When in Doubt: The Law of Fact-finding in Canadian Refugee Status Determination

by

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A thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science

Faculty of Law
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Abstract

Which mistake is worse: to deny a refugee claim that should have been granted, or to grant a claim that should have been denied? Canadian refugee law has not made up its mind. In any area of legal adjudication, the law’s error preference lies at the root of the structures that allow decision-makers to resolve their doubts: its burdens of proof, standards of proof and presumptions. The Federal Court, where Canadian refugee law is made, is divided on the question of which kind of error Refugee Board members should prefer, and as a consequence, the law’s fact-finding structures work at cross-purposes. Board members are therefore often free to choose whether to resolve their doubts in a claimant’s favour or against her, and since refugee status determination is mainly about fact-finding, this helps to explain the infamous disparities in the Board’s grant rates. These disparities could suggest that many members must be highly suspicious or highly trusting, or else deciding claims on a whim or in bad faith. But in order to make nothing but negative decisions, a member does not need to be cynical or biased. He simply needs doubt, along with access to the structures that allow him to resolve that doubt against the claimant. To make nothing but positive decisions, a member does not need to be highly credulous. She could, on the contrary, be full of doubt, and choosing to resolve that doubt in the claimant’s favour. Doubt lurks around every corner in a refugee hearing, and so even if every member decided in good faith, such a system could be expected to have difficulty treating similar cases consistently. And of course, if members can make whichever decisions they prefer for whatever reason they want, the system is vulnerable to influence and abuse.
Dedication

This dissertation is dedicated to my mother, who made it possible, and to Tigist, Maricruz, Angie and all of the others who made it necessary.
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I will never play poker again. I was never good enough to make it a game of skill, and I must have used up my lifetime’s allotment of luck on this dissertation.

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Chapter 1
Introduction: Which Mistake Is Worse?

Which mistake is worse: to deny a refugee claim that should have been granted, or to grant a claim that should have been denied? Although this project will return to this question in its conclusion, it is not mainly concerned with answering it. Instead, it sets out to explore the consequences of the fact that Canadian refugee law has not made up its mind.

In the Federal Court, where Canadian refugee law is made, two streams of thought have reached opposite conclusions about which kind of error a decision-maker should prefer.¹ In any area of legal adjudication, the law’s error preference lies at the root of the structures that set its fact-finding parameters: its burdens of proof, standards of proof and presumptions. When a Refugee Board member decides a claim, these structures determine whether and to what extent his doubts will help or harm the claimant.² Doubt lurks around every corner in a refugee hearing, and with a divided Court using these structures at cross-purposes the member can frequently choose whether to resolve his doubts in the claimant’s favour or against her. This in turn will often allow him to reach whichever conclusion he would rather.

A system like this could be expected to produce the “vast disparities in refugee claim recognition rates” that have come to characterize the Board’s decisions.³ In recent years, some members

¹ Throughout this project, “the Court” refers to both levels of the Federal Court of Canada: the first level (formerly known as the Federal Court Trial Division, now called the Federal Court) and the Federal Court of Appeal.

² The Refugee Board (or “the Board”), here refers to the Refugee Protection Division of the Immigration and Refugee Board, the federal administrative tribunal tasked with deciding refugee claims.

have accepted all, or nearly all, of the claims that they have heard;\(^4\) others have rejected every one;\(^5\) and it is also no secret to any refugee lawyer with experience in the hearing room that the same member may decide very similar cases differently. The Court recently commented, for example, that it was “strange” that a member had reached opposite conclusions in two hearings held hours apart, on the same package of evidence, for members of the same family who feared the same people for the same reasons.\(^6\)

It may be tempting to conclude from the Board’s record that many of its members must be highly suspicious or highly trusting, or else deciding claims on a whim or in bad faith.\(^7\) But looking at refugee law through the lens of error preference suggests another possibility. In order to make 129 negative decisions in a row,\(^8\) a member does not need to be cynical or biased. He simply needs doubt, along with access to the structures that allow him to resolve that doubt against the claimant. To make nothing but positive decisions,\(^9\) a member does not need to be highly credulous. She could, on the contrary, be full of doubt, and choosing to resolve that doubt in the

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\(^4\) It is not unusual for members hearing predominantly “expedited positive” cases to have very high grant rates, for the Board’s administration has prioritized these types of claims based on the objectively dangerous conditions in the claimant’s home country and they “generally result in positive decisions.” But even leaving these cases aside, one member recently granted 95% of the 120 cases before him, where the “predicted recognition rate” based on country averages would have been 62.5%, for example, and another granted each of the 35 cases that appeared before her. Rehaag 2012, above note 3; Rehaag 2010, above note 3.


\(^7\) See for example Macklin’s description of the media response to the reports of these variances in the Board’s acceptance rates: “Depending on the commentator, these reports were presented as evidence of the alleged failings of a politicized appointment process that favored patronage over competence, or as evidence of a decision maker’s gullibility, or their insensitivity, or some combination of the foregoing.” Audrey Macklin, “Refugee Roulette in the Canadian Casino,” in Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag (eds.), Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (New York: New York University Press, 2009) (“Refugee Roulette”) 35 at 136.

\(^8\) See discussion in above note 5.

\(^9\) See discussion in above note 4.
claimant’s favour. Even if every member decided in good faith, such a system could be expected
to have difficulty treating similar cases consistently. And of course, if a member can make
whichever decision he prefers for whatever reason he wants, the system is vulnerable to
influence and abuse.

This project will look from this angle at the Court’s judgments. The remainder of this
introduction will set the scene: it will explain the error preference framework; highlight relevant
aspects of the refugee claim context; describe this project’s methodology; and give an overview
of its structure and conclusions.

1 Error preference in the law

A legal decision-maker does not need to prefer one type of error over another in order to make
findings of fact – provided she flips a coin.10 If she uses her judgement, however, she cannot
remain truly neutral, because she will need to answer two questions that force her to decide who
should benefit, and who should suffer, from her uncertainty. She will need to decide how certain
she must be before she accepts that an allegation is true. And she will need a tie-breaker: what
should she do if she is on the fence, if she cannot decide whether or not she is certain enough? In
some cases, a third question will also arise: What should she do if she believes that she knows
ahead of time that certain allegations are very likely to be true or untrue? Should she take these
‘prior probabilities’ into account? The answers to these questions will make it easier or harder
for an allegation to prove itself, and they can only come from the decision-maker’s sense of
whether and to what extent that allegation should “pay the price” for her doubts.11

10 For a serious discussion of the merits of coin-tossing as a decision-making method under conditions of ignorance
see Adrian Vermeule, “Rationally Arbitrary Decisions (in Administrative Law)” (25 Mar 2013), Harvard Public
http://dx.doi.org/10.2139/ssrn.2239155.

11 Richard H. Gaskins, Burdens of proof in modern discourse (New Haven: Yale University Press, 1992) 3. See also
Dayna Nadine Scott, “Shifting the Burden of Proof: The Precautionary Principle and Its Potential for the
51: “Who should be burdened by – and who should benefit from – the limits of our understanding?” The answer to
these questions effectively determines which position “shoulders unavoidable losses.” Neil Orloff & Jery Stedinger
Law Review 1159 at 1173. As a result, an “implicit value question” in any system of judgment under uncertainty is
which type of error should be preferred. Charles Vrek, “Judicious management of uncertain risks: II. Simple rules
1.1 How does the law prefer one type of error over the other?

Throughout the law, the structures that answer these questions determine which party will have the harder job in a multi-party dispute. In addition, in any court or hearing room, they design the "obstacle course" through which the moving party’s case must pass on its way to the finish-line. The ‘standard of proof’ is the threshold that his allegations must cross in order to be accepted as proven, and the ‘burdens of proof’ are the law’s tie-breakers: the ‘evidentiary burden’ decides whether a particular point will be accepted when the evidence is unclear, and the ‘legal burden’ or the ‘onus’ establishes, overall, whether the case itself will be accepted if the game is too hard to call. Presumptions, in turn, allow the law “to change sides.”


14 As many have noted, “the only function the burden of proof plays in civil cases is to resolve ties. In all other situations, the most persuasive case wins.” Winter, above note 12 at 339. See also Alex Stein, “Allocating the Burden of Proof in Sales Litigation: The Law, Its Rationale, a New Theory, and Its Failure” (1995) 50 University of Miami Law Review 335 at 336; Williams, above note 12 at 169; Hamer, above note 12 at 535; Lee, above note 12 at 11; Allen 1994, above note 12 at 639. Assigning these burdens will necessarily “trade off one type of risk for the other,” for a rule that allocates all indeterminate decisions to one side correspondingly awards all of the risk of error to the other. Radford, above note 12 at 870, 855. For statistical proof on this point see ibid. at 870-1. For a general
wonderful pragmatism,”16 they allow it to decide a stalemate in the opposite direction when it
wants to deviate, for example, from the basic assumption that underlies the whole of the error
preference exercise: that a decision in either direction carries an equal chance of being wrong.17

Each of these structures has many further dimensions. Scholars hotly debate the application of
probability theory to the standard of proof, for example;18 and whether or not burdens of proof
can properly be said to “shift;”19 and as Morgan notes, “Every writer of sufficient intelligence to
appreciate the difficulties of the subject-matter has approached the topic of presumptions with a
sense of hopelessness and has left it with a feeling of despair.”20 What matters for the present
analysis, however, is that each of these structures has the single and express purpose of allowing
decision-makers to turn their doubt into findings of fact, either at the expense or to the benefit of

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15 Gaskins, above note 11 at 28.


17 As Posner notes, this assumption rests “on the theory that the jury begins hearing the evidence…without any
notion of who has the better case.” Posner 1999, above note 12 at 1508. See also discussion in ibid. at 1514; D. H.
Kaye, “The error of equal error rates” (2002) 1 Law, Probability and Risk 3 at 4-5; DeKay, above note 11 at 119-
122; Hay, above note 12 at 426. The law can also use presumptions to reflect “some extrinsic policy consideration.”
Ronald Joseph Delisle, Don Stuart & David M. Tanovich, Evidence: Principles and Problems, 9th edition (Toronto:
Carswell, 2010) at 126. The law may shift the onus, for example, “where a particular contention is disfavoured”
(Winter, above note 12 at 336), such as where one party “attempts to upset certain types of regular and common
transactions, for example by showing that a deed in form is really a mortgage” (Kaplan, above note 12 at 1072). For
further discussion see Lee, above note 12 at 21, 29.

18 See for example Allen 1994, above note 12 at 641-2; Gilbert Harman, Change in View: Principles of Reasoning
1512-15.

19 “It is commonly said that they burden of proof ‘shifts’ during the course of a trial. Sometimes it is asserted that the
evidential burden but not the legal burden may shift. Sometimes it is asserted that both burdens may shift.”
Williams, above note 12 at 168. For further discussion, see James B. Thayer, “The Burden of Proof” (1890) 4
Harvard Law Review 45; Gabriel, above note 12 at 149-53; Gaskins, above note 11 at xvi; Clermont, above note 13
at 249, 267; Hay, above note 12 at 427; Winter, above note 12 at 335-6.

20 Edmund M. Morgan, Presumptions (1937) 12 Washington Law Review 255, cited in Delisle, above note 17 at
126. See also James B. Thayer, A Preliminary Treatise on Evidence at the Common Law (Boston: Little, Brown &
Company, 1898) 313, cited in Delisle, above note 17: “any detailed consideration of the mass of legal presumptions
[would be] an unprofitable and monstrous task.”
the moving party. Together they allocate the “error burden,” \(^{21}\) reflecting the law’s underlying judgment about which kind of mistake is worse. \(^{22}\)

1.2 Why does the law prefer one kind of error over the other?

Some suggest that the law speaks for everyone in choosing to err in one direction or the other. They suggest that the law’s preference reflects the values of “the community,” \(^{23}\) of “society” \(^{24}\) or of some greater “us.” \(^{25}\) This project rather follows Kaye’s narrower and more nuanced approach, seeing in the law’s preference nothing more than an expression of “institutional values.” \(^{26}\) On what basis, then, does the institution of law prefer one kind of mistake?

As Vermeule has recently noted, the law has a powerful tendency to assume that a decision-maker choosing between two uncertain options should pick the one with the best worst-case outcome \(^{27}\) rather than allowing her to err, for example, on the side of “the outcome with the best

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21 See for example Scott 2005, above note 11 at 62.

22 As several commentators note, to appreciate the effects of these structures, they “cannot be analyzed in isolation, but must be considered together”: Lee, above note 12 at 30. See also Ronald Dworkin, “Principle, Policy, Procedure” in *A Matter of Principle* (Cambridge, Mass: Harvard University Press, 1985) 72 at 91.

23 Dworkin, above note 22 at 89; Winter, above note 12 at 343.


25 Redmayne, above note 12 at 169, 194; Kaplan, above note 12 at 1077; Winter, above note 12 at 340; Allen 1994, above note 12 at 634.

26 Kaye writes that the search for error preference makes “a statement about institutional values, about the relative importance of these types of mistakes in the eyes of ‘the law’.” David Kaye, “The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation” (1982) 2 *American Bar Foundation Research Journal* 487 at 496, note 39. While this project will omit Kaye’s quotation marks around “the law” from here on, it retains them in spirit, cognisant of Valverde et al.’s observation that “the law” is a “static” term, and their caution that “[i]t is misleading to ask anything about law in general”; Mariana Valverde, Ron Levi & Dawn Moore, “Legal Knowledges of Risk,” in *Law & Risk*, above note 11, 86 at 87.

best-case payoff.\textsuperscript{28} Indeed, legal and academic commentary on the law’s error preference invariably asks which type of error will cause greater harm. As discussed below, for example, the criminal law notionally looks to the relative harms of convicting an innocent person and letting a guilty one go free, rather than the relative benefits of convicting the guilty and exonerating the innocent. But what does it mean for one type of error to be more harmful?

1.2.1 The traditional economic approach

Those who have looked at this question have typically done so through a traditional economic lens. They have assumed, following the postulates of subjective expected utility theory, that the law will weigh and compare the expected “cost” or “disutility” of both types of error.\textsuperscript{29} To arrive at an assessment of the costs of an erroneous outcome, the law will consider the magnitude of this kind of error as well as the likelihood that it will occur, and will multiply these two factors. The more harmful error will be the one for which the resulting sum, the expected “error costs,” is greater.\textsuperscript{30} Since the law as a rule assumes that either type of error is equally likely,\textsuperscript{31} an “error costs” analysis boils down in practice to a consideration of the size of the error. And so economists see the law, in short, as “favoring legal errors considered to have a lesser magnitude.”\textsuperscript{32}

The traditional economic analysis, when it observes that the law’s structures preferentially avoid one type of error, therefore infers that the law must have judged this type of error to have greater

\textsuperscript{28} Vermeule, above note 10 at 10. For further discussion of other rational rules for decision-making under uncertainty see Vrek, above note 11 at 551-553. Vermeule also argues that a common difficulty with the maximin approach, as Sunstein has discussed at length, is that “worst-case scenarios often lie on all sides of the problem.” Above note 10 at 9. For further discussion, see Sunstein 2005, Sunstein 2007, above note 27.


\textsuperscript{30} For a review see Kaplan, above note 12; Lee, above note 12 at 5; Ligertwood, above note 29 at 368, DeKay, above note 11 at 110, Posner 1973, above note 12 at 400-402.

\textsuperscript{31} See the text accompanying above note 17.

\textsuperscript{32} Lee, above note 12 at 20.
disutility, all else being equal.\textsuperscript{33} It does not stop there, however. While recognizing that disutility judgments are necessarily subjective,\textsuperscript{34} it nonetheless proposes to divine the rational reasons behind them. Theorists undertaking this kind of investigation assume that the evaluation of an error’s disutility will consider not only the cost to the parties themselves, but to the broader community;\textsuperscript{35} that it will assess the measure of the extent to which the error “threatens valued interests;”\textsuperscript{36} that it may reflect the sense of regret that the error evokes;\textsuperscript{37} and that it should, as Dworkin notes, consider the level of “moral harm” or “injustice” that the error will cause.\textsuperscript{38} In other words, these judgments are subjective only up to a point. They are assumed to be based on a reasoned evaluation along these kinds of fundamentally rational lines.

In some contexts, as discussed below, it does seem that the law’s preference has resulted from just such a calculus. But in others, different forces appear to be at play. The law’s preference does not seem to reflect a reasoned weighing of harms so much as single-minded focus on one type of harm to the exclusion of other considerations. To help explain these latter cases, this project looks to a “psychologically founded theory of choice under risk”\textsuperscript{39} based on the notion of salience, a notion that helps to explain why some types of harm seem to punch above their weight: why we fear them more than a rational calculus would suggest that we should.

\textsuperscript{33} “All else being equal” here assumes that the law has no reason for finding that one type of outcome (as opposed to one kind of error) is more costly. As illustrated below in the discussion of the civil law, where the error costs appear to be equal, and yet the law nonetheless prefers one type of outcome, a traditional economic analysis infers that the “direct costs” of this outcome must therefore be higher. For a review see Lee, above note 12.

\textsuperscript{34} See for example Kaplan, above note 12 at 1068: “The important thing to remember about utility is that, like probability, it is a personalistic measure…The utility of the same item may vary among individuals and even within the value structure of the same individual, depending upon such factors as his financial status and the demands of his resources.”

\textsuperscript{35} Radford, above note 12 at 849; Weizel, above note 24 at 1631-2; Lando, above note 24 at 33; DeKay, above note 11 at 99, 128.

\textsuperscript{36} Saks, above note 13 at 138.


\textsuperscript{38} Dworkin, above note 22 at 80, discussed further in Chapter 5.

