Federal Court  Cour fédérale

Date: 20191004

Docket: IMM-5130-17

Citation: 2019 FC 706

Ottawa, Ontario, October 4, 2019

PRESENT: Mr. Justice Annis

BETWEEN:

HASSAN NAGI MOHAMED KALLAB
ROAA ASHRAF MOHAMED KALLAB

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

I. Introduction

[1] This is an application pursuant to section72 of the *Immigration and Refugee Protection Act*, SC 2001, c.27 [IRPA or Act] for judicial review under the *Federal Courts Act*, RSC 1985, c. F-7 [FCA] of a decision rendered by the Refugee Protection Division of the Immigration and Refugee Board of Canada [Board or RPD] dated October 25, 2017. The RPD determined that the

Applicants were not credible and therefore are not Convention refugees or persons in need of protection under sections 96 and 97(1)(a) and (b) of the IRPA.

[2] The Applicants are stateless Palestinians who hold Egyptian travel documents issued to Palestinians. The principal Applicant bases his claim on membership in a particular social group, namely stateless Palestinians coerced into acting as informants for the Kingdom of Saudi Arabia [KSA] government.

[3] The female Applicant bases her claim on that of the principal Applicant and membership in a particular social group, namely women subject to a male employer's unwanted touching. Moreover, she does not want to adhere to the strict dress code and other discriminatory government policies against women in the KSA. Furthermore, she politically opposes restrictions on women in the social sphere, including the ban on women driving or being out in public without a male escort.

[4] The RPD decision dismissing the claims for refugee protection focused almost entirely on adverse credibility findings relating to the Applicants' testimony. For the most part, the credibility findings consisted of the RPD's factual inferences that refuted the Applicants' statements upon which their claims of risk were founded.

[5] In *Jean Pierre v Canada (Immigration and Refugee Board)*, 2018 FCA 97 at paras 51-53 [*Jean Pierre*], the Federal Court of Appeal held that the same considerations apply to the review of an administrative tribunal's role as a finder of fact and a maker of inferences of fact as those

discussed in the Supreme Court decision of *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]. In *Housen*, the Supreme Court established that Courts should adopt a highly non-interventionist approach for the review of facts and inferences of fact. The *Housen* standard of review did not permit Courts to resort to a reasonability analysis of factual findings, as such an assessment would not be sufficiently strict as a standard of review.

[6] In the analysis that follows, I apply the considerations of *Housen* to the RPD's findings of fact as a quasi-judicial truth-seeking tribunal in accordance with the standard of review principles in *Housen*.

[7] For the purposes of this discussion, a truth-seeking tribunal is one that holds hearings to determine both the credibility and trustworthiness of facts. The level of deference owed to such a truth-seeking tribunal is the antipode to the correctness standard which affords no deference to the decision-maker on review. The factual findings of truth-seeking tribunals are owed the highest possible deference of any administrative tribunal because they most resemble trial courts, and because factual findings are their core function, in contrast to the core function of appellate courts or judicial review courts. It is not yet apparent where to situate the Refugee Appeal Division [RAD] in its finding of facts on the deference continuum when it does not hold a hearing. Its relationship with the RPD remains to be clarified as questions have been certified for appeal in *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145.

[8] Among the *ratio decidendi* of the matter before me is that the rule in *Housen* corroborates the rule in *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at paras 61, 64-67

[*Khosa*] that a reviewing Court should not reweigh the evidence before the RPD in search of a fact-finding error.

[9] A second issue of high importance considered in this matter is whether the RPD should only make implausibility findings of adverse credibility "in the clearest of cases." This principle was first enunciated in *Valtchev v Canada (Citizenship and Immigration*), 2001 FCT 776, [2001] FCJ No. 1131 (TD) at para 7 [*Valtchev* and the *Valtchev* rule] and has since gained considerable traction in the jurisprudence of this Court.

[10] I conclude that the reasoning in *Valtchev* impermissibly raises the threshold required for the Board to make a finding of inferential implausibility or credibility to a greater probative standard than that of a probability. It would appear to be common ground, at least from the Respondent's perspective, that if so, this likely lowers the strictness of the standard of review applied to implausibility findings and thereby fetters the Board's authority to make findings of fact under paragraph 170(h) of the IRPA.

[11] In order to receive appropriate input with respect to these issues, I issued a Direction to the parties requesting their submissions. Mr. Waldman represented the Applicants; in *Valtchev*, this Court relied on his text, Waldman, Immigration Law and Practice (Markham, ON: Butterworths, 1992). I consider the parties' submissions when addressing the standard of review and the principles enunciated in *Valtchev*.

[12] In response to my Direction, the Applicants addressed the presumption of truthfulness of a sworn statement established in the Federal Court of Appeal decision *Maldonado v MEI*, [1980] 2 FC 302 (CA) [*Maldonado*] which is an additional factor applied in *Valtchev*.

[13] After considering the scope of the *Maldonado* rule, I found that, when interpreted contextually, it applies only to the credibility of evidence factor set forth in paragraph 170(h) of the IRPA, and not the factor relating to the trustworthiness of that evidence.

[14] Rather than a presumption of a sworn statement's trustworthiness, which applies at the commencement of an RPD hearing, I conclude that the "benefit of the doubt rule" in the UNCHR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Reissued Geneva, December 2011, at paragraphs 203 to 205, [UNHCR refugee handbook] applies. The benefit of the doubt rule has effect at the conclusion of the hearing, and only if the refugee claimant made a genuine effort to substantiate the sworn statement, which is otherwise found to be credible.

II. Facts

[15] The principal Applicant is a 32-year-old stateless Palestinian born and raised in the KSA. He holds a university degree in engineering and has been employed by Naizal Global Engineering Company, first as a System Engineer from August 2010 to October 3l, 2014, and then promoted to the position of Engineering Manager before leaving the KSA in July 2017.

[16] The principal Applicant alleges that his problems began after he returned from a business trip to Spain. On June 20, 2017, he received an unusual telephone call from a man who identified himself as Nasir Al-Kabtany from the Bureau of Investigation and Prosecution. Mr. Al-Kabtany stated that he knew the principal Applicant's history and that he was a well-regarded employee. He requested to meet the principal Applicant one week later. After discussing with his father and brother, the principal Applicant met Mr. Al-Kabtany who asked him to inform on three colleagues. The principal Applicant informed his father about the encounter with Mr. Al-Kabtany, after he departed for Canada, where some of his relatives reside.

[17] The female Applicant is a dentist. She was educated in the KSA but received her dental training in Egypt. She and the principal Applicant had an arranged marriage. Her family has lived successfully in the KSA for at least three generations and her father is a well-established electrical engineer. The RPD found that while the family may not hold citizenship in the KSA, they have been able to work and enjoy a remarkable lifestyle there. Her mother is also university educated and has four brothers who immigrated to Canada shortly after the Applicants. They also advanced separate refugee claims. The principal Applicant's father remains in the KSA.

[18] The female Applicant claims that she was a victim of discrimination in the KSA. She alleges that she could not attend university in the KSA and therefore studied dentistry in Egypt. She alleges that she had difficulty finding work in the KSA. The discrimination she experienced in the KSA required her to adhere to a strict dress code and other restrictions on women in the social sphere, including the ban on women driving or going out without a male escort.

[19] The Applicants left the KSA on July 9, 2017, first traveling to the United Arab Emirates and thereafter to the United States. They both filed refugee claims at the Canadian border on July 13, 2017. Their son was born in Canada in August 2017, one month after they arrived.

[20] The RPD rejected the Applicants' claims on implausibility findings of adverse credibility. Essentially, the RPD judged their evidence to not be reasonable on a balance of probabilities. The decision is summed up at paragraphs 17 and 20 to 22 of the RPD's reasons:

> [17] … The panel finds, on a balance of probabilities, that the principal claimant fabricated the story in order to support a fraudulent refugee claim…
>
> […]
>
> [20] … The female claimant has not provided a reasonable explanation for her not reporting this incident to the authorities or the licensing body of dentists in KSA…
>
> [21] … The panel finds, on a balance of probabilities, that the female claimant does know why her mother and brothers have made refugee claims and that she knows why her father is remaining in KSA.
>
> [22] When all of the above is taken into consideration, the panel finds, on a balance of probabilities, that the claimants' evidence is not credible.

III. Relevant legislation

[21] The relevant portions of section 170 of the IRPA, with my emphasis, read as follows:

170. The Refugee Protection Division, in any proceeding before it,	**170.** Dans toute affaire dont elle est saisie, la Section de la protection des réfugiés :
(a) may inquire into any matter that	**a)** procède à tous les actes qu'elle

it considers relevant to establishing whether a claim is well-founded;	juge utiles à la manifestation du bien-fondé de la demande;
(b) must hold a hearing;	**b)** dispose de celle-ci par la tenue d'une audience;
(c) must notify the person who is the subject of the proceeding and the Minister of the hearing;	**c)** convoque la personne en cause et le ministre;
[…]	**[…]**
(d.1) may question the witnesses, including the person who is the subject of the proceeding;	d.1) peut interroger les témoins, notamment la personne en cause;
(e) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations;	**e)** donne à la personne en cause et au ministre la possibilité de produire des éléments de preuve, d'interroger des témoins et de présenter des observations;
[…]	[…]
(g) is not bound by any legal or technical rules of evidence;	**g)** n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(h) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances; and	**h)** peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision;
(i) may take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge.	**i)** peut admettre d'office les faits admissibles en justice et les faits généralement reconnus et les renseignements ou opinions qui sont du ressort de sa spécialisation.

IV. Issues

[22] I find that this matter raises the following issues for consideration:

1. What is the standard of review for the Board's findings of fact, and inferential findings of fact, including questions of mixed fact and law, in light of the direction from the Federal Court of Appeal in *Jean Pierre* that the considerations discussed in *Housen* apply in the administrative law context?

2. Is the rule in *Valtchev* that the Board may only make implausibility findings of adverse credibility in the clearest of cases good law?

3. Whether, in this case, the RPD erred by making implausibility findings of adverse credibility?

4. Whether, in this case, the RPD made reviewable fact-finding process errors by ignoring crucial evidence, and by relying on immaterial evidence?

5. Whether, in this case, the RPD breached the Applicants' right to procedural fairness by denying them an opportunity to respond to its concerns about their residency documents?

V. Standard of review

[23] The first issue, regarding the appropriate standard of review to be applied by the Federal Court to the Board's factual findings, is a question of pure law going to the jurisdiction of the Court to discharge its functions. This issue must therefore be reviewed on a correctness standard. To make this determination, the Court must determine if *Jean Pierre*, which introduced the *Housen* principles with respect to the review of factual findings to the administrative context, has modified the standard of review presently followed by the Court.

[24] The parties submitted that the second issue of this Court's disagreement with the *Valtchev* rule, established in previous Federal Court jurisprudence, is a matter to be decided in accordance with the principles of judicial comity. Recall that judicial comity calls upon judges not to depart from the conclusions of law of other judges of the same Court, unless he or she is convinced that the departure is necessary and can articulate cogent reasons for doing so, such as when the preceding jurisprudence was wrong: *Apotex Inc. v Allergan Inc*., 2012 FCA 308, paras 43-48.

[25] I agree that the principle of judicial comity applies with respect to a Court's differences of opinion with previous rulings of the same Court. This implies that the Court should be held to a standard of correctness in its reasoning as a ground for not following the rule of judicial comity.

[26] With respect to the third issue, regarding the credibility findings of implausibility, these are to be reviewed on a reasonableness standard to be defined by the conclusion of the first issue.

[27] With respect to the fourth and fifth issues, regarding whether the RPD ignored crucial evidence, relied on immaterial evidence, and breached the Applicants' right to procedural fairness by failing to provide them with an opportunity to respond to concerns about a document, these are all alleged process errors and shall be reviewed on a correctness standard.

A. *Standard of review of facts and inferential facts*

(1) Fact-finding fundamentals

(a) *An inferential finding of fact*

[28] The concept of interpreting the primary evidence in the inference drawing process and the requirement that the inductive conclusion only must follow with some degree of probability, rather than of necessity, is explained in the decision of *R. v Munoz*, 86 OR (3d) 134, 2006 CanLII 3269 (ON SC) at para 23, as follows with my emphasis:

> [23] While the jurisprudence is replete with references to the drawing of "reasonable inferences", there is comparatively little discussion about the process involved in drawing inferences from accepted facts. It must be emphasized that this does not involve deductive reasoning which, assuming the premises are accepted, necessarily results in a valid conclusion. This is because the conclusion [in a deduction] is inherent in the relationship between the premises. Rather, the process of inference drawing involves inductive reasoning which derives conclusions based on the uniformity of prior human experience. The conclusion is not inherent in the offered evidence, or premises, but flows from an interpretation of that evidence derived from experience. Consequently, an inductive conclusion necessarily lacks the same degree of inescapable validity as a deductive conclusion. Therefore, if the premises, or the primary facts, are accepted, the inductive conclusion follows with some degree of probability, but not of necessity. Also, unlike deductive reasoning, inductive reasoning is ampliative as it gives more information than what was contained in the premises themselves.

(2) Distinguishing fact-finding weight and process errors

[29] *The Law of Evidence*, authored by Ontario Court of Appeal Justice David Paciocco and Professor Lee Stuesser [Paciocco Text], provides some useful explanations of terms to bear in mind when considering the distinction between fact-finding errors relating to the process followed to determine a fact, as opposed to the weighing and assessment of evidence to find a fact, in its chapter “The Basics of Admissibility and the Evaluation of Evidence”. The Paciocco

Text is also useful to demarcate the distinction between the credibility and trustworthiness aspects of fact-finding.

[30] The Paciocco Text notes that as a condition for admissibility, evidence must be relevant (whether the evidence makes a fact it is directed to more or less likely) and material (directed to a material issue in the proceedings) [together often described as logical relevance]. These conditions being satisfied, the question becomes what probative value or weight to accord the evidence (being believable or informative, i.e. credible or trustworthy).

