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**COMMENTARY ON  
UNDOCUMENTED AND  
IMPROPERLY DOCUMENTED CLAIMANTS:**

*Assessing the evidence*

*Enhancing procedures*

**Immigration and Refugee Board  
Legal Services**



**March 11, 1997**

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## **PREFACE**

This Commentary deals with assessing evidence and enhancing CRDD procedures in cases where a claimant is referred to the CRDD and either has no documents to support his or her claim (i.e. the claimant is "undocumented"), or is improperly documented.<sup>1</sup>

Part of this Commentary deals with *credibility issues that arise where the claimant does not have proper documentation to prove his or her identity or certain other elements of the claim*. For a more general discussion of the principles to be applied in assessing the credibility of refugee claimants before the CRDD, the reader is referred to the Legal Services reference paper entitled "Assessment of Credibility in the Context of CRDD Hearings", dated May 30, 1996.

This Commentary represents the opinion of Legal Services and is endorsed by the Chairperson. It is meant to assist CRDD members in dealing with evidentiary and procedural issues arising where a claimant is undocumented or improperly documented. It is not binding on the members in the exercise of their discretion as decision-makers, but it may guide them in applying generally-accepted legal principles in appropriate cases.

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## ANALYTICAL HIGHLIGHTS OF THIS COMMENTARY

Each of the points below is followed by a reference to a subsection and a line number of this Commentary, where members will find fuller elaboration of the point(s) of interest to them.

### 1. MAKING THE REFUGEE CLAIM

- Port-of entry notes and related Minister's Information are normally *relevant and admissible evidence* regarding identity and possibly other elements of the claim. It will be for the panel to determine if this information is *reliable evidence*, and to assign the information *appropriate weight* in the circumstances of the case. (*Subsection IV. A at line 242*)



### 2. REFERRAL TO THE CRDD

- If the evidence presented at the hearing in support of identity and other elements does not demonstrate reasonable diligence *before the hearing* in trying to overcome or address the lack of proper documentation, panels may draw a negative inference from the lack of diligence when assessing a claimant's credibility. (*Subsection IV. B at line 280*)
- Where a claimant, in completing the PIF, improperly describes the nature and whereabouts of his or her personal documentation, the lack of a reasonable explanation for the improper completion of the PIF may lead a panel to draw a negative inference regarding identity or other elements of the claim when assessing the claimant's credibility. (*Subsection IV. B at line 289*)
- Where appropriate, RCOs and members should make full use of *pre-hearing conferences* for early identification / resolution of identity and other elements in cases where there is a lack of proper documentation. (*Subsection IV. B at line 325*)



### **3. HEARING THE EVIDENCE**

#### *Procedural issues*

- Unless the circumstances of a particular case dictate otherwise, CRDD panels may expect claimants to be fully prepared to testify as to their identity at the outset of the hearing. (*Subsection IV. C at line 353*)
- Panels may conclude that a postponement or adjournment for the purpose of obtaining independent corroborating evidence of identity or other elements is unmerited, if a claimant could have acted before the hearing to obtain or attempt to obtain such evidence, but does not offer a reasonable explanation for the lack of diligence in doing so. (*Subsection IV. C at line 361*)
- To the extent that it is appropriate and efficient to do so, panels should attempt as much as possible to focus on the question of identity at the outset of the hearing, and to examine evidence regarding other elements of the claim afterwards. (*Subsection IV. C at line 372*)
- It is clearly preferable for CRDD panels to satisfy themselves on the issue of identity as early on as possible in the hearing. Where, however, a CRDD panel considers that it is unable after a reasonable period of time to reach a conclusion regarding the claimant's identity, it is both advisable and desirable to inform the claimant that the panel is deferring examination of identity to a later point in the hearing. In certain circumstances, it may be possible for a panel to resolve a claim without further examination of the issue of identity. (*Subsection IV. C at lines 385, 392 and 404*)

#### *Evidentiary issues*

- Members may expect claimants to provide a reasonable explanation for their lack of proper documentation. The absence of a reasonable explanation for the lack of proper documentation may lead members to draw a negative inference when assessing a claimant's credibility or when determining the substantive basis of the claim. (*Subsection IV. C at lines 409 and 414*)

- Regardless of whether subparagraph 69.1(10.1)(a) of the *Immigration Act* applies in a particular case, CRDD panel members who become aware that a claimant has destroyed or disposed of documents have the power and the duty to inquire into the reasons for the destruction or disposal. (*Subsection IV. C at line 422*)
- Panels should be aware that for subparagraph 69.1(10.1)(a) of the *Immigration Act* to apply in a given case, the following factors must be present: there must be a split decision between the members as to whether the claimant is a refugee, and both panel members must agree that a) there are reasonable grounds to believe that the claimant has destroyed or disposed of documents in his or her possession; and b) the claimant did so without valid reason. (*Subsection IV. C at line 465*)
- In the absence of proper documents proving identity and other elements of the claim, the claimant must be able to offer sufficient credible or trustworthy evidence regarding these elements, in order to be able to discharge the burden of proving the claim. (*Subsection IV. C at line 506*)
- Where a claimant is able to arrange for independent corroboration of identity or other elements of the claim but fails to do so without reasonable explanation, panels may draw a negative inference from the failure to act when assessing the claimant's credibility. (*Subsection IV. C at line 546*)



**4. RENDERING THE  
DECISION**

In determining whether a claimant lacking proper documentation has discharged the burden of proving his or her claim, consider:

- the credibility and reliability of the evidence offered, and its probative value; (*Subsection IV. D at line 563*)
- what elements of the claim have been established on the balance of probabilities; (*Subsection IV. D at line 622*)
- whether under the circumstances the claimant should be given the benefit of the doubt; (*Subsection IV. D at line 638*)

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- what are the relevant rules of law to be applied to the facts as found, in order to draw the appropriate conclusions in law: (*Subsection IV. D at line 646*)
  - the fact that a claimant may be able to offer a reasonable explanation for the destruction or disposal of personal documents means that panels may not *automatically* infer bad faith from the simple fact of having destroyed or disposed of such documents (*Subsection IV. D at line 705*)
  - where, after considering the reasonableness of the explanation offered, members conclude that a claimant has destroyed or disposed of documents in bad faith, members may in most cases correctly draw a negative inference as to the credibility of the claim as a whole, although in some cases members may correctly draw such an inference only with respect to a particular aspect of credibility (*Subsection IV. D at line 711*)

## **I. INTRODUCTION**

A significant portion of all Convention refugee claimants in Canada arrive at its borders either undocumented or improperly documented.<sup>2</sup>

10 The fact that a claimant is undocumented or improperly documented is not a bar to being recognized as a Convention refugee. This being said, claimants have the burden of proving their claim to Convention refugee status. Where claimants are undocumented or improperly documented, part of discharging the burden of proof will involve *providing a reasonable explanation for the lack of proper documentation*. It is clear that many genuine refugee claimants who arrive in Canada without documents or with improper documents are fleeing situations of persecution which make it either impossible or dangerous to travel with their own personal documents. It may also be that the country from which a refugee flees has no reliable system of identifying its nationals, and the claimant is therefore left without formal and genuine identity or travel documents. On the other hand, a portion of those arriving either undocumented or improperly documented are not genuine refugees. These people may make use of their lack of documentation, or of their improper documentation, as a means of fraudulently obtaining refugee status.

### **A. EVIDENTIARY ISSUES**

20 For all Convention refugee claimants, discharging the burden of proving their claim requires sufficient credible or trustworthy<sup>3</sup> evidence on all the elements of the claim. Claimants who lack proper documentation may have more difficulty than those with proper documents in discharging the burden of proof because of problems with the sufficiency of the evidence they can provide, with the credibility or trustworthiness of that evidence, or with a combination of these factors.

30 While credibility is a central issue in almost all refugee claims<sup>4</sup>, the assessment of credibility where a claimant lacks proper documentation will involve the additional consideration of what inferences, if any, can be drawn from the fact that a claimant is undocumented or improperly documented.

Apart from credibility, assessment of reliability<sup>5</sup> of the evidence will be a significant issue for members where claimants without proper documentation offer independent corroboration of the elements of their story.

These evidentiary difficulties faced by undocumented and improperly documented claimants are particularly apparent with respect to the issues of identity, details of travel to Canada, and the destruction or disposal of documents.

