extracts, and consequently, have no evidentiary value. In this regard, the Federal Court of Appeal held as follows in *Saddo*:[140]

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[137] For a detailed review of the case law on this matter as it relates to refugee determination, see Legal Services' reference paper *Assessment of Credibility in Claims for Refugee Protection*.

[138] *Siete v MCI* (FCTD, no. IMM-5369-01), Tremblay-Lamer, December 20, 2002, 2002 FCTD 1286: The Federal Court relied on *Dehghani v Canada*, [1993] 1 SCR 1053, in which the Supreme Court of Canada ruled that routine questioning as part of a secondary examination concerning identity, admissibility, and a claim to refugee status does not constitute detention, and consequently, does not entail a right to counsel.

[139] In *Huang, Wen Zhen v MCI* (FCTD, no. IMM-5816-00), MacKay, February 8, 2002, 2002 FCTD 149, the Federal Court ruled that the applicant had been detained within the meaning of subsection 10(b) of the *Charter* and that her right to retain counsel without delay had been violated, as she was informed of this right only on the third day of her detention. However, the court found that, in the circumstances of the case, the Refugee Division's decision to admit the port-of-entry notes into evidence did not affect the fairness of the hearing because the Refugee Division did not base its finding that the applicant was not credible on these notes. In *Chen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 910, the Federal Court found that the applicant had been in detention when he made various statements to an immigration officer, and there was no evidence that he had been informed of his right to obtain and instruct counsel. The court found that there had been a violation of subsection 10(b) of the *Charter* and the panel should have excluded the statements. Because the panel had in this case relied upon the statements in question, the court was unable to say that the decision would have been the same even had it not considered them, and the matter was remitted to a new panel.

[140] *Saddo v Canada (Immigration Appeal Board)* (FCA, no. A-171-81), Pratte, Ryan, Lalande, September 9, 1981, at para 4. Also see *Frimpong v Canada (Minister of Employment and Immigration)* (FCA, no. A-765-87), Heald, Mahoney, Hugessen, May 19, 1989.

> ... It is incorrect to state that extracts from newspapers have no evidentiary value; it is also incorrect to assert that a claimant must establish, otherwise than by the production of newspaper articles, that he has a well-founded fear of persecution.

In *Myle*,[141] the panel had not considered a news article that the applicant had submitted, and implied in its reasons that the source of the information was not reliable and independent. However, other news articles from this source were included in the IRB's country documentation package, and the Federal Court questioned on what basis the panel would impugn the reliability of this source in these circumstances.

In *Bruzzese*,[142] the ID had relied upon a Toronto Star newspaper article in making a finding that the applicant was associated with an Italian criminal organization. In addressing the argument that the evidence was unreliable, the Federal Court held that:

> It is no doubt true that news articles could not be considered as evidence of specific facts about specific incidents in a court of law, that the author of an article is not available for cross-examination, and that news reports are sometimes inaccurate, unreliable and based on hearsay. That being said, the article of the Toronto Star is well documented and quotes from Italian authorities and Italian decisions. The Applicant has not seen fit to refute the information reported and has not pointed to any factual error save on a tangential point. He was contacted by the journalist for an interview but declined to respond. In those circumstances, the ID members could reliably use this media article to make a finding of association.

6.12 Prior Inconsistent Statements or Information

A narrative filed at a prior hearing[143] and a transcript of that hearing containing inconsistent testimony[144] may be admissible in RPD hearings. The RPD may examine this evidence and base credibility findings on it, as long as it justifies those findings.

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[141] *Myle v Canada (Citizenship and Immigration)*, 2007 FC 1073 at para 24, discussed in *Oberlander v Canada (Attorney General)*, 2015 FC 46 at para 142.

[142] *Bruzzese v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 230 at para 57.

[143] *Anthonipillai, Jeyaratnam v MCI* (FCTD, no. IMM-1709-95), Simpson, December 14, 1995. The Refugee Division did not create a reasonable apprehension of bias in adducing the first Personal Information Form in evidence of its own initiative. The court was of the opinion that the form was relevant and admissible.

[144] *Badal v MCI* (FCTD, no. IMM-1105-02), March 14, 2003, 2003 FCT 311; *Darabos v Canada (Citizenship and Immigration)*, 2008 FC 484 at para 13. But see *Cheema v Canada (Citizenship and Immigration)*, 2014 FC 1082 at para 25 for a specific instance in which the use of a transcript from a prior hearing was found to have deprived the applicant of a fair hearing. In that case, the testimony of a former co-claimant from a prior hearing had been relied upon by a new RPD panel, but the testimony in question had been given under "abnormal circumstances", including the co-claimant's lawyer having to be escorted out of the room by security, the co-claimant being questioned without his lawyer present, and the presiding member ultimately recusing himself.

Under the IRB's *Policy on Court-Ordered Redeterminations*,[145] the contents of a redetermination file are determined in line with the remittal decision. Where the court has provided no specific directions and has made no determination that there was a denial of natural justice in the original hearing, the redetermination case file will contain, among other things, exhibits filed at the previous hearing, any available transcripts of the previous hearings, and any other evidence on the original file.[146]

In *Arumuganathan*,[147] the court agreed with the Refugee Division's decision to admit into evidence the Minister's factum regarding the claimant's husband's leave application for judicial review. However, the court set aside the decision on the grounds that the Division erred in failing to indicate what weight it assigned to that evidence, given that the evidence was inflammatory.

6.13 Relevance of Documentary Evidence in Successor State Scenarios

In *Litevskaia*,[148] documentary evidence concerning anti-Semitism in the former Soviet Union, prior to Latvian independence, was relevant evidence of the climate in the newly-independent Latvia, as much as in Russia. The application was allowed.

In *Muzychka*,[149] the Refugee Division found that although a particular document was a valuable indicator of how homosexuals were treated in Russia, it was not convincing on the subject of their treatment in the Ukraine. The court found that it was unreasonable for the Refugee Division to come to this conclusion. In fact, the document showed beyond any doubt that homosexual men and women were persecuted in the Ukraine and that the authorities were abusive toward these citizens.

6.14 Factors to Consider Relating to the Weight of Documentary Evidence

The following is a non-exhaustive list of factors that may be considered when assessing the weight to be given to documentary evidence:

- the date of the evidence;
- the author's identity;
- whether the information comes from an anonymous source;
- the qualifications/expertise of the author;
- the reputation of the publication/publisher;

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[145] *Policy on Court-Ordered Redeterminations* (December 11, 2013).

[146] Also see the IRB's *Policy on Redeterminations Ordered by the Refugee Appeal Division* (September 9, 2014).

[147] *Arumuganathan, Kalajothy v Canada (MEI)* (1994), 28 Imm LR (2d) 101, (FCTD, no. IMM-1808-93), Rouleau, March 25, 1994.

[148] *Litevskaia, Irina v MCI* (FCTD, no. A-971-92), Muldoon, August 28, 1996.

[149] *Muzychka, Vasily v MCI* (FCTD, no. IMM-1113-96), Tremblay-Lamer, March 7, 1997.

- any bias of the author/publisher;
- editing;
- partial quotes;
- consistency with other reliable evidence;
- the source of the author's information;
- other publications by the same author;
- whether there was an opportunity to cross-examine the author;
- the author's knowledge of the subject matter;
- whether the document has an impartial tone;
- the extent to which the document is based on opinion;
- the extent to which the document is based on observable facts;
- the purpose for which the document was prepared;
- the credibility of a witness who testifies about the manner in which the document was created or obtained;
- whether the whole document was entered into evidence or made available so that the evidence could be challenged;
- whether there are any alterations apparent on the face of the document;
- the results of any forensic examination of the document;
- any spelling errors on official documents;
- a comparison of the document to a document that is known to be genuine;
- whether the truth of a document’s contents was sworn or affirmed; and
- whether the information was obtained in accordance with the rights set out in the *Charter*.

CHAPTER 7

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7 Evidence of Identity

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

This chapter primarily focusses on weighing evidence of identity in refugee determination proceedings. However, various principles described below may also be applicable when weighing evidence of identity in other types of proceedings before the IRB.

7.1 Refugee Claimant's Obligation to Establish Identity

The issue of identity is fundamental to claims pursuant to sections 96 and 97 of the *IRPA*.[150] Both the *IRPA* and *RPD Rules* contain specific provisions governing evidence of identity before the RPD. Section 106 of the *IRPA* states:

> 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 [emphasis added].

RPD Rule 11 (formerly Rule 7) states:

> The claimant **must provide** acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them [emphasis added].

Together, section 106 and Rule 11 place the onus on the claimant to provide acceptable documentation to establish their identity on a balance of probabilities.[151] If a claimant cannot obtain such documentation, they must provide a reasonable explanation for its absence or demonstrate what reasonable steps were taken to obtain it. The language of each provision is mandatory, though neither provision states how this factor is to be weighed in a particular case.

What is considered "acceptable documentation" to establish identity is for the panel to determine on a case-by-case basis. In *Omaboe*,[152] the Federal Court described claimants' obligations under section 106 and Rule 11 as being a "heavy burden."

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[150] *Ahmedin v Canada (Citizenship and Immigration),* 2018 FC 1127 at para 35.

[151] *Teweldebrhan v Canada (Citizenship and Immigration)*, 2015 FC 418 at para 8; *Ahmedin v Canada (Citizenship and Immigration),* 2018 FC 1127 at paras 34-35.

[152] *Omaboe v Canada (Citizenship and Immigration),* 2019 FC 1135 at para 17.

In *Matanga*,[153] the Federal Court explained that it is essential for a claimant to be able to submit acceptable documentation to establish their identity and journey to Canada. Under section 106 of *IRPA,* the RPD can take account of the lack of acceptable proof of identity in assessing the claimant's credibility. In some cases, if a claimant gives serious explanations, the panel may excuse the loss or absence of acceptable documents. In this case, however, the claimant did not provide any serious explanation for the loss of her false French passport and the lack of official documentation establishing her identity. The court upheld the RPD's rejection of the claim on the basis that identity had not been established.

In *Pazmandi*,[154] the Federal Court held that section 106 refers only to personal and/or national identity. The court found that while ethnicity may be considered part of one's identity (like religion, sexuality, and other fundamental personal characteristics), it does not fall within the scope of "identity" as contemplated by section 106. Such personal characteristics are captured by Rule 11 of the *RPD Rules*.

The Federal Court has said the issue of identity is "at the very core of the RPD's expertise", and the RPD's determination of identity warrants deference.[155]

7.2 Weighing Identity Documents

In *Teweldebrhan*,[156] the Federal Court held that the IRB is required to consider and weigh all documents submitted by a claimant in support of their identity:

> [19] Notwithstanding that the RPD was entitled to set aside the presumption of validity of Mr. Teweldebrhan's identity documents, it was still required to at least consider and assess the authenticity and probative value of each of those documents, as well as the affidavits and the letters that he submitted in support of his application […]. The RPD's failure to do so rendered unreasonable its determination that Mr. Tewelderbrhan had not established his identity on a balance of probabilities.

In *Nur*,[157] the court held that it is trite law that each relevant piece of evidence must be examined separately, and while authenticity concerns about documents submitted by a claimant can be grounds to closely scrutinize other evidence submitted in support of the claim, it is not reasonable or justifiable to lump the evidence together and treat it as an undifferentiated mass. Rather, the evidence should be individually examined and then

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[153] *Matanga, Alice Baygwaka v MCI* (FC, no. IMM-6271-02), Pinard, December 4, 2003; 2003 FC 1410.

[154] *Pazmandi v Canada* (Citizenship and Immigration), 2020 FC 1094 at para 23.

[155] *Liu v Canada (Citizenship and Immigration)*, 2007 FC 831 at para 8; *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 48.

[156] *Teweldebrhan v Canada (Citizenship and Immigration)*, 2015 FC 418.

[157] *Nur v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1444 at para 32. Also see: *Jiang v Canada (Citizenship and Immigration)*, 2007 FC 1292; *Katsiasvili v Canada (Citizenship and Immigration)*, 2016 FC 622; *Denis v Canada (Citizenship and Immigration)*, 2018 FC 1182.

the panel may draw overall conclusions regarding the credibility or sufficiency of the evidence taken as a whole.

The classification of an identity document as being primary, as opposed to secondary or tertiary, may assist the panel in determining the weight to be given to it. However, the Federal Court has cautioned that a panel should not place excessive reliance on such a classification.[158]

In the absence of corroborating documents, identity may be established through credible testimony and a reasonable explanation for not having identity documents available. Evidence bearing on unsuccessful steps taken to obtain identity documents is relevant and may overcome a concern about the adequacy of what was produced, bearing in mind that, in some parts of the world, cogent identity documents may be difficult if not impossible to obtain.[159]

The panel should give a document no weight in establishing a person's identity if it finds the document to be false or inauthentic.[160] Furthermore, submitting a false document may have an impact on other credibility determinations made with respect to a claimant.[161]

The IRB is recognized as possessing expertise in the evaluation of the authenticity of identity documents. Foreign identity documents (i.e. documents purporting to be issued by a competent foreign public official) should be accepted as evidence of their content unless there is a valid reason for doubting their authenticity.[162] However, if there are irregularities on the face of an identity document (e.g., absence of a photograph, spelling errors, irregular lettering, inconsistent alignment, erasures), the panel may, in the absence of a satisfactory explanation, discount its weight without seeking an expert assessment of the document.[163] Similarly, the panel may find an individual is or is not the person depicted in a photograph, and expert evidence on this issue is not required.[164]

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[158] *Mishel v Canada (Citizenship and Immigration)*, 2015 FC 226 at para 24.

[159] *Abdullahi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1164.

[160] *Warsame v Canada (Minister of Employment & Immigration),* [1993] FCJ No. 1202 at para 10; *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20; *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 27.

[161] *Osayande v Canada (Minister of Citizenship and Immigration),* 2002 FCT 368 at para 21; *Rahaman v Canada (Citizenship and Immigration)*, 2007 FC 1008 at paras 14-15; *Teweldebrhan v Canada (Citizenship and Immigration)*, 2015 FC 418 at para 15.

[162] *Rasheed v Canada (Minister of Citizenship and Immigration),* 2004 FC 587 at para 19.

[163] *Kazadi v Canada (Citizenship and Immigration),* 2005 FC 292 at paras 11-12.

[164] *Liu v Canada (Citizenship and Immigration)*, 2012 FC 377 at para 10; *Olaya Yauce v Canada (Citizenship and Immigration),* 2018 FC 784 at para 9.

In *Zhuang*,[165] the Federal Court held that inconsistencies on the face of a document that are identified by comparison with sample documents contained in the NDP may provide grounds, in whole or in part, to conclude that a submitted document is not genuine.

The Federal Court has held that the panel may consider evidence of the widespread availability of fraudulent documents in a country, however this is not, by itself, a sufficient basis for rejecting documents from that country.[166] It may be a relevant factor if there are other reasons to question the authenticity of a document or a person's credibility.

In *Attakora*,[167] the Federal Court of Appeal found the fact that a refugee claimant had destroyed false travel documents on his way to Canada had no relevance to any issue the IRB had to decide. The claimant had explained that he had destroyed the documents out of fear that, if they were discovered, he might be arrested and returned to his home country. However, in *Katsiashvili*,[168] the court held it was open to the RPD to reject as unreasonable the claimant's explanations for destroying his genuine passport and failing to take steps to obtain additional identity documents.

The panel must provide a person with notice of—and an opportunity to address—its concerns about the authenticity of identity documents they provided.[169] The panel may rely on its specialized knowledge of country documentation (e.g., the indicia of genuine documents from a specific country or the fact that claimants from a particular country usually come with certain documents), provided it first declares its specialized knowledge and gives the parties an opportunity to respond under the relevant rules.[170]

7.3 Failure to Establish Identity

As stated above, proof of identity is an essential requirement for a person who is claiming refugee protection. Without this, there can be no sound basis for testing or verifying the claims of persecution or determining the claimant's true nationality.[171] It is trite law that, in situations where a claimant has not established identity, a negative

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[165] *Zhuang v Canada (Citizenship and Immigration)*, 2019 FC 263 at para 17.

[166] *Cheema v Canada (Minister of Citizenship and Immigration)*, 2004 FC 224 at para 7; *Lin v Canada (Citizenship and Immigration)*, 2012 FC 157 at paras 53-54; *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at paras 28-29; *Zhuang v Canada (Citizenship and Immigration)*, 2019 FC 263.

[167] *Attakora v Minister of Employment and Immigration,* [1989] FCJ No. 444 (FCA) at paras 7-8.

[168] *Katsiashvili v Canada (Citizenship and Immigration)*, 2016 FC 62. Also see *Elazi v Canada (Minister of Citizenship)*, 2000 CanLII 14891 (FC) at paras 14-17.

[169] *Karadag v Canada (Citizenship and Immigration)*, 2015 FC 353.

[170] See Chapter 10 of this paper for a more extensive discussion of the IRB's use of specialized knowledge.

[171] *Liu v Canada (Citizenship and Immigration)*, 2007 FC 831 at para 18.

conclusion as to credibility will almost inevitably be drawn and can be dispositive of the claim in and of itself.[172]

[172] *Rahman v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1495 at para 22; *Diarra v Canada (Citizenship and Immigration)*, 2014 FC 123 at para 32.

CHAPTER 8

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8 Expert/Opinion Evidence

An expert is a person possessed of special skill and knowledge acquired through study or experience that entitles them to speak authoritatively concerning their area of expertise. A panel may permit an expert to give oral or written opinion evidence on subject matter that is outside the panel's knowledge and experience[173] (e.g., medicine, psychology, country conditions,[174] document authentication,[175] anthropology,[176] foreign law[177]). Before admitting opinion evidence from a proposed expert witness, a panel should consider whether the witness is in a better position than the panel to form an opinion or draw inferences from the facts.[178]

A panel is not bound to accept and give full weight to expert opinion; to the contrary, the Federal Court has warned against giving such opinions "exalted status" in administrative proceedings simply because they are prepared by experts.[179] Instead, expert opinions should be weighed much like any other evidence.[180] A panel's assignment of weight to an expert opinion will generally attract deference on judicial review.[181]

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[173] *R. v Béland*, 1987 CanLII 27 (SCC), [1987] 2 SCR 398 at 415.

[174] *Li v Canada (Citizenship and Immigration)*, 2020 FC 335.

[175] *Mir, Abdul Rafi v MEI* (FCTD, no. IMM-3721-98), Teitelbaum, August 20, 1999; *Keqaj v Canada (Citizenship and Immigration)*, 2020 FC 563.

[176] *Ndoungo v Canada (Citizenship and Immigration)*, 2019 FC 541.

[177] *Mattu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 781 at para 22.