[31] The Board's fact-finding errors may generally arise in two different circumstances. The first arises out of the manner in which a tribunal conducts the fact-finding process. It is described as a fact-finding process error ["process error"]. Issues of relevance and materiality of evidence typify a process error, among others. The second form of fact-finding error occurs in the weighing or assessment of the probative value of evidence to form a fact. This is described as a fact-finding assessment error ["assessment error"].

[32] Process errors are not to be treated with deference. They raise issues of fairness to be considered on a correctness standard. Process errors are well described in *Judicial Review of Administrative Action in Canada*, D. J. M. Brown & The Honourable J. M. Evans, 14:3520 [*Judicial Review of Administrative Action*], at 4:3420 under the heading "Other Fact-Finding Process Errors", as follows with my emphasis:

> As well, the duty of fairness imposes certain limitations on the manner in which an agency can conduct the fact-finding process. For instance, the agency may not prevent a party from tendering

> evidence that is relevant to the issues in dispute, nor can it receive evidence ex parte without disclosing it to the other party for rebuttal. In addition, whether a tribunal has erred either by admitting and relying upon irrelevant evidence, by purporting to take judicial notice of facts that were not notorious, by failing to make necessary factual findings to support a constitutional challenge, by wrongly drawing adverse inferences, by excluding relevant evidence, by failing to consider relevant evidence, including expert evidence, by failing to make relevant inquiries, by failing to resolve conflicts in the evidence or by genuinely misunderstanding the evidence, will usually all be decided by the reviewing court without deference to the decision of the administrative agency. Similarly, questions as to the burden and standard of proof are matters on which a reviewing court will usually substitute its conclusion for that of the agency, as it will where evidence is weighed without apparent regard to statutory presumptions.

[33] To clear up any confusion that may be attributed to the term "wrongly drawing adverse inferences" referred to in the above passage, the following cases were cited in support of this reference. They indicate that this form of process error does not involve the weighing of evidence, but rather entails issues of fairness:

> • *Audmax Inc. v Ontario Human Rights Tribunal*, 2011 ONSC 315 (Superior Court of Justice, Divisional Court) at para 43: (adverse inference drawn from the employer's failure to call a witness);
>
> • *Bajwa v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 202 at para 70: (failure to provide a reasonable opportunity to disabuse the Visa Officer of her credibility concerns); and
>
> • *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at paras: 143-7 (failure to follow *Browne v Dunn* (1893) 6 R 67, H.L. in cross-examination seriously weakens the Alberta Securities Commission's inference as to credibility).

[34] The excerpted passage above sets forth the most common process errors encountered in Board decisions. They include: admitting and relying on irrelevant evidence, failing to consider relevant evidence that a party specifically raises, including expert evidence (which, as a pre-condition, must be initially admissible, per *R v Mohan*, [1994] 2 SCR 9, 1994 CanLII 80), genuinely misunderstanding the evidence (i.e. clearly misapprehending the evidence as opposed to interpreting or arguing as to its meaning). When the Board makes a factual finding without any supporting evidence at all, this might be classified under either heading as a weight-based error or a process error depending on the circumstances. In either case, the error is plain to see.

[35] In this matter, the Applicants submit that the RPD committed a process error by failing to consider relevant evidence and by relying on immaterial evidence. These issues are reviewed on a correctness standard.

[36] Likewise, it will be seen that *Valtchev* raises the requirement to consider cultural factors as a rationale for its rule that implausibility findings of credibility should only be made in the clearest of cases. In this Court's respectful view, issues relating to the consideration of cultural factors would most likely fall under the process error rubric, on the contention that the Board did not consider relevant evidence that a party brought forward. This type of error should be reviewed on a correctness standard as it raises fairness issues. Otherwise, cultural factors might contribute to the probative value accorded to some aspect of the evidence. This is a matter of weight attributed to the finding of a fact at issue, and is therefore subject to the highest deference possible in the review of such findings, even more so if they relate to a witness's credibility.

[37] Unless otherwise specifically mentioned, the following discussion of issues is limited to assessment-findings of fact, not process-findings of fact.

(3) Mixed findings of fact and law

[38] To complete the survey of the standard of judicial review of the Board's factual determinations, *Housen* is again helpful in its description of the distinction between findings of fact and mixed findings of fact and law at paragraph 26 and summary at paragraphs 36 and 37, as follows with my emphasis:

> 26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "*Appeals on Questions of Fact*" (1955), 71 L.Q.R. 402, at p. 405:
>
> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."
>
> […]
>
> 36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an

> incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in Jaegli Enterprises, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.
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> 37 In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care [a term in negligence law] was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

[39] To precis the conclusions from paragraph 36 of *Housen*, it is first necessary to distinguish the situation as one of mixed fact and law, and thereafter determine whether it is possible to extricate the legal questions from the factual ones. If so, and the error is fundamentally legal in nature, it is reviewed on a correctness standard, subject to the principles in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9, that direct many of these questions to the tribunal's expertise. If the legal principle is not extricable, then the entire mixed question of fact and law is

reviewed on the highly deferential, non-interventionist standard applying to findings of fact that can only be overturned in the clearest of cases.

(4) The standard of review of the Board's findings of fact

[40] This Court's decision in *Njeri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 291 [*Njeri*] describes the least interventionist standard of review for findings of fact at paragraph 11 where Justice Phelan stated, with my emphasis as follows:

> [11] On credibility findings, I have noted the reluctance that this Court has, and should have, to overturn such findings except in the clearest case of error (*Revolorio v. Canada (Minister of Citizenship and Immigration*), 2008 FC 1404 (CanLII)). The deference owed acknowledges both the contextual circumstances and legislative intent, as well as the unique position that a trier of fact has to assess testimonial evidence. That deference is influenced by the basis upon which credibility is found. The standard is reasonableness subject to a significant measure of deference to the Immigration and Refugee Board.

[41] I understand that in *Odia v Canada (Citizenship and Immigration)*, 2018 FC 363 at para 6 [*Odia*], Justice Boswell is the only other judge of this Court to rely on *Njeri* for that principle, apart from myself: *Ramos Aguilar v Canada (Citizenship and Immigration)*, 2019 FC 431at para 29; *Abiobun v Canada (Citizenship and Immigration)*, 2019 FC 299 at para 10; *Amin v Canada (Citizenship and Immigration)*, 2019 FC 295 at para 17; *Gamez Barrientos v Canada (Citizenship and Immigration)*, 2018 FC 1220 at para 14. Otherwise, this Court generally applies an interventionist standard of review of the Board's factual findings based on the reasonability principles of *Dunsmuir*.

[42] For the numerous reasons that follow, I conclude that the statement in *Jean Pierre* that "the same considerations apply equally to the review of an administrative tribunal's role as a finder of fact and a maker of inferences of fact" should supplement Justice Phelan's statement in *Njeri* regarding the standard of review applied to the Board's factual findings. This precludes a reasonability analysis in consideration of an alleged error of fact.

[43] The standard of review applied to factual findings in *Housen* precludes a reasonability analysis of factual findings, which would amount to an insufficiently strict standard of review that involves reweighing evidence. For that reason, I equate "clearest case of error" in *Njeri* to the term "plain to see" adopted by the Supreme Court in *Housen* to describe a "palpable" error arising from a factual finding. More significantly, I conclude that *Housen*'s preclusion of a reasonability analysis to assess alleged errors of factual findings equally applies to the Court's assessment of the Board's findings of fact, as apparently held by the Federal Court of Appeal in *Jean Pierre* at paras 51-53.

[44] This is in opposition to the Court's standard of review of facts adopted throughout its jurisprudence based upon a reasonability analysis as prescribed by the Supreme Court in *Dunsmuir*, with a reference to *Khosa* that the Court is not to reweigh the evidence. This analysis invariably requires an examination of every aspect of how the fact was found. The result is then expressed, in the context of an overall decision, that it fall within the range of possible acceptable outcomes, and be expressed by justified, transparent, and intelligible reasons. Reviewing Courts very rarely state that "some evidence" supporting the Board's factual finding is a reason not to interfere with the finding in question.

[45] In my respectful view, this leads the Court to determine, in its own mind, if the decision is reasonable. Frequently, this Court does so without recognizing that it is weighing the evidence, which is what the Supreme Court in *Housen* implies invariably happens when a reasonability analysis is applied to factual findings. In my view, this follows from the fact that once the Court starts a reasonability analysis of facts, it will take that analysis to its logical conclusion, which necessarily entails weighing the evidence that was before the administrative tribunal. It is also because it is difficult for judges to constrain themselves when it comes to reviewing facts. This was the opening statement that the Court made in *Housen* at para 4: "While the theory [not to interfere unless there is a palpable and overriding error] has acceptance, consistency in its application is missing".

[46] The parties' response to my Direction on these issues confirms my understanding of the approach that this Court generally adopts in reviewing factual findings. The Applicants' response, with my emphasis, reads as follows:

> The Applicant agrees that *Dunsmuir* sets out the proper test for the standard of review to be applied in this case. The applicant agrees that <u>the standard of review requires that the Court defer to the findings of fact of the tribunal</u>. However, in each case the Court has the obligation of reviewing the record and the reasons to ensure that the decision is within the range of possible outcomes in order to determine whether or not the decision is reasonable."

[47] The Respondent's proposal of the appropriate standard of review is somewhat more ambiguous. Eventually, it comes back to the same standard that the Applicants propose. The Respondent initially recognizes that "Housen is equally applicable to guide standards of judicial

review to truth-seeking quasi-judicial tribunals such as the RPD". The Respondent further submits that *Housen* supports the standard of review expressed in *Njeri*.

[48] But then, the Minister turns around and declares that "the 'clearest of cases of error' terminology in *Njeri* may be hyperbole, similar to the language of 'in the clearest of cases' expressed in Valtchev." Thereafter, the Respondent submits that *Dunsmuir* has replaced the "patently unreasonable" standard, apparently with the view that *Dunsmuir* was intended to render less strict the test for administrative tribunals' findings of fact. The Minister concludes that "given that patent unreasonableness is no longer a standard of review … The standard of review to be applied is simply reasonableness with deference to the RPD."

[49] I respectfully disagree with the Respondent's implied conclusion that in *Dunsmuir*, the Court's intention was to establish a more interventionist standard of review of facts than the previous patently unreasonable standard. The opposite conclusion would be more appropriately measured by the *ratio decidendi* of *Housen* that this Court directed the parties to consider. If it is impermissible to apply a reasonability analysis on review of the trial Judge's inferences of fact because that amounts to reweighing the evidence, given the universal nature of inferential findings of fact, this rule should equally apply to the review of all forms of factual findings made by the Board, which is a quasi-judicial tribunal.

[50] Moreover, I am not aware of a precedent to the effect that the factual findings of a quasi-judicial truth-seeking tribunal, like the Board, should be owed amongst the highest degrees of deference with respect to its findings of fact, in comparison to other administrative decision-

makers. In respect of these findings, there has been no attempt to crystallize and state in clear, practical and appropriate terms “Dunsmuir's recognition that reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors”: *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR. 5, at para 18 [my emphasis].

[51] In other words, the Board’s factual findings are not yet understood to be at the polar opposite end of the lowest “intervention scale” from findings reviewable on the correctness standard at the highest end. In my view, factual findings should be subject to a similar, but opposite form of “bright line”, non-interventionist review. This is the ineluctable conclusion that flows from *Housen*.

[52] Finally, it should be understood that the procedure of fact-finding analysis is distinct from that used to determine the decision’s outcome. The review of facts is a prerequisite to be completed before applying the principles of *Dunsmuir*. By this process, the fact-finding element of review is not in conflict with the principles of *Dunsmuir*. Rather, it is simply recognized as a separate specialized task that the Board must undertake which requires a specialized contextual standard of review as outlined in *Housen*. Once the conclusions on the facts are completed, if found to be in error, there remains the issue of applying the principles in *Dunsmuir* to determine whether the decision should be set aside, or not.

B. *Housen principles of the standard of review of factual findings*

(1) The rule in *Housen* precludes a reasonability analysis of the weight of a factual finding because the reasonability standard is insufficiently strict

[53] The veritable debate among *Housen* Court members was whether the minority view correctly held that in reviewing an inferential finding of fact "the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached." The five-member majority concluded that any reasonability analysis of the inference drawing step was impermissible. The reviewing court could only determine whether the alleged error was "plain to see" (ie. palpable).

[54] Two rationales underlay the majority conclusion that a reasonability analysis is not permitted as a standard of review for the step that entails drawing an inference of fact. The first rationale is explained in this section. It relates to the (universal) nature of the process employed to draw an inferred fact from the primary evidence and facts. The process involves assessing the weight of the primary facts based on the uniformity of human experience and logic (ie. an inductive process). A reasonability analysis is an insufficiently strict standard of review that is inconsistent with a highly non-interventionist approach required for the review of factual findings.

[55] This rationale is described in ***Housen*** at paras 19 and 21 to 23. In these passages, the majority first refers to and ultimately rejects the minority's contention that an appellate court may conduct a reasonability analysis of the trial Judge's inference drawing process because the test is not sufficiently strict:

> 19 We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our view, that to apply a lower standard of review to inferences of fact [my emphasis] would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.
>
> [My emphasis]
>
> […]
>
> 21 In discussing the standard of review of the trial judge's inferences of fact, our colleague states, at para. 103, that:
>
> In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles... While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact.
>
> With respect, we find two problems with this passage. First, in our view, the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard [my emphasis].
>
> [Emphasis of the Supreme Court.]

[56] First and foremost, it is not the reviewing court's role to verify whether an inference can reasonably be supported by the findings of fact that the trial Judge reached; this would result in the application of an insufficiently strict standard. Therefore, if this reasoning of *Housen* is

applied by the Federal Court in the context of judicial review, the Court would not be permitted to conduct a reasonability analysis of an inference drawn by the RPD or any other similar quasi-judicial administrative tribunals. On this basis alone, *Valtchev*, and all of the subsequent accompanying jurisprudence that the Applicants put forward with respect to implausibility findings of credibility, are incorrect in law. Rather, the Court is limited to determining whether the alleged error, the tribunal's finding of the inferential fact, is plain to see. As the Federal Court of Appeal held in *Jean Pierre* by relying on the principles of *Housen*, this Court's role on judicial review is to "examine the legality of the tribunal's decision in light of its reasons and the presence of evidence in the record capable of supporting its conclusions" (at para 52) with my emphasis.

