Immigration and
Refugee Board of Canada

Refugee Appeal Division

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

Section d'appel des réfugiés

RAD File No. / N° de dossier de la SAR : MB3-03993

Private Proceeding / Huis clos

Reasons and decision – Motifs et décision

Person Who Is the Subject of the Appeal	**XXXX XXXX XXXX XXXX**	**Personne en cause**
Appeal Considered / Heard at	Montréal, Quebec	**Appel instruit à**
Date of Decision	February 28, 2014	**Date de la décision**
Panel	M[e] Alain Bissonnette	**Tribunal**
Counsel for the Person Who Is the Subject of the Appeal	M[e] Mabel E. Fraser	**Conseil de la personne en cause**
Designated Representative	N/A	**Représentant désigné**
Counsel for the Minister	N/A	**Conseil du ministre**

Canada

REASONS AND DECISION

I. INTRODUCTION

[1] **XXXX XXXX XXXX XXXX**, the appellant, is a Cuban citizen. She is appealing against the decision of the Refugee Protection Division (RPD), alleging that it based its decision on errors in its analysis of her fear of persecution if she were to return to live in Cuba and that it failed to consider her explanations concerning the lack of details in her Basis of Claim Form (BOC Form).

II. DETERMINATION OF THE APPEAL

[2] Pursuant to subsection 111(1) of the *Immigration and Refugee Protection Act* (IRPA), the Refugee Appeal Division (RAD) dismisses the appeal and confirms the RPD's determination, namely, that XXXX XXXX XXXX XXXX is not a "Convention refugee" under section 96 of the IRPA or a "person in need of protection" within the meaning of section 97 of the IRPA.

III. BACKGROUND

A. Basis of the claim

[3] In her BOC Form, which she signed on July 3, 2013, the appellant states that she is a Cuban citizen, born on XXXX XXXX, 19XXXX, and that her husband, daughter, son, father, mother, sister and brother were living in Cuba at that time.[1]

[4] In her BOC Form, the appellant states that, should she return to live in her country, Cuba, she could be imprisoned and tortured and would be unable to work.[2] She also states that, beginning in 1993, she was harassed by people connected to the Cuban government because of her involvement in the Church of Jehovah's Witnesses; that she refused to register as a member of the

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1 Basis of Claim Form, pages 24, 29 and 32 of the RPD record.

2 *Idem*, page 25 of the RPD record.

Cuban Communist Party; that she was threatened with imprisonment and dismissal from her job as a XXXX; and that in 1994, she and her husband were in fact dismissed and she had to change XXXX in order to practise her profession.[3]

[5] In her BOC Form, the appellant states that in 2000, her husband was pressured to divorce her and refused, but was punished for this refusal. She added that she, too, was punished: she was forced to stop working for one year.[4]

[6] In her BOC Form, the appellant states that in 2012, she was threatened while working as a XXXX XXXX XXXX XXXX of Holguin.[5]

[7] In her BOC Form, the appellant states that she did not ask for help from authorities in her country, since in Cuba, one cannot request protection against the Cuban government and its people. She also states that her church does not engage in political activities.[6]

[8] In her BOC Form, the appellant states that she moved to another part of her country to seek refuge, namely, the city of Holguin.[7]

[9] In her BOC Form, the appellant states that she left her country, Cuba, on XXXX XXXX, 2013, and that, if she did not leave her country earlier or later than this, it is because it was only then that she had the means to leave.[8]

B. RPD decision

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3 *Idem*, page 24 of the RPD record.

4 *Idem*.

5 *Idem*.

6 *Idem*, page 25 of the RPD record.

7 *Idem*, page 26 of the RPD record.

8 *Idem*.

[10] The RPD hearing was held on September 9, 2013, and the decision was rendered orally at the end of that hearing. The transcript of the oral decision was sent to the appellant on October 1, 2013.[9]

[11] In its reasons for decision, the RPD states that the appellant (at that time, the claimant) based her claim on her religion and her political opinion, and then agrees to examine the claim under section 96 of the IRPA.[10]

[12] The RPD then states that the appellant's identity was established, that it believes that the appellant was a Jehovah's Witness, but that it has doubts that her department head threatened in 2013 to put her in prison because for refusing to join a group within the department called [translation] "XXXX XXXX."[11]

[13] The RPD concluded that the threats and harassment that the appellant complained of did not amount to persecution, noting that [translation] "although she refused to teach politics courses, to contribute financially to the militia, to belong to the Communist Party or to join the 'First XXXX XXXXat the XXXX, none of that impeded her career advancement."[12]

[14] In its reasons for decision, the RPD also analyzed the events that took place in 1994 and concluded that, subsequently, both the appellant and her husband were able to find work, and neither suffered setbacks in their professional development.[13]

[15] Regarding the fact that she always refused to join the Communist Party, the RPD noted that the appellant's salary was always maintained and that she was able to further her education, adding that it failed to see any elements of persecution in this.[14]

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9 RPD Notice of Decision, page 1 of the RPD record.

10 RPD decision, page 3 of the RPD record.

11 *Idem*, pages 3 and 4 of the RPD record.

12 *Idem*, page 4 of the RPD record.

13 *Idem*.

14 *Idem*, page 5 of the RPD record.

[16] Regarding the appellant's membership in the Jehovah's Witnesses, the RPD found that, although they are not recognized by the state, for the past five or six years, the community has been authorized to hold public gatherings three times a year, and that for the past nine years, the state has not intervened when there are gatherings in people's homes twice a week, as their faith requires. The RPD also referred to the documentary evidence indicating that today, mistreatment and discrimination in the workplace against members of the Jehovah's Witnesses are rare, and that members are exempt from political activities in school.[15]

[17] Hence its final conclusion:

> [Translation]
>
> The panel therefore believes that if the claimant had to return to Cuba today, she could—as she testified—practise her religion without interference from the state. She herself stated that the situation has improved, since for the past five or six years, they have been able to gather in public three times a year, and for the past nine years, there has no longer been any harassment when they meet twice a week."[16]

C. Grounds of appeal and remedy sought

[18] In her memorandum, the appellant submits that the RPD failed to take account of her explanations for the lack of detail in her BOC Form. She further submits that the RPD did not take into account the documentary evidence concerning employment and individuals who refuse to join the Communist Party or take part in various political demonstrations and events. Lastly, she submits that the RPD failed to consider the forward-looking nature of the possible persecution she would face.[17]

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15 *Idem*, pages 5 and 6 of the RPD record.

16 *Idem*, page 6 of the RPD record.