\textsuperscript{39} Bordalo, above note 37 at 1244.
1.2.2 This project’s framework: a “psychologically founded theory of choice under risk”

Researchers have long observed that when deciding which of two risky options to prefer, rather than assessing the potential harm associated with each outcome and weighing them against one another, a decision-maker may simply be struck by one worst-case scenario and “neglect” the other. As a result, when people judge the worse kind of error outcome in day-to-day decisionmaking, rational considerations of relative disutility regularly take a back seat. If one kind of harm captures the imagination, without much further analysis this option often registers as ‘worse.’ Sunstein illustrates this point with the example of the public response to the Washington sniper attacks, which caused “a miniscule increase in risk” to the population at large but provoked “high levels of anxiety and fear.” Since some of these attacks took place at gas stations, many people in the D.C. area began driving to Virginia to buy their gasoline, which “almost certainly posed risks in excess of those associated with the snipers’ attacks. The drivers were far more likely to be injured or killed in an accident than to be shot by the snipers.”

In addition, one of the fundamental observations to come out of the so-called Cognitive Revolution in the middle of the last century is that people assess identical risks differently depending on how these risks are presented. In one famous early study, subjects were asked to


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40 Ibid.
41 Ibid. at 1245. For a review see Sunstein 2007, above note 27, Chapter 1; Sunstein 2005, above note 27 at 45-49; 89-91; 208-209.
42 Sunstein 2005, above note 27 at 91.
43 Ibid.
evaluate a proposed public health response to an epidemic that was expected to kill 600 people. Responses varied considerably depending on whether the proposal claimed that “200 will be saved” or that “400 will die.”

Equally troubling to notions of rationality is the fact that decision-makers’ risk judgments will change in response to experimental manipulations that affect how they see themselves and their decision-making role. When reminded of their role as parents, for example, subjects perceived strangers to be more dangerous and trusted them less. When reminded of their own mortality, subjects were more inclined to support harsh measures to counter the risk of terrorism. Rational choice models assume that, although their information is necessarily limited and imperfect, decision-makers use “everything they know to make evaluations and decisions.”

Why should reminding subjects of something that they knew all along (that they were parents, that they were mortal) cause them to respond more strongly to a potential harm?

The psychological concepts that help to account for these types of findings are “salience” and the related notion of “framing.” Salience captures the idea that for any decision-maker some types of harm will resonate more strongly than others: “certain aspects of certain things are going to come to their attention, and others not, and some of these are going to strike them more forcefully than

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45 See discussion in Kahneman 2003, above note 44 at 1458. In another similar experiment, more subjects reported that they would choose to undergo risky surgery when they were told that they had a 0.40 probability of surviving rather than a .60 probability of dying. D. K. Wilson, R. M. Kaplan & L. J. Schneiderman, “Framing of decisions and selections of alternatives in health care” (1987) 2 Social Behaviour 51, discussed in Els C. M. van Schie, “Influencing Risk Preference in Decision Making: The Effects of Framing and Salience” (1995) 63 Organizational Behavior and Human Decision Processes 264 at 265. For a review of other experiments with similar findings see van Schie, above, at 265-67.


others. In short, some things are going to stand out.”50 While there may well be rational reasons why a particular harm should hit hard, salience is not a remotely rational phenomenon. As Miller notes, “Salience is a fact of life for all agents,” whether or not they are able to reason,51 and for human decision-makers, dangers with low (or high) risks of harm are often salient (or not) for decidedly non-rational reasons.52 In addition, researchers have long observed that one of the reasons why “salience seems to have a profound impact on decisional preference”53 is because decision-makers tend to “overemphasize the information their minds focus on.”54 By “selectively emphasizing”55 one type of harm, or a particular decision-making role or self-concept, researchers are therefore able to “frame” a problem so as to increase the salience of that harm, thereby manipulating their subjects’ perception of which potential worst-case outcome is preferable.

Drawing on recent literature that incorporates the notion of salience into an economic analysis of decision-making under uncertainty,56 the present project proposes that when the law is deciding which way to err, salience functions as a heuristic.57 Where the harm of one worst-case scenario is particularly salient, this will cut short any rational calculus. The law will direct its energy toward reducing the risk of that kind of error at the expense of increasing the other.58 Only when


51 Miller, above note 50 at 362.


53 Van Schie, above note 45 at 274. For a review see Sunstein 2007, above note 27, Chapter 1; Sunstein 2005, above note 27, Chapter 4.

54 Bordalo, above note 37 at 1245.

55 Van Schie, above note 45 at 271.

56 For a review see Bordalo, above note 37 at 1280; Gennaioli, above note 49.

57 See for example Gennaioli, above note 49 at 1399-1400.

58 “As every elementary handbook of statistics will tell you,” reducing the likelihood of one kind of error increases the likelihood of the other. Henk van den Belt & Bart Gremmen, “Between the Precautionary Principle and ‘Sound Science’: Distributing the Burden of Proof” (2002) 15 Journal of Agricultural and Environmental Ethics 103 at 111,
neither type of harm “strikes forcefully” will the law revert to a more studied weighing of both options. In other words, this analysis breaks with the traditional notion that the law’s preference necessarily reflects an assessment of the more harmful type of error. It may, but it may equally reflect the fact that one error type simply stands out.

This approach supplies a further analytical tool for looking at why the law prefers one type of mistake. The traditional economic method assumes that the law is responding to rational reasons why this error is more costly, and if it can identify several equally rational possibilities, it hits a wall. Without drawing on evidence about how people actually make decisions, it can offer little insight into which might be motivating the law’s preference and why. A psychological approach suggests a way to explore this question further. If framing affects salience, which in turn affects error preference, then looking at how the law frames the problem may suggest why it prefers one kind of error or the other.59

The remainder of this section will illustrate with a brief and broad comparative study of two generally familiar domains – the criminal and civil legal systems of common law jurisdictions60 – the difference between an area of law with a strong preference for avoiding a particularly

cited in Scott 2005, above note 11 at 62. For further discussion, see Saks, above note 13 at 138; Radford, above note 12 at 851, 872.

59 In fact, it should be noted that these types of observations need not be beyond the reach of even a traditional economic analysis (let alone a behavioral economic analysis, with which it would seem a natural fit). For while it has been suggested that rational choice models “cannot capture” framing effects (Bordalo, above note 37 at 1259), this seems an overstatement: the greatest strength and weakness of the traditional economic model is its ability to explain anything with the right theoretical manipulations. Indeed Posner, for example, notes how “the cost of legal error may differ dramatically depending on whether the purpose of the underlying substantive law is viewed as allocative or distributive” (1973, above note 12 at 405) and also remarks that “an agency that is responsible for prosecution may weigh a dollar in benefits from successful prosecution more heavily than a dollar in costs of punishing the innocent” (ibid., 416). Both observations describe the kinds of framing effects discussed above. Yet, as illustrated below, while the economic model could pursue this line of investigation, psychological insights have been largely overlooked in the literature on legal error preference.

salient kind of error, and one in which the law’s preference is purely pragmatic: neither kind of error stands out, and so the law has chosen which to prefer based on the kind of weighing of relative harms envisioned in standard economic theory.

1.2.3 Error preference in the criminal law

The structures that set up the criminal law’s fact-finding “obstacle course” purport to make the prosecution’s job difficult. Of course, the law and the legal system may in fact treat any number of accused very badly, and the structures that seek to constrain the error preference of judges and juries may not do so in practice. But as a matter of legal theory, when it comes to establishing the facts of the case, the criminal accused is “tenderly regarded by the law.” Many presumptions and inferences help him; those that increase his burden are few and far between and are subject to vigorous litigation and constitutional review, and where the accused does have an onus to meet, the standard of proof is the “balance of probabilities” or the even lower “air of reality” test. The prosecution, on the other hand, not only carries the burden of proof, but also the burden of proof that they have met it.

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61 As Kaplan noted, for example, writing in the late 60s, despite the criminal law’s very clearly articulated preference for erring on the side of the accused, the “observed high rate of conviction” in the American South for African-American accused reflected not only “the typical white Southern juror’s view that the white complaint is always telling the truth,” but also the jury’s imposition of its own contrary error preference: that the cost of convicting an innocent African-American was low compared with the cost of letting a guilty one “get away with something.” Kaplan, above note 12 at 1075. Several studies of jury decision-making have also noted that jurors may apply their own interpretations of both the civil and criminal standards of proof that differ from the law’s interpretations. See for example Rita James Simon & Linda Mahan, “Quantifying Burdens of Proof” (1971) 5 Law and Society Review 319; Zamir, above note 37; James Andreoni, “Reasonable Doubt and the Optimal Magnitude of Fines: Should the Penalty Fit the Crime?” (1991) 22 Rand Journal of Economics 385.

62 “Every safeguard is thrown about him. The requirements of proof are many, and all moral, together with many technical, rules stand between him and any possible punishment.” People v. Riley, 33 N.E.2d 872, 875 (Ill. 1941), cited in Shima Baradaran, “Restoring the Presumption of Innocence” (2011) 72 Ohio State Law Journal 723 at 724, note 2.

63 For a review, see Kent Roach, Benjamin L. Berger, Patrick Healy & James Stribopoulos, Cases and Materials on Criminal Law and Procedure (10th ed.) (Toronto: Emond Montgomery, 2010) at 52-56. Before a presumption can recognize a prior probability in criminal law, it must establish “an extremely close or inexorable link between what was proved...and what is presumed.” Ibid. at 52. See R v Vaillancourt [1987] 2 SCR 636, [1987] SCJ No 83 (Dickson CJ, and Beetz, Estey, Lamer, Wilson, Le Dain and La Forest JJ; McIntyre JJ dissenting).

64 Roach 2010, above note 63 at 50, 53-54, 323-324. See also discussion in Kaplan, above note 12 at 1073.

but must make out its case against a very high standard of proof, proof of guilt “beyond a reasonable doubt” which some within the legal sphere have at times equated with certainty.\footnote{In the Canadian context, the Supreme Court has made clear that this standard “does not require proof to an absolute certainty.” \textit{R v. Lifchus} [1997] 3 SCR 320, [1997] SCJ No 77 (Lamer CJ and La Forest, L’Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ), discussed in Roach 2010, above note 63 at 50. Yet the majority of the US Supreme Court in \textit{In re: Winship} for example, found that this standard required a “subjective state of certitude” (397 US 358 (1970) at 364) and in one famous survey of legal decision-makers, the most common response of judges and jurors was to quantify the phrase ‘beyond a reasonable doubt’ as requiring 100% probability of guilt. Simon, above note 61 at 324. See also Laurence H. Tribe, “Trial by Mathematics; Precision and Ritual in the Legal Process” (1971) 84 \textit{Harvard Law Review} 1329 at 1374; Clermont, above note 13 at 251-252.}

A great deal has been written on what the “beyond a reasonable doubt” standard of proof reveals about the criminal law’s error preference. The overwhelming conclusion is that the law is “implicitly stating” its preference for erring on the side of the accused,\footnote{Redmayne, above note 12 at 171. See for example James B. Thayer, “The Presumption of Innocence in Criminal Cases” (1896) 6 \textit{Yale Law Journal} 185; Kaplan, above note 12 at 1077; Radford, above note 12 at 849; DeKay, above note 11 at 95-99. But for a contrary view, see James Q. Whitman, \textit{The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial} (New Haven: Yale University Press, 2008). While acknowledging the contemporary understanding that the ‘reasonable doubt’ standard is meant to protect the accused, Whitman argues that “the original concern was to protect the souls of jurors,” for in Christian theology “a person who experienced doubt yet convicted an innocent defendant was guilty of a mortal sin” (Publisher’s synopsis, emphasis in original). Specifying that a jury could safely convict despite the presence of doubt, as long as this doubt fell short of being reasonable, was “a device for giving jurors what Whitman terms the ‘moral comfort’ to convict;” Saks, above note 13 at 140.} the preference that gave rise to one of the law’s most famous maxims: “it is better that ten guilty persons escape, than that one innocent suffer.”\footnote{William Blackstone, \textit{Commentaries on the Laws of England} 352 (Oxford, UK: Clarendon Press, 1769) cited in DeKay, above note 11 at 96. See also Alexander Volokh, “n Guilty Men” (1997) 146 \textit{University of Pennsylvania Law Review} 173.} Over the centuries, many “other ratios have been suggested”:\footnote{Saks, above note 13 at 138.} five guilty persons to one innocent, twenty to one, a hundred to one, a thousand to one, five thousand to one.\footnote{For a thorough review, see Volokh, above note 68; Thayer 1896, above note 67.} As Thayer notes, these formulations are “not meant to be taken literally.”\footnote{\textit{Ibid.}} Rather, they

\footnote{\textit{Ibid.}. Thayer 1896, above note 67 at 187. Many have tried, regardless, to transform these ratios into precise probabilistic rules for establishing levels of certainty. See discussion in DeKay, above note 11 at 96-98.}
express in the clearest terms the law’s error preference: “it is better to run risks in the way of letting the guilty go, than of convicting the innocent.”

The strength of this preference helps to explain an oddity that has puzzled theorists for over a century: what is the purpose of the presumption of innocence? The notion that an accused is “innocent until proven guilty” has been treated as fundamental across a wide range of legal systems, from Biblical and ancient Greek and Roman legal codes through to the Canadian Charter of Rights and Freedoms. US President John Adams famously claimed that “there never was a system of laws in the world, in which this rule did not prevail,” a sentiment that others have expressed in only somewhat more qualified fashion by suggesting that “this presumption is to be found in every code of law which has reason and religion and humanity for a foundation.” And yet, while it is “easy to understand the nature and effect of all presumptions in favor of facts which would otherwise have to be proved,” the presumption of innocence has no such practical effect. After all, the prosecution already bears the legal onus and must prove all relevant facts. A presumption under such circumstances seems to serve no purpose – yet the idea that it is

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72 Ibid. Thayer 1896, above note 67; DeKay, above note 11 at 103. As US Supreme Court Justice Harlan famously commented in In re Winship 397 US 358 (1970), cited in Lee, above note 12 at 27: “it is far worse to convict an innocent man than to let a guilty man go free.”

73 Baradaran, above note 62 at 728, note 17. For a thorough review of the early history of the presumption of innocence see Thayer 1896, above note 67.

74 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, Section 11(d): “Every person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” For a review see Roach 2010, above note 63 at 50-58. See also article 6(2) of the European Convention on Human Rights. Although not explicitly set out as a right in the US Constitution, the presumption of innocence is “inferred from the Fifth, Sixth and Fourteenth Amendments and was affirmed by the US Supreme Court as early as 1895” in the Coffin case, discussed below. Anna K. LaRoy, “Discovering Child Pornography: The Death of the Presumption of Innocence” (2007) 6 Ave Maria Law Review 559 at 560.

75 Volokh, above note 68 at 181.

76 Lord Gillies in dissent in McKinley’s Case (1817) 33 State Tr. 275 at 506 (Scotland), cited in Thayer 1896, above note 67 at 193.

77 “The Presumption of Innocence” (1895) 9 Harvard Law Review 144 at 145 [no author given].

78 For discussion see Thayer 1896, above note 67; Harvard Law Review, above note 77; Baradaran, above note 62.

merely a restatement of the burden of proof has been roundly and passionately rejected. The US Supreme Court, for example, found over a century ago that the failure to instruct the jury about the presumption of innocence was an error of law, notwithstanding correct instruction on the question of the legal onus. One Scottish judge explained, in rejecting the notion that the presumption merely restates the onus, that on the contrary, “It is a maxim which ought to be inscribed in indelible characters on the heart of every judge and juryman.”

Understood from the point of view of error preference, the enduring power of this seemingly superfluous presumption becomes clear. As Kaplan and others have noted, the law tries to constrain decision-makers to follow its error preference through its fact-finding structures, but it may also use the power of persuasion. Seeing the presumption of innocence not as a structural principle but rather as an “emphatic caution,” as a “way of emphasizing the State’s burden,” helps to explain why so many within the legal institution have been so strongly dedicated to preserving it. If decision-makers are allowed to lose sight of it, they may be more tempted to substitute their own error preference as their own reason dictates.

This error preference, therefore, has been for many centuries one of the criminal law’s “fundamental tenets.” But why? Following the economic line of analysis set out above, most theorists have concluded that this preference results from a comparative error costs calculus, that the law has weighed the harm that would be caused by both types of potential error and has concluded that “convicting the innocent involves greater negative externalities – social costs


81 Cited in Thayer 1896, above note 67 at 193.

82 Ibid. at 1077. See also Winter, above note 12 at 338, 342.

83 Thayer 1896, above note 67 at 194, 196.


85 Kaplan, above note 12 at 1077.
beyond those borne by the parties – than acquitting the guilty.” On its face, the language of ratios, above, certainly suggests this kind of weighing. Yet on closer inspection, this rather seems a paradigm case where a particularly salient type of error has simply captured the law’s attention.

Although judicial and academic commentary in common law jurisdictions routinely concludes that the cost of a false conviction greatly exceeds the cost of a false acquittal, its analysis of the relative error costs is almost entirely one-sided. Judges and legal theorists regularly point to the many reasons why the magnitude of the error of convicting an innocent person is very high (so high, in fact, that it is not remotely offset by the fact that its likelihood is low). In particular, they emphasize the accused’s vulnerability, noting that the state “almost invariably has superior resources.” They observe that the harm of being deprived of one’s liberty, or of bearing the stigma of a wrongful conviction, is greater than the harm of an erroneous liability finding under the civil system.

Strikingly neglected in these analyses is any serious consideration of the counterbalancing harm of acquitting the guilty, beyond bare statements that this harm is less costly. Posner has given

[86] Radford, above note 12 at 849; Lee, above note 12 at 25: criminal cases are “the paradigm of asymmetrical error costs.”

[87] Thayer, for example, concludes that a false conviction is by far the worse kind of error despite his perception that “of the men who are actually brought up for trial, probably the large majority are guilty.” Thayer 1896, above note 67 at 199. See also Posner: pre-trial screening “implies that…most people who are prosecuted and acquitted are actually guilty.” Posner 1999, above note 12 at 1506.