[57] It is very simple to apply this test: is there any evidence that could support the tribunal's finding? Alternatively, does the Court find that it is evaluating the evidence's weight, as opposed to asking whether some evidence supports the factual finding? Obviously, the Court is not referring here to process-findings of fact, which are reviewed on a correctness standard. This test is also commensurate with the applicable ground of review set forth in paragraph 18.1(4)(d) of the *FCA*, which permits the reviewing Court to intervene if it is satisfied that the tribunal "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" [my emphasis] ("a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose"), (See *Khosa* at paras 45-46). Plainly, the grounds for judicial review provided in the *FCA* and the Supreme Court's interpretation thereof in *Khosa* expressly ousted this Court's ability to weigh evidence, while the Court may find a

reviewable error arising from conclusions drawn that are not supported by the evidentiary record at all.

[58] Second, the statement in *Housen* that "the reasons of our [minority] colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge" [my emphasis] refers to the standard of review of a direct fact, i.e. one that is drawn directly from the evidence, such as from a statement that is believed truthful. In effect, another way to state the *ratio decidendi* of *Housen* is that the same standard applies to all findings of fact howsoever found.

[59] Third, the majority in *Housen* also adopts, to some extent, the minority's rationale, when in discussing the step of drawing inferences, which it relies on to uphold its argument that a reasonability analysis was permitted because "[i]f the reviewing court were to review only for [primary] errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings". The majority basically agrees with this outcome in paragraph 22 (and in paragraph 23), at least when it holds that if the primary facts are not in dispute, the reviewing court will be "hard-pressed" to overturn the inference. This is described in paragraph 22, with my emphasis as follows:

> 22 Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when

> it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

[60] Fourth, and of importance, because it refers to the universality of how an inference is drawn, at para 22 the *Housen* Court explains that the rationale for precluding a reasonability analysis of factual findings is that it would entail "an unjustified reweighing of the [primary] evidence". This is similar to the Supreme Court's conclusion in *Khosa* at para 61, that it was not "the function of the reviewing court [the Federal Court] to reweigh the evidence before the IAD [Immigration Appeal Division]".

[61] It is my understanding that while the Court in *Khosa* held that, in accordance with the principles of *Dunsmuir*, reasonableness was the applicable standard of review for the outcome of the decision, assessment of factual findings was nevertheless exempted from this form of review because the court was not to reweigh the evidence.

[62] When the Court in *Dunsmuir* held that reviewing courts must determine, by a reasonability analysis, if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" [my emphasis], the finding of those facts based on the weight given the evidence by the tribunal was not subject to challenge by a reasonability analysis, because the reviewing court was not to reweigh the evidence which necessarily involves an analysis of this nature.

[63] This Direction of the majority in *Khosa* was made in specific response to Justice Fish's conclusion. The Court accepted that the reasonableness standard applied, but it remains that such a standard does not permit the reviewing court to reweigh the evidence before the tribunal, as follows:

> [61] My colleague Fish J. agrees that the standard of review is reasonableness, but he would allow the appeal. He writes: While Mr. Khosa's denial of street racing may well evidence some "lack of insight" into his own conduct, it cannot reasonably be said to contradict — still less to outweigh, on a balance of probabilities — all of the evidence in his favour on the issues of remorse, rehabilitation and likelihood of reoffence. [para. 149 with my emphasis]
>
> I do not believe that it is the function of the reviewing court to reweigh the evidence.

[64] It is my understanding that *Housen* simply amplifies what the Supreme Court meant by holding that reviewing courts shall not reweigh the evidence. The practical application of this direction can be reformulated into the rule that the reviewing Court is not to intervene "if there was some evidence upon which he or she [the trial Judge] could have relied to reach that conclusion": *Housen* at para 1 [emphasis added]. Thus, the restated rule in *Housen* only permits the reviewing court to determine whether there is some evidence to support the finding, which should be plain to see.

[65] Going beyond the limited search for some evidence, will likely lead the Court to reassess the evidence as a whole, which necessarily entails a reasonability analysis of the facts. Thus, in my understanding, the rule in *Khosa* may be described by three statements intended to limit this Court's jurisdiction to intervene in a finding of fact: not to reweigh the evidence; only some supporting evidence is required; and the error must be plain to see. They reflect the highest

standard of deference that can possibly be afforded to a quasi-judiciary tribunal's findings of fact.

[66] Fifth, in *Housen* the Court further stated at para 23 in that "it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion". This refers to a process error discussed above, for example where the primary facts are not relevant to the ampliative inferred fact. Again, this is another lesson for reviewing courts that, short of a process error, it will be "hard-pressed" to intervene. Paragraph 23 reads as follows, with my emphasis:

> 23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. ….

[67] Although perhaps not necessary given the Federal Court of Appeal's endorsement of *Housen* principles, recall that a "palpable error" is defined in *Housen*, in more prosaic language at paragraphs 5 and 6, as an error that is "clear to the mind or plainly seen", as follows with my emphasis:

> 5 What is palpable error? The New Oxford Dictionary of English (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). The Random House Dictionary of the English Language (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

> 6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

[68] In this regard, it bears mentioning that time after time, appellate Courts have employed exceedingly strict, and often metaphorical, language to describe the palpable and overriding error standard of review:

> Palpable and overriding error is a highly deferential standard of review . . . . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. (*Benhaim v. St-Germain*, [2016] 2 SCR 352 at para 38 [*Benhaim*], citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para 46).
>
> "[Translation]…a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions" (*Benhaim* at para 39, citing *J.G. v. Nadeau*, 2016 QCCA 167 at para 77).

[69] Looking ahead to my analysis of the rule in *Valtchev*, the Respondent submits that the phrase "in the clearest of cases" as a requirement for the Board to draw an adverse credibility finding, does not describe a higher standard of the weight of evidence than that of a probability. I disagree. The grammatical meaning of those words clearly imposes a higher evidentiary threshold on the Board to draw an inferential plausibility finding. Moreover, these words have a well-established definition in Canadian jurisprudence to that effect. This Court consistently applies *Valtchev* in support of a highly interventionist approach to overturn implausibility findings of fact.

[70] The principle in *Housen* that drawing inferences involves weighing evidence is also described in *Judicial Review of Administrative Action in Canada* at paragraph 14:3520, as follows with my emphasis:

> In essence, drawing an inference amounts to a process of reasoning by which a factual conclusion is deduced as a logical consequence from other facts established by the evidence. And although it is sometimes said that "weighing" the evidence is distinct from drawing inferences, drawing inferences from the primary facts will generally involve making judgments about the weight or significance of the evidence. In any event, today it is clear that whatever the task involved, the facts as found are subject to the same standard of review.

[71] Thus, the Supreme Court decision in *Khosa* implicitly supports the rule in *Housen* that precludes a reasonability analysis on review of the inference drawing process. This rule has come to be recognized as applicable to the review of factual findings of administrative tribunals generally. Seen in this light, I conclude that in *Jean Pierre* the Federal Court of Appeal restated that the principles in *Khosa* should be applied as intended by the Supreme Court in *Housen*.

[72] The final point I would make is one of nomenclature. In this Court, an inferential finding of fact relating to credibility is called a plausibility finding. With respect, a slightly more appropriate phrase would be an “implausibility finding”, because the inference is used to deny a fact as stated by a witness. However, it would be even more appropriate to describe the impugned fact as “an improbability”. This would better reflect that the threshold of evidence, as a likelihood, that is required to find the inference that denies the impugned statement of fact.

[73] In closing out this section, I think psychologically for judges reviewing inferential findings that in some measure the most difficult aspect of accepting the principles set forth in both *Khosa* and *Housen* by the limitation of a reasonableness standard in the review of facts, is that while the Board should only draw reasonable inferences, the standard of review for reasons of policy, only permits intervention when "plain to see" errors of fact are made by the board (or by synonymic phrases, "wholly unreasonable to do so", or "in the clearest of cases"). Policy issues are addressed below.

> (2) The reviewing court is not just as well situated as the Board in making inferential credibility findings, nor is a tribunal required to provide a clear rationalization process to support its inferences.

[74] The above title describes two different concepts. The first speaks to the reviewing court's capacity and authority to draw the same inference on the primary facts as the Board. The minority Judges in *Housen* attempted to argue this point, which the majority ultimately rejected. The principle that the Court is often just as capable as the Board in drawing an inference is found throughout the case law that the Applicants cite in their initial memorandum, with particular emphasis on implausibility findings: *Cao v Canada (Citizenship and Immigration)*, 2007 FC 819 at para 7 [*Cao*]; see also *Martinez Giron v Canada (MCI)*, 2013 FC 7, at paras 17-19, citing *Divsalar v Canada (MCI)*, 2002 FCT 653 at para 22; *Yada v Canada (MEI)*, [1998] FCJ No 37 (QL),1998 CanLII 7247 (FC) at para 25. I conclude that, in the face of *Khosa* and *Housen* (and now *Jean Pierre*), this jurisprudence should have no application; those cases preclude reviewing courts from conducting a reasonability analysis of a finding of fact.

[75] The second principle of concern is taken from the case of *Santos v Canada (Citizenship and Immigration)*, 2004 FC 937 at paras 14-16 [*Santos*] that the Applicants put forward. In *Santos*, the Court stated that "implausibility determinations must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions." [My emphasis.] The last mentioned principle of referring to relevant evidence in the reasons is not at issue. Otherwise, this statement is problematic in light of *Housen* and *Khosa*. In speaking to the need for "a clear rationalization process", I understand that this refers to the "inference drawing process" that creates the ampliative fact from the primary evidence. This "rationalization process" is also at the heart of what makes the statement of a witness "implausible" or "plausible".

[76] Requiring a "clear rationalization process" leads to the second requirement that the Board must provide reasons formulated in "clear and unmistakable terms" [my emphasis]: *Hilo v Canada (Minister of Employment and Immigration)* [1991] FCJ. No. 228, 130 N.R. 236 (FCA) [*Hilo*] at para 6. I note that there is a difference between clear evidence [a content issue] and clear reasons [an explanatory issue].

[77] On a somewhat related topic of appropriate legal phraseology, I am not aware of any rule of evidence that requires a finding of fact to be based on clear evidence, as opposed to persuasive evidence or evidence of sufficient probative value to prove the fact. Clarity of evidence may enhance its probative value which could affect its impact. However, I do not believe that the clarity of evidence is a requirement to form a fact. At least where there is conflicting evidence in a trial, often little is clear. Sometimes a trial Judge will accept fairly ambiguous evidence as the

preferred version, based primarily on logic and context rather than on the words used by the witness.

[78] Regardless of whether it is incorrect to state that evidence should be clear, reliance on "clarity" has a tendency to raise the probative value required of evidence to prove a fact, thereby encouraging the reviewing Court's intervention. Given that the discussion pertains to the balance of probabilities standard, it is respectfully suggested that the Court should adhere to the use of traditional evidentiary terms such as "persuasive" or "probative", without adding more confusion to an already challenging process of determining facts from the evidence. Conversely, words such as "clear" should be reserved for describing some concept heading towards an exceptional standard such as where the error that must be clear, obvious, and plain to see in setting aside a finding of fact. The terms are fairly synonymous in suggesting a superlative of some degree to whatever the norm is that must be enhanced.

[79] Two points arise with respect to the adequacy of the Board's reasons in terms of clarity.

[80] First, if the description of the content of the rationalization process of weighing evidence to form an inference is at issue [not the same issue as "clear" adding to the probative content of the evidence], in my respectful view, there is simply not much for the tribunal to describe in this process.

[81] Second, demanding an explanation of the rationalization process to form an inference cannot be reconciled with the principles of *Newfoundland and Labrador Nurses' Union v*

Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708, 2011 SCC 62 at para 12 [*Newfoundland Nurses*] that "the court must first seek to supplement them [the reasons] before it seeks to subvert them". Demanding such an explanation is also contradicted by the practical example provided in *Housen*, where the Court filled in the blanks between identifying the primary evidence and finding the inference.

[82] A brief description of the facts in *Housen* is necessary to understand this point. The plaintiff, who was intoxicated, failed to navigate a curve in a road that was both unsigned and unexpected. Although the plaintiff had been speeding, the trial Judge considered that the lack of signage presented a risk to drivers, who were not warned to slow down before entering the curve. The municipality enjoyed statutory protection from claims in negligence alleging a lack of signage unless the plaintiff could demonstrate that the municipality had knowledge of the risk. The trial Judge inferred that the municipality had such knowledge. The relevant passage from the trial decision is set out at paragraph 64 of *Housen*, along with the Supreme Court's explanation upholding the trial Judge's inferential finding, as follows with my emphasis:

> 64 It is in this context that we view the following comments of the trial judge, at para. 90:
>
> If the R.M. [Rural Municipality] did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

> From this statement, we take the trial judge to have meant that, given the occurrence of prior accidents on this low-traffic road, the existence of permanent residents, and the type of drivers on the road, the municipality did not take the reasonable steps it should have taken in order to ensure that Snake Hill Road did not contain a hazard such as the one in question. Based on these factors, the trial judge drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question. This factual inference, grounded as it was on the trial judge's assessment of the evidence, was in our view, far from reaching the requisite standard of palpable and overriding error, proper.
>
> [Emphasis added]

[83] The trial Judge provided no description of the rationalization process, beyond laying out the primary facts that could be used to construe the inference that the municipality should have been put on notice of the dangerous road conditions, requiring it to investigate the risk. Considering the content relied on by the judge to draw an inference, it is not clear what other information the trial Judge would have had to provide in her reasons to demonstrate that she undertook a "clear rationalization process" (ie. an explanation).