[178] In *Isaza, Maria Patricia Lopera v Canada (Minister of Citizenship and Immigration)* (FCTD, no. IMM-3373-99), Denault, May 19, 2000, the Federal Court held it was not unreasonable for the Refugee Division to refuse to recognize an Amnesty International volunteer responsible for the Andes region as an expert witness. The witness had never been to Colombia and had no greater knowledge of the country than did the panel, which had access to abundant documentary evidence. In *Tambadou v Canada (Citizenship and Immigration)*, 2016 FC 1042, the Federal Court stated that the RPD is "not required to accept an expert report with respect to matters that are within its own expertise" (at para 28). In *Kamal v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 480, the Federal Court rejected the argument that the ID breached procedural fairness by refusing to hear expert evidence that it viewed as "either irrelevant or unhelpful", and which contradicted the applicant's own statements (at paras 22, 29).

[179] *Molefe v Canada (Citizenship and Immigration)*, 2015 FC 317 at para 31. Also see *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182 at para 17.

[180] *R. v Ratti*, [1991] 1 SCR 68; *Roberge v Bolduc*, [1991] 1 SCR 374; *Bula, Ngaliema Zena v Canada (SSC)* (FCTD, no. A-794-92), Noel, June 16, 1994; *Bains, Iqbal Singh v MCI* (FCTD, no. IMM-2055-94), Muldoon, August 24, 1995; *Rana v Canada (Minister of Citizenship and Immigration)*, 2005 FC 974 at para 17. In the recent case *Ait Elhocine v Canada (Citizenship and Immigration)*, 2020 FC 1068, the applicant had submitted to the RAD a computer engineer's audio analysis identifying gaps in the recording of the RPD hearing. The RAD reasonably rejected the expert evidence based on its own review of the recording; the RAD's findings did not require any particular expertise (at para 32).

[181] *Diaz Serrato v Canada (Citizenship and Immigration)*, 2009 FC 176 at para 27; *Wang v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 79 at para 35; *Shala v Canada (Citizenship and Immigration)*, 2016 FC 573 at para 19.

Various factors that may affect the weight assigned to expert opinions are discussed below.

8.1 Qualifications and Expertise

As a general rule in the law of evidence, witnesses appearing before a court "are to testify as to the facts which they perceived, not as to the inferences—that is, the opinions—that they drew from them." Ready-formed inferences generally are not helpful to the trier of fact, and may be misleading.[182] However, there are exceptions to this general rule, including the admissibility of opinion evidence from an expert witness who has been formally qualified (i.e. shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which they undertake to testify).[183]

None of the four Divisions of the IRB is bound by any legal or technical rules of evidence,[184] and expert witnesses do not need to be formally qualified as such in order to give opinion evidence in IRB proceedings. However, each Division has a rule regarding witnesses,[185] and despite some differences in the wording of these rules, they all require disclosure of an expert witness's qualifications and a signed summary of the evidence the expert witness will provide.

An expert witness appearing before the IRB should only be permitted to give opinion evidence on subject matter that is within their particular area of expertise. At the outset, the panel should determine the area of expertise asserted and compare it with the expert's qualifications, including their education, professional designations, and any other relevant experience. Any challenge to the qualifications of an expert witness should be made as soon as possible.[186] When a witness's expertise is not in doubt, the panel should take particular care in explaining why it has assigned limited or no weight to their evidence, especially if the evidence tends to support a party's position.[187]

Generally, a panel may assign little or no weight to opinion evidence that exceeds the scope of the witness's expertise, provided it properly justifies its decision.[188] In *Lopez*

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[182] *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182 at para 14.

[183] *R. v Mohan* [1994] 2 SCR 9 at 25.

[184] *IRPA*, ss 170(g), 171(a.2), 173(c), 175(1)(b).

[185] *ID Rules*, r 32; *IAD Rules*, r 37; *RPD Rules*, r 44; *RAD Rules*, r 61.

[186] *Akingbola, Omasalape Olalanke et al. v MCI* (FCTD, no. IMM-3329-97), Reed, August 4, 1998.

[187] *Bains, Iqbal Singh v MEI* (FCTD, no. 92-A-6905), Cullen, May 26, 1993; *Zapata v Solicitor General and MEI* (FCTD, no. IMM-4876-93), Gibson, June 22, 1994; *Miayuku, Lubanzadio v MCI,* (FCTD, no. IMM-4813-93), Pinard, July 18, 1994; *Sivayoganathan, Maria Rajeswary v MCI* (FCTD, no. IMM-4979-93), Noel, November 7, 1994.

[188] In *Jung v Canada (Citizenship and Immigration),* 2014 FC 275, the applicant had sought to support his alleged nationality with an affidavit from a witness who identified the applicant's spoken dialect as being from Ham Kyung Buk Do Province in North Korea. The RPD gave the affidavit little weight, in part because it found the witness was not an expert in linguistics. The Federal Court found the RPD's decision was unreasonable, as the panel provided no basis for finding the witness was not an expert (she had a

Estrada,[189] the panel found a proposed witness was not an expert on country conditions in Guatemala, as she did not live and work in that country during the relevant time period. The Federal Court upheld the decision and found the proposed witness did not have specialized knowledge and experience going beyond that of the panel.

In *Sokhi*,[190] the Federal Court found the RPD was correct to question the quality of a psychological report because it was authored by an orientation specialist who was not a registered psychologist. Similarly, in *Aleman*,[191] the court declined to interfere with the Convention Refugee Determination Division's decision to assign no weight to an expert report that partly attributed the applicant's misrepresentations to post-traumatic stress syndrome. The expert had no professional training, extensive experience, or publications on the subject.

However, in *Enam*,[192] the Federal Court held it was unreasonable for the RAD to give little weight to a clinical social worker's report on the applicant's psychological state. Although the RAD reasonably found the expert had exceeded her statutory authority by communicating a diagnosis, it erred in failing to properly consider that clinical social workers belong to a regulated profession and are authorized to treat certain serious psychological disorders.

It may be an error to discount an expert's opinion on a matter that is within their expertise because of inadequate answers relating to matters outside their expertise. In *Wang*,[193] the ID had rejected evidence from the applicant's expert, in part because his answers regarding Chinese passport law were inconsistent with documentary evidence that the applicant's previous counsel adduced. The Federal Court found this was unreasonable, as the witness had been offered as an expert on Chinese arrest and bail procedures. The expert did not purport to be qualified to give evidence on passport

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"Bachelor with Honours degree in Specialist in Linguistics"). In addition, the panel did not explain why the witness's evidence, which was based on personal familiarity with the dialect and personal conversations with the applicant, required specialization in linguistics (at para 59).

[189] *Lopez Estrada, Edgar Raul et al. v MCI* (FCTD, no. IMM-4089-97), Gibson, August 25, 1998 at paras 9-11.

[190] *Sokhi v Canada (Citizenship and Immigration)*, 2009 FC 140 at para 35. Also see *Singh v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1376 at para 6; *Rai v Canada (Citizenship and Immigration)*, 2008 FC 1338 at para 37; *Kakonyi v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1410 at para 50; *Jozsefne v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1411 at para 41; *Monongo v Canada (Citizenship and Immigration)*, 2009 FC 491 at para 26; *Jassi v Canada (Citizenship and Immigration)*, 2010 FC 356 at para 21.

[191] *Aleman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 710 at para 46. Also see *Aujla, Surjit Singh v MEI* (IAB V87-6021), Mawani, November 10, 1987; *Asif v Canada (Citizenship and Immigration)*, 2016 FC 1323 at para 33E; *Khan v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 309 at para 14.

[192] *Enam v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1117 at para 28. Also see *Toor, Devinder Kaur v MEI* (IAB V84-6167), Wlodyka, Mawani, Singh, November 14, 1986: The fact that a medical doctor was not a specialist and did not have an opportunity to examine the applicant or review their x-rays went to the weight of the doctor's testimony, and not to the question of whether or not he was qualified to testify as an expert witness.

[193] *Wang v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 79 at para 39.

laws, and any evidence he gave on the subject would be either inadmissible or irrelevant.

While a witness's speculation will generally be of little or no value to a panel,[194] an expert witness may be qualified to make certain predictions regarding future events or outcomes. In *Ampong*,[195] a PRRA officer had unreasonably found a medical expert's opinion to be of limited probative value because it was "somewhat speculative in nature". Justice Russell wrote "it is not speculative for a qualified medical practitioner to conclude that, if the Applicant does not receive treatment that meets his needs, the likely result will be serious illness and death."

8.2 Assessing Experts' Conclusions

An expert witness's purpose is to address subject matter that is beyond a panel's knowledge and experience. Accordingly, a panel will not usually be in a position to directly dispute inferences that fall within the scope of the expert's demonstrated expertise. For example, in *Trembliuk*,[196] Justice Gibson of the Federal Court wrote:

> While it was open to the RPD to determine the weight, if any, to be given to the assessment provided by the psychologist, it was not open to the RPD to reject the psychologist's diagnosis. While the RPD is undoubtedly a specialized tribunal […], it is certainly not an expert tribunal in the area of psychological assessment.

In *Lozano*,[197] the applicant had submitted to the RPD a psychiatrist's report that diagnosed the applicant with bipolar disorder. The Federal Court found that the RPD demonstrated a degree of skepticism that was entirely unwarranted in the circumstances by stating it was "**possible** that the claimant is bipolar [emphasis added]."

That is not to say that expert evidence must be given full weight in all circumstances. The Supreme Court of Canada has warned of the potential danger of inappropriately deferring to an expert's opinion rather than carefully evaluating it.[198] Instead, when assessing expert evidence, a panel may examine various collateral issues (such as

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[194] *Gomez-Carillo v MCI* (FCTD, no. IMM-242-96), Gibson, October 17, 1996; *Teluwo v Canada (Citizenship and Immigration)*, 2016 FC 1274 at para 25.

[195] *Ampong v Canada (Citizenship and Immigration)*, 2010 FC 35 at para 35.

[196] *Trembliuk, Yuriy v MCI* (FC, no. IMM-5873-02), Gibson, October 30, 2003, 2003 FC 1264 at para 12. Also see *Begashaw v Canada (Citizenship and Immigration)*, 2009 FC 462 at paras 41-47; *Basbaydar v Canada (Citizenship and Immigration)*, 2014 FC 158 at para 28; *Moffat v Canada (Citizenship and Immigration)*, 2019 FC 896 at para 31; *Losada Conde v Canada (Citizenship and Immigration)*, 2020 FC 626 at paras 95-97.

[197] *Lozano Pulido v Canada (Citizenship and Immigration)*, 2007 FC 209 at para 27.

[198] *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182 at para 17.

those discussed in this chapter) to determine whether the expert evidence has been sufficiently proven to be credible.[199]

8.3 Objectivity

In *Czesak*,[200] Justice Annis of the Federal Court cautioned decision makers against undue reliance upon expert reports that have not undergone the "rigorous validation process" typically seen in court proceedings, which may include an opposing party's rebuttal report and cross-examination of the expert, among other things. Justice Annis wrote (at para. 40):

> … [W]hat the court's experience with forensic experts does suggest in relation to these reports being proffered before administrative tribunals where there exists no defined procedure to allow for their validation, is that caution should be exercised in accepting them at face value, particularly when they propose to settle important issues to be decided by the tribunal. In my view therefore, unless there is some means to corroborate either the neutrality or lack of self interest of the expert in relation to the litigation process, they generally should be accorded little weight.

IRB proceedings do not typically include a process for validating expert reports that is as extensive as those seen in adversarial court proceedings. Other judges on the Federal Court have reiterated Justice Annis's cautions about undue reliance upon expert reports in the context of judicial reviews of IRB proceedings,[201] although the suggestion that such reports should generally be accorded little weight has not been widely adopted.[202]

The concerns about experts' neutrality and lack of self-interest raised in *Czesak* are also reflected in various Federal Court decisions involving expert evidence that has crossed the line between objective opinion and advocacy. The court has held that such evidence lacks probative value and may be given little or no weight.

For example, in *Molefe*,[203] a psychologist's report crossed the line into advocacy by asserting a refugee claimant's condition "can improve with appropriate care and guaranteed freedom from her threat of removal", "[i]f refused permission to remain in

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[199] *Moffat v Canada (Citizenship and Immigration)*, 2019 FC 896 at paras 38-39.

[200] *Czesak v Canada (Citizenship and Immigration)*, 2013 FC 1149 at paras 37-40. Also see *Moffat v Canada (Citizenship and Immigration)*, 2019 FC 896 at para 26; *Aldarwish v Canada (Citizenship and Immigration)*, 2019 FC 1265 at paras 78-79.

[201] *Molefe v Canada (Citizenship and Immigration)*, 2015 FC 317 at para 31; *Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 at paras 58-59; *Shala v Canada (Citizenship and Immigration)*, 2016 FC 573 at para 19; *Osinowo v Canada (Citizenship and Immigration)*, 2018 FC 284 at para 16.

[202] In *Asif v Canada (Citizenship and Immigration)*, 2016 FC 1323, Justice Brown rejected the suggestion that an expert report should be given little weight simply because it had not been subject to any form of validation. Based on that reasoning, "most, if not all, such reports would be given little weight" (at para 33).

[203] *Molefe v Canada (Citizenship and Immigration)*, 2015 FC 317 at para 33.

Canada, her condition will deteriorate", and "it will be impossible for [her] to feel safe anywhere" in her country of nationality. The court held the report lacked reliability.

In *Egbesola*,[204] the court considered a psychologist's report that contained similar statements, and held that such statements had "virtually no probative value."

Recently, in *Moffat*,[205] the court agreed with the RPD's conclusion that a clinical psychologist's report should be given little weight. In extensive reasons, Justice Annis expressed concerns about the author's independence and impartiality. Among other issues, he cited what he found to be examples of the expert advocating on behalf of the applicant. He wrote:

> These are not opinions intended to assist the RPD to better understand the influence of mental disorders in some form that are relevant to issues before the RPD. Rather, they are directives, and in many cases categorical, with the view to persuading the RPD to implement an obvious strategy in support of her lawyer's presentation of its case before the RPD. [Emphasis in original.]

However, in *Enam*,[206] the court held the RAD's finding that a clinical social worker's opinion had crossed the line into advocacy was unreasonable. The impugned portion of the opinion said the applicant's "fear is so great and the certainty of his capture, and torture and eventual death is so strong that it is my professional opinion that there is a real threat of [the applicant] committing suicide if he is forced to return to Afghanistan." Although the court found this statement did not constitute advocacy, it declined to give this aspect of the report any weight as the author was not an expert on Afghan country conditions.

Even if some of an expert's statements seem to cross the line into advocacy, it may not be appropriate to discount their entire opinion. Generally, a panel may give the impugned statements little or no weight, but should consider whether the remaining evidence has probative value.[207] Because the panel's determination of whether expert evidence crosses the line into advocacy is a matter of weighing evidence and assessing its bearing on the facts, it should be afforded deference on judicial review.[208]

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[204] *Egbesola v Canada (Citizenship and Immigration)*, 2016 FC 204 at para 15. Also see *Oluwakemi v Canada (Citizenship and Immigration)*, 2016 FC 973 at para 8; *Khan v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 309 at para 14.

[205] *Moffat v Canada (Citizenship and Immigration)*, 2019 FC 896 at para 113.

[206] *Enam v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1117 at para 28.

[207] *Smith v Canada (Citizenship and Immigration)*, 2009 FC 1194 at para 73.

[208] *Asif v Canada (Citizenship and Immigration)*, 2016 FC 1323 at para 33.

8.4 Expert Evidence Relating to Credibility

Determining whether witnesses are providing accurate testimony is one of a decision-maker's central functions. Experts should not generally opine as to whether a witness is or is not credible.[209]

However, expert evidence may tend to corroborate a party's allegations regarding past events. For example, a medical expert may properly opine that, based on their objective assessment, a claimant for refugee protection has scars of injuries consistent with their allegations.[210] Such an opinion may still be valid evidence despite its circumstantial nature; in other words, it may have probative value even though the author did not observe the cause of the injuries first-hand.[211]

Expert opinion that is based entirely on a party's account of the relevant facts may be less reliable, and thus deserving of less weight, particularly where there are reasons for a panel to question the party's credibility. In *Danailov*,[212] Justice Reed of the Federal Court – Trial Division wrote:

> With respect to the assessment of the doctor's evidence, to find that that opinion evidence is only as valid as the truth of the facts on which it is based, is always a valid way of evaluating opinion evidence. If the panel does not believe the underlying facts it is entirely open to it to assess the opinion evidence as it did.

Similarly, in *Saha*,[213] the Federal Court stated the RPD may "discount psychological evidence when the doctor merely regurgitates what the patient says are the reasons for his stress and then reaches a medical conclusion that the patient suffers stress because of those reasons." Before rejecting expert opinion on the basis that the underlying facts are not credible, a panel should ensure the opinion was not supported by information independent of the witness's credibility, such as the expert's first-hand observations or

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[209] In *Moffat v Canada (Citizenship and Immigration)*, 2019 FC 896, the Federal Court was critical of statements in a psychological report that it found to be impermissible oath-helping (i.e. evidence adduced for the purpose of proving that a witness is truthful) (at paras 64-71).

[210] For example, see *Ameir v Canada (Minister of Citizenship and Immigration)*, 2005 FC 876 at para 27; *Park v Canada (Citizenship and Immigration)*, 2010 FC 1269 at paras 46-47. But see *Singh v Canada (Minister of Citizenship and Immigration)* (FCTD, no. IMM-4300-96), Lutfy, October 1, 1997 at para 2, where the court stated that "the doctor could conclude that the applicant's scars were consistent with his version without necessarily binding the tribunal to accept its plausibility."

[211] *Mowloughi v Canada (Citizenship and Immigration)*, 2019 FC 270 at para 69.

[212] *Danailov v Canada (Minister of Employment & Immigration)*, [1993] FCJ No. 1019 at para 2.

[213] *Saha v Canada (Citizenship and Immigration)*, 2009 FC 304 at para 16. Also see *Al-Kahtani, Naser Shafi Mohammad v MCI* (FCTD, no. IMM-2879-94), MacKay, March 13, 1996 at paras 12-14; *Diaz Serrato v Canada (Citizenship and Immigration)*, 2009 FC 176 at para 21; *Brahim v Canada (Citizenship and Immigration)*, 2015 FC 1215 at para 17; *Irivbogbe v Canada (Citizenship and Immigration)*, 2016 FC 710 at para 36; *Demberel v Canada (Citizenship and Immigration)*, 2016 FC 731 at paras 45-50; *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 34; *Ndoungo v Canada (Citizenship and Immigration)*, 2019 FC 541 at para 26.

the results of objective tests.[214] For example, in *Joseph*,[215] the Federal Court explained that "a health expert's report based on a current examination of a patient's symptoms must be given more weight than a report based exclusively on a patient's own account of what happened."