[89] “Civil remedies are largely financial and involve no more than a transfer of payment between private parties. Criminal remedies, on the other hand, involve penalties such as imprisonment that result in social loss.” Lee, above note 12 at 25. In addition, unlike in civil cases, the harm to the accused is not off-set by any benefit to the other side: “While the unsuccessful civil defendant’s losses mirror the plaintiff’s gains, unsuccessful criminal defendants lose most of their freedoms and liberties without any corresponding gain to the prosecution.” Lee, above note 12 at 26. See also Redmayne, above note 12 at 188; McDougall, above note 88. Wexler and Cameron note the reality, however, that in many criminal cases in fact “the consequences may be minor when compared with a civil suit which could cost a defendant his or her home and accumulated life savings.” Stephen Wexler & Gavin Cameron, “The Two Forms of Legal Proof: The Third Standard of Proof and F. H. v. McDougall” (2009) 88 The Canadian Bar Review 169 at 177.

[90] For a counter example see Lando, above note 24.
the question of the criminal law’s error preference among its fullest treatment. In five pages of analysis under the heading “The Optimum Probability of Convicting the Innocent,” he addresses in one clause the harm of acquitting the guilty: “the number of crimes committed” will rise.\footnote{Posner 1973, above note 12 at 412, see 410-415.} In a later analysis, in one sentence, he expands on this notion: convicting the guilty has the benefit of “maintaining deterrence and preventing the person from committing crimes for a period of time, namely while he is imprisoned.”\footnote{Posner 1999, above note 12 at 1504.} That there might be a cost in justice to acquitting the guilty, for example, one to be weighed alongside the “moral harm” of convicting the innocent, is unexplored. The law’s single-minded focus on the harm of false convictions, and its neglect of the other side of the equation, is summed up nicely in the anecdote that concludes Volokh’s study of the presumption of innocence:

The story is told of a Chinese law professor, who listened as a British lawyer explained that Britons were so enlightened that they believed it was better that ninety-nine guilty men go free than that one innocent man be executed. The Chinese professor thought for a second and asked, “Better for whom?”\footnote{Volokh, above note 68 at 211.}

What emerges from these analyses is the clear sense that convicting the innocent is not more costly, so much as extremely costly in its own right. Seen in this light, the maxim that it is better to acquit ten or a hundred or a thousand guilty people than to convict one innocent one seems less an actual comparison of error costs and more simply a way of expressing the great intrinsic harm of a false conviction. Recognizing this harm effectively ends the error cost analysis and settles the question of error preference. In other words, the harm of a false conviction is very salient, and the imperative to avoid it is less a rational response than, in Kaplan’s words, “one of the fundamental feelings of our society.”\footnote{Kaplan, above note 12 at 1073 [emphasis added]. See also Redmayne, above note 12 at 169. As discussed at the outset, however, to think of this as “our society’s” feeling is misleading. In many circumstances the presumption of innocence may be very strongly at odds with “community sentiment”, as noted by David J. Bodenhamer, Fair Trial:}
The law has traditionally held fast to this error preference in matters of fact-finding even in the face of the crimes that arouse the strongest passions. In the years since the 9/11 attacks, terrorism has become “one of the most salient types of threat in contemporary Western society.”\textsuperscript{95} The Canadian legal system in general, and the criminal law doctrine in particular, have responded by passing more of the error burden on to the accused in such cases,\textsuperscript{96} leading Roach to suggest that often, as a result, “the presumption of innocence seems to be honoured more in its breach.”\textsuperscript{97} Yet the law has not sought to reverse the prosecution’s onus or to lower its standard of proof. When it comes to fact-finding, despite a general perception that these kinds of crimes make society itself vulnerable, the law still prefers to err on the side of the vulnerable accused.

1.2.4 Error preference in the civil law

The civil law’s fact-finding structures reveal its preference for erring on the side of the defendant. Yet whereas the criminal law strongly prefers to avoid false convictions, the civil law only prefers to err on the side of the defendant \emph{given that it has to err somewhere}. Neither type of error is salient, and if it could the civil law would prefer to be neutral.


\textsuperscript{97} Roach 2010, above note 63 at 55.
The strongest clue that neither error type stands out as a greater cause for concern is the civil law’s standard of proof: proof “on a balance of probabilities” or on “the preponderance of the evidence.” Although the “origins of this formulation are obscure,”98 many have noted its statistical function: “it minimizes the expected number of errors made by the fact-finder”99 (whereas the higher criminal standard accepts that the decision-maker will make a greater number of errors in exchange for making fewer of them at the accused’s expense). Many scholars have argued from an economic angle that this standard of proof necessarily implies that the civil law must view both error types as equally harmful,100 and nothing in the rest of the fact-finding structures suggests otherwise.

While a long-standing rule assigns the legal onus to the plaintiff,101 this burden of course “must be placed somewhere”102 and in many circumstances, presumptions intervene to move it to the

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98 Ligertwood, above note 29 at 371, note 16.

99 Redmayne, above note 12 at 169. For discussion and statistical proof see Hamer, above note 12 at 508; Clermont, above note 13 at 252, 258; Winter, above note 12 at 337; Weizel, above note 24 at 1632; D. H. Kaye, “Bayes, Burdens and Base Rates” (2000) 4 International Journal of Evidence and Proof 260. Minimizing the expected number of errors “is not the same as minimizing the actual number of errors, but we are unlikely ever to know the actual error rate in the trial process”, and so to pursue a goal of reducing errors overall, “minimizing expected errors is the best we can obtain.” Redmayne, above note 12 at 169. For discussion and qualifications see DeKay, above note 11 at 130; Demougin, above note 60. Some have also argued, more controversially, that the preponderance standard reduces the risk of false positives and false negatives in equal measure, or seeks to obtain equal numbers of either kind of error, points on which intense debate rages. See D. H. Kaye, “Statistical Decision Theory and the Burdens of Persuasion: Completeness, Generality, and Utility” (1997) 1 International Journal of Evidence and Proof 313; Ronald J. Allen, “Rationality, Algorithms, ad Judicial Proof: A Preliminary Inquiry” (1997) 1 International Journal of Evidence and Proof 254; Kaye 2002, above note 17; Ronald J. Allen, “Clarifying the Burden of Persuasion and Bayesian Decision Rules: A Response to Professor Kaye” (2000) 4 International Journal of Evidence and Proof 246; Kaye 2000, above.

100 If both types of errors are reduced in equal measure, error costs will only be minimized overall when both types are equally costly. See for example Lee, above note 12 at 25; Redmayne, above note 12 at 170-171; Kaplan, above note 12 at 1072; Kaye 1982, above note 26 at 496-7; Posner 1973, above note 12 at 407. In Canada, the civil law’s commitment to viewing both erroneous outcomes as equally harmful is further emphasis by its rejection of the higher intermediate civil standard of proof (“clear and convincing evidence”), used in many other jurisdictions to shift more of the error burden to the plaintiff in some circumstances. See Wexler, above note 89; Lee, above note 12 at 27; Williams, above note 12 at 185-7; Ligertwood, above note 29 at 373; Zamir, above note 37 at 172.

101 See Thayer 1896, above note 67 at 188; Redmayne, above note 12 at 172.

102 Hamer, above note 12 at 509, 535. See also Winter, above note 12 at 337; Redmayne, above note 12 at 172.
defendant. Sometimes this switch seems to reflect the sense that erring for the defendant is the worse or more likely kind of error, but very often it is for practical reasons, such as “to restore the appropriate balance between the parties” when the defendant can easily access information that is unavailable to the plaintiff. Among theorists looking at these structures through an economic lens, there is consensus that the civil law views neither type as more costly, that both are “equally regrettable.” Unlike in the criminal law, where the vulnerable accused faces off against the more powerful state, there is here “no particular reason to disadvantage either plaintiffs or defendants,” especially since, as several theorists have noted, in cases where there is both a claim and a counter-claim it will often be a question of luck which party in a civil case ends up in which role.

103 For general discussion see Williams, above note 12 at 171-75, 175-6; Kaplan, above note 12 1072; Gaskins, above note 11 at 27; Radford, above note 12 at 875; Lee, above note 12 at 19-24.

104 See for example the traditional common law requirement that the defendant prove the truth of its statements in defamation law, which suggested “an implicit judgment that the an error in defendant’s favor was of greater magnitude than an error in plaintiff’s favor”…that “the common law valued the individual’s interest in reputation more highly than it did the defendant’s interest in his money.” Lee, above note 12 at 22. See also discussion in Radford, above note 12 at 875.

105 The rule requiring the defendant to show that he or she had taken all reasonable precautions when a machine fails, for example, makes sense because “in most cases where injury is caused as a result of a mechanical failure, the explanation is likely to be failure to keep the item in sufficient state of good repair.” Williams, above note 12 at 173.

106 Allen 1994, above note 12 at 631, 632. For discussion, see Lee, above note 12 at 15-20; Gaskins, above note 11 at 27; Williams, above note 12 at 179; Winter, above note 12 at 335; Stein, above note 14 at 337; Hay, above note 12 at 426; Allen 1994, above note 12 at 632. Posner suggests that similar concerns about “the inequality of the parties’ resources for gathering and presenting evidence” underlie the criminal law’s high standard of proof, along with its assessment of the relative error costs. Posner 1999, above note 12 at 1505, 1543.

107 See for example Lee, above note 12 at 25: “Civil cases are the paradigm for symmetrical error costs.” Kaye 1982, above note 26 at 496: “A dollar mistakenly paid by defendant…is just as onerous as a dollar erroneously paid by a plaintiff.” See also Posner 1999, above note 12 at 1504.

108 Hamer, above note 12 at 509, 513.

109 Winter, above note 12 at 337; Redmayne, above note 12 at 171.

110 Clermont, above note 13 at 268; Hamer, above note 12 at 535; Williams, above note 12 at 170.
In short, as between error types, the parties to a civil dispute are “indistinguishable” and the civil law is consequently quite simply “indifferent.” Yet since true indifference is not possible in a system with no tie verdicts, a preference is ultimately required, and one is provided by the baseline rule favoring defendants. Since there is no normative reason to favour defendants – since, in other words, “a rule awarding equiprobable cases to plaintiffs would function just as well (as would tossing a coin to decide ties)” – why does the law choose to err the way that it does?

Economists suggest that while the error costs are no different, other types of “direct costs” might be lower in a system that puts the onus on the plaintiff. Erring on the side of the defendant discourages plaintiffs from bringing cases forward that have only a marginal chance of success. While Winter suggests that this is “the only discernible policy” in favour of burdening the plaintiff, others have been discerned. Erring for the defendant “avoids the ex post costs of enforcing a judgment in favor of the plaintiff.” It resonates with a general outlook of politeness and respect, with “basic principles of civility,” which suggest that it better as a rule to assume that people are “good, honest, free from blame” and which stipulate that “We do not generally accuse people of doing us wrong unless we are able to back up the explanation with

112 Clermont, above note 13 at 268. See also McDougall, above note 88 at 59.
113 Redmayne, above note 12 at 172.
114 For a discussion of the relationship between direct costs and error costs, see Lee, above note 12 at 4-6.
115 Zamir, above note 37 at 188; Lee, above note 12 at 14-15; Hamer, above note 12 at 535; Redmayne, above note 12 at 173; Winter, above note 12 at 337. Clermont, above note 13 at 267: it may in fact “deter litigation overall.”
116 Winter, above note 12 at 337.
119 Thayer 1896, above note 67 at 189, 188, 196. This notion resonates with the comments of the Supreme Court in R v. Oakes [1986] 1 SCR 103 at 120: the presumption of innocence “confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.”
Similarly, it has been suggested that “taking is generally perceived as more harmful than not giving”;\(^{120}\) that the law prefers to disadvantage the party that is attempting to disturb the status quo;\(^{122}\) that it is fairer to err on the side of the party who has been involved in the legal process against their will;\(^{123}\) or that this burden is linked to “the presumption of continuity in Mill’s inductive logic; until fresh evidence persuades the observer to revise a prior hypothesis about the natural world, that hypothesis is allowed to stand.”\(^{124}\) In addition, a recent and compelling inquiry looks at this question from a psychological angle, drawing on the observation that “in the face of uncertainty people are inclined to refrain from action,” a phenomenon known as ‘omission bias.’\(^{125}\) Since accepting (but not dismissing) a claim is seen as acting, it may seem psychologically safer to dismiss it.\(^ {126}\)

While each of these suggestions makes a plausible contribution to the quest to explain the law’s preference, the principle value of an error preference analysis in this context lies, rather, in its ability to clarify that the civil law’s preference for the defendant is different not in degree but in kind from the criminal law’s preference for the accused. The criminal law sees the accused as out-gunned from the start, and is struck by the harms that will predictably follow if it fails to take this vulnerability into account. The civil law, with no reason to imagine that either party is at an unfair disadvantage, seems above all to “desire even-handedness.”\(^ {127}\) Both areas of law arrange

\(^ {120}\) Redmayne, above note 12 at 173. See also Winter, above note 12 at 335, 343 note 1.
\(^ {121}\) Stein, above note 14 at 343.
\(^ {122}\) Clermont, above note 13 at 267; Redmayne, above note 12 at 173-174; Lee, above note 12 at 15. As many have noted, this is a particularly weak rationale, for the concept of ‘status quo’ can be flexibly defined: “taking the term ‘status quo’ to refer to the point in time before the alleged wrong occurred, the failure to right the wrong is just as bad as the mistaken imposition of a burden on the defendant.” Redmayne, above note 12 at 174.
\(^ {123}\) Williams, above note 12 at 172.
\(^ {124}\) Gaskins, above note 11 at 23.
\(^ {125}\) Zamir, above note 37 at 192-93. This observation resonates with Lee’s suggestion that the law gives the burden to the party who is seen as “the actor” in the case (above note 12 at 1-2) as well as with the argument, discussed above at note 67, that the criminal law’s “reasonable doubt” standard was originally designed to help jurors to overcome their reluctance to convict.
\(^ {126}\) Zamir, \textit{ibid}.
\(^ {127}\) Winter, above note 12 at 341; Allen 1994, above note 12 at 634.
their fact-finding obstacle courses accordingly. In both, while there is some disagreement in the literature about what the law’s preference should be,\textsuperscript{128} there is little disagreement at all about what the law’s preference is. On any given day in any given courtroom, the law’s fact-finding structures give a pretty good sense of what it sees as the right kind of mistake.

2 Fact-finding in the refugee claim context

Refugee status determination is mainly about fact-finding. As Macklin notes, “the overwhelming majority of asylum applications are determined not on the legal question of whether the claim fits within the refugee definition, but on factual assessments of claimant credibility and documentary evidence about country conditions.”\textsuperscript{129} And as discussed below in the overview of this project’s conclusions, at the heart of the Federal Court’s division on the question of error preference is the fact that fact-finding in refugee hearings is a unique blend of the familiar and the unfamiliar.

2.1 How fact-finding in refugee law is unfamiliar

Refugee law is its own creature, “a \textit{sui generis} phenomenon”\textsuperscript{130} that weaves together threads of international and domestic law. While the practice of granting asylum has its roots in antiquity, the understanding that states should commit to one another not to send foreigners home to persecution began to take shape in the first half of the twentieth century, and was born into law

\textsuperscript{128} See for example the conclusion of the UK Criminal Law Revision Committee, cited in Ligertwood, above note 29 at 369, that in fact “as much disutility flows from acquitting a guilty man as convicting an innocent one.” In the civil context, similarly, a number of scholars have argued that “the defendant in an ordinary case has more to lose than the plaintiff.” See discussion in Hamer, above note 12 at 505. For the contrary opinion, see Posner, who suggests that “the plaintiff should bear the burden of proof because of the marginal utility of wealth” (Posner 2007, above note 117 at 647), an argument critiqued in Zamir, above note 37 at 189. See also Zamir and Ritov, who draw on psychological theory to suggest that since “losses to the defendant loom larger than do unattained gains to the plaintiff,” denying the plaintiff a remedy is “far less detrimental” than imposing one unfairly on the defendant.” Zamir, above note 37 at 166-171.


\textsuperscript{130} Noll, “Introduction,” above note 129 at 3.
in the aftermath of the Second World War.\(^{131}\) This was not an easy process, and it required many compromises. In the final result, the 1951 Refugee Convention draws the outlines of the legal principles that bind its signatories, but leaves it to the states to fill them in,\(^{132}\) and lets them establish the facts in refugee cases according to their own legal traditions.\(^{133}\)

Yet the fact-finding traditions in Canadian law, as in other similar jurisdictions, were developed to answer a very different kind of question than the one asked by the Convention. Most court or tribunal processes are interested in determining responsibility or liability for past events, whereas fact-finding in refugee law is ultimately aimed at predicting the future: what will happen to this claimant if she returns home? This question requires the member to assess risk. As academics writing at the intersection of law and risk have pointed out, handling risk has been a key function of the courts for centuries, when ‘risk’ is taken to mean “uncertainty.”\(^{134}\) In addition, and increasingly, the courts are called on to manage risk in its everyday sense of “exposure to danger”: regulatory agencies assess the risk posed by new technologies,\(^{135}\) the criminal courts


\(^{133}\) See Noll, “Introduction,” above note 129; Gorlick 2003, above note 60 at 357. In fact, as Hathaway and Foster note, “the Convention imposes no duty formally to adjudicate refugee status.” Hathaway 2014, above note 132 at 26. In Canadian law, the duty to afford refugee claimants a full quasi-judicial hearing arose as a result of the Supreme Court’s decision in *Singh v. Canada (Minister of Employment and Immigration)* [1985] SCJ No 11 (Dickson CJ, Beetz, Estey, McIntyre, Lamer and Wilson JJ).

\(^{134}\) In this sense, for example, “Contracts manage the risks of non-performance.” Valverde, above note 26 at 90. See also Law Commission of Canada, “Preface,” in *Law & Risk*, above note 11, vii at vii.