[84] The other point is that the Supreme Court described the rationalization process ["drew the inference that the municipality should have been put on notice"] linking the municipality's knowledge to the trial Judge's finding that the municipality had not acted reasonably. The Court in *Housen* supplemented the trial Judge's reasons by making the assumption ["we take the trial judge to have meant that"] by her reference to the primary facts to draw the inferred factual conclusion that ["the municipality did not take the reasonable steps it should have taken"]. As long as the reviewing Court is not rewriting the decision, but providing the rational explanation

joining the primary facts and the new inferred fact, I would understand that the reasons given in the decision under review are sufficient.

[85] In particular, I conclude for this reason that dwelling on these requirements of the clarity of evidence, or the explanation of the rationalization process are really intended to convey an attitude that implausibility findings should generally only be made with caution –that "[i]mplausibility findings are dangerous at the best of times": *Jung v Canada (Citizenship and Immigration)*, 2014 FC 275 at para 74 [my emphasis]. This similarly conveys an interventionist attitude that the Court may take in reviewing what it refers to as implausibility findings. Overall, when such an interventionist approach is employed by a reviewing Judge, his or her attitude is the most important factor predicting how a court will review a fact when approaching the task.

[86] What comes through clearly in *Valtchev*, and the jurisprudence applying it, is what I would describe as a disrespectful and interventionist attitude in respect of the Board's implausibility findings – even if they are factual inferences "supported by some evidence". The appropriate attitude should be that overturning an assessment finding of fact, including an inferential fact, is fairly exceptional. The judge should exercise caution that he or she is not unconscionably and impermissibly stepping into the Board member's shoes.

[87] If the findings with respect to the primary facts are not in contention, the question arises therefore, as to what is left over for the reviewing Court. There may remain some process errors. Issues of the relevance of the primary facts to a given inferred fact would fall within the Court's purview, and on a correctness standard at that.

[88] Similarly, it could also be plain to see that the primary facts simply cannot support the inferred fact because it would be a wholly unreasonable finding. This represents a standard that does not require a reasonability analysis of factual findings, but where the Court is taken aback when first confronting the inference as simply being beyond the ken of any reasonable connection, such that the error is plain to see. However, to achieve this result, it must be obvious that the inference drawn was not supported by the evidence and not simply that, in the Court's mind, the inference drawn was unreasonable, rather than wholly unreasonable. This would amount to an insufficiently strict standard of review that ultimately entails an impermissible reweighing of the primary evidence.

C. *Underlying policies strongly favour a stricter, non-interventionist approach rather than reasonableness for the review of factual findings*

[89] In *Housen*, policy considerations inform the true rationale that motivates a non-interventionist approach of a stricter standard of review of findings of fact than a reasonability analysis. The Supreme Court's statement on the relevant policies is set out with headings at paragraphs 16 to 18 of *Housen*, as follows with my emphasis:

> (1) Limiting the Number, Length and Cost of Appeals
>
> 16. Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

> (2) Promoting the Autonomy and Integrity of Trial Proceedings
>
> 17. 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.
>
> (3) Recognizing the Expertise of the Trial Judge and His or Her Advantageous Position
>
> 18. The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony viva voce, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

[90] For the most part, the policies described in *Housen* that support a non-interventionist approach to reviewing factual findings speak for themselves. Similarly, these policy rationales apply to the review of factual findings of quasi-judicial administrative truth-finding tribunals, including the RPD.

[91] However, it is arguable that a more forceful case can be made for a non-interventionist approach in reviewing the Board's factual findings than applies to trial courts, to effectively "[l]imi[t] the number, length and cost of appeals". In fact, the first policy ground's title does not really speak to the true nature of the problem in immigration matters. The problem of interventionist review in this area is in large part about undermining the refugee regime itself. Moreover, the refugee regime is problematic in that many provisions of the IRPA, that provide for alternative means to obtain permanent residence, are significantly leveraged by the untoward

delays created by judicial review proceedings, which in turn prevents the removal of failed refugee claimants.

[92] The alternative or collateral permanent residence applications consist of the Pre-Removal Risk Assessment [PRRA] (using the same test applied at the RPD hearing, based on new evidence) or applications for an exemption from certain requirements under the IRPA or the Regulations that must be fulfilled to obtain permanent residence in Canada on Humanitarian and Compassionate [H&C] grounds, on alleged changed personal circumstances while or due to living in Canada. These include allegations of hardship that would be suffered if removed (which can include consideration of country conditions and discrimination sometimes involving the same risk evidence considered in refugee claims such as the less serious harm contributing to persecution, i.e. discrimination and annoyances), marriage in Canada, the best interests of directly affected children or BIOC, establishment in Canada since the refugee claim was dismissed, and new medical conditions. Many of these developments tend to arise while the failed refugee claimant is living in Canada.

[93] In other words, permanent residence originating from a refugee claim may be obtained through success in any number of applications heard by different decision-makers granted authority under the IRPA (i.e. those of the RPD/RAD panels, or from PRRA or H&C officers). The first two applications refer to the same risk criteria, while the H&C application refers to hardship criteria not entailing risk factors (see subsection 25(1.3) of the IRPA). In addition, just prior to removal, a failed refugee claimant may apply for the judicial review of an enforcement officer’s decision refusing to defer removal (see section 48 of the IRPA). Each time one of these

judicial review applications is successful, the matter is returned to a different officer for reconsideration, whose decision may also be judicially reviewed and so on. The multiplicity of procedures subject to judicial review plays into the refugee system's weakest component: the longer a refugee claimant remains in Canada, the greater the opportunity for the claimant to succeed in achieving a permanent residence by recourse to these alternative processes.

[94] Parliament has attempted to respond to this problem by establishing one-year and three-year bars in 2012, under paragraphs 25 (1.2)(c) and 112 (2) (b.1) of the IRPA, respectively in the context of H&C applications and PRRA applications. The distinction between the lengths of time of the bars was originally contingent upon the perceived risk or hardship factors based upon differing country conditions. The three-year bar has been found wanting in this Court, although questions have recently been certified for the Court of Appeal to consider: *Feher v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335. These bars are intended to prevent recourse to PRRA or H&C applications if insufficient time has elapsed since an unfavourable decision was rendered by the RPD or RAD, leaving only the enforcement officer’s decision as a possible ground for further judicial review to prevent the removal of failed refugee claimants to their country of origin.

[95] If the one-year bar is exceeded, then failed refugee claimants have access to the PRRA and H&C applications and judicial review of these applications. These may be repeated thereafter, depending upon the extent of delay in removal that is occasioned by these applications, always backstopped by a final challenge of the enforcement officer’s decision to

refuse to defer the removal. Again, delay may be replicated throughout the system, increasing the backlog and thereby further adding to the delay to the point of overwhelming the regime.

[96] In this gamut of decisions subject to judicial review proceedings, the effective early removal of failed refugee claimants comes down to the leave application of the original RPD or RAD decision. If this Court grants leave for judicial review, the one-year bar to the collateral permanent residence applications is overridden by the time it takes to complete the reconsideration by the Board, which is subject to a further judicial review.

[97] Bearing in mind that the RPD and RAD decisions principally relate to factual findings following paragraph 170(h) of the IRPA, made "on evidence adduced in the proceedings and considered credible and trustworthy in the circumstances", the Court's standard of review of facts tends to be the fulcrum issue. This standard of review directly impacts whether a relatively early removal of failed refugee claimants will occur (i.e. unless overly backlogged, one to two years before engaging the removal process, as opposed to several more years by recourse to judicial review proceedings of the collateral decisions that may provide permanent residence status). That said, I do not believe that statistics have been collected and recorded to assist in understanding the extent of these issues and their impact on the regime as a whole, or at least none have been published, if they exist, which for the sake of transparency, they should be.

[98] In light of these issues, the standard of review of facts is an important policy issue. If the error must be plain to see without a reasonability analysis for judicial review decisions, that error would be equally visible at the leave stage. Similarly, the further issues discussed below of

sensibly moderating the *Maldonado* rule on the impact of sworn statements by refugee claimants, and eliminating the *Valtchev* rule to bring inferential fact finding on credibility issues back in line with standard principles, would similarly reduce inappropriate leave granting rates. Conversely, if a reasonability analysis based only on some declaration of deference is the standard for the review of assessment facts, the leave application will be more readily forthcoming, just because there is no bright line set at a non-interventionist level. The other advantage of a "plain to see" standard for assessment facts is that it will bring consistency to the leave process in that every applicant will be judged on the same unequivocal standard of a "plain to see" error.

[99] All of these issues arise from concerns about undermining the Rule of Law by not applying policies and rules put in place to allow for fair and efficient hearings accompanied by the prompt removal of unsuccessful refugee claimants. The greatest threat to our refugee and immigration regime is that effective and efficient determination processes that deliver decisions serve little purpose because they cannot be executed in a timely fashion. In addition to driving up cost and delay, they are a backdoor which allow refugee claimants to obtain permanent residence status by other means. To the extent that this happens, it encourages more unfounded betterment claims to be brought. This concatenating effect is detrimental to the entire refugee and immigration regime by increasing the cost and backlog of decisions, thereby imperiling the regime and support for legitimate claims for refugee protection.

[100] For the most part, reasonable and empathetic Canadians strongly support our immigration and refugee policies which have greatly benefited the country. No one is suggesting that they be

radically changed, or that the number of foreign nationals, including refugees, entering Canada be reduced. It is essential however, that these policies be applied as Parliament intended.

D. *Conclusion on the principles that apply to the standard of review and accompanying rules of evidence concerning implausibility findings of credibility and presumptions as to the truth of sworn statements*

[101] On the basis that the principles in *Housen* apply to the standard of review of Board decisions, their application may be summarized as follows:

1. If a mixed question of fact and law, determine whether the legal principle is extricable, and, if so, whether it represents the error being considered and should be reviewed on the basis of correctness in accordance with the principles of Dunsmuir. If not extricable, the mixed question will be reviewed as a finding of fact, similar to direct and inferred findings of fact.
2. Delineate the nature of the alleged fact-finding errors. If a process error, it should be reviewed on a correctness standard.
3. If an assessment fact-finding error, a reasonableness standard should be adopted according the factual finding the highest deference such that a reasonability analysis is precluded as it is sufficient that only some evidence supports the finding. Otherwise, intervention is permitted only if the error is plain to see or was made in the clearest of cases (ie. palpable).
4. With respect to the inference drawing step, assuming that the primary evidence and primary findings of fact are not in dispute, the Court will be hard-pressed to intervene

absent a process error, or if the inference drawing error was made in the clearest of cases (ie. palpable).

5. It is impermissible to conduct a reasonability analysis of the inference drawing process, because it involves the weighing and assessment of primary evidence. Moreover, the rationalization process of the inference is sufficiently described if the primary evidence and facts are identified and could be said to support the inferred fact, unless the error was made in the clearest of cases (ie. palpable).
6. Once the Court has concluded its review of the Board's findings of fact, it can then turn its attention to determining the impact of its factual conclusions on the decision in terms of whether it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law and if the decision is justified with transparent and intelligible reasons.

VI. The Board is not limited to making implausibility findings of credibility only in the clearest of cases

A. *Introduction*

[102] In the 2001 *Valtchev* decision, this Court declared, in rule-like fashion, that in matters of credibility "plausibility findings should be made only in the clearest of cases" (at para 7). By such language, the Court requires the Board to make negative inferences at a threshold of probative value above that of a probability or likelihood.

[103] Since first declared, numerous Federal Court decisions have cited the rule in *Valtchev* (referred to in 255 cases in the Federal Court according to Lexis-Nexis). Moreover, this rule is

constantly cited in leave memoranda, as it was in this matter. More importantly, the Federal Court tends to caution against relying on plausibility findings and has generally adopted the distrustful attitude conveyed towards plausibility findings in *Valtchev*.

[104] At first blush, the *Valtchev* rule appears to relate only to the probative value of evidence required to formulate a plausibility finding. However, less evident is that the rule also affects the standard of review applied to plausibility findings because the rule heightens the probative value required of evidence to make the finding. If this Court adopts the principles of *Housen*, stressing a non-interventionist approach of the Court to findings of fact, this should end any further reference to the *Valtchev* rule. If nothing else, the *Valtchev* rule turns these principles of *Housen* on their head: as the Court has been applying a "plain to see" rule, not as a limitation to its own authority to intervene with the Board's factual inferences, but rather as a limit on the Board's authority to make inferential findings of fact. In other words, the *Valtchev* rule fetters the Board's discretion to make factual inferences.

B. *The statement of the Valtchev rule*

[105] The *Valtchev* rule, including its context, is set out as follows, with my emphasis:

> [7] A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman,

> Immigration Law and Practice (Markham, ON: Butterworths, 1992) at 8.22]

[106] This excerpt is taken word for word from Mr. Waldman's text, referred to by the Court in the passage. Mr. Waldman's firm represents the Applicants and he has filed submissions on their behalf in response to my Direction.

[107] *Valtchev* uses the term "plausibility" to describe an adverse credibility finding. The phrase "implausibility finding" is also used and, as discussed above, perhaps is more appropriate. An implausibility finding is simply an inference of a fact used to refute an assertion of fact by a given witness, which is found to be implausible and which may be used to discredit the credibility of the witness or the claimant. If a reasonability analysis was applied, the most appropriate term would be an "improbability finding", which would reflect a threshold of a probability, if the term is used to limit the Board's authority to make inferential findings of fact. The appropriate language, I suggest, would be that the inference is plainly or obviously speculative.

C. *Interpretation of "only in the clearest of cases"*

[108] In my opinion, the term "clearest of cases", although tending to hyperbole, is similar to the "plain to see" formulation, which conveys the same meaning as the term "clear and obvious". Indeed, it is a reasonable conclusion that a number of terms are relatively synonymous with "plain to see" used in *Housen*: "the clearest case of error" (*Njeri),* "wholly unreasonable" (Paciocco Text), "clear to the mind", "obvious" and again "the clearest of cases" in *Valtchev*.

[109] When speaking to the only clearest of cases formulation, one is addressing the clarity of whatever the "case" is about. In *Njeri*, the case concerned the extent to which an error must be clear for the Court to intervene with respect to the Board's finding of fact. In the case of *Valtchev*, the Court considered the clarity of evidence in terms of the degree of its probative value required to support the inferential implausibility finding drawn by the Board.