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**1. IDENTITY**

40 Where a claimant is undocumented or improperly documented, the determination of  
identity will very often pose difficulties of proof. This is in part because of the fact that  
determination of identity is not solely a matter of proving that a claimant is a person with a  
particular given name and surname; rather, identity can have a much broader meaning in  
that a person's identity can also be defined in terms of a number of different characteristics  
such as one's country of nationality or former habitual residence, citizenship, ethnic  
background, or race.<sup>6</sup> A consequence of the broad meaning given to identity is that  
whether or not there is sufficient credible or trustworthy evidence regarding one's identity  
may also affect proof of other elements of the definition of Convention refugee. A claimant  
may allege, for example, that he or she fears persecution because of membership in a  
religious sect (ground of religion) or a political party (ground of political opinion). Proper  
50 documentation identifying the claimant as person "x", who is a member of or adherent to  
such groups, would clearly facilitate proof of inclusion under a particular ground of the  
definition. By contrast, claimants who have lost, disposed of, destroyed, or left behind  
reliable documents identifying themselves as members of such groups, or who use improper  
documentation to so identify themselves, will likely have more difficulty in proving their  
inclusion under the relevant ground.

**2. DETAILS OF TRAVEL TO CANADA**

The route travelled and the documents used to travel to Canada from the country against  
which one claims a fear of persecution, are not in and of themselves elements of the  
definition to be proven.<sup>7</sup> However, the details of a claimant's travel to Canada may,  
60 depending on the circumstances of the case, be a factor in the panel's assessment of the  
claimant's credibility or in the panel's determination of whether, for example, a claimant's  
fear of persecution is well founded.

Details of a claimant's travel to Canada may include: a) the claimant's departure from his or  
her country of nationality or former habitual residence (e.g. the date of departure, the means  
of travel, the travel documents used to depart); b) the route travelled (including short- and  
longer-term stays in countries other than Canada); and c) arrival in Canada (e.g. the date of  
arrival, the means of travel, the travel documents used to come to Canada). Also, as the  
next paragraph explains, the details of travel to Canada may sometimes include details of  
70 destruction or disposal of personal documents in the claimant's possession.

**3. DESTRUCTION OR DISPOSAL OF DOCUMENTS**

Depending on the circumstances of the case, an undocumented or improperly  
documented claimant may be required to respond to the question of whether and why the  
claimant destroyed or disposed of personal documents relevant to the refugee claim. Most  
typically, if a claimant has destroyed or disposed of documents, this will have occurred  
while the claimant was *en route* to Canada, but it could also occur at any point thereafter.  
In some cases, undocumented and improperly documented claimants face the additional  
hurdle of explaining whether they have destroyed or disposed of documents "without valid

80 reason" within the meaning of subsection 69.1(10.1)(a) ("the unanimity provision") of the *Immigration Act*. Even where members find that this section does not apply in the circumstances of a case, a claimant's credibility or possibly other elements of the claim may nonetheless be at issue if the claimant is unable to reasonably explain why he or she destroyed or disposed of personal documents.

### ***B. PROCEDURAL ISSUES***

90 In addition to evidentiary complications, *lack of proper documentation poses a significant obstacle to the efficient processing of a claimant's case*, and more particularly it can give rise to procedural difficulties which delay processing. For example, a failure by an undocumented or improperly documented claimant to take steps before the hearing to overcome or address a lack of proper documentation may cause the hearing to be prolonged if the panel is consequently obliged to engage in lengthy questioning of the claimant or witnesses on identity or other elements of the claim.

Related to this is the issue of postponements or adjournments granted to allow claimants to obtain personal documents for identity or other purposes. In many cases, an adjournment or postponement might not have been necessary, *had the claimant taken steps before the hearing* to attempt to obtain the necessary documentation.

### ***C. RATIONALE AND APPROACH***

100 Despite the evidentiary and procedural difficulties which claimants and CRDD panels face where the claimant is undocumented or improperly documented, the CRDD has over the years developed a significant expertise in assessing whether there is sufficient credible or trustworthy evidence on identity and other elements of the claim, the proof of which is affected by lack of proper documentation.

It is against the above backdrop that Legal Services has prepared this Commentary. Its aim is to enhance the existing expertise of the CRDD in dealing with the evidentiary and procedural issues that arise in the case of undocumented and improperly documented claimants.

110 In terms of the conceptual approach taken in this Commentary, Legal Services has attempted to acknowledge the reality that when an undocumented or improperly documented claimant comes before the CRDD, the evidentiary and procedural issues do not present themselves as separate elements of the claim -- these issues are tied to each other (and to other issues as well). The Commentary therefore presents the evidentiary and procedural issues in a linked fashion: that is to say, these issues are discussed as they arise at specific points in time during the CRDD process. Legal Services is of the view that this approach will allow for a more accurate conceptualization of the issues, and for earlier recognition of the problem areas in a particular case, whether those problems be evidentiary or procedural.

120 **II. DEFINITIONS**

Certain terms and phrases used in this Commentary are given a working definition below. Legal Services recognizes that the definitions of “properly documented”, “undocumented” and “improperly documented” below are imprecise in the sense that they appear to impose an artificial assessment of the weight and reliability to be given to the claimant’s evidence, depending on whether a claimant is considered "documented", "undocumented" or "improperly documented". Legal Services considers that the definitions are nonetheless necessary, so as to ensure that there exists a basic common understanding of the ideas being expressed. It is also more convenient for the reader if some “shorthand” definitions are applied. For the purposes of this Commentary, the following definitions apply:

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- "identity" most commonly refers to the name(s) by which the claimant presently identifies, or in the past has identified, himself or herself. “Identity” also includes but is not limited to one or more of the following indications of personal status: country of nationality; country of former habitual residence; citizenship; race; ethnicity; linguistic background; and political, religious, or social affiliation;
- "properly documented" refers to refugee claimants who, at the time that their claim is processed by the CRDD, possess reliable identity, travel, or other personal information documents;

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- "undocumented" refers to refugee claimants who, at the time that their claim is processed by the CRDD, indicate that they have no identity, travel, or other personal information documents available as evidence in support of their claim;
- “improperly documented” refers to refugee claimants who make use of false, forged, altered, stolen, illegally issued or similarly unreliable identity, travel or other personal information documentation for purposes related to the determination of their claim by the CRDD;

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- it is possible that the documented or undocumented status of a claimant may change at any time up to and including the hearing of the claim. Thus, an undocumented claimant may become improperly documented or properly documented; an improperly documented claimant may become undocumented or properly documented; and a properly documented claimant may become undocumented or improperly documented. Where the documented or undocumented status of a claimant changes, he or she should be prepared to provide a reasonable explanation of how and why this has occurred.

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For simplicity, this Commentary will refer hereinafter to claimants who are either undocumented or improperly documented as claimants "lacking proper documentation", unless the context requires a more specific reference.

### **III. BURDEN OF PROOF, STANDARD OF PROOF, AND BENEFIT OF THE DOUBT**

#### ***A. THE BURDEN OF PROOF***

This Commentary proceeds from the basic principle that *the claimant has the burden of proving* his or her claim. That is, it is up to the refugee claimant to lead enough credible or trustworthy evidence to establish the claim.<sup>8</sup>

170 It is important to underline for members that the *CRDD Instructions for the Acquisition and Disclosure of Information* do not in any way modify the claimant's burden of proving his or her claim.<sup>9</sup>

This being said, it is important to recognize the context in which refugee claimants are obliged to discharge the burden of proof. The *UNHCR Handbook*<sup>10</sup> at paragraphs 196 and 197 reflects the need to balance recognition of the "special situation" in which refugees find themselves and the impact which this situation may have on the proof they are able to offer, against the reality that unsupported statements need not be accepted as true if they are not consistent with the claimant's account or with what is otherwise known about the claim.<sup>11</sup>

#### ***B. THE STANDARD OF PROOF***

180 In its evaluation of the evidence, once a CRDD panel reaches the point of determining *what facts have been established* by the evidence, *the standard of proof which it applies is that of a balance of probabilities*.<sup>12</sup> That is, the evidence must show that the elements in question are more likely than not to exist.

190 The fact that a claimant lacks proper documentation means that the claimant must rely on his or her own testimony and, if available, any independent means of establishing the elements of his or her case. These independent means of establishing the facts (for example, reliance on witnesses' testimony, or the use of affidavits), taken together with findings on credibility, may or may not be sufficient to satisfy the CRDD panel that the elements in question are more likely than not to exist.

**C. BENEFIT OF THE DOUBT**

A CRDD panel, in assessing whether a claimant has met the standard of proof, may determine that there is still a lack of evidence regarding certain aspects of the claim. It may therefore be appropriate to give the claimant the benefit of the doubt. This general principle merits close attention in considering whether a claimant lacking proper documentation has presented sufficient evidence to discharge the burden of proving his or her case. As paragraph 203 of the UNHCR *Handbook*<sup>13</sup> states,

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After a claimant has made a genuine effort to substantiate his story, there may still be a lack of evidence for some of his statements. ... [It] is hardly possible for a refugee to “prove” every part of his case and, indeed, if this were the requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.