Furthermore, panels should have regard to the purpose(s) for which expert evidence was adduced. For example, expert evidence regarding a person's psychological condition may be intended to explain potential problems with the quality of that person's testimony, rather than to corroborate their account of the events that purportedly caused the condition. Failure to recognize such a distinction and assess how the report impacts the assessment of credibility may lead to a decision being overturned on judicial review. For example, in *Feleke*,[216] the Federal Court stated:

> [10] In considering mental health assessments when evaluating the Applicant's credibility, there are two reasons why the assessment may aid an Applicant. First, it may serve as corroborative evidence of an Applicant's story or second, it may provide an explanation for the inconsistencies in the Applicant's evidence. Jurisprudence of this court has supported the notion that mental health assessments may be tendered for either purpose.
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> …
>
> [17] I agree with the Applicant that the RPD did not consider the impact of the psychological report on the discrepancies of Applicant's evidence, all the while acknowledging the Applicant's difficulties during her testimony…
>
> [18] The medical assessment, which the RPD accepted, stated that the Applicant suffered from "cognitive difficulties, avoidance behaviours, generalized anxiety symptoms", all of which could have provided an explanation for the Applicant's behaviour. The RPD, in finding a decision either way, with regards to

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[214] *Gosal v MCI* (FCTD, no. IMM-2316-97) Reed, March 11, 1998 at para 14; *Unal v Canada (Minister of Citizenship and Immigration)*, 2004 FC 518; *Ameir v Canada (Minister of Citizenship and Immigration)*, 2005 FC 876 at para 27; *Gunes v Canada (Citizenship and Immigration)*, 2008 FC 664 at paras 29-37; *Mico v Canada (Citizenship and Immigration)*, 2011 FC 964 at paras 54-55; *Ye v Canada (Citizenship and Immigration)*, 2014 FC 1184 at para 20; *Mendez Santos v Canada (Citizenship and Immigration)*, 2015 FC 1326 at paras 18-19; *Sterling v Canada (Citizenship and Immigration)*, 2016 FC 329 at paras 9-12.

[215] *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 393 at para 39.

[216] *Feleke v Canada (Citizenship and Immigration)*, 2007 FC 539 at para 15. Also see *Mbuyi, Nicole Madeleine v MCI* (FCTD, no. IMM-58-97), Reed, November 5, 1997 at para 2; *Min v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1676; *Lozano Pulido v Canada (Citizenship and Immigration)*, 2007 FC 209; *Atay v Canada (Citizenship and Immigration)*, 2008 FC 201 at para 32; *Sokhi v Canada (Citizenship and Immigration)*, 2009 FC 140 at para 38; *Mico v Canada (Citizenship and Immigration)*, 2011 FC 964 at para 49; *Warsame v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 118 at para 32; *Nwakanme v Canada (Citizenship and Immigration)*, 2020 FC 738.

credibility, had an obligation to explain how the diagnosis impacts the RPD's assessment of any discrepancies.

However, where problems with testimony (e.g., inconsistencies, omissions) are found to be unrelated to the person's condition, expert evidence regarding that condition may be given little or no weight.[217] In *Zararsiz*,[218] an expert opined that the applicant met the diagnostic criteria for post-traumatic stress disorder. The RAD reasonably found that the expert report did not explain the deficiencies in the applicant's evidence, which arose not from his inability to recall details, but from significant inconsistencies between his statements at the port of entry and various iterations of his Basis of Claim narrative.

8.5 Factors to Consider Relating to the Weight of Expert Evidence

The following is a non-exhaustive list of factors that may be considered when assessing the weight to be given to expert evidence:

- whether the evidence is within the expert's area of expertise;
- the manner in which the expertise was acquired;
- whether the expert's opinion was formed with full knowledge of the relevant facts;
- the facts and assumptions the expert relied upon;
- whether the facts the expert relied upon have been established;
- the quality of source material the expert relied upon;
- the reliability of the expert's methods (e.g., the nature of any tests applied, whether the methods were culturally sensitive);
- whether the expert has relied upon hearsay in forming their opinion and the reliability of that hearsay;[219]
- whether any hearsay the expert relied upon is of a nature generally relied upon by other experts in the field;
- whether there is evidence that other experts in the field hold different opinions on the subject matter;
- any radical views the expert holds;
- the expert's independence and impartiality;
- whether the expert has examined the party or simply referred to existing records;

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[217] *Dekunle v MCI* (FC, no. IMM-4847-02) O'Reilly, September 29, 2003 at para 8; *Diaz Serrato v Canada (Citizenship and Immigration)*, 2009 FC 176 at para 24; *Kanziga v Canada (Citizenship and Immigration)*, 2017 FC 1014 at para 37.

[218] *Zararsiz v Canada (Citizenship and Immigration)*, 2020 FC 692 at paras 87-88.

[219] But see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909.

- whether the expert has provided sufficient justification for their conclusions;
- when the opinion was prepared in relation to the timing of the proceeding; and
- the purpose for which the expert evidence was submitted (e.g., corroborating allegations, explaining foreseeable problems with the quality of testimony).

CHAPTER 9

Table of Contents

9 Foreign Law and Foreign Judgments with Particular Reference to Adoptions

9.1 Introduction

This chapter discusses principles and factors relating to foreign law and judgments. Although this chapter focuses primarily on adoption, some of the principles referred to herein may be of assistance to decision-makers when they assign weight to evidence of foreign law and judgments more generally.

Under the *Regulations*, for sponsorship purposes, a child will only be considered a member of the family class by virtue of an adoption if that adoption was (a) in the best interests of the child within the meaning of the *Hague Convention on Adoption*, and (b) not entered into primarily for the purpose of acquiring any status or privilege under the *IRPA*.[220] Some of the factors relating to the best interests of the child are incorporated into the *Regulations* as requirements, including that the adoption created a genuine parent-child relationship,[221] and that the adoption was in accordance with the laws of the place where the adoption took place.[222] Some of these requirements were incorporated in the definition of "adoption" in the former *Immigration Regulations, 1978* and therefore any cases decided under the former *Regulations* continue to be of assistance.[223] The requirements developed by the IAD under section 4 of the version of the *Regulations* that was in force prior to September 30, 2010 remain just as relevant to determining whether the adoption created a genuine parent-child relationship and whether it was entered into primarily for the purpose of acquiring any status or privilege under the *IRPA*.[224]

Most adoption cases that come before the IAD involve foreign adoptions. Where the refusal is based on the legal validity of the adoption, the sponsor must establish that the adoption is valid under the laws (sometimes under the customs) of the jurisdiction where the adoption took place. This involves presenting evidence of the content and

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[220] s 117(2). Under section 4 of the version of the *Regulations* that was in force prior to September 30, 2010, a foreign national who had been the subject of an adoption was not considered an adopted child if the adoption was not genuine or was entered into primarily for the purpose of acquiring any status or privilege under the *IRPA*. As of September 30, 2010, section 117 of the *Regulations* states that a child who is or will be adopted shall be considered a member of the family class for sponsorship purposes. Subsection 4(2) of the current *Regulations* establishes the circumstances in which a foreign national shall not be considered an adopted child for adoptions that are not family class sponsorships.

[221] s 117(3)(c).

[222] s 117(3)(d).

[223] *Singh, Bhupinder v MCI* (IAD TA2-16527), MacAdam, July 24, 2003: The panel held that the wording of section 4 of the *Regulations* is not a substantive change from the meaning of "adopted" under section 2(1) of the former *Regulations*; *Asare, Vida (a.k.a. Achew Asare-Kumi) v MCI* (IAD TA2-17261), MadAdam, July 31, 2003.

[224] *Elia v Canada (Citizenship and Immigration),* 2011 CanLII 40064 (CA IRB): The IAD indicated that the issues arising in the amended provisions of the *Regulations* raise the same pivotal questions as those addressed under section 4 of the version in force prior to September 30, 2010.

effect of the foreign law or custom.[225] For example, in the case of adoptions in India, that evidence is usually the *Hindu Adoptions and Maintenance Act, 1956* (*HAMA*).[226]

In addition to the actual foreign law, sponsors may submit other forms of evidence such as expert evidence, doctrine, foreign case law, declaratory judgments, and adoption decrees and deeds.

The *Regulations* require that the adoption create a legal parent-child relationship which severs the pre-existing parent-child relationship[227] and—as stated above—that the adoption be in accordance with the laws of the place where the adoption took place.[228] In determining whether an adoption is legally valid, it is important to understand how foreign law is proved, and to identify and understand the principles of conflict of laws which govern the effects of foreign laws and judgments before Canadian courts and tribunals.[229]

9.2 Terminology

The following terms are used in reference to foreign law:

- declaratory judgment: a judgment declaring the parties' rights or expressing the court's opinion on a question of law without ordering that anything be done;[230]
- *in personam*: where the purpose of the action is only to affect the rights of the parties to the action *inter se* (between them);[231]

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[225] For an example of a case where the adoption in question was proven by custom, see *Vuong v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8174 (FC). Also see *He v Canada (Citizenship and Immigration)*, 2014 CanLII 64256 (CA IRB), where the sponsor failed to establish the customary adoption in China through clear and unambiguous evidence. The local authorities had registered the adopted child as the sponsor's biological child to avoid the penalties associated with the one-child policy.

[226] For a detailed examination of *HAMA* and its interpretation in Canadian law, see Wlodyka, A., *Guide to Adoptions under the Hindu Adoptions and Maintenance Act, 1956*, 25 Imm LR (2d) 8. Note, however, that this article was written in April 1994 and has not been updated to reflect any subsequent changes to this law. For examples of cases dealing with the validity of an adoption in light of the *HAMA*, see *Maini, Kaushalya Devi v MCI* (IAD T97-00839), Hoare, March 17, 1998: The appellant failed to prove the validity of the adoption at issue; *Canada (Minister of Citizenship and Immigration) v Sharma*, 2004 FC 1069; *Sahota v Canada (Citizenship and Immigration)*, 2015 FC 756: The applicants failed to establish any applicable custom or usage that created an exception to the requirements of *HAMA*.

[227] s 3(2).

[228] ss 117(3)(d) and 117(4)(a).

[229] Castel, J.-G., *Introduction to Conflict of Laws* (Toronto: Butterworths, 1986) at 6: "when the problem involves the recognition or enforcement of a foreign judgment, the court must determine whether that judgment was properly rendered abroad."

[230] Dukelow, D.A. and Nuse, B., *The Dictionary of Canadian Law* (Scarborough: Carswell, 1991) at 259.

[231] McLeod, J.G., *The Conflict of Laws* (Calgary: Carswell, 1983) at 60.

- *in rem*: where the purpose of the action is to determine the interests and rights of all persons with respect to a particular *res* (thing);[232] and
- deed of adoption: a registered document purporting to establish the fact that an adoption has taken place.

9.3 Proof of Foreign Law[233]

The usual rule in Canada is that foreign law is a fact which must be pleaded and proved,[234] on a balance of probabilities, by producing clear and cogent evidence.[235] The IAD cannot take judicial notice of it.[236] In cases before the IAD, the burden of proving the foreign law or custom lies on the party relying on it, in most cases, the sponsor.[237]

There are several ways in which foreign law can be proved, including statute, expert evidence,[238] and agreement of the parties (consent). The foreign law ought to be proved in each case. Although the IAD is not entitled to take judicial notice of the proof

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[232] McLeod, J.G., *The Conflict of Laws* (Calgary: Carswell, 1983) at 60.

[233] Also see Legal Services' reference paper *Sponsorship Appeals* (January 1, 2008).

[234] Castel, J.-G., *Introduction to Conflict of Laws* (Toronto: Butterworths, 1986) at 44; *Canada (Minister of Employment and Immigration) v Taggar (C.A.),* 1989 CanLII 5278 (FCA), [1989] 3 FC 576; *Canada (Minister of Citizenship and Immigration) v Saini*, 2001 FCA 311, [2002] 1 FC 200. Also see *Gossal v Canada (Minister of Employment and Immigration)* (1988), 5 Imm LR (2d) 185 (IAB); *Batool v Canada (Citizenship and Immigration),* 2014 CanLII 93892 (CA IRB).

[235] *Canada (Minister of Citizenship and Immigration) v Mann,* 2003 FCT 193. In *Canada (Minister of Employment and Immigration) v Taggar (C.A.),* 1989 CanLII 5278 (FCA), [1989] 3 FC 576, the Federal Court of Appeal stated that a custom must be "clearly proved to exist". The court did not comment on the letter of a lawyer with extensive experience in Indian family law indicating that a custom had to be "clearly and unambiguously" proved, which the visa officer accepted. Also see *F.H. v McDougall,* 2008 SCC 53, [2008] 3 SCR 41: Regarding the standard of proof in Canada, "… the evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test"; *He v Canada (Citizenship and Immigration),* 2014 CanLII 64256 (CA IRB): The IAD indicated that, in its proceedings, the onus is on the appellant to establish foreign law on a balance of probabilities and by evidence that is "clear and unambiguous." There are several ways in which foreign law can be proven, including the filing of relevant statutes and expert evidence.

[236] *Quao v Canada (Minister of Citizenship and Immigration),* 2000 CanLII 15954 (FC); *Vaganova v Canada (Citizenship and Immigration),* 2006 CanLII 52294 (CA IRB); *Cheikhna v Canada (Citizenship and Immigration),* 2012 FC 1135.

[237] *Canada (Minister of Employment and Immigration) v Taggar (C.A.),* 1989 CanLII 5278 (FCA), [1989] 3 FC 576; *Sahota v Canada (Citizenship and Immigration),* 2015 FC 756.

[238] *Lee v Canada (Citizenship and Immigration),* 2003 CanLII 54300 (CA IRB); *Fuad v Canada (Citizenship and Immigration),* 2003 CanLII 54231 (CA IRB): The IAD considered the validity of a marriage celebrated under Sharia or Islamic law in Ethiopia; *Vaganova v Canada (Citizenship and Immigration),* 2006 CanLII 52294 (CA IRB): The IAD noted that neither the text of the foreign law nor the expert evidence was presented as evidence of foreign law.

presented in other cases,[239] it can adopt or follow the reasoning of other panels regarding their interpretation of the foreign law.

In *Shergill*,[240] the IAD had to weigh the conflicting evidence relating to Indian law and gave little weight to three Indian lawyers' interpretations of an *HAMA* provision. The Federal Court dismissed the judicial review, finding the IAD had not erred in weighing the evidence and stating that while the evidence related to the interpretation of Indian law, "the weighing of such evidence is no different than the weighing of any other evidence by a tribunal."

Section 23 of the *Canada Evidence Act*[241] provides that evidence of judicial proceedings or records of any court of record of any foreign country may be given by a certified copy thereof, purporting to be under the seal of the court, without further proof. The IAD does not normally require strict proof in this manner, although the failure to comply with section 23 has been relied on in weighing the evidence produced.[242] It must be remembered that the IAD is not bound by any legal or technical rules of evidence.[243]

The jurisdiction of the IAD in an adoption case is to determine whether or not the adoption in question falls within the *Regulations*; in other words, that it (a) has been proven under the relevant law, (b) has not been entered into primarily for the purpose of acquiring any status or privilege under the *IRPA*, and (c) creates a genuine parent-child relationship. The IAD's role is not to adjudicate the status of adoption generally.[244] The *Regulations*, as indicated earlier, require that the adoption be in accordance with the laws of the jurisdiction where the adoption took place.[245] Thus, in a foreign adoption, the

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[239] *Kalair, Sohan Singh v MEI* (FCA, no. A-919-83), Stone, Heald, Urie, November 29, 1984; *Seng v Canada (Citizenship and Immigration),* 2015 CanLII 94341 (CA IRB).

[240] *Shergill v Canada (Minister of Citizenship and Immigration),* 1998 CanLII 7884 (FC). Also see: *Gill, Ranjit Singh v MCI* (IAD V96-00797), Clark, April 7, 1999: The IAD examined the text of the law itself in a case where expert evidence on foreign law was not presented and the testimonial and documentary evidence was inadequate. The IAD rejected the arguments that it had no jurisdiction to interpret foreign law.

[241] RSC 1985, c C-5.

[242] *Brar, Kanwar Singh v MEI* (IAD W89-00084), Goodspeed, Arpin, Vidal (concurring in part), December 29, 1989; *Ihemadu v Canada (Citizenship and Immigration),* 2010 CanLII 90629 (CA IRB).

[243] *IRPA*, s 175(1)(b).

[244] In *Singh, Babu v MEI* (FCA, no. A-210-85), Urie, Mahoney, Marceau, January 15, 1986, the Federal Court of Appeal held that the Immigration Appeal Board was entitled to conclude that the adoption in question had not been proven, but that it was not authorized to make a declaration that the adoption was "void as far as meeting the requirements of the *Immigration Act, 1976*." In *Canada (Minister of Employment and Immigration) v Sidhu,* [1993] 2 FC 483 (CA) at 490, the court noted that "[the Appeal Division's] jurisdiction is limited by the *Act* which, in turn, is subject to the *Constitution Act, 1867*. Parliament has not purported to legislate independently on the subject matter of adoption for immigration purposes. On the contrary, on that very point, it defers or it adopts by reference the foreign legislation." The court added in a footnote that "[t]he provision generally reflects the characterization made by English Canadian common law courts, i.e., that adoption relates to the recognition of the existence of a status and is governed by the *lex domicilii* [the law where a person is domiciled]."

[245] *Regulations*, ss 117(3)(d) and 117(4)(a).

absence of evidence about the applicable foreign law does not allow the IAD to consider whether the adoption was done in accordance with Canadian law.

In *Asad*,[246] the Federal Court of Appeal considered an appeal of an application made under the *Citizenship Act*.[247] The court rejected the appellants' argument that, in the absence of any evidence of foreign law, it should be presumed that it is the same as Canadian law. The court wrote (at para 37):

> This argument is without merit. As is readily apparent from subsection 5.1(1) of the Act, Parliament has set a statutory standard pursuant to which an adoption must notably be shown to have occurred 'in accordance with the laws of the place where the adoption took place and the laws of the country of residence of the adopting citizen' (subsection 5.1(1)(c)). The language of the Act creates an obligation to adduce evidence of foreign law and the Officer's decision has to be measured according to this standard.

In *Sharma*,[248] the IAD had allowed the appeal based on a finding that the applicants' adoption complied with the provisions of the *HAMA*. Two legal opinions provided by lawyers in India were filed in support of the validity of the adoption. The IAD found the two legal opinions supported the allegation that the requirements of *HAMA* were met and the adoption was formally valid. The Federal Court allowed the application for judicial review and held that the IAD's conclusion was not supported by the evidence.