[110] The term "only" denotes singularity of circumstances. The term "clear", as indicated, already tends to elevate the standard to one approaching or the same as obvious. The suffix "est" obviously represents the highest degree of clarity: (est, is a suffix "[f]orming the superlative degree of adjectives and adverbs", Oxford English Dictionary). The reference to cases, establishes and particularizes the threshold, as amongst all the cases, the one in question should stand out from them as being clearly exceptional.

[111] The phrase "clearest of cases" has this well-established meaning in law generally. At this time, the Lexis-Nexis application indicates that it is been used in no fewer than 6,923 cases. The Supreme Court has recognized that the term sets a higher threshold than a mere probability. For example in the matter of *R. v O'Connor*, [1995] 4 SCR 411, the Court stated at para 69 as follows with my emphasis:

> 69 Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the "clearest of cases" threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the Charter regime is more flexible than the common law doctrine of abuse of process.

[112] Our Court continues to constantly cite this phrase when it reviews the Board's plausibility findings. For example, in the recent matter of *Miclescu v Canada (Minister of Citizenship and Immigration)*, 2019 FC 166, [*Miclescu*] the Court relied on the term to impose a higher degree of probative value to prove a plausibility finding at para 19, as follows with my emphasis:

> With regard to the police officers the female applicant could not name, the Member was not convinced that this was plausible in the small town in which the applicants lived, and that it was to be expected that the applicants would have made enquiries as to their identities. This is essentially a finding of implausibility, which should be made only in the clearest of cases: *Valtchev v Canada (Citizenship and Immigration)*, 2001 FCT 776 at para 7. Such a conclusion based on the small size of the town is not sufficiently clear, especially considering that the applicants are part of a minority that is ostracized from many aspects of Romanian society, and therefore may not wish to be familiar with local police.

[113] *Miclescu* is but one of many demonstrations of how the term "clearest of cases" is used as a measure to impose higher probative value to prove the fact. However, *Miclescu* is not out of the ordinary, but simply represents the logical application of the *Valtchev* rule. This reasoning embodies an interventionist approach that infringes the standard of review rule for inferential findings of fact set forth in *Housen*. Through this reasoning, the Court is essentially re-weighing the primary evidence and drawing its own inference. However, *Housen* established that if the primary facts are not disputed, the Court will be "hard-pressed" to intervene.

[114] With respect, *Valtchev* conveys significant distrust of implausibility findings and follows that up by indicating that they should be limited to very [only] clearly exceptional circumstances [the clearest of cases]. By using this phrase, the Court imposed a higher standard of evidence required by the Board to formulate an implausibility finding of adverse credibility. The *Valtchev*

rule is a clear invitation to the Court to intervene whenever this unusually high standard of proof is not met. That is exactly how the rule has since been relied on by this Court, notwithstanding the subsequent rules in *Housen* and *Khosa*.

D. *The parties' submissions in response to the Court's Direction*

[115] The Applicants submit that the *Valtchev* rule must be considered in its context to understand its meaning. I respectfully disagree because the rule is usually cited as categorical, without any accompanying context or explanation. While I consider the context of the rule below, the Applicants' submission must be rejected as the *Valtchev* rule must be considered in the fashion that it is most regularly stated, as in the case of *Miclescu* referred to above.

[116] In response to the Court's Direction, the Respondent submits that the "clearest of cases" phrase does not prescribe a higher evidentiary threshold. Nevertheless, the Respondent's submissions are equivocal with respect to the phrase's meaning. If nothing else, this ambiguity of the phrase "clearest of cases" certainly supports the conclusion that it should be abandoned for the confusion it sows. The Respondent's various statements on the phrase's ambiguity read as follows, with my emphasis:

> However, in this case, the Respondent submits that the *Valtchev* decision is <u>open to different interpretations</u> by the Court. It is not <u>plainly evident</u> that the *Valtchev* decision makes a ruling that "the evidentiary probative value of the evidence required to prove implausibility findings of credibility exceeds that of a probability."
>
> …
>
> The Respondent submits that a review of the *Valtchev* decision does not include <u>an explicit ruling that the onus is on the Board</u> to prove the lack of believability with evidence having a probative

> value that exceeds that of probability. To impute this meaning from its reference to the phrase "clearest of cases" requires too much inference.
>
> The Respondent submits that the phrasing "clearest of cases" in *Valtchev* is such that it may appear as a hyperbole or exaggeration to make its point. In fact, in *Valtchev* itself, Justice Muldoon explains … [Considering the contextual submissions referred to by the Applicants, which I review below]
>
> It is evident that the *Valtchev* ruling has been interpreted in different ways but has not been categorically followed as imposing a higher evidentiary threshold on the RPD to prove the implausibility of the Applicant's evidence.

[117] While I respectfully disagree with the Minister's refusal to accept the ordinary grammatical meaning of the term "the clearest of cases", the Minister does acknowledge that very serious consequences flow from a conclusion that the term describes a higher standard of probative value to form an inference. These include affecting the standard of review and fettering the Board's legal authority to make findings of fact under paragraph 170(h) of the IRPA. The Minister's comments on this point read as follows with my emphasis:

> The Respondent submits that if Valtchev were applied categorically in a way that required proof of implausibility greater than [a] probability to be demonstrated by the RPD, that could be considered a fetter on the broad discretion bestowed on the RPD by Parliament to demonstrate the credibility and trustworthiness of claims in accordance with paragraph 170(h) of the IRPA.
>
> Nevertheless, in the hypothetical, the Respondent submits that if a higher standard of the probative value of evidence beyond a probability were to be required by the RPD to make implausibility findings, this could well result in a less deferential and more interventionist approach and could affect the standard of review [*I agree*].

E. *The contextual rationale does not support the conclusion that the Valtchev rule was not intended to impose a higher evidentiary threshold to find a fact*

[118] The Applicants and Respondent agree that the statement in *Valtchev* was not intended to alter the probative value required to form an implausibility finding. Instead, they argue that the two examples of plausibility findings provided by the Court in *Valtchev* represent the interpretation to be applied to the "clearest of cases" phrase. In this regard, the Applicants' submission is as follows with my emphasis:

> The Applicant also agrees with the Respondent that *Valtchev* does not alter the burden of proof. What *Valtchev* recognizes is that there is a distinct thought process in plausibility findings and a plausibility finding can only be reasonable if the inferences drawn are reasonably open to the tribunal either <u>because the evidence is outside the realm of what might be expected</u> or <u>because the evidence is inconsistent with the documentary record</u>.
>
> […]
>
> In some cases the inferences are based on common sense – a claim that a person was able to run one kilometer in five minutes might be implausible if the person making the claim has serious health problems that render the statement unreasonable. In other cases the statement is implausible because there is documentary evidence that contradicts it.

[119] I respectfully disagree with these submissions.

(1) "could not have happened"

[120] I start with the second example, as it is the clearer of the two. It perfectly typifies that the clearest of cases of a permissible plausibility finding would require evidence well above that of a mere probability. The Applicants have reformulated the test in *Valtchev*, which does not assist the Court in this analysis. I restate the example of a plausibility finding from *Valtchev* made only in the clearest of cases, and immediately thereafter the version found in the Applicants' memorandum along with the further example provided, with my emphasis:

> *Valtchev*: where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant…
>
> Applicants: because the evidence is inconsistent with the documentary record/ the statement is implausible because there is documentary evidence that contradicts it…

[121] The difference between the example in *Valtchev* and that advanced by the Applicants is significant. In *Valtchev*, the term "could not" has the meaning of "not possibly". Accordingly, the Board can only make an implausibility finding when it is impossible that it could have happened in the fashion alleged. That example describes an impossibility to support the rule and is certainly an implausibility finding that could be made only in the clearest of cases when it could not have happened. This is normally described as a flagrant misapprehension of the evidence. The example entirely substantiates a level of implausibility greatly above a standard of a probability.

[122] The version provided by the Applicants no longer describes impossible statements of fact, but merely ones that are inconsistent with other evidence. With respect, this example does not describe an inferred implausibility finding, but rather is a direct finding of inconsistent testimony. This is a process error in the primary facts, if the contradiction is overlooked, as opposed to being an issue of assessing evidence, the latter situation, which *Khosa* and *Housen* indicate cannot be disturbed.

(2) "outside the realm of what could reasonably be expected"

[123] *Valtchev*'s other example of a permissible implausibility finding made in the clearest of cases is described along with the related example cited in the Applicants' memorandum, with my emphasis:

> *Valtchev*: the facts as presented are outside the realm of what could reasonably be expected.
>
> Applicants: the evidence is outside the realm of what might be expected/ a claim that a person was able to run one kilometer in five minutes might be implausible if the person making the claim has serious health problems that render the statement unreasonable.

[124] The example provided by *Valtchev* is somewhat ambiguous. It sounds very much like the reasonableness standard of review in *Dunsmuir* of a range of possible acceptable outcomes, which is intended to be highly deferential to the tribunal. But the rule in *Dunsmuir* relates to a standard of review of the Board's decisions ("range of possible, acceptable outcomes which are defensible in respect of the facts and law", *Dunsmuir* at para 47), which in this case is instead being applied as a requirement to a finding of fact by the Board (ie. impermissibly reweighing the evidence, see *Khosa* at paras 45-46 and 59-67).

[125] The Applicants' example of an individual's ability to run in certain circumstances also describes the probative value of evidence well beyond that of a likelihood. In terms of a probability scale between 51 per cent and 100 per cent, the concept of someone with a serious health problem running a five minute kilometer is a probability factor up in the 80 to 90 per cent range. This example presents a very high standard, well above a probability of a finding being "only in the clearest of cases".

F. *The fact that the Board hears cases involving refugees from diverse cultures cannot rationalize the rule in Valtchev*

[126] The final point I address is the rationalization of the rule in *Valtchev* that a higher standard is required to make an implausibility finding, because claimants come from diverse cultures. Again, quoting from the decision as follows, with my emphasis:

> A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu.

[127] The essence of the Applicants' argument, as apparently adopted by the Court in *Valtchev*, is that the Board does not realize that implausible statements can be plausible when viewed in the context of the claimant's cultural framework. If this statement was just the Court lecturing Board members to remember to do their job, it could be shrugged off as simply condescending. But because this comment has become the rationale for the *Valtchev* rule, it has taken on another purpose. Turning to the facts in *Valtchev*, there was an issue with respect to the claimant's Roma ethnicity. That said, there does not appear to be any suggestion that the Board failed to understand testimony, as opposed to the Judge disagreeing with the findings. Indeed, the Court parsed a large number of items, over some 52 paragraphs of reasons describing its disagreement with the Board's findings, point-by-point (namely, at paras 6-47). Cultural factors therefore did not actually appear to be directly at play in *Valtchev*, despite the Court's determination that the Board's plausibility findings warranted intervention.

[128] The rationale appears to be that because cultural factors may impact on the testimony of refugee claimants, it is necessary to *categorically* limit the Board's authority to make implausibility findings, unless it has done so in the clearest of cases. With respect, it is not logical to advert to cultural diversity to rationalize a highly overreaching declaration that implausibility findings should only be made in the clearest of cases. Similarly, it is illogical to declare a categorical rule dictating to the Board how it should make plausibility findings, based on a fairly rare factual circumstance when compared with the enormous number of different factual scenarios presented before the Board in refugee hearings.

[129] If cultural considerations are raised, they should be assessed on a case-by-case basis as an aspect of the probative value attaching to the evidence to support an implausibility finding. In most cases, the submission would be in the form of a process error. The submission would be that the Board's attention was drawn to a particular cultural aspect affecting the testimony of a refugee claimant, which the Board ignored despite its demonstrated relevance.

G. *Raising the evidentiary burden for implausibility findings of credibility adversely affects the standard of review of the facts at issue*

[130] The Respondent acknowledges that raising the evidentiary burden for implausibility findings lowers the standard of review of such facts, in addition to fettering the Board's authority to make findings of fact under paragraph 170(h) of the IRPA. It comes down to requiring the Board's error to be less plain to see. This in turn enables the Court to be more interventionist for a fact that needs to be proven only to a probability of 51 %, than an error of finding a fact that is

more plain to see if it must be proven to some higher degree of probability based on the evidence, say in the 70 to 80 % range made only in the clearest of cases.

[131] Under the *Valtchev* rule, the Court applies the least deferential standard of review possible when it is required to apply the highest degree of deference to findings of fact. The correct approach is that the two standards should work together, so that the fact is found only on a probability threshold, which can only be overturned in the clearest of cases. The rules in *Valtchev* and in *Housen* represent standards of deference at polar opposites.

VII. *The presumption in Maldonado does not apply to presume that facts are "trustworthy"*

A. *Introduction*

[132] In responding to the Court's Direction inquiring as to whether *Valtchev* has displaced the onus to disprove an implausibility finding to the Board, the Applicants raise the impact of *Maldonado*. Their submission is as follows, with my emphasis:

> The Court draws the attention of counsel to the use of the expression "in the clearest of cases". This does not alter in any way the burden of proof. The burden of proof in a refugee claim is always on the claimant. However, there is a presumption that the claimant is telling the truth as reflective in the *Maldonado* decision. It is this presumption that comes into play in plausibility findings. If there is a presumption that a claimant is telling the truth then this presumption must be applied to plausibility findings. If a claimant's evidence is presumed to be true then it should only be found to be implausible when it is outside the realm of what could reasonably be expected to occur or is inconsistent with the documentary record.

[133] The Applicants are correct in stating that *Maldonado* played a role in *Valtchev*. Paragraph 7 of *Valtchev* set out above was preceded by the following title and reference to *Maldonado* at paragraph 6, which reads as follows with my emphasis:

> Presumption of Truth and Plausibility
>
> [6] The tribunal adverts to the principle from *Maldonado* that when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness. But the tribunal does not apply the *Maldonado* principle to this applicant, and repeatedly disregards his testimony, holding that much of it appears to it to be implausible. Additionally, the tribunal often substitutes its own version of events without evidence to support its conclusions. [Citations omitted]

[134] I assume that, in *Valtchev*, the RPD's failure to apply the presumption in *Maldonado* explains why the onus was placed on the Board to provide reasons as to why it doubted the truthfulness of the Applicants' sworn allegations.