The benefit of the doubt does not apply in all cases, however:

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204. The benefit of the doubt should...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.<sup>14</sup>

**IV. EVIDENTIARY AND PROCEDURAL ISSUES IN PROCESSING  
CLAIMANTS LACKING PROPER DOCUMENTATION**

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The italicized paragraph at the beginning of each of the subsections below is intended to summarize in very general terms what currently occurs at each of the various stages that a claimant passes through in the processing of his or her file, from the time of making the refugee claim to the time that the CRDD makes its decision. Throughout the subsections below, certain text is boxed and appears in bold. This emphasis indicates a “***Recommended approach to, or interpretation of, the issue under consideration.***”

**A. MAKING THE REFUGEE CLAIM**

*Current Practice.* The person concerned makes a refugee claim to an immigration officer. The immigration officer examines the refugee claimant and refers the claimant, if eligible, to the CRDD. The immigration officer and

other departmental officers prepare and forward Minister's Information<sup>15</sup>, such as "port-of-entry" notes, to the CRDD to be placed on the claimant's file .

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Minister's Information, including information contained in "port-of-entry" notes, is routinely forwarded by the Department of Citizenship and Immigration to the CRDD. It may contain observations by the immigration officer as to whether the claimant was cooperative in providing information about his or her case, and in particular it may contain remarks regarding the claimant's cooperation or lack thereof regarding identity and travel to Canada.

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The information in the "port-of-entry" notes and related Minister's Information is, in the normal course of events, *relevant and admissible evidence* regarding identity and possibly other elements of the claim. In *Rahman*,<sup>16</sup> the Court considered the admissibility of certain border documents, including the immigration officer's "port-of-entry" notes. The Court found that it was not contrary to the *Privacy Act* to admit the notes, insofar as the notes are used for a use consistent with the purpose for which the information was obtained. Using the notes for determining refugee status was a "consistent purpose". In *Mongu*,<sup>17</sup> the Court held that the examination form prepared by the immigration officer who had questioned the male claimant was hearsay because the immigration officer was not available to testify. The Court referred to section 68(3) of the *Immigration Act*, and noted that by virtue of this section hearsay is admissible in the Refugee Division.

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Once admitted, it will be for the panel to determine if the above Minister's Information is reliable evidence.<sup>18</sup>

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It will then be up to the panel to assign this evidence the appropriate weight, considering all the circumstances of the case.<sup>19</sup> The following types of factors could affect the immigration officer's assessment of the information provided by the claimant about his or her identity or other aspects of the case; the existence of these kinds of factors would go to the weight which the CRDD panel assigns to the immigration officer's notes. A claimant who appears uncooperative may be fearful, tired, or have difficulty communicating. On the other hand, a claimant's uncooperativeness may reflect a desire by the claimant to mislead the immigration officer about the genuineness of his or her refugee claim.

## **B. REFERRAL TO THE CRDD**

**Current Practice.** *The claimant is referred to the CRDD. The claimant, together with counsel if the claimant has one, prepares the case in anticipation of the full hearing.*<sup>20</sup>

In any refugee claim before the Refugee Division, careful advance preparation by counsel and claimant of the evidence to be presented at the hearing is key to the successful

270 processing of the claim. Proper advance preparation is even more fundamental where a claimant is undocumented or improperly documented, since the claimant is obliged to prove his or her case without the benefit of proper documentation which could quickly corroborate identity or other elements of the claim. If the claimant and claimant's counsel are disorganized or disinterested in their preparation of the evidence during the advance stages of the claim, it may affect the panel's assessment of the case.

**If the evidence presented at the hearing in support of identity and other elements does not demonstrate reasonable diligence *before the hearing* in trying to overcome or address the lack of proper documentation, a panel may draw a negative inference from the lack of diligence at the time when it assesses a claimant's credibility.**

### ***1. THE PIF***

280 Part of completing the PIF (Personal Information Form) involves indicating all documents used to travel from the claimant's country of nationality or former habitual residence to Canada, whether these documents are genuine or false, and the present location of these documents. The claimant must also indicate all "travel and/or identity documents" in the claimant's possession when completing the PIF.

Where a claimant, in completing the PIF, improperly describes the nature and whereabouts of his or her personal documentation, the lack of a reasonable explanation for the improper completion of the PIF may lead a panel to draw a negative inference regarding identity or other elements when assessing the claimant's credibility.

290 It is possible that information which the claimant has provided in the PIF regarding destruction or disposal of personal documents will give rise to the application of subparagraph 69.1(10.1)(a) of the *Immigration Act*. Later sections of this Commentary will canvass this issue in detail (see **IV. C. HEARING THE EVIDENCE**, and **IV. D. RENDERING THE DECISION**).

### ***2. PREPARATION OF TESTIMONY***

300 Careful advance preparation by counsel and claimant of the evidence to be presented at the hearing includes proper preparation of the claimant's testimony. It is reasonable for panels to expect claimants to be fully prepared to testify regarding their identity, unless the panel has indicated that it will proceed otherwise. The claimant should also be prepared to provide a reasonable explanation for any change in his or her documented or undocumented status.

**3. INDEPENDENT CORROBORATION OF IDENTITY OR OTHER ISSUES**

310 The substantive evidentiary issues which arise in relation to independent corroborating evidence of identity or other elements of the claim are discussed in detail below in subsection **IV. C. HEARING THE EVIDENCE**. What is important to underline here is that CRDD members may expect claimants and counsel *to act diligently before the hearing* in obtaining or attempting to obtain independent corroborating evidence of identity or other elements of the claim, where such evidence is reasonably available.

Before the hearing, claimants and counsel may be able to arrange, or initiate the process of obtaining, such independent corroborating evidence of identity and possibly other elements of the claim as the testimony of witnesses (e.g. friends, relatives, members of the claimant's community, and expert witnesses), affidavits<sup>21</sup> of individuals who have personal knowledge regarding the claimant's identity or other elements of the claim, and any reliable identity or other personal information documentation that the claimant may have been able to obtain since first making a refugee claim.<sup>22</sup>

320 **4. IDENTIFYING AND RESOLVING ISSUES BEFORE THE HEARING**

**Where appropriate, the RCO and members should make full use of pre-hearing conferences for early identification / resolution of identity and other elements in cases where there is a lack of proper documentation.**

If identity or other elements of the claim cannot be resolved at a pre-hearing conference called for that purpose, claimants should be fully prepared to address these issues at the outset of the hearing.

**C. HEARING THE EVIDENCE**

330 **Current Practice.** *In most claims, panels begin the hearing by examining the evidence regarding the claimant's identity. Insofar as it is possible to do so, the panel completes the examination of identity before proceeding with an examination of the other elements of the claim.*

*Where lack of proper documentation makes it difficult for the panel to establish the claimant's identity at the outset of the claim, the panel defers the*

*examination of identity and proceeds with an examination of other elements of the claim.*

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*If necessary for the resolution of the claim, the panel later returns to examination of identity.*

***1. PROCEDURAL ISSUES***

***1.1 Testimony on identity***

Whether a claimant is properly documented or not, CRDD panels generally begin their exploration of the claim by eliciting evidence with respect to identity. Satisfactory proof of identity, in its broadest sense, can be pivotal to the outcome of a refugee claim, since failure to prove one's identity can be an indication of lack of credibility, or can have an impact on the ability of the claimant to prove other elements of the claim.

**Unless the circumstances of a particular case dictate otherwise, CRDD panels may expect claimants to be fully prepared to testify as to their identity at the outset of the hearing.**

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***1.2 Postponements and adjournments***

Subsection **IV. B** above, **REFERRAL TO THE CRDD**, notes that CRDD members may expect claimants and counsel *to act diligently before the hearing* in obtaining or attempting to obtain independent corroborating evidence of identity or other elements of the claim, where such evidence is reasonably available.

**Panels may conclude that a postponement or adjournment for the purpose of obtaining independent corroborating evidence of identity or other elements is unmerited, if a claimant could have acted before the hearing to obtain or attempt to obtain such evidence, but does not offer a reasonable explanation for the lack of diligence in doing so.**

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*1.3 Focus on examination of identity*

While identity is very often the first issue on which the panel will want to hear evidence, evidence on other elements of the claim such as the grounds of the definition may tend to be presented at the same time. This is because for both properly and improperly documented claimants, the evidence led regarding identity often also goes to the determination of other elements of the claim, and the reverse may also be true. Thus, while conceptually identity is separate from these other elements of a claim, on a practical level the evidence regarding identity and other elements may be presented together.