\(^{135}\) Valverde, above note 26 at 90.

assess the risk of recidivism;\textsuperscript{137} the civil courts assess the risk of tobacco advertising.\textsuperscript{138} But while other courts and tribunals may also be called upon to assess risk, very rarely are they required to do so in a context where there is so much room for doubt: where they have so little information and no expert tools with which to analyse it.

### 2.1.1 So little information

There are typically no witnesses in a refugee hearing and few if any supporting documents. For the purposes of this project’s analysis, refugee hearings are single-party proceedings,\textsuperscript{139} and this single party often comes before the Board with nothing more than her own story.\textsuperscript{140} In some cases, there may be forensic evidence in the nature of medical or psychiatric reports confirming a claimant’s injuries or pathology. And occasionally she will be able to provide documents from home, although as Noll notes, even when such materials are available, “the assessment of their authenticity and significance might prove more difficult than they would be in the domestic domain.”\textsuperscript{141} Beyond this, Board members have access to a package of collected news and agency reports about the general conditions in the claimant’s country. On this thin evidentiary record, the member is supposed to decide whether or not the claimant’s testimony is trustworthy, and whether or not she has reason to fear returning home.


\textsuperscript{139} While the government will on occasion intervene to oppose the granting of refugee status to a claimant who meets the Convention definition of a person at risk of persecution, this project is concerned only with the Board’s determinations of whether or not the claimant is at risk. See discussion in below note 176.


\textsuperscript{141} Noll, “Introduction,” above note 129 at 4.
2.1.2 No expert tools

As Houle has pointed out, having expertise means having information and also having a particularly informed understanding of what to do with it.\(^{142}\) Members enter the hearing room without any “normative tools”\(^{143}\) that would allow them to make better findings of fact than a layperson would. Applying the facts to the legal definition requires a degree of specialized understanding (which some at the Board see as superfluous: as one senior official has explained, “we have taken steps to dejudicialize the way we function…The idea is that we can function without legal expertise”).\(^{144}\) The rare members with a legal background may have this kind of expertise, but they have no greater insight into how to read the claimant or her evidence. They may have a special understanding of which facts are relevant, in other words, but not of which assertions should be considered fact. And neither will members gain such expertise on-the-job. Members typically specialize in cases from a small selection of countries, and so will ordinarily develop a good familiarity with the country conditions materials in their information packages. They bring only their common sense to the reading of these materials, however, and common sense is a lay tool. The fact that a member may have plenty of common sense, and may use it well, does not change its character. In addition, and crucially, although members spend most of their time in the hearing room assessing credibility,\(^{145}\) this experience will not help them to develop any special insight into whether or not a claimant is telling the truth.

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\(^{143}\) Jacobs, above note 142 at 76.


\(^{145}\) For discussion see Macklin 1998, above note 140 at 134. See also Rosemary Byrne, “Credibility in Changing Contexts: International Justice and International Protection” in Proof, above note 129, 179 at 180; Reneman, above note 140 at 213.
The notion that experience leads to expertise makes sense intuitively. In many endeavours, we improve with practice. But a wealth of social science evidence suggests that experienced credibility assessors – so-called ‘experts’ such as veteran police detectives, customs agents, judges – are no better at judging credibility than inexperienced ones such as college students.\(^{146}\)

In fact, two recent reviews of hundreds of studies involving tens of thousands of subjects, stretching over many decades and across a wide variety of contexts, reveal strikingly little variance in the human ability to assess credibility by observing testimony, leading the researchers to conclude that “real differences in detection ability are miniscule.”\(^{147}\) The reason most commonly suggested for the failure of experience to improve credibility assessment is the “feedback hypothesis.”\(^{148}\) This theory holds that “mere on-the-job experience is not enough…to improve lie detection accuracy,” because without regular, prompt and reliable feedback about whether or not their assessments were correct, decision-makers cannot learn from their mistakes and adjust their methodologies.\(^{149}\) Instead, experienced and inexperienced assessors alike tend to


\(^{147}\) Bond 2008, above note 146 at 486; Bond 2006, above note 146. Like tribunal adjudicators, the subjects in these studies made their judgments “in real time with no special aids;” Bond 2006, above note 146 at 231. For further discussion see Garrido 2004, above note 146 at 267; Hilary Evans Cameron, “Refugee Status Determinations and the Limits of Memory” (2010) 22 International Journal of Refugee Law 469 at 489-492.


\(^{149}\) Granhag 2005, above note 148; Pär Anders Granhag & Leif A. Strömwall, ‘Repeated interrogations – Stretching the deception detection paradigm’ (1999) 7 Expert Evidence 163. Researchers suggest that this helps to explain, for example, why the credibility assessments of Swedish Migration Board members failed to improve over time: such decision makers “rarely receive any reliable outcome feedback about the correctness of their veracity assessments.” Granhag 2005, above note 148 at 30. Indeed, as one judge has noted about fact-finding in the refugee context, “Experience is not much use; we never know if the assessment was right or wrong.” Geoffrey Care, “The Refugee
rely on the same deeply ingrained and deeply flawed assumptions about how to tell whether or not someone is lying.\textsuperscript{150} There are no credibility assessment experts, in other words, because no one has yet discovered any “normative tools” that work: the “typical” accuracy rate across these hundreds of studies is just slightly better than random chance.\textsuperscript{151}

This is a problem for decision-makers in all legal contexts, of course, and as a result, as many scholars have noted, in any finding of fact there will always be room for doubt. Indeed, fact-finding in legal settings is a paradigm example of judgment under “inescapable uncertainty,”\textsuperscript{152} for although judges or juries may be thoroughly convinced of their conclusions, they can never be objectively certain that these conclusions are correct.\textsuperscript{153} But Refugee Board members have a uniquely difficult task. For a start, they must assess the claimant’s credibility across a vast divide. The members’ assumptions about how people think and act may be of even less help when they are judging a person from a different culture, of a different gender, who is suffering the aftereffects of trauma and giving evidence through an interpreter.\textsuperscript{154} In addition, in the refugee claim context, the general lack of expert evidence and the members’ own lack of expertise pose an exceptional problem.

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\footnotesubscript{150} As the researchers note, both groups “hold virtually the same stereotypical beliefs about the indicators of deception.” Garrido 2004, above note 146 at 267. See also Cameron 2010, above note 147 at 489-492.

\footnotesubscript{151} For the mean of all of the studies reviewed, “54\% is a reasonable estimate,” in tests where 50\% would represent chance. Bond 2006, above note 146 at 230. For further discussion see Maria Hartwig, Pär Anders Granhag, Leif A. Strömwall, ‘Guilty and innocent suspects’ strategies during police interrogations’ (2007) 13 Psychology, Crime \& Law 213 at 213; Pär Anders Granhag & Leif A. Strömwall, ‘Effects of preconceptions on deception detection and new answers to why lie-catchers often fail’ (2000) 6 Psychology, Crime \& Law 197; Bond 2008, above note 146.


\footnotesubscript{153} As Radford notes, “the evidence is always doubtful; even a defendant’s confession or admission of fault cannot raise the probability of guilt or liability to 100\%.” Radford, above note 12 at 845. See also Miller, above note 152 at 101; Kaplan, above note 12 at 1071; Winter, above note 12 at 336. Allen 1994, above note 12 at 633; Posner 1999, above note 12 at 1508: “all evidence is probabilistic – there are no metaphysical certainties.”

\footnotesubscript{154} For a vivid illustration of the divide between claimant and Board member, see Peter Showler, “Two Exercises,” in Refugee Sandwich: Stories of Exile and Asylum (Montréal: McGill-Queen's University Press, 2006) at 3.
\end{footnotesize}
Fact-finding in other areas of law is based implicitly on the assumption that judges and juries will bring their common sense and reason to the table and do the best they can with what they have. Despite the “myth of certainty” that characterizes legal decision-making,\textsuperscript{155} the law recognizes that decision-makers are not omniscient,\textsuperscript{156} and in other domains there is certainly no expectation that they will be experts. Refugee law asks members to make a risk assessment, however, and assessing risk has become the sovereign domain of experts.

Lay people make judgments about danger and safety every day, and refugee law could easily ask Board members for a lay opinion: “On the evidence before you, how dangerous will it be for the claimant to return home? Is it safe enough for her to go back?” Indeed, the Convention itself does not speak of risk. It asks only whether or not the claimant has a “well-founded fear.”\textsuperscript{157} But instead, as discussed further in Chapter 3, refugee law asks members: “On the evidence before you, is the claimant at risk? If so, what is her level of risk exposure? Does she face more or less than a minimal possibility of persecution?” Scholars across many domains have noted a marked rise in this type of “risk discourse,”\textsuperscript{158} and with it, the demand for expertise. For whereas ‘fear’ and ‘danger’ are lay terms, a question about risk and probability is a question “framed by experts, to be answered by experts.”\textsuperscript{159} Lay people are “not very good at estimating

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\item \textsuperscript{155} Ligertwood, above note 29 at 387. See also Radford, above note 12 at 856; Kaplan, above note 12, at 1073; Tribe, above note 66 at 1372-5. As discussed further in Chapter 3, “it is a hallmark of the legal process that once a fact is established at trial as sufficiently probable, it is thereafter treated as if it were absolutely true.” Radford, above note 12 at 856.
\item \textsuperscript{156} Radford suggests, for example, that an “awareness of the risk of error pervades the theory and practice of law.” Radford, above note 12 at 846.
\item \textsuperscript{157} United Nations Convention Relating to the Status of Refugees, 1951, Chapter 1, Article 1A(2) (“the Refugee Convention”). Similarly, the 1975 Convention Against Torture does not speak of risk, but rather of a “danger of being subjected to torture.” United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975, Part 1, Article 3(1).
\item \textsuperscript{158} MacAlister, above note 137 at 20. See also Valverde, above note 26.
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probabilities,”160 to put it mildly,161 and to further confound members, we have the greatest trouble in distinguishing among low probabilities162 – such as, for example, between a “minimal possibility” and “more than a minimal possibility.”

Throughout the legal system, the “shift away from danger and towards risk”163 has meant that those confronted with making a risk assessment, if they have no expertise of their own, will have to borrow it. Whereas Board members have little beyond their own common sense to guide them, other decision-makers have begun to appeal increasingly to “formal risk-based instruments,”164 to statistics, charts and models.165 In particular, figuring out how people are likely to act – and especially whether dangerous people are likely to act badly – has in other areas of Canadian law become the domain of “the number-cruncher.” 166 A Parole Board member deciding whether a criminal is likely to reoffend, for example, can consult the Hare Psychopathy Checklist, the Violence Risk Appraisal Guide, the Sex Offender Risk Appraisal Guide, the Spousal Assault


161 We are so poor at it, in fact, that most of the time we do not even try. “Probability neglect” – our “remarkable unwillingness to attend to the question of probability” – has been documented in a variety of studies that show that in making decisions we “often do not try to learn about probability at all,” even when such information is readily available and highly relevant. Sunstein 2005, above note 27 at 70. Few people would play the lottery if it were not for “probability neglect” and the fact that we are “sensitive to the possibility rather than the probability” of winning. Slovic 2005, above note 160; Loewenstein, above note 160 at 276. When it comes to danger, lay people typically “dichotomize risk” as either present or not. Mileti, above note 160 at 40.

162 Lay people are typically unable to detect even “significant differences in low probabilities.” Sunstein 2005, above note 27 at 71. See also Loewenstein, above note 160 at 276-8; Slovic 2004, above note 160 at 8.

163 Valverde, above note 26 at 100.


165 MacAlister argues that this phenomenon is nowhere more pronounced than in Canada. MacAlister, above note 137 at 27.

166 Valverde, above note 26 at 91.
Risk Assessment Guide, and the Sexual Violence Risk Guide.\textsuperscript{167} Whether or not these expert tools made decisions any more accurate, they give them a ‘sciency’ feel that is reassuring.\textsuperscript{168} And they help to fill an “evidentiary void” that is left gaping in a refugee hearing.\textsuperscript{169}

\section*{2.2 How fact-finding in refugee law is familiar}

At the same time, a refugee hearing has a lot in common with a proceeding before one of Canada’s many other quasi-judicial administrative tribunals, which in turn has a lot in common with a proceeding in civil or criminal court. The hearing room looks like a courtroom – a coat of arms adorns the wall, Canadian flags stand on either side of the member’s desk – and it operates like a court room, both in form and in substance. Participants stand when the member enters the room. To counsel and to those in the know, the member is addressed as “Mr. Chair” or “Madam Chair,” but to many claimants it is “Your Honour” (and occasionally “Your Highness” or “Your Majesty”).\textsuperscript{170} The proceedings are recorded and begin with a string of legal formalities. The claimant and the interpreter are sworn in; exhibit lists are read into the record; the member clarifies the relevant issues. The hearing begins in earnest when the claimant tells her story, with the member, and often her counsel, questioning her along familiar lines: What does she claim happened? And can her story be trusted? Like trial court judges and juries, members spend much of their time listening to testimony and trying to figure out if the story that they are hearing is true. And while the rules of evidence are loosened here, as they are in tribunal hearings generally,\textsuperscript{171} the obstacle course is created in the same way: administrative law borrows its fact-

\textsuperscript{167} MacAlister, above note 137 at 28-9.

\textsuperscript{168} As pioneering risk researcher Mary Douglas noted, risk language appeals, in part, because it makes “oblique reference to the rationality of science.” Quoted in Wilkinson, above note 160 at 23.


\textsuperscript{170} Claimants are not alone in mistaking members for judges. See for example “Immigration judge made sex bribe: Court,” Sam Pazzano, The Toronto Sun, Feb 23 2010; “Refugee board judge sought sex, court told,” Peter Small, The Toronto Star, Feb 23 2010.

\textsuperscript{171} Members are “not bound by any legal or technical rules of evidence” and may base their decisions on any evidence “considered credible or trustworthy in the circumstances.” Immigration and Refugee Protection Act, ss. 170(g) and (h) (“IRPA”). As the Court noted in Rhéaume v. Canada (Attorney General) [2002] FCJ No 128
finding structures from the civil and criminal law. The upshot is that much about a refugee hearing will be comfortably recognizable, not just to those familiar with administrative law systems, but to any lawyer, to any judge.

In addition, on a substantive level, like many other litigants the claimant is asserting a statutory right to a remedy. And while a grant of refugee status need only confer temporary protection from deportation, in Canada, as in many other countries, it is a direct route to permanent residence. A successful claimant has the right to apply for landing, and once she becomes a permanent resident, she has largely the same rights as any other immigrant. Her entitlement to remain in Canada is ultimately conditional as it is for all non-citizens, qualified by good conduct and residency requirements, and in addition, returning home even for a brief period will jeopardize her status; but as long as she upholds these requirements she can stay indefinitely, and can work, study, travel and potentially sponsor her parents. Seen from this angle, the member is not tasked with conducting an unsettling and unusual risk assessment, but with adjudicating a routine legal claim to an entitlement, one with close parallels in the decidedly unremarkable immigration law context. For while a claimant’s reasons for wanting to stay in

(Rouleau J) at para 28: “Parliament has seen fit to give administrative tribunals very wide latitude when they are called on to hear and admit evidence so they will not be paralyzed by objections and procedural manoeuvres. This makes it possible to hold a less formal hearing in which all the relevant points may be put to the tribunal for expeditious review.”

172 See for example discussion in Catherine Dauvergne, Making People Illegal: What Globalization Means for Migration and Law (Cambridge: Cambridge University Press, 2008) at 57: “The Refugee Convention does not establish a right to remain permanently, and contemplates that protection will end when the conditions at home that lead to risk are resolved… In practice, many Western states with established refugee reception programs either grant refugees permanent status at the outset, or allow them to apply for it.”

173 Immigration and Refugee Protection Act s. 21(2). This application can include the claimant’s partner and children abroad, and will be granted as long as she and they are not found to be criminals, human rights violators or threats to Canada’s security. See IRPA, above note 171, Division 4: Inadmissibility.

174 See IPRA, ss. 27 and 28, and Division 5: Loss of Status and Removal. Unlike other foreign nationals, a Convention Refugee who loses her permanent resident status may be entitled to remain in Canada if she continues to be at risk in her homeland. On the other hand, she may lose her permanent resident status if the Board determines that she obtained her refugee status through fraud.

175 Recent changes to the law, and to its enforcement, have meant that if a former claimant returns home, even years after becoming a permanent resident, the Board may revoke both her refugee status and her permanent resident status. Regulations Amending the Immigration and Refugee Protection Regulations PC 2014-1118 (Oct 23 2014). For discussion see Andrea Woo, “‘Draconian’ changes to refugee act put those with protected status on edge” (The Globe and Mail; theglobeandmail.com: May 7 2014); Nicholas Keung, “Former refugees face losing residency in Canada if they return to homeland” (The Toronto Star: TheStar.com, Feb 23 2015).
Canada may be different from those of other would-be immigrants, at the end of the day, what she is seeking is thoroughly familiar. She is hoping to obtain through the refugee system what many others across the world request every day through the government’s various immigration programs.

3 Methodology

This project sets out to explore the Federal Court’s error preference in the context of refugee claims. For pragmatic reasons, its analysis is limited to the law that governs fact-finding in the Board’s first-level decisions on “inclusion,” on whether or not a claimant is at risk of persecution. As discussed above, the drafters of the Refugee Convention left to its signatories the work of fleshing out its principles and developing the procedures needed to apply them. The statute that incorporates the Convention into Canadian law merely reproduces its bare language without elaboration, and a result, Canadian refugee law is made in the Court, in its judgments on applications for judicial review of the Board’s decisions. By looking through these judgments for evidence of how judges think about refugee claimants and refugee law – for evidence, in other words, about how they frame the problem of error preference – and by looking at how they have designed the law’s fact-finding structures, this project hopes to figure out, at the level of its “institutional values,” how the Court prefers to err and why.