[135] Having considered the Applicants' submission, it becomes apparent that the *Maldonado* rule enables the *Valtchev* rule. In other words, the *Valtchev* rule cannot be stated without the presumption of truthfulness applying to statements found to be implausible.

[136] It is to be recalled that the Paciocco Text, cited the Ontario Court of Appeal decision in *R v Thain* (2009), 243 CCC (3d) 230 at para 32. (Ont CA) [*Thain*], was to the opposite effect of the *Maldonado* rule: there is no presumption that witnesses are telling the truth. What appears to be overlooked, is that the authors associated the standard of review of a fact (not be set aside except when wholly unreasonable), with the rule that there is no presumption of truthfulness. I repeat

the passage cited as follows with my synoptic terms in square brackets and emphasis on the term "therefore":

> Together the believability [credibility] and informativeness [trustworthiness] of evidence are often referred to as "probative value". The trier of fact is free to decide how believable or important evidence is, so long as their findings are not wholly unreasonable. There is <u>therefore</u> no presumption that witnesses tell the truth (*Thain*). It is up to the trier of fact to decide whether that is so. [Citations omitted]

[137] Accordingly, to the extent that the *Maldonado* presumption informs the *Valtchev* rule, *Maldonado* is relevant both to the issues of the standard of review of facts ["therefore" above] and the propriety of a rule that imposes a requirement on the Board to make implausibility findings in only the clearest of cases.

[138] In the analysis that follows, I express my disagreement with much of the Applicants' submissions. Furthermore, in my review of *Maldonado*, I also conclude that the presumption applies only to the <u>credibility</u> and not the <u>trustworthiness</u> of a claimant's sworn allegations.

B. *Maldonado places the legal onus on the Board to refute the truthfulness of a sworn fact*

[139] When the Applicants state that the burden of proof in a refugee claim always lies on the claimant, they refer to the <u>legal</u> onus placed on claimants to prove their case on the balance of probabilities. A presumption is the same thing as an onus, if not countered.

[140] The *Maldonado* rule raises a presumption only with respect to a <u>finding of fact that the claimant swears</u> to be true (remarkably, including those contained in a corroborative out-of-court

statement, such as that made by the claimant's spouse in *Maldonado*). In most cases, an evidentiary presumption of fact is a reversible presumption. During the course of the hearing, the evidentiary onus goes back and forth depending on the probative value of the evidence presented. If not responded to, the fact will be found in the opponent's favour. However, the legal onus of proving the fact rests with the party advancing the fact, if the decision-maker is unable to make the either/or finding on the balance of probabilities.

[141] In the case of *Maldonado*, the Court has stipulated that the legal onus of a fact sworn to be truthful by a refugee claimant shifts to the Board, or the Minister if intervening (which it does on rare occasions, see section 29 *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*]). There would be no need to state the rule of a reversing presumption of evidence to find or disprove a fact in the course of the hearing. It already exists. *Maldonado* stands for the proposition that it is the respondent's onus, or the Board's onus to demonstrate in its reasons, sufficient grounds to prove that the sworn statement is not true. As described in *Valtchev*, this extends to factual implausibility inferences of adverse credibility, which in addition, the Board can only make in the clearest of cases.

[142] Accordingly, *Maldonado* and *Valtchev* represent a twofold usurpation of the Board's authority to find facts under paragraph 170(h) of the IRPA. This is further expanded by the Court undertaking a reasonability analysis of the Board's finding, while imposing a requirement that the "rationalization process" be described in clear terms.

[143] It is probably worth noting at this point that the courts have established that the legal standard imposed on a refugee claimant to prove a well-founded fear of persecution is that of a "serious possibility". In comparative terms, I estimate this standard at a threshold of 35 to 40 %, as opposed to 51 % for the balance of probabilities normally applied in civil matters. The well-founded fear legal standard, being a question of mixed fact and law, is essentially a factual determination. While the facts still have to be established on evidence to a threshold of 51% by whoever is seeking to establish the fact, there is an impact that follows when no longer relying on the legal standard of the balance of probabilities in civil matters. It effectively places the onus on the Board to establish that the refugee claimant does not have a well-founded fear on a measure that would approximately equate with the standard in criminal law of "proof beyond a reasonable doubt".

[144] Now, there is no suggestion for various reasons that the lower legal standard to establish persecution should be made more exacting. However, it is respectfully submitted that the Court of Appeal should denounce for once and for all the competing legal standard of "more than a mere possibility". It continues to be referred to as the standard by some RPD members, and more often by PRAA officers. It would impose legal standard in the range of 80% on the Board to find the claimant was not a refugee; in effect requiring a finding of a near-certainty.

[145] The contextual point made here is that where the legal standard already is reduced to the level of a possibility, the *Maldonado* and *Valtchev* rules have an exacerbating effect on the reliability of the decisions rejecting refugee claims. They add considerably to the barriers preventing normal fact-finding principles followed by courts and administrative tribunals in

other legal regimes in Canada, including in the Federal Court. The legal possibility standard, in conjunction with the *Maldonado* and *Valtchev* rules should raise concerns about the overall reliability of persecution findings, beyond their undermining effect on the reliability of the Board's decisions.

[146] This brings me to a point of distinction that could limit the impact of the *Maldonado* rule if it is supplemented with a less categorical standard that employs what may be described as the "benefit of the doubt rule". It would respond to the intended rationale underlying Maldonado which acknowledges that refugees cannot always provide corroborating evidence, particularly if in a situation of flight from risk. The benefit of the doubt rule is regularly employed worldwide in refugee matters. Its description can be found in the UNCHR refugee handbook as follows, with my emphasis:

> (2) Benefit of the doubt
>
> 203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196) ["In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents."], it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.
>
> 204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.
>
> (3) Summary
>
> 205. The process of ascertaining and evaluating the facts can therefore be summarized as follows:

> (a) The applicant should:
>
> (i) Tell the truth and assist the examiner to the full extent 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 the reasons invoked in support of his application for refugee status and he should answer any questions put to him.

[147] The significant difference between the UNCHR rule and that in *Maldonado* is twofold. First, the refugee claimant must demonstrate genuine efforts to obtain corroborative evidence, or explain why the information was not available. This should have the effect of refugee claimants seeking and providing objective corroborative evidence that is often not presented in refugee claims when the claimant may simply rely on the truthfulness of their sworn statements of fact to prove their case. As it stands now, most refugee claimants rely on their sworn statement to prove that they are refugees, as in this matter. It also means that the Board can inquire into the pre-planning etc. that went into the decision to "flee" in order to determine whether it really was a situation of flight, or one in which the claimant understood the requirements to make a refugee claim and despite that could not use any of the modern technology available today to substantiate his or her story.

[148] The Board can also inquire into the instructions provided by immigration consultants or lawyers after the fact as to efforts to obtain corroborating evidence. This is not a privilege issue

as it does not pertain to legal advice but instructions to follow the law. The claimant is required to demonstrate genuine efforts, and in that regard to seek instructions from his or her immigration representatives. The "benefit of the doubt" rule also is generally limited to situations of flight, without application to circumstances where it would be expected that the claimants should be able to obtain information without risk being a justifiable factor not to do so, where the *Maldonado* rule has no application.

[149] This places an onus on representatives, similar to that when advising clients engaged in matters before most judicial and quasi-judicial tribunals. It is a ground rule that parties should bring forward all the normal expected corroborative evidence to support their case, obviously with a focus on objective evidence having the greatest probative value. This is substantiated to some degree by the rarely applied section 11 of the *RPD Rules*, which provides that "[t]he claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them" (See as exceptions *Bersie v Canada (Citizenship and Immigration)*, 2016 FC 900 at para 29; *Ismaili v Canada (Citizenship and Immigration)*, 2014 FC 84 at paras 31-36.

[150] However, there remains contradictory jurisprudence based on Maldonado: see for example in *Dayebga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 842 (CanLII), where it was stated as follows at para. 27:

> [27] The respondent's approach would reverse engineer the principle from *Ahortor* above. [T]he applicant's failure to produce documents would create a credibility concern allowing the Board to consider his failure to produce documents as a reason to doubt

> credibility. If the Board engages in such reasoning, it circumvents the presumption that sworn testimony is truthful (see *Maldonado v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 72) by analyzing the applicant's reasons for a lack of documents without addressing the credibility or plausibility of the applicant's allegations as described in oral testimony.

[151] Second, and most legally significant, the "benefit of the doubt rule" is applied at the end of the evidence examination process and not at the beginning. By imposing the factual presumption as the starting point when the statement is sworn to be true, the *Maldonado* rule has transmogrified an evidentiary rule into a legal presumption rule, but regarding findings of fact. It is for this reason that the *Maldonado* rule, as currently interpreted by this Court, fetters the Board's jurisdiction to find facts. It approaches a fetter on the Board by impermissibly shifting the onus to the Board.

C. *Maldonado only presumes the credibility of the facts alleged in sworn statements, not their trustworthiness*

[152] Second, and as a partial and saving explanation for the *Maldonado* rule, it is arguable that the Federal Court of Appeal only intended its statement of principle to apply to sworn credibility statements. This means that the rule does not obviate the requirement that the refugee claimant prove the alleged fact's trustworthiness. Trustworthiness is the second evidentiary component described in paragraph 170(h) of the IRPA that should "base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances".

[153] This issue appears not to have been previously addressed by the Court. A court is not restricted in adopting a different interpretation of a case than that of other judges, if valid reasons

exist to doubt its correctness. It does not appear that other judges of this Court have reflected on the context in which the presumption rule in *Maldonado* arose. The relevant passage from paragraph 5 of *Maldonado* reads as follows, with my emphasis:

> It is my opinion that the Board acted arbitrarily in choosing without valid reasons, to doubt the applicant's credibility concerning the sworn statements made by him and referred to supra. When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness.

[154] It would appear that, in *Maldonado*, the Court's concern initially was the "doubting" of the applicant's credibility ["without valid reasons to doubt the applicant's credibility"]. Thereafter, the Court refers to the applicant swearing to the truth of the statement. Swearing to the truth of a statement is a step intended to enhance the credibility of the statement by placing the individual's honesty at risk of being punished if knowingly false, although admittedly enforced in rare circumstances in immigration matters (*Criminal Code*, RSC, 1985, c. C-46, sections 131 to 133). Thereafter, the Court re-states the rule of the presumption of truthfulness using the same wording that relates back to the Board's original reasons doubting that the allegations are true ["are true unless there be reason to doubt their truthfulness"]. The focal or pivot point of the presumption is clearly on the credibility attached to the applicant's statement. The Court implicitly concluded that the applicant's credibility is fortified by swearing to the truthfulness of the alleged fact.

[155] This is important, because credible evidence is generally not sufficient to prove a fact. Before most truth-seeking tribunals, the party attempting to prove a fact would still need to demonstrate its trustworthiness (i.e. sufficiency and reliability of sworn statements, usually by

corroboration). This is why the Paciocco Text states at page 33 that "Together the believability and informativeness of evidence are often referred to as probative value". While the credibility of a claimant's statement may not be in doubt, the claimant may nevertheless need to support that statement by presenting trustworthy evidence. This distinction is of particular import when the statement arises in a situation where the weight of self-interest is very high that nevertheless raises questions of sufficiency and reliability, as in the context of a refugee claim, relative to the moral and deterrence factors that tend to dissuade untruthfulness. Thus, it has a corroborating impact on credibility getting the statement over the sufficiency requirement of proving the fact as a probability.

[156] To date *Maldonado* has been interpreted liberally to apply to both the credibility and trustworthiness elements of the Board's fact-finding mandate described in paragraph 170(h) of the IRPA. If the sworn statement raises no presumption as to the trustworthiness of the evidence, this would require the refugee claimant to adduce sufficient and probative evidence to support an alleged fact or demonstrate that genuine efforts were made to obtain same in order to warrant the benefit of the doubt that the statement was credible, all else being in order. I find this to be the proper interpretation of *Maldonado*. It is also supported by Rule 11. As such, the UNCHR "benefit of the doubt rule" should apply without any presumption of trustworthiness of the sworn statement, thereby requiring corroboration unless demonstrated as not being reasonably available. Better still however, the Court of Appeal might reconsider its application after some 40 years to determine whether it should not be entirely replaced by the "benefit of doubt rule" as an aspect of comity with the evidentiary standards applied in other countries.

VIII. Conclusions on the standard of review and evidentiary presumptions

[157] My conclusions on the evidentiary presumptions that apply in this matter are as follows:

1. Fact-finding process issues are reviewed on a correctness standard.
2. Fact-finding weight assessment issues, including those pertaining to credibility findings are reviewed on a non-interventionist reasonableness standard, being accorded the highest deference and subject to the following prescriptions:
    a. The Court cannot reweigh the evidence and cannot intervene if there is some evidence that could support the Board's finding of fact, as this would amount to reweighing the evidence. This restriction thereby limits the Court's intervention to the clearest cases of error that are plain to see, made without the necessity of a reasonability analysis: *Housen*; *Odia*; *Njeri*.
    b. The same standard of review precluding a reasonability analysis applies to inferential findings of fact, including all plausibility findings and questions of mixed fact and law, to which the considerations of *Housen* similarly apply. If the primary facts are proved, the Court will be hard-pressed to intervene apart from process errors.
    c. Implausibility findings of credibility are subject to the same rules of evidence as other inferential evidence, in all respects, and in particular these findings are not limited to being made by the Board "only in the clearest of cases", but on a probative evidentiary standard of probability only.
    d. The reasons describing the rationalization process of drawing an inference are subject to the same standards as that described in *Dunsmuir* and *Newfoundland*

Nurses, using the example of the Supreme Court in *Housen* where the Court described the rationalization process based on a presumption arising out of the established primary facts.