17 Appellant's memorandum, November 2013, 13 pages, pages 7 to 15 of appeal record.

[19] For these reasons, and based on documents not introduced into evidence before the RPD, the appellant requests that the RAD allow the appeal and refer the matter to the RPD for a new hearing and re-determination.[18]

IV. ADMISSIBILITY OF EVIDENCE PRESENTED ON APPEAL

A. Evidence presented by the appellant on appeal

[20] The following evidence was presented by the appellant in her appeal memorandum:

a) Appellant's affidavit dated November 5, 2013[19]

b) Document entitled "Delivery of the Work File" dated October 29, 2013[20]

B. Test for admissibility

[21] Subsection 110(4) of the IRPA states that the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim for refugee protection or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. It should be noted that the time limit referred to in subsection 110(4) is the rejection of the appellant's refugee protection claim, not the hearing before the RPD. A party who wants to provide a document as evidence after a hearing but before a decision takes effect may make an application to the Division.[21]

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18 *Idem*, page 19 of the appeal record.

19 Reproduced on pages 20 to 25 of the appeal record.

20 Reproduced on pages 26 and 27 of the appeal record.

21 RPD Rules, SOR/2012-256, rule 43.

110. (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	110. (4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[22] The RAD Rules provide that the record of the person who is the subject of the appeal must include a written statement indicating whether the appellant is relying on any evidence referred to in subsection 110(4) of the IRPA, as well as a memorandum that includes full and detailed submissions regarding how that evidence meets the requirements of that subsection and how it relates to the appellant. [22]

[23] Since the wording of subsection 110(4) of the Act is very similar to the wording concerning the new evidence admissible in a pre-removal risk assessment (PRRA), I am of the opinion that it is necessary to use *mutatis mutandis* the factors developed by the case law concerning PRRA; to address the questions identified particularly in *Raza* with regard to the credibility, relevance, newness and materiality of the evidence presented; and to make a determination as to whether the evidence presented on appeal is admissible or whether, on the contrary, it must be excluded from the appeal.[23]

[24] The fact that evidence corroborates events, contradicts RPD findings or clarifies the evidence before the RPD does not make it "new evidence" within the meaning of subsection 110(4) of the IRPA. If it did, refugee protection claimants could split their case and present evidence before the RAD at the appeal stage that could have been presented at the start, before the RPD.[24] In my opinion, this is exactly the wrong that subsection 110(4) of the Act prohibits.

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22 RAD Rules, SOR/2012-257, subrule 3(3).

23 *Raza v. Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, No. A-11-07, Sharlow, Linden and Ryer, December 26, 2007; 2007 FCA 385, paragraph 13.

24 *Dhrumu v. Canada (Minister of Citizenship and Immigration)*, No. IMM-1610-10, Kelen, February 11, 2011; 2011 FC 172, paragraph 27.

C. RAD's decision on the admissibility of the documents presented on appeal

a) Appellant's affidavit dated November 12, 2013

[25] The appellant's memorandum contains the following submissions regarding this affidavit:

> The claimant testified that she believed all her story was included in the BOC form. She could not reasonably be expected to conclude otherwise as she was referred to an interpreter by the lawyer. The lawyer cannot be held accountable for the interpreter's actions as the interpreter does not work at the lawyer's office and is not an employee of the lawyer. For that reason, the claimant did not make a complaint to the Bar.
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> Although the information contained in the detailed affidavit of the claimant is not "new", it is credible, it is material, it is relevant, and the claimant could not have reasonably been expected in the circumstances to have concluded that it was not all written out in the BOC form.
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> More importantly, the outcome of the hearing would probably be different if the information had been available to the Tribunal.[25]

[26] This document is dated November 12, 2013, more than two months after the oral decision rendered by the RPD on September 9, 2013, rejecting the appellant's claim for refugee protection. That being said, the newness of documentary evidence cannot be tested solely by the date on which the document was created. What is important is the event or circumstance sought to be proved by the documentary evidence.[26]

[27] The affidavit contains, among other things, the following assertions:

> 40. I stated everything that had happened to me in Cuba before my arrival in Cuba to the interpreter. None of what I said to the interpreter was put in my Basis of Claim Form, not even a miscarriage I suffered due to the psychological stress I was under; …
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> 47. The Tribunal kept asking me why this or that was not in my story. After I was given the decision, which seemed to be based on the shortness of my story, I sought the advice of another lawyer who told me I could make a complaint to the Bar, but that lawyer did not offer to help me make the complaint and I felt lost. So I decided to seek another opinion from a lawyer, this time one who spoke Spanish, and she told me that if it was

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25 Appellant's memorandum, November 2013, 13 pages, page 16 of appeal record.

26 *Raza v. Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, No. A-11-07, Sharlow, Linden and Ryer, December 26, 2007; 2007 FCA 385, paragraph 16.

> the interpreter who shortened my version of the story, the lawyer could not be blamed unless I had complained to the lawyer about the interpreter's act. As the lawyer did not speak Spanish, I could not complain to him directly, and I did not feel comfortable complaining to him in the presence of the interpreter, who in any case had already denied that he had shortened my story, and said all this to my face, in Spanish, but as I don't know or understand English or French, I never knew if the interpreter told the lawyer what I had told the interpreter; [27]

[28] Actually, this affidavit essentially seeks to present more comprehensively the information that should have been in the BOC Form. In signing her BOC Form on July 3, 2013, the appellant declared that "the entire content of this form and all attached documents has been interpreted to me." She also declared that the information provided in her BOC Form was complete, true and correct, and that her declaration had the same force and effect as if made under oath.[28] The BOC Form also contains a declaration by the interpreter, Victor Barrantes, declaring that he accurately interpreted the entire content of the form and all attached documents and that the claimant (now the appellant) assured him that she understood the entire content of the form and all attached documents and the answers provided, as interpreted by him.[29]

[29] Thus, there could not be a more direct contradiction between what the appellant is claiming in her BOC Form and what she claims in her affidavit dated November 12, 2013. It is my opinion that the content of the affidavit does not constitute new evidence, since it is essentially intended to amend the content of the appellant's BOC Form.

[30] For these reasons, I conclude that the affidavit dated November 12, 2013, is inadmissible in this appeal.

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27 Appellant's affidavit signed November 12, 2013, pages 23, 24 and 25 of the appeal record.

28 Basis of Claim Form, page 32 of the RPD record.

29 *Idem*.

b) Document entitled "Delivery of the Work File" dated October 29, 2013.