As noted at the outset and discussed further below, this analysis reveals that the Court is deeply divided. This is hardly news to anyone familiar with its jurisprudence. The profound doctrinal

176 Omitted from this analysis is the law that governs: “exclusion” (whether a claimant who is at risk should nonetheless be denied protection, either because he can access a safe haven elsewhere or else because he does not deserve it); vacation and cessation (whether a successful claimant’s refugee protection should be revoked); “compelling reasons” (whether a person who has ceased to be a refugee should be offered protection regardless); and appeals to the new Refugee Appeal Division. Also omitted is the law elaborated in the relatively few cases in which claimants have applied for refugee protection from overseas (the Convention does not bind signatories to offer protection to those outside of their borders).

177 IRPA, above note 171, ss. 96, 98.

178 A great many of these decisions hinge on determinations of the claimant’s credibility, which the Court suggests are “central to most, if not all, of the findings that the Board makes when assessing asylum claims.” Umubyeyi v Canada (Minister of Citizenship and Immigration) [2011] FCJ No 76, 2011 FC 69 at para 11 (Noël J). See also Peti v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 68, 2012 FC 82 at para 37 (Scott J). For discussion generally, see sources cited in note 140 above.
rifts that characterize Canadian refugee law are partly a function of the fact that very few cases are ever heard by the Court of Appeal, and partly a symptom of a wider problem in refugee law internationally: “Theorists differ on even the most basic precepts underlying the Convention” because of the drafters’ lack of guidance, because its standards often “are not easy to discern,” and because no one body has the authority to interpret it definitively. Courts and decision-makers in Canada and abroad are therefore very often left in doubt about how to apply the Convention.

This project contends that the Court would still be profoundly divided, however, even if all of the judges concurred on how to apply the Convention to the facts. It argues that there are two coherent and conflicting perspectives within the Court on how members should make findings of fact. The Court’s judgments can be divided meaningfully into two broad streams of thought – the First Stream and the Second Stream – because each has a strong tendency to look at this question from one angle and to emphasize one set of related values, leading it to prefer one kind of mistake. The First and Second Streams do not have an exclusive hold on their particular values, however, and they are not two solitudes. Each Stream has its standard-bearers, and many judges do seem to take predominantly one perspective or the other. But others may see the merits of both approaches, and on a particular set of facts, even a judge with a strong leaning in one direction may see the matter differently. The point that this project makes is not that individual

179 In immigration and refugee matters, there is no appeal by right of the judgments of the lower level of the Federal Court. Instead, to open the door to the Court of Appeal, the judge who hears the case at the lower level must find that it raises “a serious question of general importance” (IRPA, above note 171, s.74). As Hamlin notes, “The question must be proposed by either the applicant or the respondent prior to knowledge of the judgment in the case. Because the process requires judges to choose to open themselves up to reversal, it is not surprising that only about 300 questions have been certified on any immigration matters since the Immigration and Refugee Protection Act went into force in 2002.” Only about one third of these cases were pursued, and only a handful of these related to refugee status decisions. Hamlin, above note 144 at 94-95.


181 This project was inspired by Daniel Kahneman to reject other more descriptive but more cumbersome labels. In Thinking Fast and Slow (New York: Farrar, Straus & Giroux, 2011), Kahneman names the two cognitive processing systems that he identifies as “System One” and “System Two,” to good effect.
judges have to choose sides. It is that the law of fact-finding has to choose sides. By their very nature, its structures cannot create equilibrium. This project imagines that two Streams with conflicting visions are struggling to impose their contrary error preferences, but it could just as easily say that the Court is of two minds, and is trying to prefer both kinds of error at the same time.

This project’s approach to the Court’s jurisprudence differs from a traditional legal analysis in several ways. First, it highlights the Court’s widely divergent positions on many points of law because of what this division shows about how its judges think about refugee claimants and refugee law. It does not delve more deeply into the substantive questions for their own sake, and makes no claim to be giving a full account of the law on any one of these points. It does not suggest, for example, that the two opposing views that it showcases are the only angles from which the Court has approached a particular issue, or in fact that these two conflicting positions are necessarily irreconcilable. Indeed, between the two end-posts that this project discusses is often a measured middle ground in which the Court tries, with varying degrees of success, to resolve these doctrinal conflicts. While these attempts are of course important to the particular question of law at issue, the clearest expressions of the split in the Court’s thinking are often found at the poles, where its judgments are more passionate and less guarded.

For the same reason, this project does not seek to focus on the judgments that one would expect to be the most valuable from the perspective of the substantive doctrine. Although many of the judgments that draw this project’s attention are recent, and all are good law, they are not necessarily the newest or the most frequently-cited. Instead, they are those that give the most useful insights into the Court’s error preference. If this approach seems more literary than legal – and indeed, it treats the sum of the Court’s jurisprudence more as a volume of collected works than as the living law – it also reflects a peculiarity of how refugee law does in fact work in practice. Since so few judgments make it to the Court of Appeal, very little of the Court’s jurisprudence is definitively overturned. A particular position may fall out of fashion, therefore, but it stays in play. As a result, refugee lawyers know that a recent decision, even one with wide

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182 None has been overturned on the point for which it is cited, and where a case has been overturned on other grounds, this is indicated. Where the comments cited were made in obiter, this is also indicated.
support from the bench, is not necessarily a more powerful tool than an older one or one that is less favoured. A dozen judgments may recently have gone in one direction, but to the right judge, on the right facts, an older and more obscure case going in the opposite direction may yet be convincing.

In addition, this project takes a broad view of what counts as a fact-finding structure. For many on the Court, a structure that arises out of the substantive doctrine, rather than out of the rules of evidence, is a “legal test” as distinct, for example, from a “standard of proof.” This project argues that this approach is misguided, and that if a structure sets an evidentiary threshold for deciding a question of fact, it is a fact-finding structure. While “question of fact” and “question of law” are not watertight categories, for this project’s purposes, fact-finding structures help to answer questions that an omniscient member could answer unaided — such as whether or not the claimant is at risk of harm. Legal tests, in contrast, answer questions of interpretation on which even an omniscient member would need guidance — such as whether or not this harm qualifies as persecution under the Convention.

Lastly, while this project claims to have discovered in the Court’s judgments something about how its judges see the world, when it turns its sights to Board members, in contrast, it makes no such claims. In arguing that members may be motivated to err against claimants for unlawful reasons, it follows the logic of the law’s approach to allegations of bias. It claims only that, in

183 See discussion in Chapter 3, s. 2.2.1.1.2.

184 See for example Gorlick 2003, above note 60 at 367: “the term ‘standard of proof’ means the threshold to be met by the claimant in persuading the decision-maker of the truth of his or her factual assertion.”

185 See for example discussion in Posner 1999, above note 12 at 1515-1516.

186 The test for deciding allegations of bias against Refugee Board members is whether or not their conduct raises a “reasonable apprehension of bias.” The Court adopts the test set out by the Supreme Court in R v. RDS [1997] 3 SCR 484, [1997] SCJ No 84 at para 11 (Lamer CJ and La Forest, L’Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ): “the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part,” then a “reasonable apprehension of bias” will have been established. Zhong v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 323, 2011 FC 279 at para 23 (Near J). For a discussion of the law’s flexible approach
light of the social science evidence, there are good reasons to be concerned that this is happening, not that there is evidence to suggest that it is. Beyond this, when this project discusses the Board’s “decision-making,” to use the common legal idiom, it is concerned throughout with the practice of decision-writing rather than with the psychology of legal judgment. The fact-finding structures discussed throughout dictate how members will need to justify their conclusions on paper. How members actually make their decisions – which thought processes lead them to these conclusions – is quite a different question, and one beyond this project’s reach.187

In particular, in noting the high level of doubt inherent in the refugee determination process, and in discussing how members resolve this doubt, this project makes no claims about how uncertain they actually feel about their conclusions. The point here is not that members are highly unsure of their findings. Indeed, the opposite may be true. The same studies that show that experienced credibility assessors are no more accurate than novices also show that they tend to be more confident,188 and in the refugee context in particular, it is easy to imagine that this confidence is self-protective. It must be very hard to make these kinds of decisions without some conviction that you are getting them right. In addition, Board members have been told for years that they are experts in determining credibility,189 and some have come to believe it. Former Board member Macklin observes that many of her colleagues subscribed to the “‘gut feeling’ fallacy – the


188 See for example Kassin 2005, above note 146; DePaulo, above note 146; Granhag 1999, above note 149 at 165.

unquestioned assumption that our gut is a uniquely trustworthy arbiter of truth.” 190 Similar factors may help to explain the “surprising” finding of a recent study by the UNHCR: that, despite the many obvious challenges that it poses in the refugee context, “many decision-makers interviewed in the research stated that the credibility assessment was not one that they found particularly difficult, and that it was a straightforward task.”191

For some members, in short, doubt may not weigh very heavily at all. But in arguing that it is uniquely present, this project makes two observations. First, the fundamental uncertainty inherent in the refugee determination process may be more obvious from outside of the hearing room. Specifically, as discussed in Chapter 2, it is obvious to the First Stream of the Court on review. And second, this doubt is available to be used if and when a member needs it. As discussed in Chapter 4, a member can often reach either conclusion as long as he is in doubt, or can plausibly claim to be. And in the circumstances of a refugee hearing, finding reasons to be in doubt will often present little challenge.

4 Overview of this project’s structure and conclusions

Applications for judicial review of the Board’s decisions are almost always brought by rejected claimants. The First Stream, finding that the law should err in the claimant’s favour, often overturns the Board’s decisions. The Second Stream, preferring to err against her, often upholds them, and in so doing regularly emphasizes the “great deference,”192 “substantial deference,”193

190 Macklin 1998, above note 140 at 139.

191 Madeline Garlick, “Selected aspects of UNHCR’s research findings” in Assessment of Credibility, above note 60, 51 at 52. See also Kagan, above note 140 at 375, citing a study in which “a UNHCR officer in Kenya told a researcher: ‘I can understand if someone is lying or not in the first minute of the interview.’”


193 See for example Gomez v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 267, 2010 FC 237 at 33 (Lemieux J); Diagana v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 448, 2007 FC 330 at para 17 (Gibson J); Cletus v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1771, 2008 FC 1378 at para 16 (Snider J).
or “significant deference”194 that it owes the member’s findings of fact. It may therefore be tempting to conclude that these two Streams come to different conclusions about the merits of the Board’s decisions because they take different approaches to their role on review.

This project hopes to show that such an analysis has it backwards. How readily the Court will overturn the Board’s decisions is a consequence, not a cause, of its conclusions about their merits, conclusions that reflect a deeper division in the judges’ worldviews. For while the Supreme Court has recently stressed in the strongest terms the deference that judges owe to tribunal fact-finding,195 it has also made clear that a judge must and may only defer to a decision if that decision is reasonable.196 The two Streams of the Court have profoundly different visions not of deference but of refugee claimants and refugee law, and as a result they are profoundly split on the question of what makes a decision reasonable.197 For the First Stream, a decision will only be reasonable if it takes the claimant’s exceptional vulnerability into account. For the Second Stream, a decision will be reasonable as long as the member treats the claimant as any other tribunal would treat any other kind of litigant.

194 See for example Rahal v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 369, 2012 FC 319 at para 22 (Gleason J); Nzohabonayo v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 685 2012 FC 71 at para 39 (Boivin J); Jia v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No. 463 2012 FC 444 at para 26 (Scott J). The Court continues to use this and similar language widely even after the Supreme Court categorically rejected the notion that the reasonableness standard contains “variable degrees of deference.” Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association [2011] 3 SCR 654 at paras 36, 47. For discussion see Hilary Evans Cameron, “Substantial deference and tribunal expertise post-Dunsmuir: A new approach to reasonableness review” (2014) 27 Canadian Journal of Administrative Law and Practice 1.


196 The Supreme Court in Dunsmuir did away with the with the former “patent unreasonableness” standard of review, and mandated that in every case in which judges owe deference to a tribunal’s decision, they are to ask themselves whether or not the decision is reasonable, in the sense that it is justified, transparent and intelligible and “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” The “patent unreasonableness” standard was improper, the Court made clear, because it allowed for the possibility that a judge might defer to an appreciably unreasonable decision, which is “inconsistent with the rule of law.” Ibid., at paras 39, 42, 47; for discussion, see Alice Woolley, “The Metaphysical Court: Dunsmuir v. New Brunswick and the Standard of Review” (2008) 21 Canadian Journal of Administrative Law and Practice 259 at 263.

197 In the pre-Dunsmuir jurisprudence, the Court is likewise split on what makes a decision “patently unreasonable.”
Chapter 2 explores the two Streams’ perspectives on refugee status determination, perspectives that depend on whether the Court is struck by the ways in which this area of law is unusual or the ways in which it is familiar. When the First Stream focuses on the more remarkable aspects of fact-finding in this context, refugee claimants seem exceptionally vulnerable compared with other kinds of civil or administrative litigants. The Court is struck by the fundamental uncertainty in this domain, and in particular by the fact that the member’s ultimate task – predicting the future – is an uncommon and inherently unreliable exercise. At the same time, it is struck by the fact that aspects of the hearing process unavoidably put claimants at a real disadvantage. As a result, the First Stream is strongly concerned about the grave harm that claimants stand to suffer if the protection that they seek is wrongly withheld. On this framing, it makes sense, as it does in the criminal law, to design the law’s obstacle course to try to avoid a particularly salient harm to a particularly vulnerable kind of litigant.

When the Second Stream of the Court focuses instead on refugee law’s familiar aspects, it comes away with a different impression of refugee claimants and the hearing process. In all relevant respects, a refugee claimant is no different than a person seeking disability support, or a tenant asking for a rent rebate, or an employee trying to reclaim lost wages. Like them, she is claiming a right to a statutory remedy, and like them, she already has a leg up compared to civil litigants in establishing the facts of her case: she will be able to take advantage of her tribunal’s relaxed rules of evidence. In addition, the member hearing her claim is not tasked with anything extraordinary. He is doing what decision-makers do every day in hearing rooms across the country: using his expertise and common sense to make sense of the case before him. On this framing, since the claimant is simply a litigant like any other, in a process like any other, there is no reason to depart from the civil and administrative law’s long-standing preference for erring against the moving party.

Chapter 3 explains how the two Streams put their error preferences into practice. The First Stream uses the law’s fact-finding structures – its burdens of proof, standards of proof and presumptions – to design an obstacle course that tips the balance in the claimant’s favour, in order to attempt to ensure that overall fewer genuine claimants are denied the protection that they
need in exchange for wrongly granting status to more who do not need it. The Second Stream’s fact-finding structures, on the other hand, try to bring the law back into line with civil and administrative law generally, by tipping the balance against the claimant and trading more mistaken rejections for fewer mistaken grants.

The first part of Chapter 4 explores how members are able to use refugee law’s burdens of proof, standards of proof and presumptions to get where they want to go. The second part looks at where they might want to go and why. It argues that the division within the Court on the question of which mistake to prefer maps onto a wider debate, one taking place on quite different terms, in which the harms of mistaken grants are salient in their own right. Within the context of this larger debate, and in light of what social science has shown about the factors that predictably influence risk perception, there are good reasons to fear in particular that members may be choosing to err against claimants for unlawful reasons.

This project’s conclusion returns to the question at the heart of this endeavour: Which mistake is worse? When the Court’s two perspectives are considered in isolation, either could make its case, and indeed both have their merits. But considering them in their real-life decision-making context suggests that the First Stream’s approach should be preferred, and not merely because claimants are exceptionally vulnerable and the harm that they stand to suffer is particularly grave. In a legal context in which a member will often be able to use the law’s error preference structures to decide the case as he chooses, and in a social and political context in which support for refugee protection is waning, the Second Stream’s approach gives members the tools they need to make profoundly unjust decisions, in a context in which there is good reason to believe that some will use them. A preference for mistaken denials lets the fox into the henhouse.
Chapter 2
Error Preferences

1 The First Stream: Refugee claimants are exceptionally vulnerable

For the First Stream of the Court, refugee law is a special case. Board members are not like other types of civil and administrative decision-makers, for they must “prognosticate potential risks” in a context fraught by every type of evidentiary complication.\(^{198}\) Theirs is, quite simply, “among the most difficult forms of adjudication.”\(^{199}\) And refugee claimants are not like other litigants.\(^{200}\) They are a “vulnerable, poor and disadvantaged group”\(^{201}\) and, for a host of reasons particular to the refugee law context, they are particularly susceptible to having their claims wrongly denied. They stand to pay the price, in other words, for the “radical uncertainty” in this area of fact-finding.\(^{202}\)

The First Stream’s judgments raise several areas of concern widely reflected in academic thinking about refugees and refugee law. The Court warns that claimants may be misunderstood and wrongly disbelieved because aspects of a truthful claimant’s testimony may raise doubts in the member’s mind; because her conduct may lead the member to make flawed judgments about her character or to conclude that her fear is implausible; and because she may lack access to key evidence. In addition, the Court warns that if the member concludes that the claimant has

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\(^{199}\) Ibid.

\(^{200}\) “Refugee claimants are not ordinary claimants as in civil matters.” Kabongo v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1369, 2011 FC 1106 at para 31 (Martineau J).

\(^{201}\) Canadian Doctors for Refugee Care v. Canada (Attorney General) [2014] FCJ No 679, 2014 FC 651 at paras 587, 608 (Mactavish J). See also Thamotharem v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 8, 2006 FC 16 at para 90, overturned on other grounds (Blanchard J).

\(^{202}\) Audrey Macklin, “Coming Between Law and the State: Church Sanctuary for Non-citizens,” Nexus, University of Toronto, Faculty of Law (Fall/Winter 2005) 49, 51, cited in Luker, above note 132 at 515. See also generally Luker, above note 132.
invented her story, he may overlook the possibility that she is nonetheless at risk. And it stresses that genuine refugees may be sent home to persecution if the Board enforces its procedural requirements too rigidly.