**To the extent that it is appropriate and efficient to do so, panels should attempt as much as possible to focus on the question of identity at the outset of the claim, and to examine evidence regarding other elements of the claim afterwards.**

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*1.4 Deferring examination of identity*

This subsection *HEARING THE EVIDENCE* advocates that panels examine the issue of the identity of claimants lacking proper documentation at the outset of the hearing. Given the possible impact that lack of proper documentation can have on the successful establishment of a claimant's identity and other elements of a claim, it is clearly preferable for CRDD panels to be able to satisfy themselves on the issue of identity as early on as possible during the hearing. At the same time, this Commentary recognizes that panels may be faced with situations where it may be fruitless to continue examination on identity or certain other elements of the claim, where a claimant lacks proper documentation.

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There may be any number of reasons for the fact that a claimant lacking proper documentation is unable to readily establish identity. For example, the claimant may have only his or her sworn testimony to rely on to establish identity and although well-intentioned, the claimant may simply be a poor witness, or possibly be fearful of the perceived consequences of lacking proper documentation. Or, it may be that a claimant is deliberately attempting to mislead the panel with evasive, contradictory or incomplete answers regarding identity.

**Where a CRDD panel considers that it is unable after a reasonable period of time to reach a conclusion regarding the claimant's identity, it is both advisable and desirable to inform the claimant that the panel is deferring examination of identity to a later point in the hearing.**

390 Where the panel's decision is likely to be negative for reasons unrelated to the determination of  
identity, it may be possible for the panel to resolve the claim without further revisiting  
identity. In such a case, the panel should make clear either at the hearing or in its reasons  
that its decision is based on factors unrelated to the question of identity. Note that a finding  
of this nature differs from a conclusion that a claimant is not a refugee on the basis that the  
panel cannot establish on a balance of probabilities the claimant's identity.<sup>24</sup> In order for a  
panel to reach such a finding, it would be necessary for the panel to return to the issue of  
identity that it had deferred earlier in the hearing, to notify the claimant that it remained  
unsatisfied with respect to proof of identity, and to then allow the claimant a final  
400 opportunity to satisfy the panel on the issue.

**Depending on the facts of the claim, it may be possible for the panel to resolve the claim without further examination of the issue of identity.**

## **2. EVIDENTIARY ISSUES**

### **2.1 A reasonable explanation for the lack of proper documentation**

Members may expect claimants to provide a reasonable explanation for their lack of proper documentation. More generally, to quote the UNHCR *Handbook*, the applicant "should be asked to give a coherent explanation of all of the reasons invoked in support of his [or her] application for refugee status and he [or she] should answer any questions put to him."<sup>25</sup>

**The absence of a reasonable explanation for the lack of proper documentation may lead members to draw a negative inference when assessing a claimant's credibility or when determining the substantive basis of the claim.<sup>26</sup>**

410 Two particular situations, among others, require claimants to provide a reasonable explanation for their lack of proper documentation: a) the claimant has destroyed or disposed of documents in his or her possession, either before or after arriving in Canada and making a refugee claim; and b) the claimant has used fraudulent or otherwise improper documents for purposes relating to the determination of his or her refugee claim.

420        **2.1.1 Destruction or disposal of documents.**        Regardless of whether or not  
subparagraph 69.1(10.1)(a) of the *Immigration Act* applies in a particular case (see  
discussion below), panel members have both the power and the duty to inquire into the  
reasons for destruction or disposal of documents as a factor possibly affecting a claimant's  
credibility or the substantive elements of the claim such as identity.<sup>27</sup>

430        *Attakora*<sup>28</sup> and certain later decisions<sup>29</sup> of the Federal Court are important guideposts  
regarding the nature of inferences as to credibility which can appropriately be drawn where  
the claimant has destroyed or disposed of documents. *Attakora* states the proposition that a  
negative inference as to credibility cannot be drawn from the simple fact of having  
destroyed or disposed of documents. In *Attakora*, the Immigration Appeal Board had  
concluded without explaining why that the claimant's credibility was weakened because the  
claimant had destroyed his false travel documents while on the plane to Canada. Justice  
Hugessen held that:

440                [t]here is certainly nothing inherently incredible in a refugee saying that  
he has destroyed false travel documents in order to avoid detection and  
arrest once they have served their purpose. In the circumstances of the  
case, the destruction of such documents could not have had any conceivable  
relevance to any issue which the Board had to decide. I can only conclude  
that the Board's insistence upon its significance is founded upon some  
erroneous view of the law. Does the Board think that only persons who  
arrive here with their travel documents can be refugees? Or that those who  
arrive with false documents have some obligation to preserve them? (p.169)

450        The case of *Rahnema*<sup>30</sup> is significant for its remarks regarding the standard which should be  
applied by the CRDD in concluding that the reason which a claimant provides for  
destroying documents is implausible. The Iranian claimant had explained that on the advice  
of a smuggling agent, he destroyed a false Iranian passport after passing through Philippine  
emigration controls on his way to Japan for his trip to Canada. The Court found that the  
panel's conclusion that the claimant's explanation was implausible amounted to an error of  
law because the panel had applied its own standard of analysis and judgment "rather than a  
reasonable standard of one similarly situated to the Applicant."<sup>31</sup>

460        **The "unanimity provision"**. In eliciting from claimants the reasons for destruction  
or disposal of documents in their possession, the panel may extend its focus to examination  
of the possible application of subparagraph 69.1(10.1)(a) of the *Immigration Act*, one of  
three unanimity provisions.<sup>32</sup> This subparagraph states that when a two-member panel  
reaches a split decision as to whether the claimant is a refugee, the negative decision will  
prevail where both members agree that "there are reasonable grounds to believe that the  
person, *without valid reason*, has destroyed or disposed of identity documents that were in  
the person's possession."<sup>33</sup> [emphasis added].

**Panels should be aware that for subparagraph 69.1(10.1)(a) of the**

***Immigration Act to apply in a given case, the following factors must be present: there must be a split decision between the members as to whether the claimant is a refugee, and both panel members must agree that a) there are reasonable grounds to believe that the claimant has destroyed or disposed of documents in his or her possession; and b) the claimant did so without valid reason.***

Where the panel considers that the unanimity provision may possibly apply to the facts of a case, the panel must notify the claimant or claimant's counsel of this fact, so that the claimant has the opportunity to make representations regarding its applicability.<sup>34</sup>

470 A panel's conclusion that the unanimity provision applies in a particular case occurs at the time that the panel renders its decision. Both panel members may have agreed earlier in the CRDD process that there has been destruction or disposal of documents and that this was done without valid reason, but the unanimity provision only applies when and if the panel members are divided on the ultimate question of whether the claimant is a Convention  
480 refugee. Subsection **IV. D** below, **RENDERING THE DECISION**, discusses the case law interpreting the application of this provision.

**The impact of Bill C-49.** A bill that is currently before Parliament, *Bill C-49*,<sup>35</sup> contains a provision which, if enacted, would reduce the quorum of CRDD panels from two members to one. A consequential provision contained in the Bill would revoke the unanimity provisions currently contained in the *Immigration Act*. Revocation of the unanimity provisions would obviously be necessary since these provisions would have no meaning in a revised legislative scheme where a single panel member constitutes the quorum  
480 of the Refugee Division.

Revocation of the unanimity provisions would not mean that destruction or disposal of documents is no longer an issue for the Refugee Division. Rather, single-member panels would have the same general power and duty as current two-member panels to consider whether the claimant has offered a reasonable explanation for the destruction or disposal of documents. The same principles of interpretation as those already discussed above at line 422 under the heading **2.1.1 Destruction or disposal of documents**, would apply.

490 **2.1.2 Use of improper documents.** The claimant may freely volunteer the fact that he or she made use of improper documentation for the purposes of his or her claim. Depending on the reasonableness of the explanation which the claimant offers for being improperly documented, there may or may not be valid reasons for questioning the claimant's evidence on this point.<sup>36</sup>

Where it comes to light before or during the hearing that a claimant is improperly documented and the claimant has not volunteered this information before its discovery, the fact that he or she was not forthright with the information may lead the panel to draw a negative inference when assessing the claimant's credibility.<sup>37</sup>

500      **2.2 Sufficient credible or trustworthy evidence**

In the absence of proper documentation in support of identity and other elements of the claim, a claimant will be obliged to rely on his or her testimony, and on any other means of independently corroborating the facts of his or her case, if such means are reasonably available,<sup>38</sup> in order to discharge the burden of proving the claim.

**2.2.1 Sworn Testimony.** Where the claimant relies on his or her sworn testimony or on that of other witnesses to prove identity or other elements of the claim, the principle set out in *Maldonado*<sup>39</sup> applies. That is, sworn testimony is presumed to be true, unless there is valid reason to doubt its truthfulness.