[31] This document is dated October 29, 2013, just under two months after the oral decision rendered by the RPD on September 9, 2013, rejecting the appellant's claim for refugee protection.

[32] The appellant's memorandum contains the following submissions regarding this document:

> For the same reasons stated in point a) above, but with the further reason that it is new evidence, we are producing a document dated 29 October 2013 that the claimant was sent evidence by her daughter. It is titled: "Delivery of the Work File". It states that the work relationship between XXXX XXXX XXXX XXXX XXXX and the entity called XXXX XXXX XXXX XXXX XXXX XXXX XXXX) due to the cause of the Application of Resolution 43 of Emigration.
>
> It is obvious that the claimant's "emigration" has been the cause of the cessation of her employment.
>
> Although the information contained in the detailed affidavit of the claimant is not "new", it is credible, it is material, it is relevant. The evidence is capable of proving an event that is due to circumstances that arose prior to the RPD hearing but that occurred after the hearing. Although the applicant feared this would happen should she return to Cuba, the evidence was not reasonably available to her for presentation at the RPD hearing as it occurred after.
>
> Most importantly, the outcome of the hearing would probably be different if the information had been available to the Tribunal.[30]

[33] This document, dated October 29, 2013,[31] provides information on the employment relationship between the appellant and her employer. According to the French translation of this document, a XXXX named XXXX XXXX XXXX, representing the administration of the XXXX XXXX XXXX in the municipality of Holguin, gave XXXX XXXX XXXX XXXX XXXX a certificate of delivery of her work file, the latter having ended her employment relationship in accordance with emigration resolution 43. On the face of it, it can be seen that several parts of the document have not been completed, including the time, day, month and year when this certificate of delivery of the work file was allegedly completed. In addition, the parts pertaining to the

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30 Appellant's memorandum, November 2013, 13 pages, pages 16 and 17 of the appeal record.

31 The original Spanish version is reproduced at page 26 of the appeal record. The French translation of the document is reproduced at page 27 of the appeal record.

appellant herself—that is, the position she occupied, the entity with which she was associated, and the province and organization—were left blank. Nor does her signature appear on this document. While a seal identifying the human resources department of the XXXX XXXX XXXX XXXX, Holguin, does appear on the document in question, there is no letterhead or address.

[34] In form IMM 5669, which she filled out in French without the help of an interpreter and signed on July 9, 2013, the appellant states, in response to question 8, that from XXXX 2006 to XXXX 2010, she worked as a XXXX XXXX XXXX XXXX XXXX XXXX of the Holguin XXXX XXXX, and that from XXXX 2010 to XXXX 2013, she worked as an XXXX XXXX XXXX the XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX in Holguin. In signing this form, the appellant declared that the information provided in the form was truthful, complete and correct, and that she had made her declaration conscientiously believing it to be true and knowing that it had the same force and effect as if made under oath.[32]

[35] Consequently, in view of the sections that were not completed in the document entitled "Delivery of the Work File," I doubt its authenticity. But more importantly, since the information she provided in form IMM 5669 indicates that she was no longer working at the Holguin XXXX XXXX XXXX as of XXXX 2012, I conclude that this document is not relevant, since it does not concern the position held by the appellant from XXXX 2010 to XXXX 2013 in the pXXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX in Holguin. Finally, given the document's source and the circumstances in which it appeared, I also conclude that it does not contain any new evidence that can be found credible.

[36] For these reasons, I am of the opinion that the document entitled "Delivery of the Work File," dated October 29, 2013, is inadmissible in this appeal.

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32 Form IMM 5669, Schedule A Background/Declaration, signed by the appellant on July 9, 2013, reproduced at pages 68 to 72 of the RPD record.

V. RAD HEARING

A. The appellant did not request a hearing

[37] The RAD Rules provide that the record of the person who is the subject of the appeal must include a written statement indicating whether the appellant is requesting that a hearing be held under subsection 110(6) of the Act and a memorandum that includes full and detailed submissions regarding why the RAD should hold such a hearing, if the appellant is requesting that a hearing be held.[33]

[38] Neither in her affidavit nor in her memorandum did the appellant specifically request that a hearing be held before the RAD, although she indicated that the RAD could hold a hearing if, in its opinion, there was documentary evidence that was central to its decision.[34]

[39] It should be pointed out that, under subsection 110(3) of the IRPA, the RAD generally proceeds without a hearing, on the basis of the record of the RPD's proceedings:

110. (3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.	110. (3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

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33 RAD Rules, SOR/2012-257, subrule 3(3).

34 Appellant's memorandum, page 18 of the appeal record.

B. Subsection 110(6) test

[40] Under subsection 110(6) of the IRPA, when evidence presented on appeal has been found to be admissible, it must be determined whether it raises a serious issue with respect to the credibility of the person who is the subject of the appeal, whether it is central to the decision with respect to the refugee protection claim, and whether it would justify allowing or rejecting the claim. If so, the RAD may hold a hearing. Even if the person who is the subject of the appeal has not requested such a hearing, I am of the opinion that the RAD has the discretion to hold such a hearing if all of the factors set out in subsection 110(6) of the IRPA are met.

110. (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	110. (6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	b) sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

C. No RAD hearing should be held

[41] In this case, since I have already concluded that the evidence presented by the appellant is not admissible in this appeal, it is not necessary to hold a hearing before the RAD.

VI. WHAT DEFERENCE IS DUE AND WHAT STANDARDS OF REVIEW SHOULD BE APPLIED IN AN APPEAL BEFORE THE RAD?

[42] In the following paragraphs, I will analyze the particular context of the RPD and the RAD, and what I think can be inferred from the few legal decisions that deal with these issues.

A. The particular context of the RPD and the RAD

[43] The RAD is not a court of law, and it does not review RPD decisions, but rather determines appeals in an administrative and non-judicial context. The RPD and the RAD are two separate

divisions of the Immigration and Refugee Board (IRB).[35] Sections 162 to 169 of the IRPA contain the provisions that apply to them both. Each division "has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction."[36] Each member has the powers and authority of a commissioner and may do any other thing they consider necessary to provide a full and proper hearing.[37] Hearings are held in the absence of the public, although each may conduct a proceeding in public and take any measure that it considers necessary to ensure the appropriate access to the proceedings.[38] Sections 169.1 to 170.2 of the Act identify the provisions specific to the RPD, and sections 171 to 171.1 identify the provisions specific to the RAD.