1.1 Credibility

1.1.1 The claimant’s testimony

The First Stream emphasizes that there are many reasons why, in listening to her testimony, a member may come to distrust a truthful claimant. Echoing the concerns of many in the field, the Court warns that the member may fail to appreciate that the claimant is suffering the effects of trauma, or may simply expect too much of her memory even in non-traumatic contexts. The member may misread the claimant’s demeanour, or misinterpret aspects of her evidence that require a nuanced understanding of her cultural background, gender or sexual orientation. And giving evidence through an interpreter may further impair the claimant’s ability to be understood and believed.

1.1.1.1 Trauma

As a result of their experiences of persecution, many claimants will experience what the UN Handbook calls “some degree of mental disturbance.” Much has been written about the irony that genuine refugees’ experiences of trauma may make their testimony seem unbelievable, for the predictable consequences of trauma – trouble with memory, with focus, with ordered thinking – may strike a decision-maker as signs of deception.

The First Stream is strongly concerned that the Board may wrongly disbelieve claimants for this reason. The Court concludes categorically that “many, if not most, refugee claimants are


vulnerable and as a result have difficulty testifying effectively.” It overturns decisions in which the Board ignored a psychiatric or psychological report, misunderstood or downplayed it, or failed to consider whether the claimant’s trouble testifying could be explained by the mental health factors noted within it. It reminds members where their competence lies: “while members of the Refugee Protection Division have expertise in the adjudication of refugee claims, they are not qualified psychiatrists, and bring no specialized expertise to the question of the mental condition of refugee claimants.” Qualified psychiatrists and psychologists, on the other hand, do have such expertise, and the Court also reminds the Board that these professionals use this expertise in reaching their diagnoses and conclusions: they do not simply accept what the claimant reports, but rather rely on clinical observation and standardized tools. An expert

205 Thamotharem v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 8, 2006 FC 16 at para 90, overturned on other grounds (Blanchard J).

206 See for example Fernandez v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 215, 2009 FC 192 at paras 22-24 (Lagacé DJ); Dhanju v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1020, 2004 FC 850 at paras 11-16 (Rouleau J); Csonka v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1294, 2001 FCT 915 at para 29 (Lemieux J); Sawadogo v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 792 at para 20 (Rouleau J).


208 See for example Reyes v. Canada (Minister of Employment and Immigration) (CA) [1993] FCJ No 282 (Mahoney, Stone and Linden JJ); Rudaragi v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1157, 2006 FC 911 at paras 5-6 (O’Reilly J); Atay v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 251, 2008 FC 201 at para 30-32 (O’Keefe J); Fidan v Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1606, 2003 FC 1190 at para 12 (von Finckenstein); Feleke v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 738, 2007 FC 539 at paras 14-18 (Tremblay-Lamer J); Yahya v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1308, 2013 FC 1207 at para 8 (Mosley J); Hidad v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 530, 2015 FC 489 at paras 10-12 (O’Reilly J).

209 Pulido v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 281, 2007 FC 209 at para 28 (Mactavish J). See also Ors v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1151, 2014 FC 1103 at para 22 in obiter (Mactavish J). The Court has given similar warnings in the context of assumptions about a claimant’s physical injuries. See Attakora v. Canada (Minister of Employment and Immigration) (CA) [1989] FCJ No 444 (Heald, Mahoney and Hugessen JJ).

210 Unal v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 624, 2004 FC 518 at paras 7-10 (Layden-Stevenson J); AM v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1187, 2011 FC 964 at paras 54-55 (Russell J). See also the Court’s more qualified comments in Ameir v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1094, 2005 FC 876 at para 27 (Blanchard J): “It is open to the Board to afford no probative value to a medical report if that report is founded essentially on a claimant’s story which is disbelieved by the Board. However, there may be instances where reports are also based on clinical observations that can be drawn independently of the claimant’s credibility.”
report’s validity is therefore not undermined by the fact that the claimant obtained it in support of her refugee claim, nor by the fact that she was referred to the specialist by her counsel rather than by her doctor, nor by the fact that the specialist met with her only once in preparing it.\footnote{As the Court notes, since “all evidence should be obtained and tendered for the purpose of trying to influence the trier of fact, the credibility of an expert psychiatrist’s report is not lost only because it was requested by counsel, and a 90 minute interview may be of sufficient length to allow a psychiatrist to form an opinion.” \textit{KK v. Canada (Minister of Citizenship and Immigration)} [2005] FCJ No 1092, 2005 FC 873 at para 8 (Dawson J).} As a result, the Court overturns decisions in which members displayed “unwarranted” skepticism about a report’s contents,\footnote{\textit{Pulido v. Canada (Minister of Citizenship and Immigration)} [2007] FCJ No 281, 2007 FC 209 at para 27 (Mactavish J); \textit{KK v. Canada (Minister of Citizenship and Immigration)} [2005] FCJ No 1092, 2005 FC 873 at paras 6-8 (Dawson J); \textit{Kuta v. Canada (Minister of Citizenship and Immigration)} [2009] FCJ No 851, 2009 FC 687 at para 6 (Campbell J).} or substituted their own judgments about the claimant’s mental health for that of the experts.\footnote{See for example \textit{Fatih v. Canada (Minister of Citizenship and Immigration)} [2012] FCJ No 924, 2012 FC 857 at para 73 (O’Keefe J); \textit{KK v. Canada (Minister of Citizenship and Immigration)} [2005] FCJ No 1092, 2005 FC 873 at paras 6-8 (Dawson J); \textit{RKL v. Canada (Minister of Citizenship and Immigration)} [2003] FCJ No 162 at para 17 (Martineau J).} The Court finds, for example, that in concluding that the claimant was not credible, the member erred in ignoring a psychiatrist’s warnings that “formal questioning may trigger memories of past traumatic events” and choosing to rely instead on the fact that she showed “no problems in her manner of testifying” (especially, perhaps, since the hearing had to be adjourned and the claimant taken to hospital because, as the member also noted on the record, she “is crying and sobbing and can’t breathe properly.”)\footnote{\textit{RKL v. Canada (Minister of Citizenship and Immigration)} [2003] FCJ No 162 at para 17 (Martineau J).} In short, where such expert evidence is before the Board it must be fully considered, and the Court goes so far as to find that in the face of such evidence, the member should be “very cautious in arriving at credibility conclusions.”\footnote{\textit{Kuta v. Canada (Minister of Citizenship and Immigration)} [2009] FCJ No 851, 2009 FC 687 at para 6 (Campbell J).}

The Court, in fact, goes further. Even absent any psychiatric or psychological evidence, the Court faults the member for failing to consider mental health factors as a possible explanation for problems with a claimant’s testimony, such as vagueness, gaps and inconsistencies.\footnote{\textit{Zhang v. Canada (Minister of Citizenship and Immigration)} [2014] FCJ No 774, 2014 FC 713 at para 32 (de Montigny J); \textit{Akter v. Canada (Minister of Citizenship and Immigration)} [2006] FCJ No 1517, 2006 FC 1205 at para 6 (Campbell J).} For
victims of torture and victims of sexual violence, in particular, the Court cautions that trauma and its psychological sequelae come standard. “We would expect the legitimate victim of torture to have difficulties testifying,” the Court warns, in part because of problems with “memory, consistency and coherence.”217 Women giving evidence about gender-based violence may similarly have trouble telling their stories, 218 not only because of “social, cultural, traditional and religious norms”219 but also because of “difficulty in concentrating and loss of memory.”220 As a result, a member evaluating testimony in such claims must assume for the sake of argument that the claimant is being truthful about her experiences. The Board “must consider the evidence from the perspective of the teller,”221 “in the context of the allegation contained in the claim,”222 paras 16-19 (Beaudry J); Njeri v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 350, 2009 FC 291 at para 16 (Phelan J). In Zhang, for example, the Court finds that “It is clear that disturbing events...can reasonably alter an individual’s recollection.” It bases this finding on previous jurisprudence, which had relied on the Board’s Guidelines for accommodating vulnerable persons and victims of torture. Yet the claimant in Zhang was not alleging that he was a vulnerable person, nor that he had been tortured, and these materials were not considered at the hearing or, for that matter, raised in Court. Zhang, above at para 32.

217 Wardi v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1612, 2012 FC 1509 at para 15 (Rennie J), citing the Board’s “Training Manual on Victims of Torture.”

218 Here too the Court cites the Board’s own materials: “Women refugee claimants who have suffered sexual violence may exhibit a pattern of symptoms referred to as rape trauma syndrome, and may require extremely sensitive handling” (“Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution”). See for example Mayeke v. Canada (Minister of Citizenship and Immigration) [1999] FC No 758 at para 13 (Tremblay-Lamer J); Elezi v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 275, 2003 FCT 210 at para 9 (Campbell J); CLJ v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 496, 2011 FC 387 at para 3 (Campbell J).


220 Mayeke v. Canada (Minister of Citizenship and Immigration) [1999] FC No 758 at para 14 (Tremblay-Lamer J). See also Myle v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1127, 2006 FC 871 at para 20 (Shore J); Akter v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1517, 2006 FC 1205 at para 17 (Beaudry J). The Court again refers the Board to its own Gender Guidelines (above note 218): “The Board is obliged to take into consideration in cases such as these that victims of domestic abuse may exhibit symptoms of Post-Traumatic Stress Disorder (PTSD) or Rape Trauma Syndrome (Gender Guidelines), which may impair a claimant’s memory or make it difficult for her to describe her trauma.” Jones v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 591, 2006 FC 405 at para 15 (Snider J). See also Njeri v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 350, 2009 FC 291 at para 16 (Phelan J).

221 Griffith v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 1142 at para 3 (Campbell J).

in order to consider properly “the effects that such an experience might have” on her ability to testify.\textsuperscript{223} The Court stresses that this is the only reasonable way to proceed with such an analysis. To discount the claimant’s experiences of trauma because of troubles with her testimony, and then, since the claimant is not a traumatized person, to discount evidence that traumatized people often have trouble testifying, is “circular and illogical reasoning”: it “amounts to rejecting a diagnosis because of the symptoms.”\textsuperscript{224}

In addition, when claimants are testifying about any kind of traumatic experience, “the Board should not have inflated expectations” of what they will remember.\textsuperscript{225} Echoing a considerable quantity of social science evidence, the Court finds that “It is clear that disturbing events…can reasonably alter an individual’s recollection.”\textsuperscript{226} It warns members not to “demand more of the applicant’s memory than is reasonable” under such circumstances,\textsuperscript{227} especially when it comes to the “accuracy and consistency” of the claimant’s recollections,\textsuperscript{228} and in particular when they

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\textsuperscript{225} \textit{Zhang v. Canada (Minister of Citizenship and Immigration)} [2014] FCJ No 774, 2014 FC 713 at para 32 (de Montigny J).

\textsuperscript{226} \textit{Ibid}. See also \textit{Bains v. Canada (Minister of Employment and Immigration)} [1993] FCJ No 497 (Cullen J): “The trauma of an arrest might shake the memory of anyone.” For discussion see sources cited in above note 204.


\textsuperscript{228} \textit{Wardi v. Canada (Minister of Citizenship and Immigration)} [2012] FCJ No 1612, 2012 FC 1509 at para 19 (Rennie J).
concern “peripheral details of a traumatic event.” So where the Board finds that the claimant should remember whether his teeth were broken during his arrest or during his subsequent torture, or whether he was tortured with an wooden or an iron instrument, or where the member draws a negative inference from a claimant’s “lack of spontaneity” in describing her gang rape, or expects that “given the traumatic circumstances…the claimant would have a vivid memory of the events and would be able to provide a fulsome description without hesitation or difficulty of any kind,” the First Stream concludes that this reasoning is unsound.

1.1.1.2 General memory

Even when claimants have no general underlying mental health troubles, however, and even when they are testifying about non-traumatic subjects, the Court repeatedly warns that their claims may be wrongly denied if decision-makers have unreasonable expectations about what and how people remember in everyday contexts.

Memory is neither as complete nor as stable as people typically believe. Consistent with a large body of research on point, the First Stream has long cautioned against a “microscopic”

229 Ibid.; Zhang v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 774, 2014 FC 713 at para 32 (de Montigny J). See also Cameron 2010, above note 147 at 483-486 on memory for peripheral information in general, and in particular on the effect of ‘weapon focus’: “in study upon study, subjects exposed to a weapon would focus on it at the expense of everything else around it, including the person holding it” (485).


232 Akter v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1517, 2006 FC 1205 at paras 11, 16-19 (Beaudry J).

233 Liu v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1004, 2014 FC 972 at para 3 (Campbell J).

234 As discussed further in 2.2.2.3 below, people very commonly assume that memory functions like a video camera, recording all aspects of the events that we experience and creating memories that remain unchanged over time. In fact, whole categories of information are difficult to recall accurately, if at all: temporal information, such as dates, frequency, duration and sequence; the appearance of common objects; discrete instances of repeated events; peripheral information; proper names; and the verbatim wording of verbal exchanges. In addition, autobiographical memories change over time, and may change significantly. For a review see Cameron 2010, above note 147; United
or “overzealous” or “over-vigilant” search for gaps or inconsistencies in the claimant’s testimony. To be relevant, such problems must be “rationally related” to the question of credibility and the Court finds that little can be gleaned from a “one day discrepancy” in his testimony about dates, for example; or from a claimant’s inability to describe “every single detail” of his identity document; or from her failure to remember aspects of religious “trivia,” or the name of the ship on which he fled his country, or whether he had started

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235 See for example Attakora v. Canada (Minister of Employment and Immigration) (CA) [1989] FCJ No 444 (Heald, Mahoney and Hugessen JJ); Dong v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 54, 2010 FC 55 at paras 23-28 (Kelen J); Aria v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 354, 2013 FC 324 at para 14 (de Montigny J); Chen v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 524, 2012 FC 510 at para 68 (Russell J); Rusznyak v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 281, 2014 FC 255 at para 47 (Russell J).


237 Attakora v. Canada (Minister of Employment and Immigration) (CA) [1989] FCJ No 444 (Heald, Mahoney and Hugessen JJ); Zhang v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 692, 2006 FC 550 at para 36 (Russell J); Elmi v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 977, 2008 FC 773 at para 24 (Teitelbaum J).


240 “The Board found that the Applicant never had a citizenship card because he was only able to point to 6 of the 9 particulars contained in this document. Despite the fact that Mr. Elhassan correctly identified that the citizenship card has a green exterior with white interior and contains his photograph, a stamp, the Minister’s signature, and his mother’s name, the panel drew a negative inference with respect to Mr. Elhassan’s credibility because he forgot to refer to his fingerprint, details of his tribe and his father’s name. It was unreasonable to expect an individual to recall every single detail on a piece of identification. Even the most familiar piece of identification contains information that is difficult to completely recall.” Elhassan v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1367, 2013 FC 1247 at para 27 (de Montigny J).

241 Wu v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 1143, 2009 FC 929 at para 22 in obiter (Kelen J); Wang v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1291, 2011 FC 1030 at para 13 (Beaudry J); Dong v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 54, 2010 FC 55 at para 21 (Kelen J); Chen v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 524, 2012 FC 510 at paras 66-67 (Russell J); Zhang v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 539, 2012 FC 503 at
dating a former partner at “the beginning of July, the middle of July, or the end of July” several years earlier. The claimant’s failure to remember the specific dates even of important events, such as an assault, or an arrest, or even the disappearance of a loved one, “bears a tenuous connection” to her credibility. For the First Stream, quite simply, “a refugee claim should not be determined on the basis of a memory test.”

1.1.1.3 Demeanour

Equally worrying to many thinkers on refugee topics is the possibility that claimants will be wrongly disbelieved because of their manner of testifying. The problems inherent in assessing demeanour across cultures have been widely noted, leading many to conclude that in the refugee

para 12 (Campbell J). The First Stream of the Court holds claimants attempting to prove their religious identity by demonstrating knowledge of religious doctrine to “a very low standard.” Lin v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 312, 2012 FC 288 at para 59 (Russell J). For a recent review see Zhang, above at paras 6-24; Chen v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 630, 2012 FC 545 at paras 9-13 (Campbell J); Wang, above; Dong, above, at paras 18-22 (Kelen J); Huang v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 452, 2008 FC 346 at para 10 (Mosley J); Feradov v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 135, 2007 FC 101 at para 16 (Barnes J); Chen v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 395, 2007 FC 270 at para 16 (Barnes J). In fact, the Court has suggested that when it comes to shedding light on the sincerity of a person’s religious faith, “a process of questioning religious knowledge is a fundamentally flawed fact-finding venture.” Zhang, above at para 23.


244 Adegbola v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 693, 2007 FC 511 at para 31 (O’Keefe J); Akter v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1517, 2006 FC 1205 at para 16 (Beaudry J). In Zavalat v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 1639, 2009 FC 1279 at para 72 (Russell J), the Court overturned a decision because the member “chose to reject all of the verbal testimony and written evidence of the Applicant on the basis of a single inconsistency in dates.”


context in particular “the risks of assessing credibility based on demeanor are extreme.” 249 Some argue that it ought, in fact, to play no role at all in a refugee hearing. 250

The First Stream amply shares this concern, not only because of the possibility for cross-cultural misunderstandings, 251 discussed further below, but also because of the potentially distorting effect of the member’s quasi-inquisitorial role. 252 The Court rejects the Board’s assumptions about the demeanour that one would expect to see, for example, from a political activist (the claimant “did not present as leadership material”); 253 or an assault victim (the claimant’s testimony was not credible because she “did not display any emotion”); 254 or a bereaved parent


250 Kagan, above note 140 at 378-380. See also Hathaway 2014, above note 132 at 143.

251 “Problems may arise in interpreting the demeanour of refugee claimants from different cultural backgrounds.” Valtchev v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1131 at para 24 (Muldoon J). See also Rajaratnam v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1125, 2014 FC 1071 at para 46 (O’Keefe J); Nahimana v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 219, 2006 FC 161 at 26 (Shore J); Chowdhury v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 575, 2003 FCT 416 at para 23 (Blanchard J): “There is no universal standard for the demeanour of a political activist. When one considers that the applicant comes from another culture and speaks a different language from the panel members, the inference becomes even more dubious.”