3. Once the Court has concluded its review of the Board's findings of fact, it can then turn its attention to determining the impact of its conclusions on the pertinent issues of the decision in terms of whether it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law and if the decision is justified with transparent and intelligible reasons, per *Dunsmuir* and *Newfoundland Nurses*.
4. *Maldonado* does not apply to preclude the requirement that applicants make genuine efforts to provide probative corroborative evidence to support the trustworthiness of sworn statements required by section 170(h) of the IRPA and in accordance with Rule 11, unless they are able to demonstrate that their genuine efforts to obtain such evidence were unsuccessful, in which case the applicants are entitled to the benefit of doubt.

IX. Analysis of the Applicants' submissions

[158] Applying the *Housen* principles of standard of review of factual findings, rejecting the *Valtchev* rule on implausibility findings of credibility, and limiting *Maldonado* to a presumption as to the credibility (and not the trustworthiness) of sworn statements, will in many cases result in different outcomes in the review of factual findings. This is one of those cases. In order to demonstrate the different outcomes, arising from the impact of these rules on the Court's review of the Applicants' submissions, I will distinguish the outcomes.

A. *The Principal Applicant*

[159] The Board drew an implausibility finding with respect to the principal Applicant's answer to its question as to why he did not report to his company that a government security officer had asked him to inform on fellow employees. The principal Applicant provided two explanations for his failure to do so, which the Board found to be implausible: first that he did not think the company could do anything, and second, out of fear, because Mr. Al-Kabtany told him not to tell anyone else.

[160] The RPD noted that the second more plausible reason was not included in the principal Applicant's Basis of Claim [BOC] narrative. The RPD also found that the principal Applicant was evasive and unable to provide a reasonable explanation for the omission and referred to the fact that his employer was itself a government owned company. Similarly, the RPD noted that the principal Applicant was unable to provide details about an alleged two hour conversation with Mr. Al-Kabtany.

[161] On a more general basis, the RPD referred to the principal Applicant's personal history: being born and educated in the KSA, his longevity and success with the company, and achieving a management position as a systems engineer. The RPD found the principal Applicant's testimony that he was required to pay his own travel expenses to be inconsistent with the record, as the only evidence before the RPD was that such expenses had been reimbursed on another trip.

[162] These foundational facts provided the basis for the RPD's adverse credibility inference that the principal Applicant's testimony did not have "the ring of truth" of having abandoned his

homeland due to this one incident, without having advised his employer. Accordingly, the RPD concluded that the principal Applicant had fabricated the incident itself.

[163] The foundational facts are contested to some degree, but I reject these challenges. The principal Applicant claims that in reviewing the transcript, it will be seen that he answered all of the questions that the RPD put to him, ignoring the fact that this still leaves two hours of discussion with Mr. Al-Kabtany unaccounted for. Ultimately, the principal Applicant simply asked this Court to carry out its own analysis of the fact-finding based on the same evidence before the RPD, by relying on this Court's jurisprudence, referred to above, that it is in just as good a position as the RPD to consider the reasonability of inferences drawn. However, *Housen* considered and rejected this proposition.

[164] In its introductory remarks, the RPD stated that it would not apply "the clearest of cases" test from *Valtchev*. The Board's inferential conclusions of fact applied the standard balance of probabilities test to the findings of implausibility ["balance of probabilities that the principal claimant fabricated a story; balance of probabilities that the female claimant does know why"…].

[165] The principal Applicant did not directly challenge this standard of evidence, instead making an implicit reference to the reasoning in *Valtchev*, as follows with my emphasis cited from paragraph 70 of the Applicants' initial memorandum:

> Moreover, this is not a situation where the facts presented to the Member are either so far outside the realm of what could

> reasonably be expected that the member could reasonably find that the events did not occur as described by the principal Applicant.

[166] The principal Applicant's submission is that his statement explaining why he did not report the situation to his employer was not "~~either~~ so far outside the realm of what could reasonably be expected" that the Board drew an erroneous implausibility finding. In layman's language, only if the principal Applicant's statement was way outside the realm of what could reasonably be expected, could the Board find that he fabricated his story.

[167] I have applied the strikethrough font to the term "either" in the statement from the principal Applicant's memorandum because there was no "or" accompanying the word, there being only one submission.

[168] The principal Applicant asks the Court to conduct a reasonability analysis to reweigh the primary evidence by applying the rules in *Maldonado* and *Valtchev*. Such an analysis entails the Court determining whether the RPD's implausibility finding was made in only the clearest of cases.

[169] In the Applicants' submission, unless the Court concludes that the principal Applicant's statement is so far out of the realm of reasonableness based on the primary evidence, it must intervene to set aside the RPD's implausibility finding. In my view, every aspect of the foregoing submission infringes the reasoning in *Housen*.

[170] I would agree, however, that applying the *Valtchev* rule to review the RPD's implausibility finding would require this Court's intervention. I could not say that the principal Applicant's statement was so far outside the realm of what could reasonably be expected to support the conclusion that the implausibility finding was made only in the clearest of cases.

[171] The Minister advanced no submission with respect to the appropriate test that the RPD was required to apply to implausibility findings of credibility. Instead, the Minister submitted that "the reviewing court should be hesitant interfering unless the applicants can demonstrate that the decision is unreasonable."

[172] In terms of the parties' submissions, in the Court's experience, this case is similar to most of those challenging implausibility findings of credibility.

[173] I conclude that *Valtchev* incorrectly directs the Court to conduct a reasonability analysis of factual findings while setting too high a standard of the probative value required to make the impugned implausibility finding. As I apply the directions from *Housen*, I conclude that the principal Applicant's application must be dismissed, as the alleged error is not plain to see and the RPD's conclusion in this regard is supported by some evidence.

B. *The Female Applicant*

(1) Whether the RPD made a reviewable error by drawing an implausibility finding that the female Applicant, or her father, would not report the inappropriate touching incident to the licensing body for dentists or her employer?

[174] The RPD noted that the female Applicant claims that her employer dentist inappropriately touched her on one occasion, highlighting the one occasion in bold. She told her parents and when asked if they reported this incident to her licensing body, she said no; her employer dentist was a Saudi and his brother was involved in security issues for the KSA government.

[175] The RPD found the female Applicant's explanation unreasonable: as a professional affiliated with the dental Society working as an apprentice for two years to become a dentist it was implausible that she would not report the incident to her licensing body. The RPD also found the explanation that her father would not report the incident as implausible given that his family was well-established in the KSA for three generations; he had been able to work and enjoy a "remarkable lifestyle" in the KSA. The assumption that the Court draws from this evidence, is that the female Applicant giving up her career because of one incident of inappropriate touching, without any complaint by her or her father, was not reasonable.

[176] The Applicants submit that all of the RPD's questions concerned why the female Applicant failed to report the incident, which is not accurate. She was specifically asked why her parents did not report the incident to authorities, the response to which questions are described above.

[177] With respect to the probative value required to support the implausibility finding, the RPD indicated that "while the female claimant's position may be possible it was not plausible". I understand this comment to mean that that the explanation did not meet the balance of

probabilities of plausibility required to take some action with respect to a vaguely described incident of inappropriate touching. In other words, the RPD found it more likely that the female Applicant fabricated this narrative as a false basis to immigrate to Canada with her husband.

[178] Given that the primary evidence was not challenged, it cannot be said that the inferential finding of implausibility amounts to an error that is plain to see or that it was made in the clearest of cases. Conversely, if the RPD could only make the plausibility finding in the clearest of cases, thereby rendering the standard of review considerably less strict, based on a reasonability analysis, the RPD's inference would not have met the standard required to make the implausibility finding.

[179] The Applicants argue that this finding was made without proper consideration and application of the *Gender Guidelines Regarding Women Refugee Claimants Fearing Gender-Related Persecution* [Gender Guidelines], and without consideration of the objective country conditions in Saudi Arabia regarding the risks of harassment faced by women. In its decision, the RPD stated that it had taken the Gender Guidelines into consideration.

[180] The father's involvement suggests that the female Applicant relied on him to decide whether to take action or not, and in a family situation this seems reasonably unrelated to a gender issue, but rather that the dentist's brother was a security officer. In any event, the real issue is whether the inappropriate touching incident would plausibly be sufficient for her to take no action and instead give up everything she had been working for, to depart for Canada to make a refugee claim along with her husband. She appeared to make this decision with her husband

who just happened to have his own refugee claim occurring at the same time and for different reasons.

[181] As such, I believe the RPD adequately considered the Gender Guidelines and did not commit a reviewable error in this regard.

(2) The implausibility of not having knowledge of other family members' refugee claims and why the female Applicant's father remained in the KSA.

[182] The Applicants challenge the Board's finding that she was not credible because she did not know the basis of her mother and four brothers' claims for refugee protection or why her father remains in the KSA.

[183] While the impugned implausibility finding is an inference, the Applicants submit that it is not material or relevant to the female Applicant's claim for protection. This is a form of process error relating to the materiality and relevance of the foundational facts to the inference drawn of her being untruthful. As indicated, this form of error is assessed on a correctness standard.

[184] I disagree that questions concerning other family members' refugee claims are not material or relevant depending upon the context. In this case, the four brothers and her mother have followed her and her husband to Toronto and are also advancing refugee claims. It also appears that the principal Applicant's brother had previously made a refugee claim and that his wife is the female Applicant's aunt.

[185] The RPD's question as to whether she knew why her mother and brothers were making refugee claims gave rise to the unexpected answer that "she did not know", which was judged to be implausible, as was her statement that she did not know why her father, of all the family members, remained behind in the KSA.

[186] There is a personal self-interest for foreign nationals seeking to attain Canadian permanent residence as refugees in having family members residing with them in Canada. Numerous provisions of the IRPA and its Regulations recognize family reunification as an important immigration policy benefit afforded persons who attain permanent residence in Canada (see in particular paragraphs 3(1)(d), 3(2)(f) and section 12 of the IRPA). Having mutual family support in Canada for a new permanent resident is an advantage in many ways, namely the support and comfort it adds to the integration process of a refugee into Canadian society. This is why family reunification is considered a valid objective of Canada's immigration regime.

[187] In this case, coincidence would be an important issue due to the acknowledged fact that a large number of family members are advancing refugee claims at the same time as the two Applicants. Coincidences may be relevant to determining a refugee claim's legitimacy. It should be borne in mind that logical relevance provides a wide scope for permissible questions, so long as they have any tendency to support a pertinent and therefore valid fact. This is the definition of relevance.

[188] The Oxford online dictionary defines the term "coincidence" as a "remarkable concurrence of events or circumstances without apparent causal connection". If the witness's

significant personal interest combines with the alleged random events and cannot be objectively corroborated, the evidence tends to damage credibility, simply because it is remarkable that the events occurred together. Indeed, coincidence can similarly assist by providing probative value to a fact when not associated with self-interest: *Briand v Canada (Attorney General)*, 2018 FC 279 at para 61.

[189] In this matter, the Applicants' circumstances exhibit a degree of remarkable self-interested concurrence: they are victims of two independent and separate claims for refugee protection which arose at approximately the same time. These circumstances favourably support the family's chances of attaining permanent residence in Canada, when analyzed against the various means that successful or unsuccessful refugee claimants may advance to obtain such status. The fact that several other members of the family also required refugee protection in Canada at the same time raises an inference that this was a planned event of the entire family packing up and leaving for Canada, with the father remaining behind, if events did not work out.

[190] In conclusion, I find the questions regarding the female Applicant's knowledge of her family members' refugee claims to be initially permissible, such that her lack of knowledge about these claims was similarly material and relevant to an assessment of her credibility.

[191] Added to the underlying coincidental factual matrix, the RPD also noted that the female Applicant had testified that she was close to her family, saw them on a weekly basis, and reported her own incident to her parents. All members of the family were highly educated. They

lived there for three generations, and had "been able to work and enjoy a remarkable lifestyle there."

[192] In conclusion I find that no process error arises as the questions regarding family refugee claims and the father remaining behind were both material and relevant.

[193] In responding to the female Applicant's lack of any knowledge of the other family members' refugee claims or her father's intentions, the RPD indicated that "culturally" he could not understand her answers on the basis that she and her husband had so many relatives living in Canada and the fact that they were both educated individuals. He followed up with another question as to whether her father was planning to come to Canada as well, to which she responded that she did not know.

[194] The Applicants do not challenge the foundational facts apart from the materiality of the RPD's questions. Drawing an inference is an evaluative process that the RPD undertakes which relates to the evidence's probative value, such that the Court would be hard-pressed to challenge it. Notwithstanding these somewhat remarkable coincidences, this simply does not pass the exceedingly onerous test of *Valtchev*, which essentially largely fetters the RPD's discretion to drawing such findings, at least as if it was impossible for the events to have occurred as the implausibility rule is described by the applicant(s).

[195] If "only in the clearest of cases" should have the same meaning as "plain to see", given the deference owed the decision-maker, I would otherwise conclude that the Applicants have not

demonstrated that the RPD made an error that was plain to see in finding the female Applicant not credible due to her lack of knowledge of her family members' refugee claims, or the reason her father remains in the KSA. Given the very remarkable degree of coincidence underlying the foundational facts involving the spate of refugee claims by family members for unrelated reasons, I would consider that this was a permissible implausibility finding made by the RPD in the clearest of cases applying the *Valtchev* rule. Obviously, if the inferential fact only need be made as a probability, there would similarly be no reviewable error on the part of the Board in its finding of fact that the female Applicant was not credible.

(3) Whether the RPD ignored crucial evidence

[196] Apart from the credibility findings at issue, the Applicants advance that the RPD made a further process error. They allege that the RPD failed to consider relevant evidence of general discrimination against women in the KSA. They argue that this evidence was "crucial" and should have been considered, with the other evidence, to determine whether the female Applicant was in need of protection. For the following reasons, I reject this submission.

[197] In the first place, it is not correct to state that the RPD ignored this evidence. When presented, the RPD pointed out that the female Applicant and her family had lived "successfully" in the KSA for generations and enjoyed a remarkable lifestyle. The RPD stated that a generalized claim of this nature was recognized as being insufficient to support a need for protection.