[44] The RPD and the RAD, in their respective roles, must deal with whether or not to grant protection or refugee protection to persons who make a claim. They are therefore part of the Canadian refugee protection system under the Act that governs them and whose objectives include establishing fair and efficient procedures that will maintain the integrity of the system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings.[39]

[45] The primary role of the RPD is to hold hearings in order to determine whether refugee protection claimants are "Convention refugees" or "persons in need of protection." By holding a hearing to dispose of a claim for refugee protection, the RPD is able to see and question refugee protection claimants, which gives it a significant advantage in making findings of fact and assessing the credibility of claimants.

[46] Pursuant to subsection 110(1) of the IRPA, a person or the Minister may appeal—on a question of law, of fact or of mixed law and fact—to the RAD against a decision of the RPD to

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35 Section 151 of the IRPA: "The Immigration and Refugee Board consists of the Refugee Protection Division, the Refugee Appeal Division, the Immigration Division and the Immigration Appeal Division."

36 Section 162 of the IRPA.

37 Section 165 of the IRPA.

38 Section 166 of the IRPA.

39 Paragraph 3(2)(*e*) of the IRPA.

allow or reject the person's claim for refugee protection. However, pursuant to subsection 110(3) of the IRPA, the RAD generally proceeds without a hearing, on the basis of the RPD record of proceedings. For a hearing to be held before the RAD, there must be new evidence that has been deemed admissible. The RAD must also be of the opinion that this evidence raises a serious issue with respect to the credibility of the person who is the subject of the appeal, is central to the decision with respect to the refugee protection claim and would justify allowing or rejecting the refugee protection claim.[40] In other words, there are significant differences between the RPD and the RAD.

B. Right to appeal and deference to RPD decisions

[47] I would now like to refer to the concepts developed by the Alberta Court of Appeal in two decisions that do not directly relate to the IRPA, which governs the RPD and the RAD, and, consequently, do not serve as precedents that must be followed as such in this context. However, I am of the opinion that they may provide some teachings, not only with respect to the issue of whether the appeal before the RAD is an appeal *de novo*, but also with respect to the standards of review to be applied in this appeal.

[48] When analyzing the respective roles of two administrative tribunals and deciding which standard of review the Law Enforcement Review Board should apply in determining an appeal against a decision made by the officer tasked with hearing a complaint about a police officer's behaviour, the Alberta Court of Appeal noted that the mere presence of a right to appeal—including appeals within an administrative structure—in no way means that no deference to the first-level decision-maker is called for.[41]

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40 Subsection 110(6) of the IRPA.

41 *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, paragraphs 55 and 56:

> [55] … While *H.L.* was decided on the *Housen* principles, and *Khosa* was decided on the *Dunsmuir/Pushpanathan* principles, both cases clearly reject the argument that the mere presence of a right of appeal signals that no deference is called for. There is no principle basis on which to make an exception for appeals within an administrative structure, such as the one that is in issue in this appeal.

[49] In its decision, the Court of Appeal referred to the example of the relationship established between a trial judge and an appeal judge:

> The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.[42]

[50] In citing the Supreme Court of Canada, the Court of Appeal was emphasizing the importance of promoting the autonomy of the trial process and its integrity, adding that the same principle applies within administrative structures:

> The same principle applies to the hearings before the presiding officers. If the Board was to continue to routinely rehear all matters on a *de novo* basis, and to extend no deference whatsoever to the decisions of the presiding officers, that would only undermine the apparent integrity of those hearings. As previously stated, that is inconsistent with the hybrid scheme of the *Act*. As the appellant noted, that approach undermines those hearings to the point that they become almost academic, and call into question the need of the interested parties to even participate in them. The hearing would be reduced to a type of preliminary inquiry.[43]

[51] Having considered the respective roles of the decision-makers, their particular expertise and the general economy of the proceedings, the Alberta Court of Appeal identified which standards of review the Law Enforcement Review Board should apply to the decision rendered by the first-level decision-maker:

> [82] In conclusion, the decision of the Board to conduct a *de novo* hearing, and to assume that it owed no deference to the findings of the presiding officer was in error. The role of the Board is primarily to sit on appeal from the presiding officer. The Board is not a tribunal of first instance, and cannot simply ignore the proceedings before the presiding officer, and the conclusions reached by him. The focus of the appeal to the Board should be on its dual mandate of civilian oversight, and the correction of unreasonable results.

> [56] The mere presence of a right of appeal from the presiding officer to the Board does not warrant a correctness standard of review.

42 *Housen v. Nikolaisen*, 2002 SCC 33; [2002] 2 S.C.R. 235, paragraph 17, as cited by the Alberta Court of Appeal in *Newton* at paragraph 81.

43 *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, paragraph 81.

> [83] There is no general power to hold a *de novo* hearing in every case, and no requirement that a *de novo* hearing be held unless the parties consent to proceeding otherwise. Where a sufficient reason is shown or the issues on appeal warrant it, the Board has the power to admit fresh evidence. When sufficient cause is shown the Board can even rehear key evidence presented to the presiding officer.
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> [84] The Board has a legitimate role to play in providing civilian oversight to the system of police discipline where oversight issues arise. The Board is not bound by the inferences and conclusions of the presiding officer, but it should be able to offer some articulable reason based in law, fact or policy when it interferes with a decision under appeal. The Board should proceed primarily from the record created by the hearing before the presiding officer. It should extend deference to the decision of the presiding officer on questions of fact, credibility, and technical policing issues. If the decision of the presiding officer was reasonable, the Board should not substitute its own view just because it might have come to a different conclusion. Where the appeal raises issues of acceptability of particular police conduct, or the integrity of the discipline process, the Board's mandate is more robust.[44]

[52] In a more recent decision by the same Alberta Court of Appeal, the Honourable Mr. Justice Slatter states that the *Newton* standard of review may well vary depending on the issue at hand. Referring to the Métis Settlements Appeal Tribunal, Mr. Justice Slatter notes that this administrative tribunal plays a number of roles, including promoting consistency in the interpretation and application of the statutory regime to all Métis throughout Alberta. In the future, if an appeal were to concern this particular aspect of its role, according to Mr. Justice Slatter, the Appeal Tribunal should give less deference to a decision made at the local level.[45]

[53] In some decisions of interest rendered by the Quebec Court of Appeal, this same issue of the standards of review to be applied by an appellate jurisdiction that is part of an administrative

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44 *Idem*, paragraphs 82 to 84.