510      "Valid reason to doubt its truthfulness" may arise during the hearing where, for example, there is a discrepancy between what the port-of-entry notes indicate about the claimant's identity or other elements of the claim, and the claimant's testimony at the hearing.

Another example of a situation where there may be valid reasons to doubt the truthfulness of testimony regarding identity or other elements of the claim is that discussed under **2.1.2 Use of improper documents** at line 294 above, where it has come to light before or during the hearing that the claimant is improperly documented, and the claimant has not volunteered this information before its discovery.<sup>40</sup>

520      **2.2.2 Independent Corroborating Evidence.** There is no legal requirement that the claimant provide independent documentary or other corroboration of identity or other elements of a claim, insofar as his or her account with respect to these elements is uncontradicted and credible.<sup>41</sup> This being said, it is worthwhile referring to the direction given in the UNHCR *Handbook*<sup>42</sup> to applicants (claimants) and their examiners regarding the process to be followed in ascertaining the facts of a case. The *Handbook* states at paragraph 205 that the applicant should

530      ... (ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence.<sup>43</sup>

Where a claimant categorically refuses to make attempts to obtain corroborating evidence regarding identity and where the panel is aware that such evidence could have reasonably been obtained, the CRDD may draw a negative credibility inference from such a refusal.<sup>44</sup> Even where there is no categorical refusal to provide independent corroborating evidence, the CRDD may draw an adverse inference regarding credibility where the claimant's responses to the panel on the question of corroborating his or her identity indicate an unreasonable unwillingness to produce evidence.<sup>45</sup>

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

Natural justice requires that where a claimant's evidence (whether his or her own testimony or some independent corroborating evidence) is offered in support of identity or some other element of the claim, and that evidence is put into doubt by the introduction of some other evidence, the panel must provide the claimant with a reasonable opportunity to explain the discrepancy, inconsistency, or contradiction.<sup>46</sup>

#### ***D. RENDERING THE DECISION***

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*Current Practice. Determination by the CRDD: Notwithstanding the lack of proper documentation, has the claimant discharged the burden of proving his or her claim?*

**In determining whether a claimant lacking proper documentation has discharged the burden of proof with respect to identity and other elements of the claim, CRDD panels are encouraged to employ the following conceptual analysis<sup>47</sup> and to consider the principles applicable at each step of that analysis.**

#### ***1. IN ASSESSING THE EVIDENCE WHICH HAS BEEN PRESENTED, DETERMINE THE CREDIBILITY AND RELIABILITY OF THE EVIDENCE OFFERED, AND DETERMINE ITS PROBATIVE VALUE.***

560

##### ***1.1 Credibility of the evidence offered***

*Goudi*<sup>48</sup> reiterates, in the context of a claim made by undocumented refugee claimants who were unable to satisfy the CRDD as to their identity, the general proposition that questions of credibility and weight are within the jurisdiction of the CRDD as the trier of

fact in refugee claims. When a tribunal's impugned finding relates to the credibility of a witness, the Court will be reluctant to interfere.<sup>49</sup>

Credibility findings with respect to identity, like all other credibility findings, cannot be based on a "microscopic examination".<sup>50</sup>

570 While it has been made clear earlier in this Commentary that there is no legal requirement for corroborating evidence of identity or other elements of the claim where a claimant is credible and his or her story is uncontradicted, if the panel considers the claimant not credible, "some form of corroboration or independent proof will be required to 'offset' the Board's negative conclusion on credibility."<sup>51</sup>

Where the CRDD finds the claimant to be bereft of credibility, "in most cases, it will necessarily follow that the Board will not give the applicant's documents much probative value, unless the applicant has been able to prove satisfactorily that the documents in question are truly genuine."<sup>52</sup>

580 **1.2 Reliability**

Panels should be aware that the following types of factors, among others, may have an influence on the reliability of the evidence offered on issues such as identity where a claimant lacks proper documentation. At the same time, panels should keep in mind that the technical rules of evidence do not apply in CRDD proceedings, and so the evidence offered in support of identity and other elements where the claimant lacks proper documentation may well contain some of the characteristics listed below (e.g. hearsay, opinion evidence) but still be found reliable:

- 590
- regarding a witness's testimony on behalf of or against the claimant: whether the witness's testimony is based on hearsay; the witness's relationship to the claimant; whether the witness has any interest in the outcome of the hearing; the extent to which the witness's testimony is based on opinion and inference.
  - regarding evidence which may be described as "self-serving", such as an affidavit attesting to the identity of the claimant: the relationship of the author to the party producing the evidence; whether the author has any interest in the outcome of the hearing; whether the evidence shows any apparent bias or contrived appearance.

**1.3 Probative value**

600 At this point, the principal question where a claimant lacks proper documentation will be to what extent the evidence offered in support of or disproving identity or some other element helps in determining the matter of identity or other elements.

*Fajardo*<sup>53</sup> underlines that the technical rules of evidence, which would otherwise require that the deponent of an affidavit be available for cross-examination for the contents of the affidavit to be admissible, do not apply in the CRDD context to prevent a panel from giving

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610 weight to evidence contained in an affidavit. In order to corroborate her testimony regarding the ground of political opinion, the claimant had submitted the affidavit of a nun who deposed as to harassment of and threats to the claimant . The CRDD gave "very little weight" to the affidavit evidence, stating that although it was "convinced of the sanctity of the Sisters, [t]hey, like everyone, must be tested regarding the value of their evidence." The Federal Court of Appeal held that this was an error. Subsection 68(3) of the *Immigration Act* empowers the CRDD to base its decision on any evidence adduced in the proceedings considered credible or trustworthy in the circumstances. The CRDD could not discount the evidence of "patently respectable deponents" where, "in the very nature of the process, the deponents are not available to be examined."

**2. DETERMINE WHAT FACTS HAVE BEEN ESTABLISHED ON THE BALANCE OF  
PROBABILITIES.**

620 The issue for the panel at this stage of its deliberations is whether there exists enough credible or trustworthy evidence of a reliable nature to satisfy the panel that the elements of the claim, such as the claimant's alleged identity, are more likely than not to be true.

In *Shanmuganathan*,<sup>54</sup> the CRDD found much of the claimant's testimony regarding his travel route to Canada and his travel documents (a Sri Lankan passport, allegedly altered), to be not credible. On the issue of identity, the panel held that given the above credibility findings and in the absence of any updated pieces of evidence proving current residency or citizenship of the claimant in Sri Lanka, the panel could conclude no more than that the claimant was born in Sri Lanka and had lived and worked in Colombo. After 1987, the claimant "might have lived anywhere in the world." Because of this, the claimant failed to  
630 establish that he was in Colombo or even in Sri Lanka within the timeframe alleged by him.

**3. AS APPROPRIATE, GIVE THE CLAIMANT THE BENEFIT OF THE DOUBT .**

In assessing whether a claimant lacking proper documentation has met the standard of proof, the panel may determine that there is still a lack of evidence regarding identity or other elements of the claim. The panel should consider whether the circumstances of the case (including the reasons for the claimant's lack of proper documentation) dictate that the claimant should be given the benefit of the doubt with respect to the evidence brought in support of identity or other elements in question.

640 **4. APPLY THE RELEVANT RULES OF LAW TO THE FACTS AS FOUND, IN ORDER TO DRAW  
THE APPROPRIATE CONCLUSIONS IN LAW.**

For the purposes of this Commentary, the relevant rule of law to be applied is subparagraph 69.1(10.1)(a) of the *Immigration Act*.

**4.1 Unanimity provision**

650 The leading case on the interpretation of subparagraph 69.1(10.1)(a) is *Gebremariam*.<sup>55</sup> In that case, the 15 year-old claimant travelled on a false Ethiopian passport to the United States. The claimant's mother had told her that a certain person would take care of her when she arrived in Washington. This person told her to give him her passport, which she did. When she later asked the man to return the passport, he refused. She arrived  
650 undocumented in Canada. Justice Muldoon for the Court made several important holdings with respect to subparagraph 69.1(10.1)(a):

1) He adopted the *obiter* reasoning in the earlier Federal Court decision of *Sebastiampillai* that "disposal of identity documents" in the subparagraph is broad enough to encompass the disposal of both genuine and fraudulent identity documents. Justice Muldoon also agreed with the reasoning that "[s]uch an interpretation is in keeping with what appears to be the purpose of the provision (to penalize individuals who, without a valid reason, dispose of travel documents)."