[198] The female Applicant refers to two incidents in which she was stopped, because she was alone with a male taxi driver on her way to work, and that she was also forced to wear a Hijab.

This form of discrimination against women in the KSA has been acknowledged by the objective country condition evidence. However, while unfortunate, these incidents are at worst discrimination and do not, separately or collectively, rise to the level of persecution as required to meet the threshold of section 96 of the IRPA. Moreover, the only personalized risk element of the female Applicant's claim concerned the alleged inappropriate touching at her place of work, which was the reason she allegedly felt compelled to flee the KSA. She was found not to be credible with respect to this incident, and I have already found no basis to intervene with respect to this conclusion.

[199] Even if the RPD's decision to reject the inappropriate touching incident was clearly in error, the female Applicant's evidence regarding incidents of general discrimination against her, and other women in the KSA, which is not in dispute, bears no factual relationship to the alleged touching incident. That incident would be personal and particular to her peculiar employment circumstances. These forms of evidence do not supplement each other in terms of risk or persecution as they are conceptually and causally unconnected.

[200] That is not to say that discriminatory conduct of harassment cannot rise to a level of persecution if it is extensive and occurs over a long period of time, or otherwise supports other persecutory conduct when assessed all together, so as to amount to persecution. In this regard, this Court noted the following in *Kadhm v Canada (Citizenship and Immigration*), 1998 CanLII 7257, 140 FTR 286 (FCTD), at paragraph 12 with my emphasis:

> It is worth recalling that in general the courts have recognized…that harassment in some circumstances may constitute persecution <u>if sufficiently serious and it occurred over</u>

> [page585] such a long period of time that it can be said that a claimant's physical or moral integrity is threatened. [Citations omitted]

[201] These are not the female Applicant's circumstances however. She is highly educated and lives in a liberal family environment which has permitted her to enjoy a comfortable lifestyle and lead a relatively successful life. She has attended school in Egypt, learned English, and has been trained as a dentist. Notwithstanding the alleged isolated incident in her place of employment, taken as a whole, these are not the circumstances of discrimination or persecution that would justify a claim for refugee protection.

C. *Unfairness in suggesting the Applicants were selective in failing to provide customary immigration documentation*

[202] The Applicants contend that the RPD breached their right to procedural fairness because it found that they were "selective" in failing to provide their KSA residency cards. I find this issue to be highly collateral to those of significance discussed above.

[203] The RPD made this unfortunate statement in the context of its general finding that the Applicants had not presented any evidence with respect to their residence in the KSA to support their allegation that they were unable to return to the country. Refugee claimants are expected to provide such documentation. Given that the Applicants failed to provide such documents and did not provide an explanation, the RPD was not wrong in making the point. There is no requirement for the RPD to request the information, as it is up to the Applicants to provide all the relevant documentation to support their claim as provided under section 11 of the *RPD Rules*.

[204] That said, I agree that the RPD's comment that the Applicants were "selective" in providing their documentation was not called for, unless explained in a manner that would not require some opportunity to respond from the Applicants. This remark was unexplained and imputes a degree of intention not to produce documents which may not have been well-founded. The remark was also unnecessary, as it was sufficient to state that expected documentation was not provided without justification, so as to enable the RPD to conclude that the Applicants did not provide evidence as to why they could not return to the KSA.

[205] As a collateral point, it would seem reasonable to require refugee claimants to provide an attested list of all relevant factual documents in their possession or control as part of a pre-hearing procedure. Such a procedure would ensure that relevant documents are brought to RPD's attention, and avoid situations like this, as missing expected documents would be highlighted.

[206] It follows from the foregoing analysis, based on the principles prescribed in *Housen*, and rejecting the *Valtchev* rule, that the Court dismisses the Applicants' challenges to the RPD's credibility findings. The Applicants' other submissions are similarly rejected, and the Court accordingly concludes that both applications must be dismissed.

X. Questions are certified for appeal

[207] The Federal Court of Appeal recently restated the requirements to certify a serious question of general importance permitting an appeal to the Federal Court of Appeal, under paragraph 74(d) of the IRPA, in *Lewis v Canada (Public Safety and Emergency Preparedness*), 2017 FCA 130 at paras 35 to 36 and 39 [*Lewis*], and more recently in *Lunyamila v Canada*

(Public Safety and Emergency Preparedness), 2018 FCA 22 at paras 44-47 and 52 [*Lunyamila*]. In essence for these purposes, "the question certified by the Federal Court must be dispositive of the appeal, must transcend the interests of the parties and must raise an issue of broad significance or general importance" (*Lewis* at para 36; *Lunyamila* at para 46) and "cannot have been previously settled by the decided case law" (*Lewis* at para 39).

[208] In my Direction to the parties, I indicated that I was contemplating certifying questions for appeal concerning the *Valtchev* rule and the appropriate standard of review for implausibility findings of fact. With respect to the latter issue, I directed the parties' attention to *Housen* with a series of questions. Both parties responded, as described above, yet they agreed that there was no question that was dispositive of the appeal that permitted the matter to be certified.

[209] In regard to the second factor required to certify a question, that it must transcend the interests of the parties and raise an issue of broad significance or general importance, it would appear clear that this case raises issues of singular importance. These questions include whether the Court is precluded from continuing with its general practice of undertaking a reasonability analysis of assessments of factual findings of quasi-judicial tribunals such as the RPD, or whether the Court is applying incorrect principles of fact-finding relating to adverse inferential findings of credibility or the presumptions of trustworthiness of facts sworn to be true by a refugee claimant.

[210] The Court certifies these questions on the basis that answers to these questions are dispositive of the matter. By applying a reasonability analysis to an inference of fact required to

be made only in the clearest of cases, certainly in the grammatical sense of these words, on the additional principle that the Court is just as capable as the Board in deciding whether a particular scenario might reasonably have occurred and where it is necessary for the Board to provide a clear explanation of the rationalization process, I would rule in the Applicants' favour that Board's implausibility findings were made in error. Particularly, I could not conclude that the implausibility inferences were plain to see, made only in the clearest of cases.

[211] As significant reviewable errors for both Applicants, I would nevertheless be required to determine whether the errors in fact-finding are such that the decision nevertheless remains within the range of acceptable possible outcomes which are defensible in respect of the facts and the law in accordance with the principles enunciated in *Dunsmuir*. Because the question is one of mixed fact and law, setting aside significant adverse credibility inferences that contributed to the Board's conclusions, would be dispositive of the outcome of the decision as well.

[212] In other words, the fact-finding analysis is a distinct procedure that is a prerequisite to be completed before applying the principles of *Dunsmuir*. By this process, the fact-finding element of review is not in conflict with the principles in *Dunsmuir*, but simply recognized as a separate specialized task that the Board must undertake that requires a specialized contextual standard of review, as outlined in *Housen* and then incorporated into the decision determine whether it is sufficiently important to require the Court's intervention.

[213] In finding that the errors were of a reviewable nature rendering the Board's decision beyond the range of possible acceptable outcomes, I would set aside the decision with instructions that the matter returned to be considered by a different Board member.

[214] However, these are not my conclusions. Rather, I find that I am precluded from conducting a reasonability analysis of the Board's implausibility findings following the Federal Court of Appeal's direction in *Jean Pierre* to the effect that the principles from *Housen* apply in the context of judicial review. There is some evidence supporting the primary conclusions, while the reasons contain no process errors. I conclude that the implausibility inferences regarding the Applicants' credibility do not demonstrate an error that is plain to see. I also do not require the Board to provide a "clear rationalization process", so long as the primary evidence and facts that support the inference are sufficiently described, which I find to be the case here.

[215] In the alternative, if the Federal Court of Appeal is not satisfied that the questions certified are dispositive of the decision, it is respectfully submitted where as a consequence of questions considered to be of singular importance concerning their impact and need for speedy resolution of issues of unsettled law or conflicting jurisprudence, that an exception be recognized permitting certification, if the questions significantly contribute to the outcome of the decision, even if not dispositive of the matter.

[216] The Supreme Court at paragraph 9 in *Housen* set out that the primary function of appellate courts in comparison with that of trial courts, which would include administrative tribunals, is to settle the law. In exercising these functions it also indicated that appellate courts

should have a broad scope of review to do so. Their comments on these issues are as follows with my emphasis:

> 9 ……Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

[217] Unsettled law is generally recognized as an important ground of appeal where leave is an issue in provincial jurisdictions. For instance, in the Province of Québec leave to appeal, where there is no appeal as of right, is notably permitted if "[the matter] involves a question of principle, a new issue or an issue of law that has given rise to conflicting judicial decisions": *Code of Civil Procedure*, CQLR c C-25.01, section 30. Similarly in the Province of Ontario, leave is permitted for an interlocutory decision of the divisional court of Ontario if "there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the panel hearing the motion, desirable that leave to appeal be granted": RRO 1990, Reg. 194: *Rules of Civil Procedure*, pursuant to the *Courts of Justice Act*, RSO 1990, c. 43.

[218] Moreover, the Federal Court of Appeal's jurisdiction to entertain appeals from this Court, under section 74(d), states only that appeals from a decision of the Federal Court "may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question". The IRPA does not explicitly contemplate a requirement that the issue be "dispositive" of the appeal.

[219] Moreover, the Federal Court of Appeal recently recognized an exception to the certification requirement, admittedly in very different circumstances, where the Federal Court decision raises issues regarding compliance with the rule of law in *Canada (Citizenship and Immigration) v Tennant*, 2018 FCA 132 at para 17 as follows:

> 17. This exception covers cases where:
>
> - it is alleged that there is a fundamental flaw going to the very root of the Federal Court's judgment or striking at the Federal Court's very ability to decide the case—examples include a blatant exceedance of authority obvious from the face of the judgment or an infringement of the rule against actual or apparent bias supported by substantial particularity in the notice of appeal; and
>
> - the flaw raises serious concerns about the Federal Court's compliance with the rule of law.

[220] In my view, issues of unsettled law raise important rule of law issues due to the potential inconsistencies of outcomes depending upon which version of unsettled law is followed. In this regard, I would refer to the dissenting reasons of Justices Côté, Brown, and Moldaver in *Wilson v Atomic Energy of Canada Ltd*., [2016] 1 SCR 770, regarding the rule of law issues raised by unsettled legal questions, albeit at the administrative level, at para 89, which reads as follows with my emphasis: "…it does not matter whether one or one hundred [administrative] decisions have been rendered that conflict with the 'consensus' interpretation identified by the majority. <u>As long as there is one conflicting but reasonable decision, its very existence undermines the rule of law.</u>"

[221] In making this submission, I acknowledge that the Federal Court of Appeal should not be inundated by refugee and immigration appeals, given the significant number of decided cases in

this area, not similarly found in other jurisdictions, in addition to the tendency for refugee and immigration claimants to exhaust all judicial avenues that might secure Canadian permanent residence status. Nonetheless, the Federal Court shares a similar concern and is alive and alert to the need to place reasonable limits on appeal access, as is similarly the case in judicial review applications of refugee, immigration and citizenship decisions requiring the demonstration of an arguable case or serious chance of success.

[222] I also recognize that neither Court should be required to hear theoretical questions, even if they are transcendent or of general importance, that are concocted by parties with no real bearing on the decision, or of practical effect.

[223] However, I contend that this case raises several serious questions of unsettled law that are transcendent and of general importance, and should be resolved as quickly as possible. It seems reasonable to expect that such a case should be heard by the Federal Court of Appeal if the questions significantly contribute to the outcome of the decision, if found not to be determinative.

[224] For these reasons, the Court concludes that the application must be dismissed, with the following questions certified for appeal:

1. When the Federal Court of Appeal held in *Jean Pierre* that "the same considerations apply to the review of an administrative tribunal's role as a finder of fact and a maker of inferences of fact as those discussed in the Supreme Court decision of *Housen*", does this preclude the Court from carrying out a reasonability analysis in the assessment of the

evidence supporting a factual finding, in particular including a reasonability analysis of the inference drawing step that results in the finding of an inference of a fact, such that if the primary evidence is proved, it will be "hard-pressed" to intervene unless the error is plain to see, wholly unreasonable, or one made in the clearest of cases?

2. Is the statement in *Valtchev* that the Board's implausibility findings of credibility can only be made in the clearest of cases a correct statement of law?

3. Does the presumption of truthfulness of sworn statements in *Maldonado* only apply to the credibility of the truth of the claimant's sworn statement, and not to the trustworthiness of the statement under paragraph 170(h) of the IRPA, and if so, is the refugee claimant required to make genuine efforts to substantiate the statement, including pursuant to Rule 11, as a condition to obtaining "the benefit of the doubt" that the statement is trustworthy in accordance with the UNCHR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*?

JUDGMENT in IMM-5130-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and the style of cause is amended to correctly reflect the Respondent as the Minister of Citizenship and Immigration.

The following questions are certified for appeal:

1. When the Federal Court of Appeal held in *Jean Pierre* that "the same considerations apply to the review of an administrative tribunal's role as a finder of fact and a maker of inferences of fact as those discussed in the Supreme Court decision of *Housen*", does this preclude the Court from carrying out a reasonability analysis in the assessment of the evidence supporting a factual finding, in particular including a reasonability analysis of the inference drawing step that results in the finding of an inference of a fact, such that if the primary evidence is proved, it will be "hard-pressed" to intervene unless the error is plain to see, wholly unreasonable, or one made in the clearest of cases?

2. Is the statement in *Valtchev* that the Board's implausibility findings of credibility can only be made in the clearest of cases a correct statement of law?

3. Does the presumption of truthfulness of sworn statements in *Maldonado* only apply to the credibility of the truth of the claimant's sworn statement, and not to the trustworthiness of the statement under paragraph 170(h) of the IRPA, and if so, is the refugee claimant required to make genuine efforts to substantiate the statement, including pursuant to Rule 11, as a condition to obtaining "the benefit of the doubt" that the statement is trustworthy

in accordance with the UNCHR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*?

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5130-17
STYLE OF CAUSE:	HASSAN NAGI MOHAMED KALLAB ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 22, 2018
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