45 *Kikino Métis Settlement v. Métis Settlements Appeal Tribunal*, 2013 ABCA 151, paragraph 12: "This *Newton* standard of review may well vary depending on the issue at hand. The Appeal Tribunal is charged with preserving and enhancing Métis culture and identity and furthering the attainment of self-governance by Métis settlements under the laws of Alberta: *Métis Settlements Act*, RSA 2000, v. M-14, s. 0.1. It undoubtedly plays other roles, including, for example, promoting consistency in the interpretation and application of the statutory regime throughout Alberta. To the extent that an appeal raises issues of this type, the Appeal Tribunal owes less deference to the settlement council. The settlement council, on the other hand, is charged with the local management of the Métis settlement, and with having regards to local interests and issues. On those issues, as well as on its basic findings of fact, more deference is due."

tribunal was analyzed, but in a different legislative context from ours. I note from these two decisions that it is essential that [translation] "the applicable legislation be reviewed carefully to determine the limits of the intervention framework that each decision-maker, at each decision-making level, has been assigned by Parliament."[46] I also note that, contrary to the statutory scheme analyzed in that case, which provides that the appellate body hearing the appeal may uphold, amend or reverse any decision brought before it,[47] in the context of the IRPA, which governs the RPD and the RAD, as I understand it, the RAD may set aside only erroneous decisions of the RPD.[48] Finally, I am sensitive to the argument that an appeal before an appellate jurisdiction that is part of an administrative tribunal must not be equated to a kind of judicial review.[49] However, I also note that even that type of appeal has its intrinsic limitations and that it does not necessarily constitute a new proceeding.[50]

[54] When all is said and done, I am of the opinion that, except for strict questions of law that may include, in particular, questions of interpreting the Act that governs the RPD and the RAD, and except for questions of natural justice, it is appropriate for us, as members of the RAD, to extend the same deference to RPD decisions. In fact, this deference is comparable to, although distinct from, the deference to be given by courts of law to first-level decision-makers where the issue is a question of fact or a question of mixed law and fact. In my opinion, it follows that, except in exceptional circumstances, an appeal heard by the RAD does not constitute an appeal *de novo*.

[55] That being said, the Federal Court should soon be able to enlighten us on the issue of what standards of review must be applied in appeals heard by the RAD against decisions rendered by the RPD. At that point, it will no longer be necessary to refer to the RAD context or to decisions such

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46 *Laliberté v. Huneault*, 2006 QCCA 929, paragraph 16.

47 *Idem*, paragraph 18.

Parizeau v. Barreau du Québec, 2011 QCCA 1498, paragraph 76.

48 Paragraph 111(2)(*a*) of the IRPA.

49 *Parizeau v. Barreau du Québec*, 2011 QCCA 1498, paragraphs 75 to 78.

50 *Idem*, paragraph 79.

as those rendered in cases concerning different legislation from that which governs the relationship between the RPD and the RAD. However, for now, I am of the opinion that it is necessary to proceed as I did in the preceding paragraphs, knowing that this situation is temporary and that the standard of review analysis does not need to be conducted in all cases.[51]

C. Standard of review to be applied in this case

[56] In her memorandum, the appellant submits that the RPD failed to take account of her explanations concerning the lack of detail in her BOC Form and, in so doing, breached its duty to allow her to be heard. She further submits that the RPD did not take into account the documentary evidence concerning employment and individuals who refuse to join the Communist Party or take part in various political demonstrations and events. Lastly, she submits that the RPD failed to take account of the forward-looking nature of the possible persecution she would face.[52] However, she does not specify what standard of review should be applied in her appeal.

[57] The question of whether or not the RPD considered all of the evidence has to do with the assessment of the evidence, which constitutes a question of fact. Based on the case law, it is my opinion that the applicable standard of review in similar cases is that of reasonableness.[53]

[58] The question of whether the RPD erred in how it applied the notions of persecution to the facts of the case constitutes, in my opinion, a question of mixed fact and law. Based on the case

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51 *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190, paragraph 62. *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53; [2011] 3 S.C.R. 471, paragraph 16.

Cetinkaya v. Canada (Minister of Citizenship and Immigration), No. IMM-3362-11, Russell, January 4, 2012; 2012 FC 8, paragraph 16.

52 Appellant's memorandum, November 2013, 13 pages, pages 7 to 19 of the appeal record.

53 *Bayard Ndam v. Canada (Minister of Citizenship and Immigration)*, No. IMM-5447-09, Beaudry, May 14, 2010; 2010 FC 513, paragraph 4. *Ferencova v. Canada (Minister of Citizenship and Immigration)*, No. IMM-3940-10, Mosley, April 8, 2011; 2011 FC 443, paragraph 8.

law, it is my opinion that, at the appeal stage, when a question of mixed law and fact is involved, it must be reviewed on a standard of reasonableness.[54]

[59] When a decision is reviewed on a standard of reasonableness, the analysis must be concerned with the existence of justification, transparency and intelligibility within the decision-making process, as well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[55]

[60] As for the question of whether the RPD breached its duty of allowing the appellant to be heard, we must refer to the principles of natural justice and procedural fairness. Based on the case law, it is my opinion that this question must be treated as a question of law[56] and that correctness is the standard that applies here. This is what should be done in such cases:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.[57]
>
> This procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty.[58]

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54 *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190, paragraph 190. *Gabor Miroslav v. Canada (Minister of Citizenship and Immigration)*, No. IMM-3466-09, Russell, April 12, 2010; 2010 FC 383, paragraph 20. *Kadiatou Sow v. Canada (Minister of Citizenship and Immigration)*, No. IMM-1493-11, Russell, November 16, 2011; 2011 FC 1313, paragraph 20.

55 *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190, paragraph 47. *Gabor Miroslav v. Canada (Minister of Citizenship and Immigration)*, No. IMM-3466-09, Russell, April 12, 2010; 2010 FC 383, paragraph 22. *Bethany Lanae Smith v. Canada (Minister of Citizenship and Immigration)*, No. IMM-5699-11, Mosley, November 2, 2012; 2012 FC 1283, paragraph 19.

56 *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190, paragraphs 55, 79 and 87. *Canada (Minister of Citizenship and Immigration) v. Khosai*, 2009 SCC 12; [2009] 1 S.C.R. 339, paragraph 43. *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, paragraph 53.

57 *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190, paragraph 50, as cited by the Honourable Justice Russell in *Ahanin v. Canada (Minister of Citizenship and Immigration)*, No. IMM-2554-11, Russell, February 8, 2012; 2012 FC 180, paragraph 37.

58 *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, paragraph 53.

[61] For the rest of the analysis, I will begin by addressing this question of whether the RPD did or did not breach the principles of natural justice or procedural fairness.