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[246] *Asad v Canada (Citizenship and Immigration),* 2015 FCA 141. In *Fan, Jiang v MCI* (FCTD, no. IMM-1537-97), Hugessen, Sept. 3, 1998, the court noted that the definition of "adopted" in the *Regulations* is not legislation about adoption but about immigration. Regarding the validity of adoptions in Pakistan, also see *Siddiq, Mohammad v MEI* (IAB 79-9088), Weselak, Davey, Teitelbaum, June 10, 1980; *Alkana v Canada (Minister of Employment and Immigration),* [1989] IADD No 6; (1990), 10 Imm LR (2d) 232. But see *Jalal* v *Canada (Minister of Citizenship and Immigration),* [1995] IADD No. 804; 39 Imm LR (2d) 146, where the IAD held that in the absence of legislation in Pakistan, the Sharia applies to personal and family law matters, and that the prohibition against adoption does not apply to non-Muslims. In that case, the IAD accepted the expert evidence that Christians in Pakistan may adopt. On July 1, 2013, CIC published a notice stating that: "The provinces and territories will no longer accept applications for adoption placements from Pakistan, effective July 2, 2013. The Government of Canada, in support of this decision, will no longer process related immigration applications as of the same date. Pakistani law allows for guardianship of children but does not recognize our concept of adoption." Also see *Addlow, Ali Hussein v MCI* (IAD T96-01171), D'Ignazio, October 15, 1997, a case involving an alleged adoption in Somalia; *Zenata, Entissar v MCI* (IAD M98-09459), Bourbonnais, September 17, 1999, a case involving an alleged adoption in Morocco; *Demnati v Canada (Citizenship and Immigration),* 2001 CanLII 26685 (CA IRB), a decision on a guardianship case in Morocco; *Mashooqullah v Canada (Citizenship and Immigration),* 2014 FC 982, wherein children were not considered to be adopted based on the interpretation of the word "adoption" under section 5.1 of the *Citizenship Act*, which is inconsistent with the concept of guardianship under Pakistani law.

[247] RSC 1985, c C-29.

[248] *Canada (Minister of Citizenship and Immigration) v Sharma,* 2004 FC 1069.

In weighing evidence of foreign law, the IRB may have regard to the following factors:

- the date of the foreign law;[249]
- any amendments made to the law since it was published;
- where the evidence is a statute, the potential effect of foreign case law; and
- whether the evidence was presented by an expert,[250] and if so, the expert's relevant qualifications and experience.[251]

For example, in *Fuad*,[252] the panel looked at the validity of the marriage celebrated under Sharia law or Islamic law in Ethiopia in relation to the refusal of a sponsored application. Three legal opinions were presented to the panel on the interpretation of Ethiopian law regarding marriages by proxy. Faced with conflicting opinions, the panel observed that it is always useful to know the degree of expertise of the person who prepared a legal opinion. The panel preferred the opinion of an expert whose qualifications—including practice in the relevant field of law—were provided in detail. To his credit, that expert went a step further than the others and discussed practical applications of the Ethiopian Civil Code.

In *Bajracharya*,[253] the appellant before the IAD provided a written legal opinion of a lawyer who also testified at the hearing on a number of provisions of the adoption laws of Nepal. Since the expert was unable to provide any credible explanation for an apparent contradiction between his opinion and the wording of the provisions, the panel adopted its own interpretation.

In *Lee*,[254] neither the Minister's counsel nor the appellant was able to provide copies of the applicable adoption statutes of Myanmar, both arguing that such documentary evidence was difficult to obtain. The panel decided to accept the legal opinion of a lawyer from Myanmar that was obtained by the visa office "as evidence that sets out the relevant and applicable adoption laws in Myanmar. There was no objective evidence that the legal counsel has any interest in the outcome of this case and [he] appears to have provided objective, credible and trustworthy evidence."

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[249] *Vuong v Canada (Minister of Citizenship and Immigration),* 1998 CanLII 8174 (FC): It is the law applicable at the time of the adoption that is relevant for the purpose of determining whether there has been a valid adoption under the *Immigration Act* and associated regulations. Also see *Singh v Canada (Minister of Employment and Immigration),* [1992] FCJ no 861; *Grewal v Canada (Minister of Citizenship and Immigration),* [1997] IADD No. 1332; *Chen v Canada (Minister of Citizenship and Immigration),* [1998] IADD No. 2200, where the panel concluded that an adoption law in the People's Republic of China did not apply because it was not in effect at the time that the appellant adopted the applicant.

[250] *Canada (Minister of Citizenship and Immigration) v Sharma*, 2004 FC 1069.

[251] See Chapter 8 of this paper for a discussion of factors that may be considered in weighing expert evidence generally.

[252] *Fuad v Canada (Citizenship and Immigration),* 2003 CanLII 54231 (CA IRB).

[253] *Bajracharya v Canada (Citizenship and Immigration)*, 2003 CanLII 54292 (CA IRB).

[254] *Lee v Canada (Citizenship and Immigration)*, 2003 CanLII 54300 (CA IRB).

9.3.1 Declaratory Judgments and Deeds

Sponsors before the IAD often seek to establish the status of applicants for permanent residence through the production of foreign judgments declaring the applicants' status in the foreign jurisdiction. While there is a presumption that a judgment made by a foreign court of competent jurisdiction is valid, there are circumstances in which the decision maker is entitled to go behind the judgment. In any event, the IAD is not bound by the foreign judgment and must make its decision based on the whole of the evidence before it. The foreign judgment forms part of the evidence in the case, and as such must be weighed by the decision maker.

Some of the factors that may be considered when assigning weight to foreign judgments include whether the foreign court had before it the full evidence that is before the IAD, and whether the foreign judgment was obtained on consent of the interested parties, if applicable.

The issue has been expressed as one of determining whether the IAD ought to look behind the judgment to determine either its validity or its effect on the issues before the IAD.

In *Guide to Adoptions under the Hindu Adoptions and Maintenance Act, 1956*, Wlodyka states that:[255]

> The starting point in any discussion of the legal effect of a declaratory judgment [...] is the decision of the Federal Court of Appeal in *Taggar*. This case stands for the proposition that a declaratory judgment is a judgment "in personam" and not "in rem". Therefore, it is binding only on the parties to the action. Nevertheless, the declaratory judgment is evidence and the weight to be accorded to the declaratory judgment depends on the particular circumstances of the case.

In *Sinniah*,[256] the Federal Court held that it was patently unreasonable for the visa officer to ignore the legal effect of a final court order and to decide, in the absence of cogent evidence, that an order pronounced by a court in Sri Lanka was insufficient to establish that an adoption was made in accordance with the laws of Sri Lanka.

In *Boachie*,[257] the Federal Court considered the effect in Canada of a foreign court order that appeared, on its face, to be inconsistent with the relevant foreign law. The IAD had dismissed the appeal after the Minister successfully raised a new ground of refusal by questioning the legal validity of the adoption. The Minister argued non-compliance with subsection 673(a) of Ghana's *Children's Act*, *1998* (Act 560), whereby an adoption order shall not be made unless the adoptee has been in the continuous care of the applicant for at least three consecutive months immediately before the date of the

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[255] A. Wlodyka, *Guide to Adoptions under the Hindu Adoptions and Maintenance Act, 1956*, 25 Imm LR (2d) 8 at 46.

[256] *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 822. Also see *Ogbewe v Canada (Minister of Citizenship and Immigration)*, 2006 FC 77.

[257] *Boachie v Canada (Citizenship and Immigration)*, 2010 FC 672.

adoption order. The authenticity of the Ghanaian court order was not in question, and there were no allegations of fraud with respect to that order. The court allowed the application for judicial review, holding that a valid foreign court order of adoption cannot be ignored or set aside by a Canadian visa officer or the IAD for an apparent irregularity or failure to comply with a provision of the foreign law unless there is clear evidence that the order was obtained by fraud.

However, in *Singh Dhadda*,[258] the Federal Court concluded that it was not unreasonable for the immigration officer to place little weight on the Indian Adoption Deed. The deed indicated that the "ceremony of giving and taking the child in adoption including physical delivery from hand to hand has been performed under ceremonial pomp and show." However, there were significant material discrepancies and inconsistencies in the evidence given by the individuals interviewed concerning the nature of the relationship between the adopted child and his biological parents and the adoption ceremony itself.

Cheshenchuk[259] is an example of a case where the high threshold required to disregard a foreign court order for "fraud or irregularity" was satisfied. The applicant adopted two children through a domestic private adoption in Ukraine based on her Ukrainian citizenship and a misrepresentation that she resided in Ukraine. The applicant had not disclosed that she was also a Canadian citizen or that she actually resided in Canada, which would have forced her to seek an international adoption under Ukrainian law. A citizenship officer concluded that the adoptions were not in accordance with Ukrainian law and disregarded the Ukrainian court order declaring the adoption. The Federal Court concluded that there were sufficient grounds for the officer to disregard the Ukrainian court order because (a) the order was not made in circumstances that accorded with the Ukrainian law pertaining to adoption, and (b) it was obtained based on the applicant's serious misrepresentations to the Ukrainian authorities concerning her place of residence and civil status.

In *Singh*,[260] the Federal Court upheld the visa officer's decision to give no weight to the Deed of Adoption on the basis that it was not a court order. The officer was faced with

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[258] *Singh Dhadda v Canada (Citizenship and Immigration)*, 2011 FC 206. Also see *Kaur v Canada (Citizenship and Immigration)*, 2013 FC 1177.

[259] *Cheshenchuk v Canada (Citizenship and Immigration)*, 2014 FC 33. Subsection 5.1(1)(c) of the *Citizenship Act* (RSC 1985, c C-29) requires that an adoption be made in accordance with the laws of the place where the adoption took place and the laws of the country of residence of the adopting citizen. Also see *Atwal, Manjit Singh v MEI* (IAB W86-4205), Petryshyn, Wright, Arpin (concurring decision), May 8, 1989: The majority accepted the declaratory judgment and noted "that a foreign judgment is not to be disturbed unless there is proof of collusion, fraud, lack of jurisdiction of the court and the like"; *Ghorbannejad v Canada (Citizenship and Immigration)*, 2010 CanLII 94169 (CA IRB): The panel concluded that the evidence established that the divorce contract had been obtained by providing false information to Iranian authorities and therefore by fraud; *Nadow v Canada (Citizenship and Immigration)*, 2014 CanLII 99949 (CA IRB).

[260] *Singh v Canada (Citizenship and Immigration)*, 2012 FC 1302. Also see *Sandhu, Bacchitar Singh v MEI* (IAB T86-10112), Eglington, Goodspeed, Chu, February 4, 1988: In a pre-*Taggar* decision, the panel treated the judgment of the foreign court as a declaration as to status, conclusive and binding on the whole world (including Canadian authorities), and thus found the adoption was valid under Indian law. The authenticity of the declaratory judgment was not challenged; *Sahota v Canada (Citizenship and Immigration)*, 2015 FC 756; *Gill v Canada (Citizenship and Immigration)*, 2016 FC 193. But see *Brar v*

independent, “cogent evidence” which cast doubt on the adoption deed, specifically the applicant’s statement to the officer that the giving and taking ceremony had not occurred.

In *Sran*,[261] the appellant sought to rely on a declaratory judgment of an Indian court upholding the validity of an adoption deed. At the time of the adoption, the appellant had three Hindu sons. The IAD dismissed the appeal, holding that it was bound by the *Taggar* decision,[262] in which the Federal Court of Appeal held that the declaratory judgment in question was a judgment *in personam* which bound only the parties to the action. The IAD stated that the declaratory judgment was merely evidence which must be considered along with other evidence in determining the validity of the adoption and did not dispose of the issue by itself. The IAD noted that the existence of “Hindu sons” at the time of the adoption was apparently never raised before the Indian court, and stated that the declaratory judgment could not cure the defect in the adoption, which clearly contravened the *HAMA*.

Similar considerations apply in the context of foreign marriage and divorce. Caution must be exercised in concluding that a marriage is not valid in the face of what appears to be a valid court order.[263]

In *Gill*,[264] the applicant obtained an *ex parte* order from an Indian court stating that two marriage certificates were false and that he was not married. When his application for permanent residence was refused, he sought a declaration from the Federal Court that he was never married and had answered the visa officer’s questions truthfully. A motion to strike the action was granted because the court does not have jurisdiction to make declarations of fact. In *obiter*, the court was critical of the officer’s failure to accept the judgment of the Indian court on the basis that it was obtained *ex parte*, as this alone

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Canada (Minister of Employment and Immigration), [1989] IADD No. 8, December 29, 1989: The panel was presented with a document that contained discrepancies, was not presented in accordance with section 23 of the *Canada Evidence Act* (RSC, 1985, c C-5), and purported to validate an adoption that clearly did not comply with the requirements of the foreign statute. The majority of the panel determined that the declaratory judgment had no weight.

[261] *Sran, Pritam Kaur v MCI* (IAD T93-10409), Townshend, May 10, 1995. Also see *Gill v Canada (Minister of Employment and Immigration)*, [1991] IADD No 40. In *Pawar v Canada (Minister of Citizenship and Immigration),* [1999] IADD No. 2190, the panel held that notwithstanding the existence of a declaratory judgment, the evidence established that there was no mutual intention of either the birth parents or the adoptive parents to transfer the child, and therefore the adoption did not meet the requirements in *HAMA*. For other cases in which it has been held that declaratory judgments are not determinative, see *Singh, Ajaib v MEI* (IAB W87-4063), Mawani, Wright, Petryshyn, April 26, 1988: The disregarded declaratory judgment was internally inconsistent and collusive and did not result from a fully-argued case; *Badwal v Canada (Minister of Employment and Immigration),* [1989] IADD No 68; *Sandhu v Canada (Citizenship and Immigration),* 2009 CanLII 87175 (CA IRB); *Singh v Canada (Citizenship and Immigration),* 2009 CanLII 89204 (CA IRB).

[262] *Canada (Minister of Employment and Immigration) v Taggar*, 1989 CanLII 5278 (FCA), [1989]3 FC 576.

[263] *Sinniah v Canada (Department of Citizenship and Immigration)*, 2002 FCT 822. Also see Legal Services’ reference paper *Sponsorship Appeals* (January 1, 2008).

[264] *Gill v Canada (Minister of Employment and Immigration),* [1991] FCJ No. 944.

does not make the judgment valueless or invalid. The judgment was issued by a court with proper jurisdiction to render such a decision.

In *Burmi*,[265] the panel gave little weight to a declaratory judgment by an Indian court respecting the marriage of the appellant and applicant, as it did not refer to the date and place of the marriage and was obtained some four months after the applicant received her refusal letter.

In another case, the IAD gave little weight to a declaratory judgment obtained *ex parte* that purported to establish the marriage of the appellant and sponsoree, as the record showed that the evidence before the Indian court had been incomplete. Based on the evidence before the IAD, it appeared that the appellant was married to another person and thus lacked the capacity to marry the sponsoree.[266]

In *Cheikhna*,[267] the IAD ruled on the validity of a marriage under Mauritanian law. No probative value was given to the marriage certificate because of the confusion surrounding the role of a witness at the time of the marriage and the certificate's non-compliance with the requirements of Article 76 of the *Personal Status Code*. The Federal Court, citing *Ramalingam*,[268] stated that "one does not have to find problems with an official document issued by a foreign state, such as a marriage certificate, to question its validity … such documents benefit only from a presumption of validity."[269]

In matters of divorce,[270] the Federal Court of Appeal has held that a domestic court may not refuse recognition of a foreign divorce on the ground that there was fraud or collusion in obtaining it unless the fraud was such that it led the foreign court to wrongly assume jurisdiction over the subject matter.[271]

The rules concerning the recognition of foreign divorce judgments in Canada are provided by the case law and section 22 of the *Divorce Act*.[272]

It should be noted that subsection 22(3) of the *Divorce Act* preserves the common law with respect to the recognition of divorces. There were several common law rules

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[265] *Burmi, Joginder Singh v MEI* (IAB T88-35651), Sherman, Arkin, Weisdorf, 14 February 1989.

[266] *Gill v Canada (Minister of Employment and Immigration),* [1990] IADD No 36, appeal dismissed: *Gill, Sakinder Singh v MEI* (FCA, A-860-90), Pratte, Heald, Desjardins, 24 April 1991.

[267] *Cheikhna v Canada (Citizenship and Immigration),* 2012 CanLII 52039 (CA IRB).

[268] *Ramalingam v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7241 (FC).

[269] *Cheikhna v Canada (Citizenship and Immigration)*, 2012 FC 1135 at para 21.

[270] Also see Legal Services' reference paper *Sponsorship Appeals* (January 1, 2008).

[271] *Sandhu, Kirpal Singh v MEI* (FCA, A-221-81), Pratte, Urie, Verchere, 8 October 1981. Also see *Powell v Cockburn,* 1976 CanLII 29 (SCC), [1977] 2 SCR 218, concerning situations where a foreign court is fraudulently led to believe the facts are such that it has jurisdiction; *Johal, Tarsem Singh c MEI* (CAI 83-6737), Glogowski, Howard, P. Davey, 19 February 1986, concerning a foreign judgment declaring the parties married.

[272] RSC, 1985, c 3.

developed prior to the adoption of divorce legislation in Canada which are succinctly summarized in *El Qaoud*,[273] quoting *Payne on Divorce*, 4th ed.:

> Section 22(3) of the *Divorce Act* expressly preserves pre-existing judge made rules of law pertaining to the recognition of foreign divorces. It may be appropriate to summarize these rules. Canadian courts will recognize a foreign divorce: (i) where jurisdiction was assumed on the basis of the domicile of the spouses; (ii) where the foreign divorce, though granted on a non-domiciliary jurisdictional basis, is recognized by the law of the domicile of the parties; (iii) where the foreign jurisdictional rule corresponds to the Canadian jurisdictional rule in divorce proceedings; (iv) where the circumstances in the foreign jurisdiction would have conferred jurisdiction on a Canadian court had they occurred in Canada; (v) where either the petitioner or respondent had a real and substantial connection with the foreign jurisdiction wherein the divorce was granted; and (vi) where the foreign divorce is recognized in another foreign jurisdiction with which the petitioner or respondent has a real and substantial connection.

In *Lau*,[274] the IAD had concluded that the applicant's divorce from his first wife, which was obtained in China, was not undertaken in compliance with Canadian law and therefore was not considered a valid divorce in Canada. Therefore, the applicant was still married to his first wife and did not have the right to sponsor his alleged second wife. The panel considered subsection 22(1) of the *Divorce Act* and concluded that it did not apply because neither the applicant nor his first wife were ordinarily resident in China for at least one year immediately preceding the commencement of proceedings for their divorce. With respect to subsection 22(3), the IAD held that allowing Canadian residents to divorce in a jurisdiction with which they had no connection "of any substantive nature" would offend Canadians' notion of fairness and not be in harmony with Canadian public policy.

The Federal Court allowed the application for judicial review. Citing *Amin*,[275] the court held that subsection 22(3) of the *Divorce Act* required the IAD to first determine whether the divorce was legally valid in China, which it failed to do. The court could not speculate as to whether the IAD's conclusion regarding fairness and Canadian public policy would have been the same had the divorce's validity in China been properly considered.

9.3.2 Presumption of Validity Under Foreign Law

Documentary evidence before the IRB may benefit from a legal presumption of validity in the jurisdiction in which it originated. For example, the IAD has dealt with the issue of

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[273] *Orabli v Qaoud*, 2005 NSCA 28 at para 14.

[274] *Lau v Canada (Citizenship and Immigration)*, 2009 FC 1089. Also see *Hayat v Canada (Citizenship and Immigration)*, 2019 CanLII 128443 (CA IRB).

[275] *Amin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 168.

adoption deeds in the context of section 16 of *HAMA*, which creates a presumption of validity under Indian law.[276]

In *Dhillon,*[277] the Federal Court of Appeal ruled that, according to subsection 2(1) of the *Immigration Regulations, 1978,* (now subsection 3(2) and section 117 of the *Regulations*), the panel had to determine whether the adoption complied with the laws of India. As there was no doubt in this case that the adoption had not been carried out in compliance with Indian laws, the presumption was essentially rebutted.