660 2) What constitutes "valid reason" is a variable standard.<sup>56</sup> There will be a lower standard of "valid reason" for "a 14- or 15 year-old girl in a bewildering, strange country, who has been instructed to put her trust in the person who would take care of her", than for a "more worldly-wise or self-assured adult".<sup>57</sup> "[T]he words which Parliament chose [in subparagraph 69.1(10.1)(a)] , 'disposed of / s'en est departi' connotes intention, or an act of will, or as noted in *Petit Robert* '(surtout une attitude)'. They are not words connoting victimization by theft, robbery, trickery, or intimidation." (Pages 8 and 9).

670 3) Importantly, Justice Muldoon goes on to state, "If one were to enact something ... to suppress refugee claimants' lying, deceit and evasion of the law, one would probably provide something like this: In any instance in which the person who has ceased to have possession of identity documents claims to have lost possession by another person's theft, robbery, intimidation or trickery, the person who had such documents bears the onus of proving such theft, robbery, intimidation or trickery. But Parliament has not enacted that, either. This Court will not purport to legislate where Parliament has not legislated." (Page 9)

680 Justice Muldoon in *Gebremariam* did indeed hold that "disposal" under subparagraph 69.1(10.1)(a) connotes intention or an act of will, but he went on to conclude that Parliament has not gone so far as to legislate to "suppress refugee claimants' lying, deceit and evasion". In doing so he noted the limits to the scope which should be given to the subparagraph. Moreover, in every case where the subparagraph applies, panels must make a finding that the destruction or disposal was "without valid reason". It is certainly conceivable for a panel to conclude that a claimant has willfully disposed of an identity document by passing the document back to a smuggler, and to conclude that it was not a valid reason to do so simply because the smuggler directed him to do so, but these actions do not necessarily connote bad faith. There are certainly situations where destruction or disposal of documents is done in bad faith, but whether this is so must be determined in  
690 each case, and cannot be automatically inferred by the panel.

This same reasoning would apply in an analysis by the CRDD of the impact of destruction or disposal of documents where the unanimity provision does not apply (e.g. where only one of the panel members considers that there has been destruction or disposal of documents). Thus, a panel member may conclude that there has been willful destruction or disposal of documents, but the fact that it was willful does not automatically imply bad faith.

**The fact that a claimant may be able to offer a reasonable explanation for the destruction or disposal of personal documents means that panels may not *automatically* infer bad faith from the simple fact of having destroyed or disposed of such documents.**

700 In a particular case, members may conclude that the willful act was done in bad faith, but members can only reach such a conclusion after having considered whether the explanation offered for the willful destruction or disposal of documents was reasonable in the circumstances.

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

**5. DETERMINE WHETHER THE CLAIMANT HAS DISCHARGED THE BURDEN OF PROVING THE CLAIM.**

710 This Commentary focuses on only a part of the analysis involved in determining whether a claimant is a Convention refugee: that is, has the undocumented or improperly documented claimant brought sufficient credible or trustworthy proof of identity and certain other elements of a claim, and what is the impact of the unanimity provision on the factual conclusions reached in a particular case?

720 Consideration of these issues alone does not allow a panel to determine whether the claimant has succeeded in discharging the burden of proving the claim. In every claim, there are clearly other evidentiary, legal, and procedural issues involved in the overall determination of refugee status. These other issues must be considered together with the specific evidentiary and procedural issues addressed in this Commentary, before the panel can conclude that an undocumented or improperly documented claimant has discharged the overall burden of proving his or her claim.

## ENDNOTES

<sup>1</sup> This Commentary contains certain working definitions of the terms "undocumented", "improperly documented", and "properly documented". For these and other working definitions, please see Section III, **Definitions**, at page 4.

<sup>2</sup> The IRB does not currently gather statistics regarding a claimant's documented or undocumented status. Some statistics on the incidence of improperly documented arrivals in Canada are, however, available from the Department of Citizenship and Immigration ("CIC"), Intelligence and Interdiction Division. Since 1991, CIC has gathered statistics regarding the number of improperly documented individuals arriving in Canada at various airport ports of entry. CIC defines "undocumented arrivals" as individuals who arrive at a port of entry without any documents of any kind (including travel documents) to identify themselves. For CIC purposes, "improperly documented arrivals" include undocumented arrivals, as well as individuals who arrive in Canada with documents that do not belong to them, or have been altered in some manner to make them fraudulent. "Improperly documented" does not include an individual who has arrived with proper identity and travel documents, but without a visa or another immigration document required for entry or admission to Canada.

No direct link can or should be drawn between the CIC statistics below and the number of refugee claimants who are referred each year to the CRDD. In interpreting the statistics below, CIC points out that of the total number of improperly documented individuals who arrive in Canada each year, a very small percentage have come to Canada for reasons unrelated to Convention refugee status. Also, some percentage of improperly documented arrivals who make a refugee claim to an immigration officer do not appear later for examination of their eligibility for referral to the CRDD. These individuals are therefore obviously not among those who are referred to the CRDD. Lastly, the statistics below reflect only airport ports of entry and do not include improperly documented arrivals at other border ports of entry. The CIC statistics are nonetheless relevant as an indication of the fact that a significant majority of improperly documented arrivals go on to make refugee claims before CIC immigration officers.

<b>YEAR</b>	<b>TOTAL NUMBER OF IMPROPERLY DOCUMENTED ARRIVALS (AIRPORT* PORTS OF ENTRY)</b>
1991	6569
1992	5074
1993	3005
1994	3396
1995	4466
1996	4082**

\* For the years 1991-1994, the totals reflect improperly documented arrivals at six airport locations as follows: Gander, Mirabel, Pearson I, Pearson II, Pearson III, and Vancouver. The 1995 total includes

Calgary Airport (reporting as of August 1995), and the 1996 figure includes Halifax (reporting as of November 1996).

\*\* This total may be adjusted slightly upon final editing.

<sup>3</sup> In this Commentary, "credible" and "trustworthy" are used interchangeably, i.e. evidence which is credible is also trustworthy, and vice versa. Whether the credible or trustworthy evidence that is presented in a refugee claim is also *reliable* depends on the circumstances in which the evidence arose. For further explanation of the relationship between the terms "credible or trustworthy" and "reliability", see the IRB Legal Services draft training module on "Evidence", January 1992 (available on SHARENet).

<sup>4</sup> In a recent case, *Paranawithana, Tissa Rupananda v. M.C. I.* (F.C.T.D., no. IMM-670-96), Heald, November 21, 1996, the Federal Court noted that "[i]t is a "given" in refugee hearings that, at the outset of the proceedings, the credibility of the applicant's testimony is in issue." (page 3)

<sup>5</sup> See endnote 3, *supra*.

<sup>6</sup> See **Definitions**, section III. "Identity" is given a very broad definition in this Commentary.

<sup>7</sup> There are some qualifications to this statement, e.g. claimants may be required to explain why they did not claim refugee status in a country through which they passed or in which they stayed, where the country is a signatory to the *1951 Convention Relating to the Status of Refugees*.

<sup>8</sup> In *Kante, Abdoulaye v. M.E.I.* (F.C.T.D., no. IMM-2585-93), Nadon, March 23, 1994, Justice Nadon held at page 2 that:

The law is clear that the burden of proof lies with the Applicant, i.e. he must satisfy the Refugee Division that his claim meets both the subjective and objective tests which are required in order to have a well founded fear of persecution. Consequently, an Applicant must come to a hearing with all of the evidence that he is able to offer and that he believes necessary to prove his claim.

See also *Rahmatizadeh, Ali v. M.E.I.* (F.C.T.D., no. IMM-2696-93), Nadon, April 6, 1994, at page 3, where Justice Nadon made the same point:

It is up to [the applicants], and [the applicants] alone, to introduce into evidence all the material that they consider to be essential to establish that their claim is well-founded.

<sup>9</sup> *CRDD - Instructions 96-01*. Under the heading "D. General Principles", the *Instructions* clarify that:

1. Acquisition of information by the Refugee Division in no way absolves parties to proceedings before the Division of their responsibility to present evidence in support of their case.

<sup>10</sup> Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, January 1992.

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<sup>11</sup> The relevant UNHCR *Handbook* paragraphs read as follows:

196. Often ... an applicant may not be able to support his statements by documentary or other proof, and cases where an applicant can provide evidence of all of his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests with the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.

197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the claimant.

<sup>12</sup> The standard of proof applicable to the *facts* established by the evidence is distinguished from 1) the standard of proof applicable to the *legal issue* of whether there exists an objective basis to the fear of persecution, where the standard is a “reasonable chance” or “serious possibility”, and 2) the standard of proof applicable to exclusion clause 1F) where the standard is “serious reasons for considering”.

<sup>13</sup> *Supra*, endnote 10.