VII. ANALYSIS OF THE MERITS OF THE APPEAL

A. Did the RPD breach its duty of allowing the appellant to be heard?

[62] Having read the arguments made by the appellant in her memorandum, analyzed the RPD's reasons for decision and listened to the recording of the hearing before the RPD, I conclude that the RPD did not breach its duty of allowing the appellant to be heard. Here is why.

[63] On this specific point, the appellant's memorandum contains arguments that are not immediately clear, in particular because they are scattered throughout various parts of the memorandum:

> And although the Tribunal is not responsible for ensuring that a claimant is well-represented, the Tribunal does have the duty to ensure that the claimant has a fair hearing and the opportunity to present her full story to the Tribunal. The Tribunal ought to have dug deeper to get more information on why the BOC form was so lacking in detail; …
> The RPD has the significant advantage of hearing first-hand evidence from witnesses in an oral hearing, whereas the RAD is primarily an appeal on the record. Deference ought to be given to the tribunal which has the advantage of a full oral hearing in which to make its findings of fact and law. Except that in this case, it did not have the advantage of hearing the facts and drew and (sic) adverse credibility finding because of a lack of detail in the BOC form provided by the claimant. But the lack of detail was not the claimant's doing, nor was it her fault. The claimant testified that she believed the facts were in the BOC form. The tribunal did not go beyond that explanation. As a result, the tribunal was unreasonable when it found the claimant not credible. …
>
> We submit that the Tribunal erred in not providing a fair hearing and a fair opportunity for the claimant to be heard.[59]

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[59] Appellant's memorandum, pages 8, 18 and 19 of the appeal record.

[64] Where procedural fairness is in issue, it must be asked whether the principles of natural justice have been met in the particular circumstances of the case.[60] In a refugee protection claim before the RPD, procedural fairness means ensuring that refugee protection claimants understand the proceedings, have a reasonable opportunity to tender any evidence that supports their claim and are given a chance to persuade the RPD that their claim is well-founded.[61] A breach of procedural fairness will not result in relief in each case. Federal Court jurisprudence has held that if it is apparent that the decision-maker would have reached the same decision notwithstanding the breach, and no purpose would be achieved by remitting it for reconsideration, the decision should stand.[62]

[65] In the past, it has emerged from Canadian case law that administrative tribunals have the obligation to ensure that the proper balance is struck between ensuring a full and fair hearing and ensuring that access to justice is effective and efficient. How that balance is set is discretionary, but the fundamentals of natural justice must not be compromised:

> A right to a fair and full hearing does not require tribunals … to abdicate their control over dockets to the parties. What constitutes a fair hearing is largely a contextual analysis, informed by the nature of the rights in issue, the provisions of the legislative or

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60 *Fei Zheng v. Canada (Minister of Citizenship and Immigration)*, No. IMM-1998-11, Mosley, November 25, 2011; 2011 FC 1359, paragraph 7.

Also read *Bokhari v. Canada (Minister of Citizenship and Immigration)*, No. IMM-3907-10, Harrington, March 22, 2011; 2011 FC 354, paragraph 13.

61 *Nemeth v. Canada (Minister of Citizenship and Immigration)*, No. IMM-2522-02, O'Reilly, May 14, 2003; 2003 FCT 590, paragraph 10: "The Board was aware that the Nemeths had been represented up until just prior to the hearing. It was, or should have been, alive to the risk that the claimants were ill-prepared to represent themselves. Under the circumstances, it had an obligation to ensure that the Nemeths understood the proceedings, had a reasonable opportunity to tender any evidence that supported their claim and were given a chance to persuade the Board that their claims were well-founded."

62 *Fei Zheng v. Canada (Minister of Citizenship and Immigration)*, No. IMM-1998-11, Mosley, November 25, 2011; 2011 FC 1359, paragraph 8.

Sumit Roy v. Canada (Minister of Citizenship and Immigration), No. IMM-7106-12, Scott, July 9, 2013; 2013 FC 768, paragraph 34: "While there is no need to establish a prejudice in order [to] prove a breach of procedural fairness based on inadequate interpretation, the Applicant *is* required to demonstrate that the breach of procedural fairness was material to the Board's decision in order for this Court to intervene" (citations omitted).

Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board, [1994] 1 S.C.R. 202.

> regulatory scheme which underlies the decision making process. A fair hearing is not necessarily the "fullest" of hearings. In the end, the controlling determination of fairness will be whether the applicant or party had an opportunity to respond to the case against them.[63]

[66] The RPD's obligations in situations where claimants are without legal representation are more onerous because it cannot rely on counsel to protect their interests.[64]

[67] The RPD's oral reasons for decision read in part as follows:

> [Translation]
>
> As to credibility, the panel believes that the claimant is a Jehovah's Witness, but doubts that in 2013 her department head threatened to put her in prison for refusing to join a department group called "XXXX XXXX."
>
> The panel asked the claimant why that specific fact, namely, her department head's threat, was not in her Basis of Claim (BOC) Form. She explained that she thought that everything was in there. At question 2(b) of the BOC Form, it is written, and I quote, "I could be put in prison, tortured and, what's more, I could not work."
>
> Owing to the lack of detail in the BOC Form, that is, that she had been threatened with imprisonment and that this threat—the threat by the department head—had occurred in 2013, the panel does not believe the claimant on this point. Furthermore, at the hearing, the claimant testified that she was expected at the XXXX to resume work the coming XXXX.[65]

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63 *Yan Chen v. Canada (Minister of Citizenship and Immigration)*, No. IMM-1106-11, Rennie, November 7, 2011; 2011 FC 1268, paragraph 19.

Also read the Supreme Court of Canada decision in *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, at pages 568 and 569: "In order to arrive at the correct interpretation of statutory provisions that are susceptible of different meanings, they must be examined in the setting in which they appear. We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion."

64 *Nemeth v. Canada (Minister of Citizenship and Immigration)*, No. IMM-2522-02, O'Reilly, May 14, 2003; 2003 FCTD 590, paragraph 10, which is reproduced at footnote 37 of the present decision.

65 RPD decision, pages 3 and 4 of the RPD record.

[68] I listened carefully to the recording of the hearing before the RPD. During the hearing, the appellant was represented by counsel and had the benefit of an interpreter, allowing her to speak in Spanish even though the language of the hearing was French. The appellant is an educated person who holds a master's degree in XXXX. She expresses herself in a clear and logical manner.