Later, in *Singh*, the Federal Court of Appeal ruled that the presumption set out in section 16 of *HAMA* cannot be used to determine whether a person is "adopted" for the purposes of the *IRPA*.[278]

In *Sahota,*[279] the Federal Court agreed with the applicants' argument that the officer had been bound by the presumption of validity because she had no authority to declare an Indian adoption void. Her task was merely to determine whether the adoption was valid for the purposes of Canadian law. Her determination that an adoption was invalid for the purposes of the Citizenship Act has no effect on the adoption's status in India.

In *Gill,*[280] the IAD had to determine whether all the parties to the adoption agreed on the sponsor's adoption. Three years after the adoption ceremony, an Indian court had rendered a declaratory judgment establishing that the mother of the applicant was her sole guardian, as her father was presumed dead. The IAD stated that this evidence did not contradict the other evidence that the parties to the adoption had the intention of moving forward with the adoption. The declaratory judgment had been obtained merely to facilitate the sponsorship application. The panel ruled that the testimony of the

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[276] Section 16 of *HAMA* sets out the following:

> 16. Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

[277] *Dhillon v Canada (Minister of Employment and Immigration)* (FCA), [1987] FCA No 474 (the facts in this case are set out in *Dhillon, Harnam Singh v MEI* (IAB V83-6551), Petryshyn, Glogowski, Voorhees, January 3, 1985). Also see *Dhudwarr v Canada (Citizenship and Immigration),* 2006 CanLII 65633 (CA IRB); *Gill v Canada (Citizenship and Immigration),* 2016 FC 193.

[278] *Singh v Canada (Minister of Employment and Immigration*), [1990] 3 FC 37, 11 Imm LR (2d) 1 (CA), leave to appeal to the Supreme Court of Canada refused (doc. 22136, Sopinka, McLachlin, Iacobucci), February 28, 1991, *Singh v Canada (Minister of Employment and Immigration)* (1991), 13 Imm LR (2d) 46 [appeal note]. Also see *Canada (Minister of Employment and Immigration) v Sidhu,* 1993 CanLII 2943 (FCA), [1993] 2 FC 483.

[279] *Sahota v Canada (Citizenship and Immigration),* 2015 FC 756. Also see *Seth v Canada (Minister of Citizenship and Immigration)*, [1996] IADD No. 168, in which the court stated that it is not up to the Canadian High Commission in New Delhi to seek standing before an Indian court and to have the adoption declared invalid. Instead, the visa officer is entitled to conclude that an alleged adoption has not been proven for immigration purposes. In *Persaud v Canada (Minister of Citizenship and Immigration),* [1998] IADD No. 1655*,* the final order of the Supreme Court of Guyana constituted evidence but was not determinative of whether the adoption was in compliance with the former *Immigration Act.*

[280] *Gill v Canada (Minister of Employment and Immigration),* [1991] IADD No 40.

appellant and of others who testified on her behalf outweighed the declaratory judgment, given the particular circumstances of this case.

9.3.3 Parent and Child Relationship Created by Operation of Foreign Law

Although the Immigration Appeal Board historically interpreted section 12 of *HAMA*[281] as having the effect of creating a parent and child relationship by operation of law,[282] it would be an error to presume that a parent and child relationship has been created simply because an adoption is proved to be legal. Various relevant factors must be taken into account in the assessment of the parent and child relationship.[283]

The Federal Court – Trial Division indicated the following in *Sharma:*[284]

> A parent and child relationship is not automatically established once the requirements of a foreign adoption have been demonstrated. In other words, even if the adoption was within the provisions of HAMA, whether the adoption created a relationship of parent and child, thereby satisfying the requirements of the definition of "adoption" contained in subsection 2(1) of the *Immigration Regulations, 1978*, must still be examined.[285]

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[281] Section 12 of *HAMA* provides, in part, as follows:

> 12. An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family.

[282] See, for example, *Banga v Canada (Minister of Employment and Immigration)* (1987), 3 Imm LR (2d) 1 (IAB); *Sandhu, Gurcharan Singh v MEI* (IAB T87-9066), Eglington, Teitelbaum, Sherman, November 13, 1987; *Shergill v Canada (Minister of Employment and Immigration)* (1987), 3 Imm LR (2d) 126 (IAB). But see *Kalair, Sohan Singh v MEI* (IAB V82-6104), Chambers, Howard, Davey, January 9, 1987.

[283] *De Guzman, Leonor G. v MCI* (IAD W95-00062), Ariemma, Bartley, Wiebe, August 16, 1995: The IAD set out some criteria for assessing the authenticity of the parent-child relationship. Also see *Davis v Canada (Citizenship and Immigration),* 2013 FC 1243: The decision was rendered in the context of the *Citizenship Act,* which contains similar provisions to the *Regulations* regarding the requirement that there be a genuine parent and child relationship. The Federal Court mentioned that the analysis proposed in *De Guzman* is important because it establishes a structured method for determining what is a "genuine relationship" and the "main goal" of the adoption. For more on this subject, see Legal Services' reference paper *Sponsorship Appeals* (January 1, 2008).

[284] *M.C.I. v Sharma, Chaman Jit* (FCTD, no. IMM-453-95), Wetston, August 28, 1995.

[285] The term "adoption" is now defined in subsection 3(2) of the *Regulations*. The two-stage process set out in *Sharma* has been followed in *MCI v Edrada, Leonardo Lagmacy* (FCTD, no. IMM-5199-94), MacKay, February 29, 1996, and *Gill, Banta Singh v MCI* (FCTD, no. IMM-760-96), Gibson, October 22, 1996 (upheld by the Federal Court of Appeal in *Gill, Banta Singh v MCI* (FCA, no. A-859-96), Marceau, Linden, Robertson, July 14, 1998). These cases indicate that the issue had already been determined by the Federal Court in *Singh* (leave to appeal to the Supreme Court of Canada (doc. 22136, Sopinka, McLachlin, Iacobucci) refused on February 28, 1991, *Singh v Canada (Minister of Employment and Immigration)* (1991), 13 Imm LR (2d) 46 [appeal note]).

In *Rai,*[286] the sponsor's adoption was governed by the *Alberta Child Welfare Act*. The IAD rejected the argument that an adoption order under that Act was clear and incontrovertible evidence that a genuine parent and child relationship had been created.

In *Frounze,*[287] the IAD erred in presuming that because the adoption was legal, there was a parent and child relationship. The Federal Court wrote:

> [32] I cannot agree with the Respondent's position in this regard. The word "adopted" is defined in the *Immigration Regulations* to mean a person who is adopted in accordance with the laws of a province or of a country other than Canada "where the adoption creates a genuine relationship of parent and child." Hence, in my opinion whenever the word "adopted" comes up for consideration under the *Immigration Regulations*, it is not sufficient to consider the bare legality of an adoption and the decision maker must also determine whether a genuine relationship of parent and child was created.
>
> [33] This means that, under ss. 2(1) of the *Immigration Regulations*, someone will not have been adopted if, notwithstanding an adoption in accordance with the laws of another country, no genuine relationship of parent and child has been created. …

9.3.4 Power of Attorney

In cases where the sponsor, for one reason or another, does not travel to the country where the applicant is in order to complete the adoption, the sponsor may give a power of attorney to someone to act in their stead. The power of attorney gives the person named in it the authority to do whatever is necessary in order to complete the adoption in accordance with the laws of the jurisdiction where the adoption is to take place.

An issue that has arisen in this area with respect to Indian law is whether *HAMA* requires that the power of attorney be in writing and registered for the adoption to be valid. In a number of decisions, panels have ruled that neither is required.[288]

Another issue is whether the sponsor can give a power of attorney to the biological parent of the person to be adopted. In *Poonia*,[289] in dealing with the requirements of a giving and taking ceremony under Indian law, and after reviewing a number of Indian

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[286] *Singh Rai v Canada (Citizenship and Immigration),* 1999 CanLII 14710 (CA IRB).

[287] *Frounze v Canada (Minister of Citizenship and Immigration),* 2004 FC 331. Also see *Canada (Minister of Citizenship and Immigration) v Sohal,* [1997] FCA no 21; *Chahal v Canada (Minister of Citizenship and Immigration)*, [2000] FCA no 914; *Canada (Citizenship and Immigration) v Nahal,* 2007 FC 92. In *Dhaliwal v Canada (Minister of Citizenship and Immigration),* [1996] FCA no 1504, the Federal Court stated that even the former definition of the word "adopted" (in effect prior to February 1, 1993) requires that a genuine parent-child relationship be demonstrated.

[288] See, for example, *Kler, Sukhdev Singh v MEI* (IAB V82-6350), Goodspeed, Vidal, Arpin, May 25, 1987; *Paul, Satnam Singh v MEI* (IAB V87-6049), Howard, Anderson (dissenting), Gillanders, February 13, 1989; *Gill, Balwinder Singh v MEI* (IAD W89-00433), Goodspeed, Arpin, Rayburn, September 13, 1990.

[289] *Poonia, Jagraj v MEI* (IAD T91-02478), Arpin, Townshend, Fatsis, October 5, 1993.

authorities, the IAD held that the power of attorney must be given to a third party who cannot be the biological parent as that person is a party to the adoption.

9.3.5 Revocation of Adoption

Under subsection 133(5) of the *Regulations*, an immigration officer (and the IAD) may consider whether the revocation of an adoption by a foreign authority was obtained for the purpose of sponsoring an application for a permanent resident visa made by a member of the family class (of the biological family), and if it was, to rule that the intended sponsorship is not permissible.

In the past, visa officers have refused to recognize revocations by foreign authorities, and in some cases where the sponsorship applications of biological parents by their children given up for adoption had failed, the IAD (and the Immigration Appeal Board) had the chance to examine the issue.

In *Sharma,*[290] the IAD was presented with a declaratory judgment from an Indian court nullifying the adoption of the sponsor. The judgment was obtained by the sponsor's biological father in an uncontested proceeding. After considering the expert evidence presented by the parties, the IAD concluded that the judgment was *in personam* and that the weight to be given to it would depend on the particular circumstances of the case. The IAD inferred from the evidence that the Indian court had not been informed of the immigration purpose for the action and gave the judgment little weight. It also found that the only possible reason for nullifying an adoption under Indian law, misrepresentation, was not present in the case.[291]

In *Chu,*[292] the panel acknowledged that an adoption can be terminated in China with the agreement of the parties. However, because neither the sponsor nor her adoptive father had any real and substantial connection with China at the time the revocation was obtained, the panel ruled that the applicable law was not Chinese law but British Columbia law. Under this law, termination of adoption was not possible.

In *Purba,*[293] the sponsor had been adopted by her grandparents but was granted an immigrant visa on the basis that she was their dependent daughter. The fact of the adoption was not disclosed to the visa officer. A few years later, she attempted to sponsor her biological mother, but that application was refused. The evidence presented at the IAD hearing showed that the adoption was void *ab initio,*[294] however, the appeal was dismissed on the basis of estoppel. As the panel put it:

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[290] *Sharma, Sudhir Kumar v MEI* (IAD V92-01628), Wlodyka, Singh, Verma, August 18, 1993.

[291] Also see *Heir, Surjit Singh v MEI* (IAB V80-6116), Howard, Campbell, Hlady, January 16, 1981.

[292] *Chu v Canada (Minister of Employment and Immigration)* [1992] IAB no. 168.

[293] *Purba, Surinder Kaur v MCI* (IAD T95-02315), Teitelbaum, September 10, 1996.

[294] The evidence included a judgment of a court in India declaring the adoption null and void. The grandfather already had three daughters and therefore did not have the legal capacity to adopt another daughter under *HAMA*.

> [The sponsor] was granted status in Canada as a landed immigrant and subsequently as a Canadian citizen based on a misrepresented status which was acted upon by Canadian immigration officials. In my view, she is estopped from claiming a change in status to enable her to sponsor her biological mother.[295]

In *Bailey,*[296] the IAD found that although the appellant had been adopted, the visa officer should have assessed whether a genuine parent and child relationship had been created rather than presuming that she could not sponsor her biological mother. The panel ruled that such a relationship had not been created between the appellant and her adoptive mother, therefore the appellant was not prevented from sponsoring her biological mother as a member of the family class.

9.3.6 Severing the Pre-Existing Legal Parent-Child Relationship

Subsection 3(2) of the *Regulations* requires that an adoption creates a legal parent-child relationship and severs the pre-existing legal parent-child relationship. In some foreign jurisdictions, an adoption may be granted without severing the pre-existing legal parent-child relationship. For the purposes of the *Regulations*, this would constitute an incomplete adoption.

In *Sertovic*,[297] the adoption was considered "incomplete" under the adoption laws of Bosnia-Herzegovina because the child was over the age of five at the time of the adoption. Under that country's law, the adoptive parents gain the full rights of natural parents, however, the natural parents' rights are in no way affected. The legal relationship uniting the child (the applicant) to her biological mother (the sole surviving parent) was not severed. Even though the panel ruled that the appellant and her spouse had actively taken part in the upbringing of the applicant, the appeal was dismissed because the parent and child relationship between the applicant and her biological parent had not been severed.

In *Vo Abadie*,[298] the IAD determined that the "ordinary" (as opposed to "plenary") adoption obtained under the French civil code did not amount to a valid adoption under subsection 3(2) of the *Regulations*. It was established that following an ordinary adoption decided in France, the adopted child maintained his ties and rights to his biological family.

In *Kenne*,[299] the IAD had dismissed the appeal on the basis that the applicants' adoptions did not comply with Cameroonian law and did not sever their pre-existing legal parent and child relationships with the biological parents in accordance with the

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[295] Also see *Tang v Canada (Citizenship and Immigration),* 2013 CanLII 97979 (CA IRB).

[296] *Bailey v Canada (Citizenship and Immigration),* 2007 CanLII 57782 (CA IRB).

[297] *Sertovic v MCI* (IAD TA2-1698), Collins, September 10, 2003.

[298] *Vo Abadie v Canada (Citizenship and Immigration)*, 2009 CanLII 28374 (CA IRB).

[299] *Kenne v Canada (Citizenship and Immigration)*, 2010 FC 1079. Also see *Koulla v Canada (Citizenship and Immigration)*, 2010 CanLII 96858 (CA IRB); *Yatomani v Canada (Citizenship and Immigration),* 2019 CanLII 106838 (CA IRB); *Tonda v Canada (Citizenship and Immigration),* 2020 CanLII 84318 (CA IRB).

requirements in subsection 3(2) of the *Regulations*. The Federal Court decided that the IAD erred in its interpretation of the Cameroonian law on adoption. The court determined that the Cameroonian adoption judgment was to be included among all the documentary evidence filed, as well as the biological mothers' consent deeds for the children that were submitted to the Cameroonian court in support of the request for adoption. These consent deeds explicitly stated that the biological mothers were informed of the substitution of the parent and child relationships, which would result in the adoption of the children.

9.3.7 Public Policy

At times, sponsors have argued that certain provisions in foreign adoption legislation are discriminatory and should not be recognized by Canadian authorities on the basis of public policy. *Sidhu*[300] dealt with a situation where the purported adoption was not recognized by the visa officer because it was in contravention of the *HAMA*. The sponsor argued before the IAD that the relevant provision in the *HAMA* was discriminatory and should not be given effect because to do so would be contrary to public policy. The IAD accepted the argument and held that the adoption was valid. The Federal Court of Appeal set aside the IAD's decision, noting that:

> Paragraph 4(1)(b) [of the *Immigration Regulations, 1978*] represents the conflict of laws rule of the *Immigration Act*. There is here no "material" rule of conflict in the sense of a substantive rule of law applicable since there is no federal adoption legislation. Nor are we in a situation where there is a law of "immediate application" in the sense of a law which must unilaterally and immediately apply so as to protect the political, social and economic organization of Canada to the exclusion of the foreign law that would normally be applicable by virtue of the conflict of laws rule of Canada. Such a situation, when it occurs, can only have the effect of excluding *in toto* the relevant foreign legislation. For instance, if the present adoption were valid under the HAMA, but contrary to Canadian public policy, a rule of immediate application could stipulate that the adoption will not be recognized in Canada. The Canadian authorities would then be obligated to refuse to recognize an adoption performed abroad for reasons of public policy. This is not what the Board did [...]
>
> What the Board did [...] was to purge clause 11(ii) of the HAMA as being contrary to Canadian public policy and then to validate what would be an otherwise invalid adoption according to the Indian legislation [...]
>
> In my view, the Board erred.

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[300] *Canada (Minister of Employment and Immigration) v Sidhu,* 1993 CanLII 2943 (FCA). Also see *Seth v Canada (Minister of Citizenship and Immigration),* [1996] IADD No. 168; *Koulla v Canada (Citizenship and Immigration),* 2010 CanLII 96858 (CA IRB).

> [... T]he Board had no jurisdiction under the *Immigration Act* to grant a foreign adoptive status which was not valid under foreign law on the grounds that the cause of the invalidity is contrary to Canadian public policy. [Footnotes omitted.]

It is unclear whether the IAD may refuse to recognize an adoption that meets the requirements of the foreign law on grounds of public policy. In *Chahal*,[301] the appellant, a Canadian citizen living in Canada, had been adopted in India. She then tried to sponsor her adoptive family. The panel found that the adoption did not comply with the requirements of the *HAMA*. In *obiter*, it went on to say that in circumstances where the adopted child is ordinarily resident and domiciled in Canada, to recognize a foreign adoption would be contrary to public policy because the protective jurisdiction of the British Columbia Supreme Court would be denied to that child.

[301] *Chahal, Gobinder Kaur v MEI* (IAD V89-00287), Mawani, Gillanders, Verma, October 6, 1989.

CHAPTER 10

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10 Judicial Notice and Specialized Knowledge

10.1 Judicial Notice

Facts that can be "judicially noticed" are facts so notorious or generally accepted as not to be the subject of debate among reasonable persons.[302] Judicial notice is invoked to relieve parties from having to prove facts that are not in dispute. Thus, when judicial notice is taken of a fact, no formal evidence of that fact must be introduced at the trial or hearing.

The purpose of taking judicial notice is to shorten the proceeding. Every trial or hearing could continue for an interminable length of time if courts and tribunals were required to receive formal proof of every assertion being made and were not allowed to make use of their ordinary experience to reach a decision. No one is required to provide evidence that Monday follows Sunday, that the sun rises in the east, or any of the other innumerable facts which are "generally known".

The essential basis for taking judicial notice is that the fact involved is of a class that is so generally known as to give rise to the presumption that all reasonably intelligent persons are aware of it. This analysis excludes from judicial notice "particular" facts not generally known (i.e. facts known to people who have some special knowledge gained through their work or travel, for example, but which are not known by the general public).