252 On this last point, the Court cites the English Court of Appeal in Yuill v. Yuill [1944] P.15: “A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict.” Rajaratnam v. Canada (Minister of Employment and Immigration) (CA) [1991] FCJ No 1271 at para 46 (Mahoney, Stone and Linden JJ); Olivera-Paoletti v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 569, 2008 FC 444 at para 13 (Mandamin J).

253 Fazal v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 737, 2006 FC 581 at paras 7-8 (Phelan J). See also Chowdhury v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 575, 2003 FCT 416 at paras 10, 23 (Blanchard J).

254 As the Court notes, “Individuals vary greatly as to the degree of emotion they show when describing such events - why is she assumed to be a person who would react emotionally?” Shaker v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 1077 at paras 9-10 (Reed J). See also Kathirkamu v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 592, 2003 FCT 409 at paras 14, 50 (Russell); Rajaratnam v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1125, 2014 FC 1071 at paras 45-46 (O’Keefe J); Reginald v. Canada (Minister of Citizenship and Immigration) [2002] 4 F 523 [2002] FCJ No 741 at 22 (Gibson J), in which the Court
(to be believable, the claimant’s testimony should have been accompanied, in the Court’s paraphrase, by an “outburst of cries”); or a fisherman (“the panel is not persuaded from the claimant’s demeanour that he was fisherman”); or simply a genuine refugee (the claimants’ “cynical, sarcastic and disrespectful comportment…was inconsistent with persons seeking refugee status for legitimate reasons”).

1.1.1.4 Culture

Cross-cultural misinterpretation is not only a potential source of errors in the assessment of a claimant’s demeanour. Decision-makers’ own “background, values, beliefs and life experiences” can also lead them to reject the substance of the claimant’s testimony. Peering across the cultural divide that separates them, the member may deem the claimant’s story implausible because of mistaken assumptions about life in his home country.

The First Stream cautions members emphatically about the perils of relying on “North American logic and reasoning,” “Western concepts,” “Canadian paradigms” or “Canadian
standards” in assessing the plausibility of a claimant’s evidence. Since “actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant’s milieu,” the Court stresses that findings of implausibility are “inherently dangerous” and “should be made only in the clearest of cases.” The Court faults the Board, for example, for expecting that a claimant would remember his siblings’ birthdays, in a cultural context in which birthdays are not celebrated, or for rejecting off-hand the claimant’s explanation that in his country, he would refer to a woman of his mother’s generation as an “aunt” without meaning to imply that they had a blood relationship. The Court faults the Board for relying on western assumptions about the size and lay-out of a supermarket, or

382 at para 51 (Russell J); Alfonso v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 72, 2007 FC 51 at para 26 (Lemieux J).

261 Ye v. Canada (Minister of Employment and Immigration) (CA) [1992] FCJ No 584 (Stone and MacGuigan JJ & Henry DJ). See also An Li Cen v. Canada (Minister of Citizenship and Immigration) [1995] FCJ No 1464 at para 10 (Gibson J); El-Naem v. Canada (Minister of Citizenship and Immigration) [1997] FCJ No 185 at para 20 (Gibson J); Abdulhussain v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 844 at para 17 (Cullen J).

262 Bains v. Canada (Minister of Employment and Immigration) [2001] FCJ No 497 (Cullen J); Valtchev v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1131 at para 9 (Muldoon J); Musleameen v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 262, 2010 FC 232 at para 43 (Lemieux J).

263 Valtchev v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1131 at para 7 (Muldoon J). See also for example Vodics v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1000, 2005 FC 783 at para 10 (Campbell J); Musleameen v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 262, 2010 FC 232 at paras 43-44 (Lemieux J); Chen v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 630, 2012 FC 545 at para 5 (Campbell J); Arslan v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 246, 2013 FC 252 at para 79 (Russell J).

264 Chen v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 778, 2014 FC 749 at 54 (Russell J).

265 Valtchev v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1131 at para 7 (Muldoon J). See for example Vodics v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1000, 2005 FC 783 at para 10 (Campbell J); Isakova v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 188, 2008 FC 149 at paras 11-12 (Campbell J); Chen v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 630, 2012 FC 545 at para 5 (Campbell J); Chen v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 778, 2014 FC 749 at 54 (Russell J). See also Santos v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1149, 2004 FC 937 at paras 14-15 (Mosley J).

266 Udeagbala v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1906, 2003 FC 1507 at para 46 in obiter (Beaudry J).

267 Sun v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1223, 2012 FC 1154 at paras 11-12 (Rennie J).

about the kinds of stories that would likely be reported in a local newspaper,\textsuperscript{269} or about how an agent of persecution would go about persecuting. Not only does the Board err in assuming that persecutors will act rationally,\textsuperscript{270} but it must take care not to view their conduct “through North American eyes.”\textsuperscript{271} In one case, for instance, the claimant testified that he was beaten by the Turkish police because he ran a business teaching Kurdish music. In overturning the Board’s finding that the police had likely mistreated him because his business was unlicensed, the Court explains that while the Canadian authorities would take a dim view of running an unlicensed business, and not of promoting Kurdish culture, there was “no evidence” that the Turkish police took the former seriously, and “significant evidence” that they took the latter very seriously indeed.\textsuperscript{272}

1.1.1.5 Gender

In addition, understanding across cultures is even more problematic when gender is added into the mix: “An entire body of literature has grown up around the issue of how these problems are further complicated by the issue of gender.”\textsuperscript{273}

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\textsuperscript{269} See for example Musleameen v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 262, 2010 FC 232 at paras 41-44 (Lemieux J); Nay v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1428, 2012 FC 1317 at para 15 (Rennie J); PUA v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1403, 2011 FC 1146 at paras 28-30 (Rennie J); Kaur v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1858, 2005 FC 1491 at 25 (de Montigny J): “there is no evidence as to what the newspapers find newsworthy in India.”

\textsuperscript{270} See for example Valtchev v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1131 at para 13 (Muldoon J); Taboada v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1395, 2008 FC 1122 at paras 34-35 (O’Keefe J); Yoosuff v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1394, 2005 FC 1116 at paras 8-11 (O’Reilly J). See further discussion in Chapter 4.

\textsuperscript{271} Baysal v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1085, 2008 FC 869 at para 13 (Zinn J); see also Ye v. Canada (Minister of Employment and Immigration) (CA) [1992] FCJ No 584 (Stone and MacGuigan JJ & Henry DJ); Chen v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 778, 2014 FC 749 at 53 (Russell J).

\textsuperscript{272} Baysal v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1085, 2008 FC 869 at para 13 (Zinn J).

The First Stream of the Court looks from many angles at the ways in which gender-specific issues and assumptions may lead to mistaken denials. It highlights the passage in the Board’s own Guidelines that explains that women and girls may have difficulty giving evidence on their own behalf, as their husbands and fathers may have kept them in the dark about matters central to their claims.\textsuperscript{274} While the Court’s observation that “women sometimes have difficulty testifying about matters relating to sexual violence” is perhaps an understatement,\textsuperscript{275} the Court notes as well that “social, cultural, traditional and religious norms” may further affect both a woman’s willingness to testify and the way that she tells her story,\textsuperscript{276} and that the Board will need to understand these norms in judging the plausibility of her evidence.

The Court often repeats the Guidelines’ caution to the effect that women from cultures “where the preservation of one’s virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence in order to keep their ‘shame’ to themselves and not dishonour their family or community.”\textsuperscript{277} Her feelings of shame may explain a claimant’s failure

\textsuperscript{274} The Guidelines explain that in many cultures, “men may decide not to share information with women in their families” and women are not empowered to ask. See \textit{Shinmar v. Canada (Minister of Citizenship and Immigration)} [2012] FCJ No 100, 2012 FC 94 at paras 18-19 in obiter (O’Reilly J); \textit{Nahimana v. Canada (Minister of Citizenship and Immigration)} [2006] FCJ No 219, 2006 FC 161 at paras 23-24 (Shore J).

\textsuperscript{275} \textit{Shinmar v. Canada (Minister of Citizenship and Immigration)} [2012] FCJ No 100, 2012 FC 94 at para 18 in obiter (O’Reilly J).

\textsuperscript{276} \textit{Diallo v. Canada (Minister of Citizenship and Immigration)} [2004] FCJ No 1756, 2004 FC 1450 at para 32 in obiter (Mactavish J); see also \textit{Shinmar v. Canada (Minister of Citizenship and Immigration)} [2012] FCJ No 100, 2012 FC 94 at para 18 in obiter (O’Reilly J); \textit{Odia v. Canada (Minister of Citizenship and Immigration)} [2014] FCJ No 706, 2014 FC 663 at para 9 (Gagné J).

\textsuperscript{277} See for example \textit{Reginald v. Canada (Minister of Citizenship and Immigration)} [2002] 4 FC 523, [2002] FCJ No 741 at para 21 (Gibson J); \textit{IR v. Canada (Minister of Citizenship and Immigration)} [2013] FCJ No 1059, 2013 FC 973 at para 39 (Gleason J). And as the Court has noted, “While the Guidelines are not law, the Chairperson delivered them with the expectation that, to ensure that a fair and just hearing is provided on a gender-based protection claim, they should be followed.” \textit{Ritchie v. Canada (Minister of Citizenship and Immigration)} [2006] FCJ No 210, 2006 FC 99 at para 3 (Campbell J). See also \textit{IR}, above at para 40; \textit{Abbasova v. Canada (Minister of Citizenship and Immigration)} [2011] FCJ No 40, 2011 FC 43 at paras 52-53, in the context of a PRRA decision, but discussing the role of the Guidelines generally (Shore J).
to disclose her sexual assault at the first opportunity in the refugee claim process,\textsuperscript{278} or her failure to do so unambiguously: the Court explains that the Board must be alert to the possibility that “the applicant’s native culture discourages an open discussion of rape and prompts her to use euphemisms instead.”\textsuperscript{279} And echoing its comments above about judging the actions of agents of persecution in other cultures, the Court stresses that the Board errs if it requires a claimant to try to explain her abuser’s conduct,\textsuperscript{280} or if it fails to appreciate the power dynamics at play in a domestic abuse situation,\textsuperscript{281} or if it imposes its own notions of how an abuser will abuse.

The Court points out the flaws, for example, in the Board’s conclusion that as a Christian, the claimant’s father would not have forced her into a polygamous marriage with a man who had raped her. Not only does this finding ignore “the possibility that the applicant’s father was not a model Christian,” it also ignores her testimony “that her father was abusive towards her, had a very traditional and patriarchal view of women’s place in society and viewed the applicant as impure after being raped.”\textsuperscript{282} In another case, the claimant testified, on the one hand, that her abuser was so jealous that he kept her confined to the house, and on the other, that he would force her “to perform sex acts with his friends and business associates.”\textsuperscript{283} The member

\begin{itemize}
\item[278] \textit{Hailu v. Canada (Minister of Citizenship and Immigration)} [2006] FCJ No 1150, 2006 FC 908 at para 5 (Dawson J); \textit{ML v. Canada (Minister of Citizenship and Immigration)} [2012] FCJ No 92, 2012 FC 763 at paras 64-65 (Russell J). See also \textit{Camara v. Canada (Minister of Citizenship and Immigration)} [2008] FCJ No 442, 2008 FC 362 at para 19 in obiter (de Montigny J). Feeling shame about a sexual assault is not, of course, a uniquely female experience, as the Court has also acknowledged. For a similar finding in relation to a male claimant, see \textit{Ogbebor v. Canada (Minister of Citizenship and Immigration)} [2001] FCJ No 770 at para 40 (Lemieux J).
\item[279] \textit{RKL v. Canada (Minister of Citizenship and Immigration)} [2003] FCJ No 162 at para 23 (Martineau J). In describing a sexual assault, the claimant had testified that the police had “insulted” and “humiliated” her. See also \textit{Shinmar v. Canada (Minister of Citizenship and Immigration)} [2012] FCJ No 100, 2012 FC 94 at para 19 in obiter (O’Reilly J), for the Court’s comments that the Guidelines’ cautions were “certainly” relevant to the fact that the claimant “had difficulty discussing the ‘dirty language’ that was used” by the agents of persecution.
\item[280] \textit{Ritchie v. Canada (Minister of Citizenship and Immigration)} [2006] FCJ No 210, 2006 FC 99 at paras 12-18 (Campbell J).
\item[281] See for example \textit{ibid.}; \textit{AME v. Canada (Minister of Citizenship and Immigration)} [2011] FCJ No 589, 2011 FC 444 at para 18 (Mosley J).
\item[283] \textit{AME v. Canada (Minister of Citizenship and Immigration)} [2011] FCJ No 589, 2011 FC 444 at para 18 (Mosley J).
\end{itemize}
concluded from this supposed inconsistency – if he was willing to share her, then he was “hardly
the kind of person to confine the claimant because jealousy” – that the claimant had
orchestrated “an elaborate scheme of fabrication based on exaggerations and embellishments.”
In overturning this decision, the Court explains that the “logic” of the Board’s reasoning betrays
a profound lack of understanding of the psychology of domestic abuse.

The Court notes that the Guidelines’ observations might explain why a claimant was “too
ashamed to seek medical attention” or to make or follow up on a police report. And it
cautions that, while it is improper to conclude that a woman from any culture will make a
“timely complaint” about a sexual assault, this type of finding is especially flawed where a
claimant is subject to a cultural imperative to hide her ‘shame’. So the Court overturns a
decision, for example, in which the member made a negative inference because the claimant had

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284 Ibid.

285 Ibid.

286 “This reasoning fails to appreciate the psychological dimensions of abuse and the many forms in which abuse manifests in an abuser. It wrongly assumes that someone who is jealous or controlling would not subject another to demeaning sexual acts. Forcing the applicant to perform sex acts with his friends and business associates was another way for Mr. Evans to assert control of her. Jealousy and controlling behaviour can coexist. Both are rooted in control and a lack of regard for the individual and her body. The logic of the Board on this issue demonstrates both an insensitivity to the applicant’s situation and a lack of awareness to the broader issue of domestic abuse and sexual assault.” Ibid. at para 18.


288 See for example Garcia v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 118, 2007 FC 79 at para 24 (Campbell J); EN v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 473, 2013 FC 452 at para 19 (Rennie J); Gonzalez de Rodriguez v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 543, 2013 FC 486 at paras 28-30 (Shore J); AME v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 589, 2011 FC 444 at para 9 (Mosley J). As the Guideline further notes at C.2, “When considering whether it is objectively unreasonable for the claimant not to have sought the protection of the state, the decision-maker should consider, among other relevant factors, the social, cultural, religious, and economic context in which the claimant finds herself. If, for example, a woman has suffered gender-related persecution in the form of rape, she may be ostracized from her community for seeking protection from the state.” Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution (1996), C.2.

289 The Court has pointed out that in Canada, the “common law doctrine of recent complaint – under which a failure to report a sexual assault quickly was a factor that could be considered as undercutting a complainant’s credibility – was abolished by statute in criminal matters in 1983.” IR v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1059, 2013 FC 973 at para 37 (Gleason J).
waited two days to tell her husband that she had been raped. As the claimant had explained, “I
knew that our lives would be ruin [sic] by this.”

1.1.1.6 Sexual orientation

The First Stream is also concerned that claimants may be wrongly denied refugee protection
because of members’ flawed assumptions about human sexuality.

For the First Stream, claimants may be wrongly disbelieved, for example, if the Board concludes
that “a well-educated man who understood the consequences of being gay” would not “choose a
life style which would inevitably cause him problems.” They may also be wrongly disbelieved
if the member thinks that he knows what a gay man looks like. The Court objects to the
“ignorance and prejudice” revealed in the assumption that a gay man will be effeminate, or
that he will have “distinctive mannerisms” that are different, in the member’s words, from those
of “any typical young man.” The Court also cautions that the member may be misled by what

290 In fact, when the claimant did tell her husband, he did not believe her and accused her instead of having had a
consensual relationship. Now estranged from the claimant, her husband testified at her hearing (after her motion for
a disjoinder of their claims was denied), and the Board accepted his opinion that she was not telling the truth about
the attack, in part because of the member’s impression that he “seems to love his wife and family and wants to keep
his family together.” IR v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1059, 2013 FC 973 at
para 25 (Gleason J).

291 As Millbank notes, “The wider the gulf between the experiences of the applicant on the one hand and the
knowledge base and cultural frame of the decision-maker on the other, the greater the likelihood that credibility
assessment may be problematic. Sexual orientation claims represent aspects of both cultural and sexual ‘otherness’
and bring this gulf of understanding into high relief.” Jenni Millbank, “The Ring of Truth: A Case Study of
Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 International Journal of
Refugee Law 1 at 30-31. See also Jenni Millbank, “From discretion to disbelief: recent trends in refugee
determinations on the basis of sexual orientation in Australia and the United Kingdom” (2009) 13 The International

292 Kravchenko v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 479, 2005 FC 387 at paras 3-6
(Heneghan J). In the words of the Board: “The claimant was asked to confirm that he made the choice to be gay and
he did so. I do not accept this as reasonable. The claimant is a well-educated man who understood the consequences
of being gay. It is unreasonable that such a man would choose a life style which would inevitably cause him
problems...It is not credible that such a man would publicly display body language and facial expressions which
would cause him public notice and trouble in a homophobic society.”