[69] At the beginning of the hearing, counsel for the appellant asked her if she recognized her BOC Form, if she had signed it, if it had been interpreted for her by Mr. Barrantes and if its content was complete, true and correct. The appellant answered these questions in the affirmative.

[70] At the beginning of the hearing, the documents filed in evidence were identified. From the appellant, four documents were entered into evidence, namely, her identity booklet, birth certificate, diploma and certificate as XXXX XXXX XXXX XXXX XXXX XXXX.[66]

[71] The member assigned to hear this case gave the usual instructions and made sure that the appellant understood her correctly. The tone of the questions and answers was calm and courteous throughout, enabling the appellant to present all the information she saw fit to present and all the necessary explanations in light of the concerns expressed by the RPD. The member also asked open-ended questions, such as the following: [translation] "Is there anything else?", "Did I understand you correctly?" and "And so?", thereby permitting the appellant to provide any clarifications she felt were necessary. When the appellant did not understand one of her questions, the member repeated or reworded it, whereupon the appellant answered each of her questions. When the member did not understand certain statements made by the appellant, she asked the appellant to clarify them, and the appellant did so. At certain points, the member also referred to or read information included in the documentary evidence, particularly concerning the freedom afforded to members of the Jehovah's Witnesses in Cuba, and she invited the appellant and her counsel to comment on this information, which they did. Near the end of her questioning, the member asked the appellant whether she had anything else to add in connection with the reasons

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66 These documents are reproduced at pages 88 to 99 of the RPD record.

for which she had claimed refugee protection in Canada, to which she responded that she was afraid that things would be worse if she had to return to Cuba.

[72] During the hearing, the appellant asserted that in 2013, her department head threatened to have her imprisoned. The member asked her to specify when in 2013 she was threatened with imprisonment. The appellant replied that it was sometime around XXXX 2013. In response to a question from the member, the appellant stated that her department head had acted at the time with the Party leaders who worked at the XXXX and that they had accused her of being a counter-revolutionary. The member then asked her to explain why this information was not clearly set out in her BOC Form—to which the appellant responded that her story was so lengthy that she thought it was included, that everything was there.

[73] Thus, the member gave the appellant an opportunity to explain this omission. The appellant provided an explanation. This explanation is clearly at odds with what the appellant stated in her signed declaration, contained in her BOC Form, and with her response to her counsel at the beginning of the hearing.

[74] During the hearing, counsel for the appellant asked the appellant whether her department head who threatened her had a political function, to which she replied that he was an activist in the Communist Party.

[75] Applying the standard of correctness in light of the relevant case law and having carefully listened to the recording of the hearing, I concur, for my part, with the manner in which the RPD dealt with the appellant during the hearing, and it is my opinion that the RPD allowed the appellant to be heard on all aspects of her refugee protection claim that she and her counsel saw fit to present. In other words, the appellant was able to understand the proceedings and tender evidence that supported her claim, and she had the opportunity to persuade the RPD that her claim was well founded. Consequently, the RPD did respect the notions of procedural fairness and the principles of natural justice.

B. Did the RPD take all of the evidence into account?

[76] Having read the arguments presented by the appellant in her memorandum, analyzed the RPD's reasons for decision and listened carefully to the recording of the hearing before the RPD, I conclude that the RPD took into account all of the evidence. Here is why.

[77] In her memorandum, the appellant submits that the RPD failed to take account of the documentary evidence concerning employment and individuals who refuse to join the Communist Party or take part in the various political demonstrations and events.[67]

[78] In his oral submissions during the hearing before the RPD, counsel for the appellant had every opportunity to refer to all of the documentary evidence. He stressed that Cuba remains a Communist country run by a dictatorship and that a number of basic freedoms are not respected there, particularly freedom of religion. He referred to the documentary evidence dealing specifically with this topic. He also noted that the surveillance system in Cuba is a serious issue and that according to the documentary evidence, when someone opposes the regime, that person is considered a counter-revolutionary. He added that while religion is now somewhat more accepted than it used to be, this is true only for state-approved religions, not for the Jehovah's Witnesses, and that the state still interferes with certain religious groups.

[79] Documentary evidence on country conditions does not by itself establish a well-founded fear of persecution or a personalized risk to the life of a refugee protection claimant from that country. Claimants must also demonstrate a connection between that evidence and their personal situation.[68]

[80] In its reasons for decision rejecting the claim for refugee protection, the RPD clearly states that the appellant was not credible in her allegation that she had been threatened with imprisonment

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67 Appellant's memorandum, November 2013, 13 pages, pages 8 to 14 of the appeal record.

68 *Morales Alba v. Canada (Citizenship and Immigration)*, (No. IMM-3943-07), Shore, October 29, 2007; 2007 FC 1116, paragraphs 31 and 32.

by the head of the department where she worked in 2013, in particular because she had failed to include this information in her BOC Form but also because, during the hearing, the appellant testified that she was expected at the XXXX to start work again in XXXX 2013.

[81] After taking account of the appellant's testimony, the RPD then indicates the following:

> [Translation]
>
> Although she refused to XXXX XXXX XXXX, to contribute financially to the militia, to belong to the Communist Party or to join the "XXXX XXXX XXXX XXXX XXXX XXXX XXXX, none of that impeded her career advancement.
>
> As for the two events that occurred in 1994, the claimant, after deciding to move to Holguin, did not get her transfer. She had to wait a year before working and finding a new job. Since this took place nearly 20 years ago and she obtained a job, although not as quickly as she would have wished, the fact remains that she was able to find work.
>
> The claimant added that in 1994 her husband lost his job as XXXX XXXX XXXX XXXX XXXX XXXX XXXX because his wife was a Jehovah's Witness. Since then, her husband has worked as an XXXX, which is his field of study. He too escaped any serious impediment to his career advancement, since he is working in the XXXX profession.
>
> The claimant alleged that since 1993, when she became a Jehovah's Witness, she has always refused to be a member of the Communist Party. The evidence shows that her salary has always been maintained and that she was able to further her education, obtaining not only a specialization in XXXX but also a master's degree in XXXX. The panel sees in all of this no examples of persecution within the meaning of the Convention. Although the claimant was called in to her supervisors' office for 20 years to defend her choices and as she alleged, she likens this to psychological persecution, the fact remains that she was able to maintain her position as a XXXX, XXXX XXXX XXXX.[69]

[82] In its oral reasons for decision, the RPD clearly referred to the documentary evidence concerning members of the Jehovah's Witnesses, reading out excerpts during the hearing and citing it again in its decision. Based on this documentary evidence, the RPD concluded that the appellant, if she had to return to Cuba today, would be able to practise her religion without state interference,

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69 RPD decision, pages 4 and 5 of the RPD record.

the situation having improved these past several years, as members of this religious group are able to gather publicly three times a year and to meet in smaller groups twice a week.[70]

[83] In light of the RPD's oral reasons for decision and having carefully listened to the recording of the hearing before the RPD, including the appellant's testimony and the oral submissions made by her counsel, it is my opinion that the RPD took account of all the evidence, focusing when rendering its decision on the core elements of the documentary evidence applicable to the facts of this case. It is also my opinion that the RPD did not have to refer to all of the documentary evidence, as the appellant had not established a personal nexus with this evidence, whether through her own testimony or through her counsel's submissions. Consequently, I conclude that the RPD committed no error in this regard.