No universal line can be drawn distinguishing between the generally known and particular facts. As a general guideline, the more central to the question in dispute a matter is, the greater the need is for proof to be made at the trial or hearing.[303]

The Supreme Court of Canada has held that the threshold for judicial notice is strict. A court or tribunal may take judicial notice—that is, accept a statement as true without formal proof—where the statement (a) would be considered as common knowledge without dispute among reasonable people, or (b) is capable of being shown to be true by reference to a readily accessible source of indisputable accuracy.[304]

Situations in which courts have taken judicial notice include local conditions (e.g., time of sunset in the summer), geographic facts (e.g., location of Canada-U.S. border), the existence and transmission of the virus that causes COVID-19,[305] and the overincarceration of Aboriginal offenders in Canada.[306] Judicial notice can be taken of Canadian laws, including all federal and provincial statutes and regulations, however

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[302] *R. v Spence*, [2005] 3 SCR 458, 2005 SCC 71. Also see *R. v Potts*, (1982), 66 CCC (2d) 219 (Ont CA).

[303] *R. v Spence*, [2005] 3 SCR 458, 2005 SCC 71 at para 60.

[304] *R. v Find,* 2001 SCC 32, [2001] 1 SCR 863 at para 48. Also see *Smith v Canada (Citizenship and Immigration)*, 2009 FC 1194 at para 56; *Yeganeh v Canada (Citizenship and Immigration)*, 2018 FC 714 at para 46.

[305] *R. v Barry Matthews*, 2020 ONSC 5459 at para 51.

[306] *R. v Sharma*, 2020 ONCA 478 at para 102.

courts do not take judicial notice of foreign laws.[307] The validity or existence of any foreign law must be established in evidence like any other fact to be proved.[308]

The *IRPA* specifically provides that the RPD and RAD "may take notice of any facts that may be judicially noticed … ."[309] Even absent similar provisions with respect to the ID and IAD, those Divisions may also rely on judicial notice to establish obvious matters.

The Divisions are not required to give notice to the parties before relying on judicial notice, unlike specialized knowledge (see 10.2 below). This is because of the very nature of the matters of which judicial notice may be taken. Judicial notice should only be used for facts that are commonly known and are not in dispute.[310] For example, the Federal Court has held that it was not appropriate to take judicial notice of dangerous country conditions.[311] Furthermore, if the source of the information is unknown, it is difficult to establish that the information is common knowledge.[312]

The Federal Court has found the RPD reasonably took judicial notice of the following:

- the fact that a claimant's son would be cared for by children's welfare agencies if he were left in Canada;[313]
- anomalies on a birth certificate, including the lack of a stamp;[314] and
- a decision in a judicial proceeding involving the same parties.[315]

Conversely, the RPD has been found to have improperly taken judicial notice of the following:

- the investigation of a person's background that occurred before a passport was issued in Turkey;[316]
- police powers under the Bangladesh *Special Powers Act*;[317] and

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[307] *Sayer v Canada (Citizenship and Immigration)*, 2011 FC 144 at para 4.

[308] See Chapter 9 of this paper for a more extensive discussion of foreign laws.

[309] *IRPA*, ss 170(i), 171(b).

[310] *Maslej v Canada (Minister of Manpower and Immigration),* [1977] 1 FC 194 (CA): Not all members of a minority group were in danger of being persecuted; *Amiri, Hashmat v MCI* (FCTD, no. IMM-1458-00), Lutfy, February 13, 2001: Dari was not spoken solely in Afghanistan. Also see *Galindo v Canada (Minister of Employment and Immigration)*, [1982] 2 FC 781 (CA), where the Immigration Appeal Board was overturned for improperly taking notice of information it had obtained in other hearings relating to Chile.

[311] *Kaur v Canada (Minister of Citizenship and Immigration),* 2004 FC 1612 at para 12; *Ruiz Castro v Canada (Citizenship and Immigration),* 2008 FC 1282 at paras 28-29.

[312] *Lovera v Canada (Citizenship and Immigration),* 2016 FC 786 at para 46.

[313] *Zheng v Canada (Minister of Citizenship and Immigration),* 2011 FC 181 at para 35.

[314] *Umba v Canada (Minister of Citizenship and Immigration)*, 2004 FC 25 at paras 40-41.

[315] *Kovac v Canada (Citizenship and Immigration),* 2015 FC 497 at para 10.

[316] *Oymak v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1243.

[317] *Rahman v Canada (Citizenship and Immigration),* 2006 FC 974 at para 69.

- the norms of diplomatic life, particularly those of the wife of an Ethiopian diplomat.[318]

10.2 Specialized Knowledge

The *IRPA* provides that in addition to having authority to take judicial notice of facts, the RPD and RAD may take notice of "any other generally recognized facts and any information or opinion that is within its specialized knowledge."[319] This special power has not been given to the other two Divisions.

Rule 22 of the *RPD Rules* provides:

> Before using any information or opinion that is within its specialized knowledge, the Division must notify the claimant or protected person, and the Minister if the Minister is present at the hearing, and give them a chance to
>
> (a) make representations on the reliability and use of the information or opinion; and
>
> (b) give evidence in support of their representations.

Rule 24 of the *RAD Rules* imposes similar requirements.

The power to take notice of facts, information and opinions within a Division's specialized knowledge must be exercised fairly,[320] in accordance with the legislative parameters.[321] The Federal Court appears to be more likely to uphold the use of specialized knowledge where the documentary evidence supports the panel's statement regarding the existence of certain facts or information.[322]

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[318] *Keleta v Canada (Minister of Citizenship and Immigration),* 2005 FC 56 at para 24.

[319] *IRPA*, ss 170(i), 171(b).

[320] In *Pamuk v Canada (Minister of Citizenship and Immigration),* 2003 FC 1187, the RPD referred to an "on-going" case between the Alevi organization and the Turkish State, but it did not identify which case or conflict it was referring to when it put this issue to the claimant. It then relied on the claimant's lack of knowledge about this "case" as a reason to doubt her membership in the Alevi organization. The Federal Court held that the RPD did not comply with Rule 18 (now Rule 22) before using its specialized knowledge, in that it did not give the claimant sufficient notice.

[321] *Sivaguru, Jegathas v MEI* (FCA, no. A-66-91), Heald, Hugessen, Stone, January 27, 1992. In *Hussain, Saeed Atif v MCI* (FCTD, no. IM-1940-99), Dawson, August 11, 2000, the Federal Court – Trial Division held that there was no requirement that notice under section 68(5) of the *Immigration Act* be given at the outset of the hearing; compliance with that provision during the hearing was sufficient. (The Convention Refugee Determination Division advised the claimant of its concerns about his statements about Shi'ite principles and rituals.)

[322] *Ahamadon, Tuan Ramaiyan v MCI* (FCTD, no. IMM-1257-99), Pinard, May 17, 2000; *Nadarajalingam, Rajah v MCI* (FCTD, no. IMM-3238-00), Gibson, May 8, 2001. In *Afzal, Amer v MCI* (FCTD, no. IMM-6423-98), Lemieux, June 19, 2000, the Federal Court – Trial Division held that the circumstances in which "first information reports" are available in Pakistan is not a matter of the Convention Refugee

Specialized knowledge is knowledge accumulated over time as a result of a decision-maker's adjudicative functions, as opposed to knowledge obtained in a personal capacity.[323] In contrast to judicial notice, specialized knowledge may be used when facts are in dispute. Unlike facts of which judicial notice may be taken, specialized knowledge involves information which would not necessarily be known to the parties in a particular case.

For example, in *Merja*,[324] the RPD had found an Albanian Legality Party membership card had been tampered with and gave it no weight because its dry seal did not form a complete circle over the applicant's photograph. The RPD had disclosed to the applicant its specialized knowledge that the dry seal on such membership cards should be applied over the photograph as a security feature. The Federal Court confirmed that the IRB can rely upon its own knowledge of what a document would normally look like and take note of particular features, such as security measures, when deciding whether a document is fraudulent.

Where the panel takes notice of matters within its specialized knowledge, the panel should still consider the weight to be given to that information in relation to the other evidence and in light of the representations made by counsel or the Minister's representative.

10.2.1 Notice Requirement

A panel cannot rely on specialized knowledge without first disclosing it to the claimant. Failure to do so can result in a breach of natural justice. For example, in *Nur,*[325] the RPD was found to have erred in concluding that nationality is determined by the father as much as the clan in Djibouti. The Federal Court held that nationality is a matter of law and therefore cannot be within the IRB's specialized knowledge; any knowledge of ethnicity, which could constitute specialized knowledge, ought to have been disclosed to the claimant.

A panel is not required to provide notice of specialized knowledge before the hearing. The relevant rules do not provide time frames for the notice requirements, however, they do require that parties be able to adequately present their points of view.[326]

Generally, failure to give the claimant the required notice constitutes a breach of natural justice that may justify overturning the decision, unless there are other findings that

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Determination Division's specialized knowledge; that is why evidence was sought on the point by the panel itself.

[323] *Mama, Salissou v MCI* (FCA, no. A-596-9), Stone, Decary, McDonald, May 26, 1997; *Appau v Canada (Minister of Employment and Immigration),* [1995] FCJ No. 300.

[324] *Merja v Canada (Minister of Citizenship and Immigration),* 2005 FC 73 at paras 44-45.

[325] *Nur v Canada (Minister of Citizenship and Immigration),* 2005 FC 636 at paras 26-27.

[326] *Munir v Canada (Citizenship and Immigration),* 2012 FC 645.

would support the decision and a redetermination would result in the same outcome,[327] or the specialized knowledge relied upon was essentially not in dispute.[328] For example, the Federal Court upheld the RPD decision in *Kabedi*,[329] despite finding that the RPD had failed to notify the claimant of its specialized knowledge regarding the content of Union for Democracy and Social Progress membership cards, due to the remaining credibility findings.

In *Agguini*,[330] the Federal Court held that the former Convention Refugee Determination Division (CRDD) erred in relying upon specialized knowledge to find the claimant was not credible because, among other things, he had mentioned that none of his Islamic aggressors had beards. In addition, the court found the Division erred by failing to give notice under section 68(5) of the *Immigration Act* of its intention to consider this fact.

In *Appau,*[331] the Federal Court doubted that the CRDD's "alleged knowledge of procedures at Swiss border points and procedures of Swissair … could be described as 'generally recognized facts' or 'information or opinion that is within its specialized knowledge.'" Even if it could be, the court found that the Division had erred in not giving notice of its intention to rely on those facts, and by not giving the claimant an opportunity to make submissions.

However, in *Tchaynikova*,[332] the Federal Court - Trial Division found that the CRDD had not erred in making use of its specialized knowledge that false documents indicating Jewish identity were commonly available in the former Soviet Union without notifying the claimant. The Division had put the claimant on notice at the outset that the hearing would focus on the claimant's ethnicity and her credibility. The adverse finding on credibility was based on all of the evidence, not just on the Division's specialized knowledge. In the view of the Court, the Division "is not required to bring to a claimant's attention every reservation held or implausibility found in reflecting upon the [claimant's] testimony as a whole, before its decision is made."

The Division must give notice of the specific knowledge at issue. In *Habiboglu*,[333] the panel stated that it had specialized knowledge of Islam, however it did not specifically disclose knowledge regarding Caliphs in Turkey. The court found that the applicant was denied an opportunity to make representations on the reliability and use of the

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[327] See, for example, *N'Sungani v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1759; *Keleta v Canada (Minister of Citizenship and Immigration)*, 2005 FC 56; *Habiboglu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1664.

[328] *Bitala v Canada (Minister of Citizenship and Immigration),* 32 Admin LR (4th) 37, 2005 FC 470.

[329] *Kabedi v Canada (Minister of Citizenship and Immigration)*, 2004 FC 442 at paras 14-17.

[330] *Agguini, Mohamed v MCI* (FCTD, no. IMM-6813-98), Denault, September 14, 1999.

[331] *Appau, Samuel v MEI* (FCTD, no. A-623-92), Gibson, February 24, 1995. This case was distinguished in *Kanvathipillai, Yogaratnam v MCI* (FCTD, no. IMM-4509-00), Pelletier, August 16, 2002, where the court upheld the CRDD's use of specialized knowledge about U.S. immigration procedures (i.e. whether rejected claimants returning to the U.S. are given a hearing there).

[332] *Tchaynikova, Olga v MCI* (FCTD, no. IMM-4497-96), Richard, May 8, 1997.

[333] *Habiboglu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1664 at para 29.

information and to give evidence in support of his representations, which constituted a breach of natural justice.

The applicable level of procedural fairness does not reach the level of disclosure found in criminal law. The relevant rules only specify that a party be afforded an opportunity to make representations and to provide evidence in line with the representations. In *Toma*,[334] the IRB was found to have provided sufficient notice of its specialized knowledge through its extensive questioning about the impugned evidence and because the knowledge was evidently based on a Response to Information Request.

10.2.2 Specialized Knowledge Must Be Specific and Verifiable

A member who declares specialized knowledge must place on the record sufficient detail of the knowledge to allow it to be tested.[335]

In *Isakova*,[336] the IRB cited specialized knowledge of police reports in the former Soviet Union, finding it unreasonable that the applicant did not produce one because it would have been available. The Federal Court held that the basis for the specialized knowledge must be "quantifiable and verifiable" and that reliance on past experience, absent specific details, prevents the applicant from being able to test the reliability of such knowledge.

Similarly, in *Cortes,*[337] the panel rejected the applicant's explanation that he had been told that it would be useless to file a complaint with the police unless he was injured. The panel claimed to have specialized knowledge of other uninjured claimants in Mexico having filed complaints. The Federal Court held that since this knowledge was neither quantifiable nor verifiable, Rule 22 could not be relied upon.

10.2.3 Reliance on Findings from Previous Cases

The Federal Court - Trial Division held that the CRDD could take notice of an expert opinion in a "lead case" and consider it in a subsequent case, as an exercise of its authority to take notice of facts, information and opinions within its specialized knowledge, provided it gives proper notice. Accordingly, a claimant has a "right to comment on the evidence in lead cases, make comments on the appropriate weight to be given to this evidence, and submit his or her own evidence."[338] However, the IRB

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[334] *Toma v Canada (Citizenship and Immigration),* 2014 FC 121.

[335] *Isakova v Canada (Citizenship and Immigration)*, 2008 FC 149; *Hernandez Cortes v Canada (Citizenship and Immigration),* 2009 FC 583; *Lipdjio v Canada (Citizenship and Immigration),* 2011 FC 28; *I.P.P. v Canada (Citizenship and Immigration),* 2018 FC 123 at paras 217-219. In *Razburgaj v Canada (Citizenship and Immigration),* 2014 FC 151, the Federal Court rejected the applicant's argument that the IRB's specialized knowledge was so unquantifiable and unverifiable that it was impossible to respond. To the contrary, the specialized knowledge disclosed was "specific and precise" (at paras 19-20).

[336] *Isakova v Canada (Citizenship and Immigration)*, 2008 FC 149 at para 35.

[337] *Hernandez Cortes v Canada (Citizenship and Immigration),* 2009 FC 583 at para 36. Also see *Lipdjio v Canada (Citizenship and Immigration),* 2011 FC 28 at para 18.

[338] *Horvath, Ferenc v MCI* (FCTD, no. IMM-2203-00), Blanchard, June 4, 2001 at para 7.

cannot import a finding of fact from a previous case without first providing notice to the claimant.[339]

In *Danyi,*[340] the RPD discounted a psychological report due to the member's previous experiences with the psychologist in question, noting that the panel "has historically assigned very limited weight to this doctor's reports." The Federal Court held that because the member had used information from sources external to the proceeding, the applicant had been deprived of an opportunity to respond to the evidence under Rule 22. This amounted to a breach of procedural fairness.

10.2.4 Information Not Considered to Be Specialized Knowledge

Findings based on rationality and common sense are not considered to be based on specialized knowledge and do not require notice. For example, in *Juma*,[341] the RPD held it was reasonable to expect that if the Palestinian Authority suspected the claimant of posing a risk, they would not have reissued him a document to return. The Federal Court found that this reasoning relied on rationality and common sense as opposed to specialized knowledge.

In *Mama*,[342] a CRDD panel was found to have erred in relying on its many years of personal experience travelling through Europe to determine the claimant's credibility in relation to the ease with which he claimed to have travelled through Europe. The Federal Court – Trial Division found that the panel's personal experience, the full extent of which was unclear, did not qualify as specialized knowledge.

National Documentation Packages are not specialized knowledge. They are to be treated and relied upon in the same manner as other documentary evidence.[343]

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[339] *Smith v Canada (Citizenship and Immigration),* 2009 FC 1194 at paras 55-64: The RPD found that 94 percent of U.S. military deserters are dealt with administratively based on a finding made by a previous panel. The Federal Court held that such a finding of fact cannot be the subject of "judicial notice" and no notice was given of the use of specialized knowledge. Furthermore, importing this finding of fact was "clearly not acceptable" because a finding of fact must be based on the evidence submitted to the decision maker.

[340] *Danyi v Canada (Citizenship and Immigration),* 2018 FC 1113 at para 10.

[341] *Juma v Canada (Citizenship and Immigration),* 2015 FC 844 at paras 28-32.

[342] *Mama, Salissou v MEI* (FCTD, no. A-1454-92), Teitelbaum, October 17, 1994, aff'd: FCA, no. A-596-94, Stone, Décary, McDonald, May 26, 1997.

[343] *Linares Morales v Canada (Citizenship and Immigration),* 2011 FC 1496.

CHAPTER 11

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11 Other Common Issues

11.1 Self-Serving Evidence

11.1.1 General Principles

The term "self-serving evidence" is used generally to describe evidence that appears to have been created or fabricated for the purpose of the hearing, to bolster the case.[344] In a broader sense, all testimony and documents a party submits in a proceeding are self-serving to the extent that they are created by or for the party and may be beneficial to their case.[345] Often, a finding that the evidence is self-serving is linked to a finding that the witness is not credible.[346]

In *Grozdev*,[347] a letter from the claimant's father enclosing a purported summons referred to recent events of which the claimant was well aware. The panel found the letter was specifically intended to be read by the panel at his hearing and was self-serving, and thus gave it little weight. The Federal Court held the panel committed no error.

However, in *Cardenas*,[348] the Federal Court did not uphold the Refugee Division's finding that correspondence from the claimant's family was self-serving. The court agreed with counsel that such correspondence was his only source of corroboration. It was natural that he would request that his family write and that they responded as they did. Although the correspondence postdated the claimant's arrival in Canada, there was no evidence that what was written was not true. The court also did not uphold the panel's adverse credibility findings.

In recent jurisprudence, the Federal Court has repeatedly criticized the rejection of evidence provided by relatives and family members of an applicant solely because such evidence is self-serving. In *Cruz Ugalde*,[349] the Federal Court acknowledged that it is true that giving evidence little weight due to its "self-serving" nature is an option open to the decision-maker. However, the court, citing the 2010 Supreme Court of Canada

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[344] See Appendix A of this paper for a discussion of the limitations on admitting self-serving evidence in court proceedings.

[345] *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 226 at para 31.