<sup>14</sup> *Supra*, endnote 10. Note that the Supreme Court of Canada in *Chan v. M.E.I.*, [1995] 3 S.C.R. 593, remarked on the proper application of the principle of “benefit of the doubt”. The majority in *Chan* held that it is not appropriate to apply the benefit of the doubt where the claimant’s allegations run contrary to generally known facts and the available evidence.

<sup>15</sup> “Minister's Information” is defined in the *CRDD Instructions for the Acquisition and Disclosure of Information For Proceedings in the Refugee Division*, *supra*, endnote 9, as follows:

**“Minister's Information”** means information pertaining to individual claimants acquired by officers of the Department of Citizenship and Immigration during the course of fulfilling their responsibilities as set out in the *Immigration Act* and *Immigration Regulations, 1978*. This information includes one or more of the following:

- i. copies of any identification or travel documents
- ii. standard form reports completed in relation to the claim by the responsible Immigration Officer or Senior Immigration Officer at the port-of-entry or inland office where the claim is received;
- iii. case claim highlights;
- iv. copies of examining officers' completed question and answer forms;
- v. copies of transportation tickets and any other itinerary information;

- vi. certified copies of any documents (including identity documents) in the possession of the claimant at the time of entry;
- vii. information from Canadian visa offices overseas pertaining to any application for a Canadian visa made by the claimant, including copies of the visa officer's notes pertaining to such application;
- viii. results of Royal Canadian Mounted Police ("RCMP") identification and criminality verification; and
- ix. information gathered by the Department of Citizenship and Immigration for the purpose of determining whether the Minister will intervene at the hearing into a claim, regardless of whether the Minister does intervene.

<sup>16</sup> *Rahman, Saidur v. M.E.I.* (F.C.T.D., no. IMM-2078-93), Denault, June 10, 1994.

<sup>17</sup> *Mongu, E-Beele v. S.G.C.* (F.C.T.D., no. IMM-5060-93), Richard, October 12, 1994. See also *Boika, Mboyo v. S.G.C.* (F.C.T.D., no. Imm-5749-93), Richard, October 12, 1994.

<sup>18</sup> In *Singh, Amrik v. M.C.I.* (F.C.T.D., no. IMM-2835-95), Campbell, April 10, 1996, the Court questioned the reliability of the SIO's notes. The SIO was called as a witness but admitted that she had no recollection of the claimant. One of the sheets of notes taken by the SIO, although dated, was not necessarily prepared on that date. The Court remarked that the "circumstances under which [these] notes were taken is sloppy at best and the degree of reliance placed on them by the Board is I think frankly misplaced." ( page 2)

<sup>19</sup> *Ibid.* The claimant testified that he had been afraid and tired at the time of the interview, and therefore had not revealed everything to the SIO. The Board found the SIO credible and disbelieved the claimant. The Federal Court stated that this was very close to being an error of law and it was at any rate "very poor practice" on the part of the Board to find on pure faith that the SIO's notes were accurate. In preferring the notes of the SIO over the claimant's testimony, the Division acted without knowledge of the context of the interview, or of the degree to which the person involved understood the questions being put to him.

<sup>20</sup> Although it is possible that a claimant who is undocumented will be considered for the expedited process, it should be recognized that cases of expedited undocumented claimants will be very rare. Proper documentation is one criterion among others which must normally be present for a case to be expedited.

<sup>21</sup> Where the claimant intends to submit an affidavit in support of his or her claim, the claimant should be prepared to have the affiant available for cross-examination, if this is reasonably possible. But see *Fajardo v. M.E.I.* (1994), 21 Imm. L.R. (2d) 113 (F.C.A.), where the Court held that the fact that the affiant could not be cross-examined due to the very nature of the process (the affiant was in the claimant's country of origin) did not render the affidavit evidence inadmissible. Rather, the fact that the claimant could not be cross-examined was a factor going to the *weight* which the tribunal could give to the contents of the affidavit.

<sup>22</sup> In addition to these sources of independent corroborating evidence, the documentary evidence (e.g. on country conditions, human rights practices) may occasionally serve as an independent means of corroborating identity (e.g. the members of a coup are identified in a newspaper article). On the other hand, the absence of corroboration in the documentary evidence of an element such as identity may

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occasionally lead a panel to draw a negative inference when assessing credibility: *Boateng, Ewurama v. M.E.I.* (F.C.T.D., no. 92-A-6524), McKeown, June 1, 1993.

<sup>23</sup> The granting of a postponement or adjournment, while subject to the requirements of natural justice, is at the discretion of the Refugee Division. Subsection 69(6) of the *Immigration Act* states that "[t]he Refugee Division shall not adjourn any proceedings before it, unless it is satisfied that an adjournment would not unreasonably impede the proceedings." Rule 13(4) of the CRDD Rules lists the following factors, among others, as those which the Refugee Division may take into consideration in deciding if an adjournment would unreasonably impede the proceedings: "(a) the efforts made by the parties to proceed expeditiously"; and "(e) the amount of time already afforded the parties for preparation of the case."

<sup>24</sup> See, e.g., CRDD A95-00602, Showler, Mawani, August 30, 1996.

<sup>25</sup> Paragraph 205 of the UNHCR *Handbook* reads in part:

(a) The *applicant* should:

(i) Tell the truth and assist the examiner to the full in establishing the facts of his case.

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

(iii) Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. *He should be asked to give a coherent explanation of all of the reasons invoked in support of his application for refugee status and he should answer any questions put to him.* [emphasis added]

<sup>26</sup> *Thuraiajah, Uthayasankar v. M.E.I.* (F.C.T.D., no. IMM-2339-93), Tremblay-Lamer, March 11, 1994 is an example of a case where the Refugee Division panel failed to consider the claimant's reasonable explanation as to why he did not have identity documents. The claimant had testified that he left Sri Lanka on a passport obtained in that country although the claimant's parents and the rest of his family then resided in India. The Federal Court held that with respect to the issue of identity, "the tribunal's reasons are unclear, confusing and place undue emphasis on the fact that the claimant's identity documents were not fully in order. The tribunal failed to consider the claimant's reasonable explanation as to why he did not have his identity documents." (page 4)

See, however, *Balayah, Khadar Yusuf v. M.C.I.* (F.C.T.D., no. A-1395-92), Simpson, July 29, 1996, where the Federal Court found no error with the panel's conclusion that it was implausible that the claimant would leave behind his own two identity documents, a Somalian passport and a current driver's licence. In so holding, the Court appeared to be making its own finding as to the implausibility of the claimant's explanation, stating as follows:

I have concluded that, even accepting that the applicant did not intend to leave Somalia when he left Mogadishu, his explanation and the explanation about Somali practice [counsel had submitted documentary evidence stating that Somalis do not rely on documents and identify themselves to one another orally with a

description of their lineage] are not satisfactory. They simply do not deal with the situation during war time, when one would expect the need to provide rapid identification. In all the circumstances, I think it was implausible that the applicant would leave behind both his passport and driver's licence and I can find no error in the Board's treatment of this issue. (page 6)

The fact that credibility is a pivotal issue where claimants lack proper documentation is clearly illustrated by the case of CRDD M95-01129, -01130, Hum, Doray (dissenting), July 23, 1996. Member Hum accepted the claimant's explanation that she lacked an Ahmadi membership certificate because she was a born Ahmadi and had not registered. Although the claimant lacked specific knowledge regarding her Ahmadi community, member Hum gave the claimant the benefit of doubt, in light of the credibility and coherence of her evidence as a whole. In so finding, the member noted that Ahmadi hold extreme traditionalist views regarding the status of women, and so insist on the seclusion of Ahmadi women in Pakistan. Member Doray, in dissent, found the claimant to be not credible.

<sup>27</sup> An exception to this rule may exist where a panel is able to dispose of a claim on grounds unrelated to and not dependent on the fact that the claimant disposed of or destroyed documents.

<sup>28</sup> *Attakora v. M.E.I.* (1989), 99 N.R. 168 (F.C.A.).

<sup>29</sup> See *Thuraiajah, supra*, endnote 26. See also *Farah, Kalthoum Abdirahman v. M.E.I.* (F.C. T.D., no. 92-A-6032), Reed, May 26, 1993., where the Court cited *Attakora* at length and referred also to the holding in the earlier Federal Court decision in *Salamat v. I.A.B.* (1989), 8 Imm. L.R. (2d) 59 (F.C.A.). Justice Reed distinguished facts of *Farah* from these cases, finding that the Somali claimant did not destroy her false Ethiopian passport immediately after escaping from her country, but used it to enter the United States and only destroyed it later in the States before coming to Canada.

<sup>30</sup> *Rahnema, Massoud v. S.G.C.* (F.C.T.D., no. IMM-1740-93), Gibson, October 15, 1993.