C. Did the RPD commit an error in its application of the notion of persecution to the facts of the case?

[84] Having read the arguments presented by the appellant in her memorandum, analyzed the RPD's reasons for decision and listened carefully to the recording of the hearing before the RPD, I conclude that the RPD committed no error in its application of the notion of persecution to the facts of the case. Here is why.

[85] In her memorandum, counsel for the appellant criticizes the RPD for failing to integrate into its persecution analysis the associated forward-looking aspect:

> The claimant is a known "passive opponent" of the Communist Party, as she always refused to join given her religious beliefs. The claimant is now known not to have returned to Cuba after the specified time that she was allowed to be absent … The claimant, a professional, could be deemed to have expressed an interest in emigrating, or even considered to have already emigrated, given that she has not returned to her job.[71]

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70 *Idem*, pages 5 and 6 of the RPD record.

71 Appellant's memorandum, page 14 of the appeal record.

[86] Although claimants must establish their case on a balance of probabilities, they are not required to show that it is more likely than not that they would be persecuted. In fact, what the evidence must show is that the claimant has good grounds for fearing persecution for one of the reasons specified in the IRPA.[72]

[87] Hence the importance of the definition given to the notion of persecution.

[88] Persecution is generally defined as the serious interference with a basic human right,[73] and the word "persecute," for its part, means to harass or afflict with repeated acts of cruelty or annoyance.[74]

[89] While it is true that the dividing line between persecution and discrimination or harassment is difficult to establish, the case law establishes that discrimination must be sufficiently serious or systematic in order to be characterized as persecution.[75] In addition, a refugee protection claimant may have been subjected to various measures of discrimination, not in themselves amounting to persecution, in some cases combined with a general atmosphere of insecurity in the country of origin. In such situations, the various elements involved may, if taken together, produce an effect on the mind of the claimant that can reasonably justify a claim to a well-founded fear of

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72 *Parampsothy v. Canada (Minister of Citizenship and Immigration)*, No. IMM-421-12, Mandamin, August 16, 2012; 2012 FC 1000, paragraph 24.

See also *Mugadza v. Canada (Minister of Citizenship and Immigration)*, No. IMM-1324-07, Mandamin, January 30, 2008; 2008 FC 122, paragraphs 20 to 22.

73 *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)*, Mosley, [2004] F.C.J. No. 316, 2004 FC 282, paragraph 29, as cited by the Honourable Justice Zinn in *Warner v. Canada (Minister of Citizenship and Immigration)*, March 23, 2011, No. IMM-4283-10; 2011 FC 363, paragraph 7.

74 *Rajudeen v. Canada (Minister of Employment and Immigration)*, (1984), 55 NRF 129 (FCA), as cited by the Honourable Justice Zinn in *Warner v. Canada (Minister of Citizenship and Immigration)*, March 23, 2011, No. IMM-4283-10; 2011 FC 363, paragraph 7.

75 *Ramirez v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1888, 88 F.T.R. 208, paragraph 8, as cited by the Honourable Justice Zinn in *Warner v. Canada (Minister of Citizenship and Immigration)*, March 23, 2011, No. IMM-4283-10; 2011 FC 363, paragraph 7. See also the analysis by the Honourable Justice Near on the same topic in *Mallampally v. Canada (Minister of Citizenship and Immigration)*, February 27, 2012, No. IMM-5626-11; 2012 FC 267, paragraphs 22 to 24.

persecution. In other words, prior incidents are capable of forming the foundation for a present fear.[76]

[90] Can it be concluded that the incidents that the appellant allegedly experienced in the past amount to not only discriminatory behaviours, but also persecution? After analyzing the appellant's personal situation, finding that certain parts of her allegations were not credible and taking account of the documentary evidence applicable to the essential elements of the claim, the RPD was of the opinion that the answer was no. For my part, I am of the opinion that the RPD committed no error in applying the notion of persecution to past facts that it considered that the appellant had established on a balance of probabilities.

[91] After answering this question in the negative, the RPD then considered whether the appellant's fear in the present, analyzed in light of what she experienced in the past, can be characterized as constituting a reasonable fear of persecution if she had to return to live in her country of origin today. After analyzing the appellant's personal situation, finding that certain parts of her allegations were not credible and taking account of the documentary evidence applicable to the essential elements of the claim, the RPD was of the opinion that the answer to this question was no. For my part, I am of the opinion that the RPD committed no error in applying the notion of persecution to those facts that it considered that the appellant had established with respect to her future. It should be noted here that during her hearing, the appellant stated that in the future, she was to return to her job at the XXXX, and that she would be able to practise her religion within the religious group she belongs to. Although this has not been established by the appellant to date, with respect to the allegation that she lost her job because she did not return to her country, I do not see how this amounts to persecution, as it was she herself who did not return to work at the arranged time.

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76 *Irem Gur v. Canada (Minister of Citizenship and Immigration)*, No. IMM-6294-11, de Montigny, August 14, 2012; 2012 FC 992, paragraph 20, citing his colleague Justice Dawson in *Tolu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 334, paragraph 17.

[92] Having carefully reviewed the appellant's memorandum and the RPD's reasons for decision, and having listened carefully to the recording of the hearing before the RPD, I conclude that the RPD did not commit any errors, that its decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law, and that the reasons for this decision are justified, transparent and intelligible.

VII. REMEDIES

[93] For these reasons, I confirm the RPD's determination, namely, that **XXXX XXXX XXXX XXXX** is neither a "Convention refugee" under section 96 of the IRPA nor a "person in need of protection" under section 97 of the IRPA.

[94] The appeal is dismissed.

Alain Bissonnette

M^e^ Alain Bissonnette

February 28, 2014

Date

IRB translation

Original language: French