[346] *Huang, Zhi Wen v MEI* (FCTD, no. A-1026-92), MacKay, September 10, 1993. Also see, *Hussain, Abul Kalam Iqbal v MEI* (FCTD, no. IMM-3011-94), Nadon, March 28, 1995, in which the court held the language of the panel was unclear as to whether the two newspaper articles were genuinely published and printed to support the claim or if they were fraudulent. However, the reasons given for discounting them were fully supported by the other evidence.

[347] *Grozdev, Kostadin Nikolov v MCI* (FCTD, no. A-1332-91), Richard, July 16, 1996.

[348] *Cardenas, Harry Edward Prahl v MCI* (FCTD, no. IMM-1960-97), Campbell, February 20, 1998.

[349] *Cruz Ugalde v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 458.

decision in *Laboucan*,[350] said that evidence generally should not be disregarded simply because it comes from individuals associated with the persons concerned.

The self-serving evidence in *Cruz Ugalde* was provided by the applicant's family members, who had experienced threats and break-ins by persecutors who were searching for the applicants. Justice de Montigny opined that the PRRA officer deciding the matter would likely have preferred letters written by individuals who had no ties to the applicant. However, it is not reasonable to expect that anyone unconnected to the applicant would have been able to furnish the evidence of what had happened to the applicant in Mexico. The applicant's family members were the individuals who observed the alleged persecution, so these family members were the people best suited to give evidence about these events. It was unreasonable for the officer to distrust this evidence simply because it came from individuals connected to the applicant.

In *Magonza*,[351] the Federal Court observed that in the vast majority of cases, the family and friends of the applicant are the main, if not the only first-hand witnesses of past incidents of persecution. If their evidence is presumed to be unreliable from the outset, many real cases of persecution will be hard, if not impossible, to prove. Justice Grammond stated that decision-makers may take self interest into account when assessing such statements. He affirmed that it is a reviewable error to dismiss entirely such evidence for the sole reason that it is self-interested.

In *Murillo Taborda*,[352] the RPD gave little weight to letters from the claimant's father and sister because they were self-serving. Although the judicial review was allowed on the bases that the panel erred in finding adequate state protection for the claimant as well as an internal flight alternative, the Federal Court commented at length on the panel's treatment of the letters and found it to be problematic. Justice Kane referred to the fact that the documents were sworn affidavits and stated that the people who could likely attest to the fact that FARC members continued to look for the claimant would be her family members.

In *Mahmud*,[353] the claimant submitted letters from his uncle and his party president. The Federal Court held the Refugee Division erred in finding them to be self-serving. It stated that the letters must be considered for what they do say, not for what they do not say. They corroborated the claimant's allegations in general terms and did not contradict his evidence.

Great care should be taken in assessing the self-serving nature of such evidence as the Basis of Claim Form which, of necessity,[354] is created by the claimant for the purposes of supporting a claim for refugee protection.

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

[351] *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14.

[352] *Murillo Taborda v Canada (Citizenship and Immigration)*, 2013 FC 957.

[353] *Mahmud, Sultan v MCI* (FCTD, no. IMM-5070-98), Campbell, May 12, 1999.

[354] *RPD Rules*, rr 6-9.

It is important for the decision-maker to state why they reached the conclusion that the evidence is self-serving. In *Rendon Ochoa*,[355] the RPD's dismissal of sworn statements from the applicant's cousin, sister and former co-worker was found to be unreasonable. The panel did not offer any reason for not according them much weight other than the fact that they came from the applicant's "family and friends" and thus were not "independent in any way." Justice Zinn held that if the panel gives such evidence little weight, it must set out some basis for doing so in its reasons other than the mere fact that the evidence comes from family and friends.

The decision-maker should also explain the consequences of the finding that the evidence is self-serving, since the IRB is not bound by the rules of evidence and this type of evidence is accepted in certain cases. In general, it may result in a finding that the evidence warrants little or no weight.

11.1.2 Factors to Consider Relating to the Weight of Self-Serving Evidence

The following is a non-exhaustive list of factors that may be considered when assessing the weight to be given to self-serving evidence:

- the reasons for which the evidence was prepared;
- the date of the evidence;
- the relationship of the author to the party producing the evidence;
- whether the author has any interest in the outcome of the hearing;
- the content of the evidence;
- any apparent bias or contrived appearance;
- whether the evidence is corroborated by and consistent with other credible evidence;
- whether the author is available for cross-examination, if required; and
- the credibility of the party producing the evidence.

11.2 Hearsay Evidence

11.2.1 General Principles

Courts may refuse to admit into the record evidence that is considered hearsay. Hearsay is evidence which is not based on the first-hand observations or knowledge of the witness.[356] The reasons for not admitting such evidence relate to its reliability. Since

[355] *Rendon Ochoa v Canada (Citizenship and Immigration)*, 2010 FC 1105.

[356] See Appendix A of this paper for a discussion of the limitations on admitting hearsay evidence in court proceedings.

none of the four Divisions of the IRB is bound by the rules of evidence, they routinely accept hearsay evidence (e.g., newspaper articles).

The IRB errs in law if it rejects evidence simply because it is hearsay.[357] However, the fact that it is hearsay may be taken into consideration in determining the weight to be given to the evidence. Panels should normally refer to the rationale behind the rule in assessing the weight of the evidence. For example, evidence which is second- or third-hand information may be given less weight or no weight because it is less likely to be accurate, given the circumstances under which it was communicated.

If evidence is rejected because it is hearsay, the panel must explain why it did not find it to be credible or trustworthy.[358]

The Federal Court of Appeal held that it was not improper for the Convention Refugee Determination Division (CRDD) to admit into evidence highly prejudicial hearsay evidence if there is other evidence to support the panel's findings. It is up to the panel to determine the weight to be given to such evidence.[359] This same principle applies to the four current Divisions of the IRB, as they also are not bound by the rules of evidence.

The IAD did not err in receiving and relying upon the evidence of a police officer which was based on the evidence of undisclosed informants. The officer testified as an expert in Asian gang activity in the Vancouver area and in the identification of individual gang members. Even if parts of that evidence were "double hearsay", the panel could still rely on it, as long as it found the evidence to be credible, trustworthy and relevant.[360]

In similar circumstances, the Federal Court of Appeal determined that the CRDD had not breached natural justice by admitting evidence of an expert witness that was unsworn and contained information from unknown sources. The court noted that pursuant to section 68(3) of the former *Immigration Act* (which contained similar language to subsection 170(e) of the *IRPA*), the panel was entitled to admit the statement if it was considered credible and trustworthy in the circumstances. As for the expert witness not having been made available for cross-examination, the court found that this was not a case where the credibility of the witness was at issue and that consequently, an opportunity for cross-examination was not essential to the fairness of the hearing. Furthermore, it found that it was not unfair for the CRDD to admit this evidence as the claimant was given every opportunity to raise objections beforehand,

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[357] *Yabe, Said Girre v MEI* (FCA, no. A-945-90), Hugessen, Desjardins, Létourneau, March 17, 1993. While this decision related to the CRDD, the general principle applies to all four current Divisions of the IRB.

[358] *Yabe, Said Girre v MEI* (FCA, no. A-945-90), Hugessen, Desjardins, Létourneau, March 17, 1993; *Sawan, Nafice v MCI* (FCTD, IMM-2988-02), Russell, June 12, 2003, 2003 FCT 734.

[359] *Mahendran v Canada (Minister of Employment and Immigration)* (1991), 14 Imm LR (2d) 30 (FCA, A-628-90), Heald, MacGuigan, Linden, June 21, 1991.

[360] *Huang, She Ang v MEI* (FCA, A-1052-90), Hugessen, Desjardins, Henry, May 28, 1992. Also see *Pascal v Canada (MCI),* 2020 FC 751.

request cross-examination before the hearing, call rebuttal evidence, and make submissions regarding weight.[361]

In *Elezi*,[362] the applicant, a citizen of Albania, feared persecution by the mafia because of his employment with a commission dealing with land claims and because his father, a former chairman of the local electoral commission, refused to favour a Socialist Party candidate in a past election. On the issue of state protection, the applicant submitted letters from government officials which indicated that Albania could not protect him. The PRRA officer deciding the application gave them little weight because in the officer's view, the letters were hearsay. The court found that the declarations were made by government actors, a local mayor, and a member of Parliament, and thus the ability of the state to protect the applicant was within their personal knowledge and could not properly be characterized as hearsay evidence. These individuals were part of the state apparatus, and as such, were presumed to have knowledge of its protection capabilities.

It is an error to assign little weight to a psychological or medical report on the mere basis that it contains hearsay evidence. In *Kanthasamy*,[363] the Supreme Court of Canada clearly commented on the inappropriateness of rejecting professionals' evidence (or similarly reducing its probative value) on the sole basis of hearsay:

> And while the officer did not "dispute the psychological report presented" she found that the medical opinion "rest[ed] mainly on hearsay" because the psychologist was "not a witness of the events that led to the anxiety experienced by the applicant." This disregards the unavoidable reality that psychological reports like the one in this case will necessarily be based to some degree on "hearsay". Only rarely will a mental health professional personally witness the events for which a patient seeks professional assistance. To suggest that applicants for relief on humanitarian and compassionate grounds may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence. In any event, a psychologist need not be an expert on country conditions in a particular country to provide expert information about the probable psychological effect of removal from Canada.[364]

11.2.2 Factors to Consider Relating to the Weight of Hearsay

The following factors may be considered when determining the amount of weight to attribute to hearsay:

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[361] *Siad v Canada (CA)*, [1997] 1 FC 608, (FCA, A-226-94), McDonald, Isaac, Gray, December 3, 1996, application for leave to appeal to the Supreme Court of Canada dismissed without reasons: [1997] SCCA No. 47. Also see *Harb, Mustafa Ahmed v MCI* (FCTD, IMM-3936-98), Pinard, August 12, 1999.

[362] *Elezi v Canada (Citizenship and Immigration)*, 2008 FC 422.

[363] *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909; *Okoye v Canada (Citizenship and Immigration)*, 2018 FC 1059.

[364] *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 at para 49.

- the source of the original information;[365]
- the number of times the information has changed hands;
- the credibility and objectivity of the persons through whom the information has passed;
- the credibility of the witness;
- the availability for cross-examination of any of the persons through whom the information was passed, if required; and
- the consistency of the information with other reliable evidence.[366]

11.3 Evidence of Children

11.3.1 General Principles

Subsection 167(2) of the *IRPA* requires each Division of the IRB to appoint a designated representative for a person appearing before the Division who is under 18 years of age. The rules of each Division contain parallel, though not identical, provisions regarding the duty of counsel to notify the Division of the need for a designated representative and the requirement for being so designated.[367] In addition, the Chairperson has issued a guideline (*Guideline 3*) that applies to procedural and evidentiary issues arising in claims before the RPD that involve children.[368]

Care should be taken in designating a representative to ensure that they will consider the best interests of the child in assisting the child with the presentation of their case, and that there will not be a conflict between the interests of the designated representative and those of the child.[369] Where the designated representative is not also counsel, the designated representative will instruct counsel on behalf of the person represented.

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[365] See, for example, *Harper, Ingrid v MEI* (FCTD, 93-T-41), Rothstein, March 4, 1993 for the Federal Court – Trial Division's analysis of a statutory declaration based on "hearsay upon hearsay."

[366] *Veres v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 124 (FCTD).

[367] *ID Rules*, rr 18, 19; *IAD Rules*, r 19; *RPD Rules*, r 20; *RAD Rules*, r 23.

[368] *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* (September 30, 1996).

[369] In *Espinoza v Canada (Minister of Citizenship and Immigration),* [1999] 3 FC 73 (FCTD), the court held that the CRDD erred in designating the applicant as the children's representative without regard to whether the applicant or the children understood the legal meaning of such a designation with respect to the outcome of the children's refugee claim. The lack of knowledge as to what was meant by designated representative precluded the children, by virtue of their designated representative, from fully answering the case against them and presenting their claim as best they could.

The designation of a representative is to apply to the entirety of the proceedings in respect of a refugee claim.[370] In *Duale*,[371] the claimant had turned 18 nine days before his RPD hearing. He was 16 years of age when he arrived in Canada and when he completed his Personal Information Form (PIF). The RPD found Mr. Duale's story not to be credible and rejected his claim. On judicial review, the Federal Court found that Mr. Duale went through each stage of the proceeding except for the actual hearing without the evidence a designated representative was intended to provide. In particular, he did not have the benefit of any assistance from a designated representative in gathering evidence to support his claim. This was contrary to the intent and scheme of the *IRPA* and the *RPD Rules* and contrary to *Guideline 3*.

Justice Dawson allowed the application for judicial review on the basis that she was unable to safely conclude that the failure to appoint a designated representative could not have had an adverse effect on the outcome of the claim. A designated representative would have been responsible for assisting Mr. Duale to obtain evidence. The evidence before the court supported an inference that the evidence gathering process was not what it could have been. The court also commented on the fact that the reasons of the RPD did not expressly refer to the applicant's age, despite a particularly minute examination of his PIF. The failure to expressly acknowledge his age and the impact that age may have had on the completion of his PIF, his testimony, and the assessment of his testimony did not enhance the RPD's credibility findings.

A minor may seek to provide oral testimony. In certain circumstances, and where a minor claimant is close to the age of majority, the RPD may err if it fails to make inquiries as to whether the minor claimant should be present in the hearing and should testify on his or her own behalf. This was the case in *Andrade*,[372] where the minor respondent in an application for cessation of refugee protection pursuant to subsection 108(1)(a) of the *IRPA* had been 17 years of age. The court found that the respondent had acquired the capacity to form and express an opinion as to his intention to avail himself of the protection of the country of his nationality. The court noted that the consequences of losing refugee protection were significant for the respondent, particularly because he had been personally targeted by the FARC. In these circumstances, the member should not have simply agreed to the request of respondent's counsel to exclude the minor respondent from the hearing room.

Pursuant to section 16 of the *Canada Evidence Act*, it is presumed that a child under 14 years of age has the capacity to testify. The statute further provides that a child under 14 shall not take an oath or make a solemn affirmation, and that their evidence shall be received if they are able to understand and respond to questions. While a witness under 14 must promise to tell the truth prior to giving evidence, they cannot be asked any questions regarding their understanding of the nature of that promise for the purpose of

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[370] *IRPA*, s 167(2); *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* (September 30, 1996).

[371] *Duale v Canada (Minister of Citizenship and Immigration)*, 2004 FC 150.

[372] *Andrade v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1007.

determining whether the evidence is admissible. If received by a court, evidence of a witness under 14 has the same effect as if it were taken under oath.[373]

In hearing and weighing the evidence of children, the panel needs to exercise sensitivity, always taking into consideration the limitations under which a child may be testifying. The CRDD has written:

> … A refugee claimant who is a child may have some difficulty recounting the events which have led him or her to flee their country. Often the child claimant's parents will not have shared distressing events with the claimant, with the intention of protecting their child. As a result, the child claimant, in testifying at his or her refugee hearing, may appear to be vague and uninformed about important events which have led up to acts of persecution. Before a trier of fact concludes that a child claimant is not credible, the child's sources of knowledge, his or her maturity, and intelligence must be assessed. The severity of the persecution alleged must be considered and whether past events have traumatized the child and hindered his or her ability to recount details.[374]

In *Uthayakumar*,[375] the Federal Court – Trial Division wrote:

> Counsel for the applicants reminded the panel that we are dealing with minor children in the instant matter and that under these circumstances, close attention must be paid to the Immigration and Refugee Board's guidelines on procedural and evidentiary issues for minor children … The panel clearly did not take into consideration the fact that the applicants were ten and twelve years of age when they travelled to Canada and that these two children clearly did not have to keep a log throughout their travels. Furthermore, it was quite possible, and perhaps even likely realistic, that both of the applicants could not precisely remember all of the circumstances of the journey, which must certainly have been very stressful under the circumstances.

11.3.2 Factors to Consider Relating to the Weight of Evidence Provided by Children

The following is a non-exhaustive list of factors that can be considered when assessing the weight to be given to children's evidence:

- whether the child would be more comfortable testifying in special circumstances (e.g., with the help of a trusted friend, relative or counsellor, or through the use of a video camera or behind a screen);
- the child's age at the time of the events;

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[373] *Canada Evidence Act*, RSC, 1985, c C-5, ss 16.1(2), (3), (6), (7), and (8). These provisions post-date the publication of *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* (September 30, 1996). Accordingly, some parts of the *Guideline* (in particular, s B(I)(2)) may be outdated.

[374] CRDD V92-00501, Burdett, Brisco, April 1, 1993 at 2.

[375] *Uthayakumar, Sivakumar v MCI* (FCTD, no. IMM-2949-98), Blais, June 18, 1999.

- the time that has elapsed since the events;
- the child's level of education;
- the child's ability to understand and relate the events;
- the child's understanding of the requirement to tell the truth;
- the child's capacity to recall the events;
- the child's capacity to communicate intelligibly or in a form capable of being rendered intelligible; and
- whether the child witness was intimidated by the hearing room setting.

11.4 Evidence of Persons Suffering from Mental or Emotional Disorders

11.4.1 General Principles

Section 167(2) of the *IRPA* gives members of each Division the power to appoint a designated representative for a person before the Division who is "unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings."[376] The rules of each Division contain parallel, though not identical, provisions regarding the duty of counsel to notify the Division of the need for a designated representative and the requirement for being so designated.[377] Care should be taken in designating a representative to ensure that they will consider the best interests of the person in assisting them with the presentation of their case, and that there will not be a conflict between the interests of the designated representative and those of the person represented. Where the designated representative is not also counsel, the designated representative will instruct counsel on behalf of the person represented.

The mere existence of a mental disorder does not necessarily mean that the person is unable to appreciate the nature of the proceedings.[378] An assessment should be made in each case by questioning the person, where appropriate, and examining any medical reports produced.[379]

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[376] In *Abdousafi, Gamil Abdallah v MCI* (FCTD, no. IMM-337-00), Blanchard, December 31, 2001, 2001 FCT 372, the Federal Court – Trial Division determined that a similarly-worded provision in the *Immigration Act* did not require the CRDD to rely on a medical assessment rather than its own assessment of the applicant's mental ability. The court further stated that the onus was on the applicant to bring forward medical evidence of his alleged deficiency and noted that no such evidence was before the CRDD.

[377] *ID Rules*, rr 18, 19; *IAD Rules*, r 19; *RPD Rules*, r 20; *RAD Rules*, r 23.

[378] For example, the person may be lucid for a sufficient period of time to complete the hearing, or may be stable when taking medication, or the nature of the illness may be such that it does not interfere with the person's understanding of the nature of the hearing.

[379] In *Ozturk, Erkan v MCI* (FC, IMM-6343-02), Tremblay-Lamer, October 20, 2003, 2003 FC 1219, the Federal Court found it apparent that on many occasions the applicant was unable to understand the questions, thus raising a doubt as to his capacity to understand the nature of the proceeding. It was therefore unreasonable to refuse an adjournment request when a medical evaluation could have cast the

While the person may not be able to appreciate the nature of the proceedings, they may still be called upon to give oral testimony. Care must be taken in assessing that testimony, as well as the testimony of individuals suffering from mental or emotional disorders which do not prevent the person from understanding the nature of the proceedings.