<sup>31</sup> *Ibid.*, at page 11.

<sup>32</sup> Subparagraphs 69.1(10.1)(b) and (c) are not relevant to the discussion in this Commentary.

<sup>33</sup> The relevant portion of subsection 69.1(10.1) is as follows:

(10.1) Where, with respect to any person who claims to be a Convention refugee, both members of the Refugee Division are satisfied

(a) that there are reasonable grounds to believe that the person, without valid reason, has destroyed or disposed of identity documents that were in the person's possession,

...

then, in the event of a split decision on the claim, the decision not favorable to the person shall be deemed to be the decision of the Refugee Division.

<sup>34</sup> *Sebastiampillai, Mary Jenita v. M.C.I.* (F.C.T.D., no. IMM-866-94), Reed, December 4, 1994.

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<sup>35</sup> *An Act to authorize remedial and disciplinary measures in relation to members of certain administrative tribunals, to reorganize and dissolve certain federal agencies and to make consequential amendments to other Acts.*

<sup>36</sup> See *Shanmuganathan, Kanagasabai v. M.C.I.* (F.C.T.D., no. IMM-2019-94), Muldoon, May 2, 1995, where the Federal Court Trial Division denied the application for judicial review. The CRDD had concluded, among other things, that the claimant's allegation that he was travelling on a false passport was untrue.

<sup>37</sup> In CRDD U92-04742, -04743, -04744, -04766, -04767, Rotman, Ariemma, April 5, 1993, the panel arranged for forensic testing of letters purporting to confirm the claimants' membership in the Ahmadi sect of Islam. The testing showed that the letters were forgeries. Since the crux of the claim rested on the claimants' fear of persecution due to their Ahmadi faith, the panel concluded that there was no credible or trustworthy evidence upon which to find the claimants to be Convention refugees.

<sup>38</sup> See Subsection **IV. B, REFERRAL TO THE CRDD**, for a discussion of the pre-hearing aspects of obtaining independent corroborating evidence of identity and other elements of the claim.

<sup>39</sup> *Maldonado v. M.E.I.* (1994), 23 Imm. L.R. (2d) 220 (F.C.T.D.).

<sup>40</sup> See endnote 37 above.

<sup>41</sup> *Ovakilimoglu v. M.E.I.* (1983), 52 N.R. 67 (F.C.A.); *Lachowski v. M.E.I.* (1993), 18 Imm L.R. (2d) 134 (F.C.T.D.); *Ahortor v. M.E.I.* (1993), 21 Imm L.R. (2d) 39 (F.C.T.D.).

<sup>42</sup> *Supra*, endnote 10.

<sup>43</sup> In regard to procuring additional independent corroborating evidence, see *Osman, Abdirizak Said v. M.E.I.* (F.C.T.D., no. IMM-261-93), Nadon, December 22, 1993. In that case, the Federal Court allowed the application for judicial review on the basis that the Refugee Division had failed to consider certain corroborative evidence for one of the stories advanced by the claimant. Apart from the ultimate decision on the judicial review, what is of interest here are the Court's comments in *obiter* regarding the claimant's failure to take steps to obtain independent corroborating evidence on identity, where such evidence was apparently available. The Court reminded the claimant that he had the burden of proving his case. The Court's *obiter* comments state in part:

.... 3) The Applicant's evidence was not very strong. As the Board pointed out in its decision, the Applicant was unable to provide any identity papers. According to his P.I.F., the Applicant has 5 cousins in Canada, 3 of whom have already been accepted as refugees in this country. The 2 others are apparently permanent residents of Canada. *Surely, one, at least, could have been called as a witness to offer corroborating evidence.*[emphasis added].

4) The Applicant, according to his revised P.I.F., spent 7 years in the United States. He attended Lackland Air Force Base in Texas in November 1982 and then went on to Keesler Air Force Base in Mississippi, where he remained until

February 1983. *One would expect the Applicant to be able to obtain some evidence from Lackland and Keesler proving that he did attend as he claims.*[emphasis added].

5) The Applicant must bear in mind that it is up to him to prove his case.  
(page 6)

<sup>44</sup> See CRDD T90-09221, Sarzotti, Bernadine, September 5, 1991, where the panel, in assessing the claimant's credibility, drew an adverse inference from the fact that the claimant was unwilling to discharge the onus of proving his nationality. The claimant categorically excluded the possibility of making attempts to obtain documents from Uganda. The panel concluded that the claimant was not from Uganda at all.

<sup>45</sup> In CRDD T93-12230, Sachedina, Weed, March 30, 1995, the claimant submitted a poor photocopy of a faxed copy of his birth certificate as the only document attesting to his Jewish nationality. The panel had repeatedly advised the claimant that other corroboration of his Jewish nationality was necessary. The claimant replied only that "best efforts have been made". The panel found that the claimant was unwilling to produce documents and from this it drew a negative inference regarding credibility. The claimant was ultimately found to be not credible. In Legal Services' view, it can be inferred from the reasons for decision that the claimant's unwillingness to produce documents was unreasonable in the circumstances of the case.

<sup>46</sup> See *Sivaraj, Subramanian v. M.C.I.* (F.C.T.D., no. IMM-170-96), McKeown, October 30, 1996, where the Federal Court found that it was a breach of natural justice for the CRDD panel to discourage the claimant's testimony regarding his identity (more specifically, regarding the failure to produce his seaman's passport), and then to rely on the absence of evidence in this regard to conclude that he was not a seaman.

See also *Rehman, Hamida Abdalla v. S.S.C.* (F.C.T.D., no. IMM-1198-94), Gibson, March 16, 1995. In misleading the claimants and their counsel as to the case which the claimants had to meet with respect to identity and citizenship, the Board breached the duty to act fairly by denying a right to a fair hearing.

<sup>47</sup> The conceptual analysis presented in subsection **IV. D.** mirrors the process of analysis recommended by Legal Services for the weighing of evidence generally. This recommended process of analysis is found in the Legal Services paper entitled *Weighing Evidence*, dated July 8, 1996, at pages 7-10.

<sup>48</sup> *Goudi, Issa v. M.E.I.* (F.C.T.D., no. A-823-92), Jerome, March 4, 1994.

<sup>49</sup> In *Goudi*, the applicants had alleged before the CRDD that their passports were lost when the wife's purse was stolen at a bus stop in New York City. Accordingly, when they appeared before the Refugee Division the applicants had no identity documents. The Court found no reason to interfere with the CRDD's finding that it did not believe the principal applicant's explanation as to his alleged identity, and its finding that the claimants were not credible.

For a concise but thoughtful example of a CRDD decision dealing with internal inconsistencies in the claimant's story with respect to identity, resulting in a finding that the claimant was not credible, see CRDD A95-00602, *supra*, endnote 24.

<sup>50</sup> *Supra*, endnote 30, at page 6.

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<sup>51</sup> *Hamid, Iqbal v. M.E.I.* (F.C.T.D., no. IMM-2829-94), Nadon, September 20, 1995, at page 9.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Supra*, endnote 21. See also the recent decision of the Federal Court of Appeal in *S.S.C. v. Siad, Mohammed* (F.C.A., no. A-226-94), McDonald, Issac, Gray, December 3, 1996, where the Court held that the affidavit of a professor in the USA was admissible even though the professor, an expert witness, was not cross-examined.

<sup>54</sup> *Shanmuganathan, supra*, endnote 36.

<sup>55</sup> *Gebremariam, Himanot Tefera v. M.C.I.* (F.C.T.D., no. IMM-62-94), Muldoon, March 8, 1995.

<sup>56</sup> The case of *Jradj, Khalil Ali v. M.E.I.* (F.C.T.D., no. IMM-1680-94), Gibson, March 16, 1995 dealt with the applicability of subparagraph 69.1(10.1)(a). The main holding of the case is not of direct interest here, rather the case is mentioned because of the facts on which the CRDD concluded that there had been disposal without valid reason. The applicant, a Lebanese citizen, escaped to Germany but did not claim refugee status there. Before the CRDD, the applicant claimed that he could not find his genuine passport as he had left it with a friend in Germany. The panel found that under the circumstances, the claimant's explanation of the whereabouts of his genuine Lebanese passport or a copy of the same "was not a reasonable excuse".

See also CRDD V94-00838, Clague, Calvin, July 22, 1996, where the panel applied the unanimity provision in a case where the claimant admitted that he had given his valid Indian passport to an agent. The panel found that the claimant had not innocently disposed of the document, but had done so intentionally, and willfully failed to inquire as to its whereabouts subsequently.

<sup>57</sup> *Gebremariam, supra*, endnote 55, page 5.