In a case before the CRDD, a claimant who had witnessed a violent murder when he was fourteen years old suffered from post-traumatic stress disorder. Eleven years later, he claimed the murderers recognized him and he feared they would track him down anywhere in India. The panel found the claimant's evidence to be implausible. It was more likely that the fearfulness and extreme anxiety resulting from the disorder coloured the claimant's perception of reality.[380]

In *Yaha*,[381] the Federal Court found that the RPD failed to take into consideration the impact that the applicant's mental illness had on his ability to provide detailed evidence. In assessing the evidence, the panel was dealing with a man who was illiterate and had recently suffered an acute psychotic episode requiring hospitalization for months. He was on medication when he testified. The panel chose to rely on the absence of any explicit reference to memory problems in the Centre for Addiction and Mental Health letter to support its finding that the applicant was not credible. The letter was written to confirm the applicant's ongoing treatment regime and was not intended to provide a complete list of symptoms associated with his schizophrenia diagnosis. Mindful of *Chairperson Guideline 8*,[382] the court held that it was reasonable to expect the panel to inform itself as to how the diagnosis might affect the applicant's memory.

In another case, the CRDD found that the claimant suffered from an organic brain syndrome which impaired his memory, but that he still understood the purpose of the proceedings. The panel placed no weight on the claimant's evidence, nor did it draw any adverse inferences from the contradictions and inconsistencies in it, and instead relied on the evidence of his adult children.[383]

11.4.2 Factors to Consider Relating to the Weight of Evidence Provided by Persons Suffering from Mental or Emotional Disorders

The following is a non-exhaustive list of factors that can be considered when assessing the weight to be given to the evidence of persons suffering from mental or emotional disorders:

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applicant's testimony in a completely different light. An applicant's mental health is of utmost importance in evaluating testimony and credibility.

[380] CRDD V94-00588, Brisson, Vanderkooy, March 27, 1996.

[381] *Yahya v Canada (Citizenship and Immigration)*, 2013 FC 1207.

[382] *Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing before the IRB* (December 15, 2012).

[383] CRDD V93-02425, Brisson, Siddiqi, October 20, 1995.

- any expert medical or psychological evidence;[384]
- the nature of the particular condition from which the witness suffers;
- whether the witness would be better able to testify if given an opportunity to stabilize their condition through medication (i.e. a short adjournment);
- whether the witness would be more comfortable testifying in special circumstances (e.g., with the help of a trusted friend, relative, or counsellor, or through the use of a video camera, or behind a screen);
- the effect of the condition on the witness's ability to recall past events;
- the effect of the condition on the witness's ability to understand the questions asked;
- to the extent it can be determined, whether the witness was lucid at times, while not so at other times; and
- whether other sources of objective evidence are available to support the witness's testimony.

11.5 Speculation

Findings of fact cannot be based "the sheerest conjecture or the merest speculation."[385] Nor should the decision-maker rely on their own speculation in making their findings.[386]

In *Matharu*,[387] the panel invited the claimant to speculate why the police had arrested him and his father and had searched their home and business. The claimant indicated the police thought they were involved with militants. The Federal Court held that why the police thought this was so can only be a matter of speculation unless the police disclosed their suspicions. It was unfair to reject the incident because of speculation.

In *Khan*,[388] the Federal Court – Trial Division stated that the Refugee Division panel expressed a general opinion that in Pakistan, when the government changes, the actions of all the operatives within the apparatus of the state also change. The court held that such an opinion is speculation unless it can be proven. The document used to support the Refugee Division's opinion predated the election by four years. The court held it is also engaging in speculation to transfer information from one period in time to another, and to rely on it to make global assertions about present conditions, without giving precise reasons.

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[384] *Sanghera, Bhajan Singh v MEI* (FCTD, no. T-194-93), Gibson, January 26, 1994. See Chapter 8 of this paper for a detailed discussion on weighing expert evidence.

[385] *MEI v Satiacum, Robert* (FCA, no. A-554-87), MacGuigan, Urie, Mahoney, June 16, 1989.

[386] *Hassan, Bedria Mahmoud v MCI* (FCTD, no. IMM-1770-95), McKeown, February 21, 1996.

[387] *Matharu, Manider Singh v MCI* (FCTD, no. IMM-868-00), Pelletier, January 9, 2002, 2002 FCT 19.

[388] *Khan, Aman v MCI* (FCTD, no. IMM-5171-97), Campbell, October 30, 1998.

In *Ke*,[389] the Federal Court – Trial Division considered the paucity of evidence available regarding the proposed bondsperson in a detention review and found the panel's decision was based on speculation. The panel considered the blood relationship that existed and commented that while it was tenuous, it was necessary to be sensitive to cultural differences. He speculated that to dishonor the bondsperson would create pain and disharmony to the detained person's mother and accepted the bond offer.

The difference between pure conjecture or speculation and a reasonable inference has been described as follows:

> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction, it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.[390]

The evidence should be examined to determine whether there is a basis upon which the witness could draw an inference, or whether the statement is purely speculative. Speculation should be given no weight.

In *Giron*,[391] the RPD had made unreasonable implausibility findings that were based on speculation or misunderstanding of the evidence. The panel found it implausible that the Mara Salvatrucha gang would be able to identify the applicant, who worked at the Judicial Centre in Metapan, El Salvador, as "someone with information to sell." Justice Kane held that, in suggesting the applicant should have known how the gang identified him, the panel ignored his testimony that he did not know the gang member who approached him and had no previous interactions with the gang. The RPD had also found the applicant's "very presence in Canada" was implausible because, if his allegations were true, the gang would have had ample opportunity to kill him. The court held this was based on speculation as to how the gang operated.

In *Soos*,[392] the applicant feared her estranged spouse who had abused her in Hungary and Canada. The spouse had been convicted of assaulting the applicant in Canada. The Federal Court allowed the judicial review due to the RPD's speculative findings concerning the well-foundedness of the applicant's fear of persecution. The panel had speculated without evidentiary support that there was a strong possibility the husband would remain in Canada without status if his own refugee claim was rejected. It failed to explain why it was not persuaded by the applicant's testimony, objective evidence from the criminal court, and psychological reports, all of which addressed the real possibility

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[389] *MCI v Ke, Yi Le* (FCTD, no. IMM-1425-00), Reed, April 12, 2000.

[390] *Jones v Great Western Railway Co.* (1930), 47 TLR 39 at 45, 144 LT 194 at 202 (HL), as quoted by MacGuigan, J.A. in *MEI v Satiacum, Robert* (FCA, no. A-554-87), MacGuigan, Urie, Mahoney, June 16, 1989.

[391] *Martinez Giron v Canada (Citizenship and Immigration)*, 2013 FC 7.

[392] *Soos v Canada (Citizenship and Immigration)*, 2019 FC 455.

that the spouse would return to Hungary. Moreover, the panel unreasonably inferred, without evidence, that the applicant would be viewed differently in Hungary because she had "legal documents from Canada" concerning the spouse's criminal history. The applicant had sufficient evidence and a non-speculative basis to support her fears of domestic violence: she feared abuse, was abused, and her estranged spouse was convicted of assault. While her inference was reasoned, the panel's inference was speculative and disregarded the pattern of violence in the evidence.

In *Dhudwal*,[393] a judicial review concerning subsection 4(1) of the *Regulations*, the IAD had found the applicant's previous marriage was a marriage of convenience. The Federal Court held this was highly speculative, given immigration authorities had investigated the marriage and found there was insufficient evidence to pursue the matter.

In *Erhatiemwomon*,[394] the issue was whether the applicant qualified as a member of the family class as a dependent son by virtue of his age. The sponsor provided birth dates for the applicant that were two months and five months earlier than the birth date of his younger brother. The Federal Court found the IAD speculated that the age difference could be accounted for by the fact that the sponsor had not kept records or registered her younger son's birth until much later. The court could find no basis for this explanation, which contradicted the sponsor's evidence and was never raised before the panel.

If the witness is drawing inferences from the evidence, the reliability of the evidence upon which the inference is based must also be considered. In *Portianko*,[395] the Refugee Division accepted the claimant's credibility in those matters of which he had direct personal knowledge, but it did not accept his conclusions based on speculation. The Federal Court held that there is a distinction between facts of which a witness has direct knowledge, such as having received a summons, and speculation relating thereto, such as whether he would be beaten or killed for responding to the summons. The acceptance of the first type of evidence and the rejection of the second is not unreasonable given that the sources of the witness's knowledge of the two are different.

Ultimately, the panel must draw its own inferences from the evidence. The presumption that sworn testimony is true applies to allegations of fact, not to speculative conclusions drawn from those facts.[396]

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[393] *Dhudwal v Canada (Citizenship and Immigration)*, 2016 FC 1124.

[394] *Canada (Citizenship and Immigration) v Erhatiemwomon*, 2016 FC 739.

[395] *Portianko, Rouslan v MCI* (FCTD, no. IMM-4382-94), Reed, May 15, 1995.

[396] *Hercules, Pedro Monge et al. v SGC* (FCTD, no. IMM-196-93), Gibson, August 25, 1993.

APPENDIX A

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Appendix A: The Rules of Evidence and the *Canada Evidence Act*

A.1 Rules of Evidence

The rules of evidence are derived from case law and applied by courts to ensure the evidence they rely upon to reach a decision is deserving of weight. As explained in Chapter 2 of this paper, the IRB is not bound by any legal or technical rules of evidence and may admit evidence that would not be admissible in a court. Nevertheless, the IRB may consider the rationales for those rules in assessing the weight of evidence.

A.1.1 Hearsay Rule

A.1.1.1 Rule

"Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein."[397]

A.1.1.2 Rationale

Hearsay evidence is thought to be generally untrustworthy. Some of the reasons that have been given for finding hearsay to be a poor type of evidence are:

- the author of the statement (the declarant) is not under oath and is not subject to cross-examination;
- there is no opportunity to observe the demeanour of the declarant;
- accuracy tends to deteriorate with each repetition of a statement;
- the admission of such evidence lends itself to the perpetration of fraud;
- hearsay evidence may result in a decision based upon secondary evidence that is weaker than the best evidence available; and
- the introduction of such evidence could lengthen trials.[398]

A.1.1.3 Exceptions to the Rule:

Hearsay evidence may be admitted where its admission is necessary to prove a fact in issue and the evidence is reliable.[399]

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[397] Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, Butterworths, 1992 at 156.

[398] Sopinka and Lederman, *The Law of Evidence in Civil Cases*, Butterworths, 1974 at 41; Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, Butterworths, 1992 at 157.

[399] *R. v Smith*, [1992] 2 SCR 915, 94 DLR (4th) 590.

"The criterion of 'reliability'—or, in Wigmore's terminology, the circumstantial guarantee of trustworthiness—is a function of the circumstances under which the statement in question was made. If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be 'reliable', i.e., a circumstantial guarantee of trustworthiness is established."[400]

Hearsay must be sufficiently reliable to overcome the dangers arising from having limited ability to test it. The trial judge must be satisfied that the statement is so reliable that cross-examination would add little, if anything, to the process.[401]

A.1.2 Best Evidence Rule

A.1.2.1 Rule

"The law does not permit a man to give evidence which from its very nature shows that there is better evidence within his reach, which he does not produce."[402]

The importance of this rule has diminished over time, as the position that all relevant evidence should be admitted even if it is not the best available has gained favour. However, the weight assigned to evidence that is not the best may be discounted when a party chooses not to submit the best evidence on a particular matter.

A.1.2.2 Application of the Rule

While this rule originally applied to all evidence, it has more recently been restricted in its application to documentary evidence: if the original document is available, it must be produced. Even this application may not be absolute, given the proliferation of technology that facilitates the creation of accurate digital copies. However, evidence of a document's authenticity remains necessary for its admissibility.

Secondary evidence may be admissible where:

- the original document has been lost or destroyed;
- the original document is in the possession of another party who refuses to produce it; or
- the original document is of an official or public nature, and great inconvenience or risk would result from its removal from its place of storage.

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[400] *R. v Smith*, [1992] 2 SCR 915, 94 DLR (4th) 590 at 933.

[401] *R. v Khelawon*, 2006 SCC 57, [2006] 2 SCR 787; *R. v Bradshaw*, 2017 SCC 35, [2017] 1 SCR 865.

[402] *Doe D. Gilbert v Ross* (1840), 7 M&W 102, 151 ER 696 (Exch).

A.1.3 Opinion Evidence

A.1.3.1 Original Rule

A witness may only testify as to what they have actually observed, and not to the inferences they draw from those observations.

A.1.3.2 Rationale

It is the jurisdiction of the trier of fact to draw inferences from the facts that are established.

However, this rule has been found to be unworkable in many circumstances because the distinction between facts and inferences is not always clear.

A.1.3.3 Exceptions to the Rule

Historical exceptions allowed lay witnesses to testify as to the identity of persons and places; the identification of handwriting; and mental capacity and state of mind.

A.1.3.4 Current Rule

Now a witness may give testimony about the inferences they draw from observed facts where they would be helpful to the court.[403] As with any evidence, the court must decide how much weight to assign to opinion evidence once it is admitted.

Expert evidence is a form of opinion evidence. “The general rule is that expert evidence is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of the judge and jury ... .”[404]

In court proceedings, there are four criteria expert evidence must satisfy in order to be admissible: it is relevant, it is necessary, it does not trigger any exclusionary rules, and it is provided by a properly-qualified expert.[405]

In *White Burgess Langille Inman*,[406] the Supreme Court of Canada stated that an expert has a duty to the court to be fair, objective, and unbiased. If they fail to discharge that duty, then they are not a properly qualified expert.

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[403] *R. v Graat*, [1982] 2 SCR 819, 144 DLR (3d) 267.

[404] *R. v Burns*, [1994] 1 SCR 656 at 666. Also see, *R. v Abbey*, [1982] 2 SCR 24 at 42; *R. v Abbey*, 2009 ONCA 624, 97 OR (3d) 330.

[405] *R. v Mohan* [1994] 2 SCR 9.

[406] *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23.

A.1.4 Self-Serving Evidence

A.1.4.1 Rule

Self-serving evidence was originally not admissible to support the credibility of a witness unless their credibility had first been put in issue. However, the Supreme Court of Canada amended the rule. Now such evidence is admissible as substantive evidence of its contents if it arises from a witness other than the accused and is reliable and necessary.[407]

The rule is generally used to exclude prior consistent statements made by the witness, but also extends to any out-of-court evidence which is entirely self-serving.

A.1.4.2 Rationale

Reasons for this rule include the risk of fabrication of evidence, the notion that repetitions do not make the evidence more reliable, and the risk that court time would be wasted in dealing with such evidence if credibility is not in issue.

A.1.4.3 Application of the Rule

Self-serving evidence may be introduced, when credibility is in issue, only to bolster credibility, and not as evidence of the truth of the statement.

Prior consistent statements may only be admitted to:[408]

- rebut allegations of recent fabrication;
- establish an eye-witness's prior identification of the accused;
- prove a recent complaint by a sexual assault victim;
- establish that a statement was made that forms part of the *res gestae* (that is, a statement that was made during the course of a transaction and so closely related in time as to form part of that transaction) or prove the physical, mental or emotional state of the accused;
- prove that a statement was made on arrest; or
- prove that a statement was made on the recovery of incriminating articles.

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[407] *R. v B. (K.G.)*, [1993] 1 SCR 740.

[408] Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, Butterworths, 1992 at 309.

A.1.4.4 Exceptions to the Rule

Such evidence is admissible as substantive evidence of its contents if it is (a) evidence of a witness other than the accused, and (b) reliable and necessary.[409]

A.2 *Canada Evidence Act*

A.2.1 Business Records

Section 30 of the *Canada Evidence Act*[410] provides that "records made during the usual and ordinary course of business" may be admitted into evidence. Subsection 30(6) indicates some of the factors that may be taken into consideration in determining the weight of such evidence include "the circumstances in which the information contained in the record was written, recorded, stored or reproduced."

A.2.2 Affidavits and Oaths Taken Abroad

Sections 52 and 53 of the *Canada Evidence Act* indicate who may take oaths and affidavits abroad.

Oaths taken abroad by persons other than those named in sections 52 and 53, may be given less weight. In addition, the circumstances of the taking of the oath should be examined to determine the weight.[411]

A.2.3 Evidence of Foreign Law

Section 23 of the *Canada Evidence Act* describes the method of providing proof of court records or judicial proceedings from a foreign country.[412]

A.2.4 Witness's Capacity to Give Evidence

Section 16 of the *Canada Evidence Act* provides a procedure for determining whether a witness of 14 years of age or older whose mental capacity is challenged should be permitted to testify.

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[409] *R. v B. (K.G.)*, [1993] 1 SCR 740. For the meaning of "reliable and necessary", see *R. v Smith*, [1992] 2 SCR 915, 94 DLR (4th) 590.

[410] RSC, 1985, c C-5.

[411] For clarity, the IRB should not refuse to receive in evidence an affidavit merely because it does not meet the requirements of the *Canada Evidence Act*. See *Dhesi, Bhupinder Kaur v MEI* (FCA, no. 84-A-342), Mahoney, Ryan, Hugessen, November 30, 1984.

[412] In *Sandhu, Bachhitar Singh v MEI* (IAB V86-10112), Eglington, Goodspeed, Chu, February 4, 1988, the IRB accepted a photocopy of a judgment of an Indian court as evidence pursuant to subsection 65(2)(c) of the *Immigration Act*. The photocopy would not be admissible as evidence pursuant to section 23 of the *Canada Evidence Act*. Nevertheless, section 23 had been applied in determining the weight to be afforded to evidence.

A.2.5 Judicial Notice

Sections 17 and 18 of the *Canada Evidence Act* provide that judicial notice may be taken of federal and provincial legislation.

A.2.6 Authentication of Electronic Documents

Section 31.1 of the *Canada Evidence Act* allows electronic evidence to be admitted into evidence if the person seeking to admit such evidence proves its authenticity. Under the *Canada Evidence Act*, the best evidence rule is satisfied (a) upon proof of the integrity of the electronic documents system by or in which the document was stored, or (b) if an evidentiary presumption is established regarding secure electronic signatures.[413]

A.2.7 Non-Disclosure of Specified Public Interest Information

Sections 37-38.16 of the *Canada Evidence Act* address the balancing that must occur with respect to the disclosure of evidence relating to a specified public interest, international relations, national defence, or national security in judicial or other proceedings. Such information may be deemed protected. A notice to the Attorney General of Canada may be made by a participant or an official (other than a participant) who believes that sensitive information or potentially injurious information is about to be disclosed during a proceeding.[414]

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[413] ss 31.2, 31.4.

[414] Similarly, section 86 of the *IRPA* provides for the possible non-disclosure of protected information in ID and IAD proceedings. The RPD may refer to section 38.01 of the *Canada Evidence Act* for guidance on the procedures to follow in the event sensitive information is about to be disclosed in a proceeding.