293 Herrera v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1499, 2005 FC 1233 at paras 11-21
(Teitelbaum J).

294 Lekaj v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1151, 2006 FC 909 at para 16
(Dawson J).
he thinks he knows about the lives of sexual minorities. The member errs if he concludes, for example, that a gay or lesbian person will discover their sexual orientation in adolescence, and will initially have “misgivings” about it; that gay men will not marry women and father children, even if they “are forced to live double lives” in a homophobic society; that the claimant, “if he were homosexual, would dissociate himself from the Roman Catholic church”; and that once in Canada, he will necessarily take advantage of the social scene: “The Board’s insistence that an individual needs to go to the gay village to be gay is not reasonable.”

1.1.1.7 Language

Lastly, the potential for misunderstandings of all kinds increases exponentially when claimants give their evidence through an interpreter. The First Stream notes this explicitly: judging

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295 Eringo v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1874, 2006 FC 1488 at para 11 (Blais J); Dosmakova v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1742, 2007 FC 1357 at paras 11-13 Dawson J.

296 Dosmakova v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1742, 2007 FC 1357 at para 11-13 (Dawson J). The Board concluded: “The claimant was asked how she felt about her discovery. She replied that she felt happiness and sexually satisfied, that she was happy about it and had no regrets. I do not accept this as credible. The claimant was a fifty-six-year-old woman, living in a society which she stated was homophobic. This departure from her previous life style was drastic. On a balance of probabilities, I find that the claimant, if she suddenly discovered that she was a lesbian in such circumstances, her emotional reaction is not in harmony with the preponderance of probabilities which a reasonable and informed person would expect. On a balance of probabilities, even if the claimant does not regret her relationship with N, it is reasonable to expect that she would express some misgivings with respect to her initial feelings. Therefore, on a balance of probabilities, I find the claimant not to be a credible or a trustworthy witness.” See also Kamau v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1505, 2005 FC 1245 at para 8 (Gibson J).

297 Leke v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1108, 2007 FC 848 at para 20 (Lagacé DJ); Eringo v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1874, 2006 FC 1488 at para 11 (Blais J). For a decision overturning similar reasoning in the related context of an application to vacate refugee status, see Santana v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 700, 2007 FC 519 (Harrington J).


299 Essa v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1819, 2011 FC 1493 at para 30 (Boivin J).

300 For a general discussion, see Kagan, above note 140 at 393; Kälin, above note 249 at 233; Credo above note 60 at 142-3 (3.5.1); Luker, above note 132 at 504. For a related discussion of EU law see Reneman, above note 140 at 162-164.
interpreted evidence is “fraught with the possibility of innocent misunderstanding” and the potential for wrongful denials, and having to rely on interpreters, both in the hearing room and throughout the refugee claim process, is another reason why many claimants are “vulnerable.”

A claimant has a right under the Charter to “continuous, precise, competent, impartial and contemporaneous interpretation.” In overturning decisions in which the interpretation fell short of this standard, the First Stream holds that, to be fatal, an interpreter’s errors “need not be central” to the claim, need not be “material, in the sense of being intertwined with key findings,” and need not cause any actual prejudice to the claimant. While it is possible for a

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301 Owusu-Ansah v. Canada (Minister of Employment and Immigration) (CA) [1989] FCJ No 442 (Heald, Mahoney and Hugessen JJ), a comment referring both to the difficulties inherent in judging interpreted evidence, as well as to problems with the former refugee determination system more broadly. See also Òwochei v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 165, 2012 FC 140 at para 60 (Russell J); Castro v. Canada (Secretary of State) [1994] FCJ No 1620 at para 9 (Jerome ACJ).

302 See for example Yoon v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 221, 2012 FC 193 at para 4 (Shore J): “Ensuring that the entire case or the full picture of a narrative is understood requires a clear, accurate, comprehensible translation. Without this, the panel may not be able to adequately assess the credibility of a narrative. Moreover, reasoning that shows a lack of credibility would be called into question by a translation that does not correctly reflect a claimant’s testimony.” See also LaForest J’s dissent in Chan v. Canada (Minister of Employment and Immigration) [1995] 3 SCR 593, [1995] SCJ No 78 at para 57 (Sopinka, Cory, Iacobucci and Major JJ; La Forest, L’Heureux-Dubé, Gonthier JJ dissenting).

303 The Court makes this observation in the context of abandonment decisions. See Peredo v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 451, 2010 FC 390 at para 33 (Mosley J): “the applicant is a vulnerable party in this case, dependent on the translation services of her interpreter.” See also Andreoli v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1349, 2004 FC 1111 at para 17 (Harrington J): “the applicants do not speak French or English, which made them particularly vulnerable and dependant [sic] on their interpreter.” In the refugee hearing context, see for example Liang v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1644, 2006 FC 1315 at para 8 (Gibson J); El Romhaine v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 693, 2011 FC 534 at para 38 (Shore J).


305 See for example Elmaskut v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 508, 2005 FC 414 (Mactavish J); Zaree v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1097, 2011 FC 889 at paras 9-10 (Martineau J); Khalit v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 928, 2007 FC 684 (Harrington J); Umubeyi v Canada (Minister of Citizenship and Immigration) [2011] FCJ No 76, 2011 FC 69 (Noël J); Neheid v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1047, 2011 FC 846 (Phelan J); Huang v Canada (Minister of Citizenship and Immigration) [2003] FCJ No 456, 2003 FCT 326 (Snider J).

306 Mah v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 907, 2013 FC 853 at para 23 in obiter (Gleason J).

307 Ibid. at paras 22-23.
claimant to waive her right to adequate interpretation if she fails to raise the issue early enough in the proceedings, the Court stresses that “the threshold for waiver is high.” The Court consistently makes clear that a claimant who does not speak the language of the proceedings, and so cannot recognize that her testimony is being misinterpreted, cannot be expected to make an objection at the hearing. Even where a claimant does speak enough English or French to appreciate that his testimony is not being properly interpreted, the Court finds that he cannot be expected, while testifying, to monitor the situation and bring it to the Board’s attention. “It is too heavy a burden” to require a claimant “to act as a watchdog, being both ‘interpreter’ of the questions put and ‘arbiter’ of the quality of the answers interpreted.” And the Court refuses to apply the waiver doctrine in cases where one might expect that the interpretation problems would “be reasonably apparent” to the claimant regardless, such as where the claimant “could tell right away” that the interpreter spoke an unfamiliar dialect.

308 See for example Mohammadian v. Canada (Minister of Citizenship and Immigration) (CA) [2001] FCJ No 916, 2001 FCA 191 at para 4 in obiter (Stone, Rothstein and Sexton JJ); Zaree v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1097, 2011 FC 889 at para 8 (Martineau J); Zaree v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1097, 2011 FC 889 at para 8 (Martineau J). In the words of the Court in Mohammadian v. Canada (Minister of Citizenship and Immigration) [2000] FCJ No 309, (2003) 3 FC 371 at para 12 in obiter (Pelletier J): “The fact that a right is constitutionally protected is a reflection of a societal consensus that this right should be beyond the reach of government and its agents. Requiring proof of prejudice as a condition of obtaining a remedy for infringement of a constitutionally protected right undermines the constitutional protection. It implicitly asserts that the right can be infringed so long as no prejudice results. This is an unwarranted qualification on the protection afforded by the Charter.”

309 Elmaskut v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 508, 2005 FC 414 at para 6 (Mactavish J); Thambiah v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 14, 2004 FC 15 at para 23 (Lemieux J). The Court in these cases expressly adopts the reasoning of the Supreme Court in R v Tran [1994] 2 SCR 951 at page 996, where the Supreme Court in fact held: “Where waiver of the right to interpreter assistance is possible, the threshold will be very high” [emphasis added].


311 Khalit v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 928, 2007 FC 684 at para 17 (Harrington J).

312 See discussion in Umubyeyi v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 76, 2011 FC 69 at para 10 (NoéJ).

The Court also cautions the Board about the perils of proceeding with a determination when it should be reasonably apparent to the member that the interpretation is inadequate. The Court emphasizes, for example, that it is improper for the member to rely on the claimant’s counsel to step in and interpret for his client where the interpretation is wanting, or to refuse to order a new hearing when an audit reveals that the interpreter at the first hearing was incompetent. The Court reminds the Board, in short, that a claimant “deserves to have his story told,” and that where the member is aware of a problem with the interpretation, the member has the responsibility to fix it.

Where the claimant alleges that poor interpretation has affected her testimony, the Board must at least consider this possibility. The First Stream is also willing to consider this possibility on its own initiative. Where serious difficulties with the interpretation are apparent on the face of the record, it concludes that there is simply no “sufficient basis...on which the Board could

314 See for example Singh v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 394, 2007 FC 267 at para 40 (Teitelbaum J); Chen v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 536; 2001 FCT 308 at para 12 (Lemieux J).


316 Faced with evidence that the interpreter’s knowledge of English was “limited to basic day to day language,” that he did “not understand government words, departments, procedure and related names” and had therefore “skipped some words and summarized about 60% of actual words spoken by people in the hearing,” the Board had concluded that these problems were not so serious as to require a new hearing. Sayavong v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 357, 2005 FC 275 at para 3 (Lutfy CJ).


318 “The transcript clearly reveals that, at the beginning of the hearing, there was a serious problem in the communications between the applicant and the interpreter. Everyone was aware of it; the panel members, counsel, the applicant and the interpreter. It required immediate resolution and it was the presiding member who had the responsibility to clear it up.” Chen v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 536, 2001 FCT 308 at para 12 (Lemieux J). See also Singh v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 394, 2007 FC 267 at para 40 (Teitelbaum J).

reasonably question the applicants’ credibility.”320 And the Court notes that even without any
language errors, the translation process alone can affect the quality and credibility of the
claimant’s evidence.321 As a consequence, the member should always bear in mind the fact that
the claimant’s evidence has been interpreted,322 and should exercise caution in identifying
inconsistencies and contradictions.323

1.1.2 The claimant’s conduct

Claimants are not only at risk of being disbelieved because of how they come across in their
testimony. As the First Stream notes, a claimant’s conduct may also lead a member to make
unsound judgments about her character, or to conclude wrongly that she is not really afraid to
return home.

320 Shkabari v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 186, 2012 FC 177 at para 63
(O’Keefe J). See also Fatih v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 924, 2012 FC 857
at para 67 (O’Keefe J).

321 See for example Garcia v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 941, 2014 FC 871
(Strickland J). In Zhang, for example, the Board disbelieved the claimant because her story was “striking similar” to
the stories of several other claimants, all of whom had used the same interpreter to prepare their initial written
statements. The Court concluded that “just because the narratives were recorded in a ‘boiler-plate’ form does not
mean that the claimants were all using a canned story. Rather, on the facts of this case, the evidence was that the
boiler-plate format of the PIF narratives was developed by the translator.” Zhang v. Canada (Minister of Citizenship
and Immigration) [2006] FCJ No 692, 2006 FC 550 at para 26 (Russell J). See also Bao v. Canada (Minister of
Citizenship and Immigration) [2006] FCJ No 411, 2006 FC 301. The Court has also pointed out that a claimant’s
evidence may become distorted because of her counsel’s role in preparing her case, for similar reasons: “It is well
understood that these documents are often prepared by representatives or on the advice of representatives with
different views of materiality.” Feradov v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 135,
2007 FC 101 at para 18 (Barnes J).

322 See for example Arslan v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 246, 2013 FC 252 at
para 90 (Russell J): “It has to be remembered that the Applicants testified through an interpreter.”

323 See Attakora v. Canada (Minister of Employment and Immigration) (CA) [1989] FCJ No 444; Owochei v.
Canada (Minister of Citizenship and Immigration) [2012] FCJ No 165, 2012 FC 140 at paras 59 (Russell J); Owusu-
Ansah v. Canada (Minister of Employment and Immigration) (CA) [1989] FCJ No 442 (Heald, Mahoney and
Hugessen JJ); Rajaratnam v. Canada (Minister of Employment and Immigration) (CA) [1991] FCJ No 1271
(Mahoney, Stone and Linden JJ); Arslan v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 246,
2013 FC 252 at para 90 (Russell J).
1.1.2.1 Deception

For many claimants attempting to flee to Canada, every legal route to entering the country is blocked by design. To reach safety, they must side-step the barriers put in place by our immigration system.324

To qualify for a visitor’s visa, a claimant must convince an immigration official that she intends to stay in Canada only temporarily. The First Stream rejects the Board’s inference that a claimant who hid her true reason for wanting to come to Canada – and her desire to stay permanently – has thereby demonstrated “that she lacks integrity and that she fails to demonstrate a sincere desire to tell the truth.”325 The Court asks: “Can it be seriously suggested that any but the most naive applicant for a visitor’s visa would indicate to the visa officer that the purpose of going to Canada was not to visit but to seek asylum?”326 Simply put, “a refugee claimant may need to lie in order to obtain a Canadian visa,”327 to say nothing of needing to lie to the agent of persecution. In one case, to obtain his release from prison, where he had been beaten and tortured, the claimant had promised to cooperate with the Iranian authorities in the future “even

324 As Dauvergne explains, deception “is often a necessary precursor to putting oneself in the position” to make a refugee claim. This stems from a situation in which, on the one hand, states have put in place a broad range of restrictive measures designed to keep claimants from entering, as discussed in Chapter 4, and on the other, international refugee law gives claimants no right to enter a prospective host state but yet dictates that “states have obligations to those who somehow have crossed the border.” Dauvergne, above note 172 at 61-62. For a related discussion of the failure of the international community to establish a right to asylum (as opposed to non-refoulment) see Bouteillet-Paquet, above note 131 at 89-97; Guy S. Goodwin-Gill “Europe: a placed to seek, to be granted, and to enjoy asylum?” in European Migration, above note 273, 33 at 35.

325 Quinteros v. Canada (Minister of Citizenship and Immigration) [1998] FCJ No 1363 at para 1 (Campbell J). See also for example Fajardo v. Canada (Minister of Employment and Immigration) (CA) [1993] FCJ No 915, 157 NR 392 at para 5 (Mahoney, Robertson and McDonald JJ); Kukhon v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 89, 2003 FCT 69 at paras 21-23 (Beaudry J); Bhatia v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1656, 2002 FCT 2010 at para 16 (Layden-Stephenson J).

326 Fajardo v. Canada (Minister of Employment and Immigration) (CA) [1993] FCJ No 915, 157 NR 392 at para 5 (Mahoney, Robertson and McDonald JJ).

though he had no intention of doing so.”

While the Board drew a negative inference from this dishonesty, the Court rather finds that it was “not surprising” under the circumstances.

Genuine refugees who are unable to obtain a visitor’s visa have little choice but to arrive by other means. When claimants have used the services of smugglers, for example, or have travelled on false papers, or have destroyed their documents, or have lied about how they got to Canada, the Court reminds the Board that this may reflect their “fear and vulnerability” rather than any intrinsic disrespect for the rule of law.

Similarly, even once she is safely in Canada, a genuine refugee may try to “embellish” her claim in order to keep from being sent home: “It is not unusual for refugee claimants to exaggerate their experiences, perhaps believing that they stand a better chance in persuading the Board to allow their claims if they do so.” The Court also notes that a claimant might guess or invent information, such as specific dates or times, if she thinks that she “must be as specific as possible for fear of not being believed.”

The Court reminds the Board that its own training materials explain that “false allegations exist on a spectrum, from a slightly distorted report to a complete fabrication,” and that even if the member disbelieves some part of the claimant’s story, she must nonetheless assess the rest of his

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329 Ibid.


332 Ozer v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1636, 2008 FC 1257 at para 12 (O’Reilly).

333 Quevedo v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1585, 2006 FC 1264 at para 21 (de Montigny J).

claim with an open mind. The fact that the claimant has been “caught in one lie” should not summarily “discredit all of his evidence.” In short, the First Stream cautions in the strongest terms that a claimant who has attempted to mislead the Board about some aspects of his claim may not deserve to be branded an inveterate liar, and may still warrant a positive determination if he is otherwise credible.

1.1.2.2 Risk response

The Supreme Court’s decision in *Ward* establishes that to qualify for refugee protection, a claimant must not only be in danger, she must also be afraid. Since the Convention speaks of a “well-founded fear,” the Supreme Court concludes that the claimant must have a “subjective fear of persecution.” As discussed below, the Second Stream of the Court is firmly convinced that a claimant’s fear, or the lack of it, can be inferred from her conduct, and over the years it has developed a comprehensive theory of how a person who is genuinely afraid will respond to a dangerous situation: she will flee as soon as she is threatened; she will ask for protection in the first safe country that she reaches; and she will never return home for any reason.

Outside of the Courts, this approach has been much criticized, both as a matter of legal interpretation, and empirically: decades’ worth of studies about human risk perception and risk management, by psychologists, sociologists, anthropologists and economists, make quite


clear that human beings do not reliably respond to danger as these assumptions suggest.\textsuperscript{339} Within the Courts, the First Stream is similarly uncomfortable with this “subjective fear” requirement. It has tried to limit its reach as a matter of legal doctrine, and also to reduce its impact in the context of the Board’s fact-finding.

Before the Supreme Court’s decision in \textit{Ward}, while noting that a claim cannot succeed merely because the claimant is afraid, the Court of Appeal had strongly questioned the wisdom of requiring a claimant to demonstrate fear when, regardless, she is objectively at risk.\textsuperscript{340} The First Stream continues to rely on this reasoning even after \textit{Ward}, finding that “a particularly brave or foolhardy claimant will not be punished for lacking a subjective fear”\textsuperscript{341} and that requiring a child, or mentally incompetent person, to prove that she is afraid is “absurd.”\textsuperscript{342} The Court finds that there is no obligation under the Convention,\textsuperscript{343} nor any legal presumption,\textsuperscript{344} that a genuine refugee will make his claim at the first reasonable opportunity; that the Board must consider the

\textsuperscript{339} Cameron 2008, above note 52.

\textsuperscript{340} “I find it hard to see in which circumstances it could be said that a person who, we must not forget, is by definition claiming refugee status could be right in fearing persecution and still be rejected because it is said that fear does not actually exist in his conscience. The definition of a refugee is certainly not designed to exclude brave or simply stupid persons in favour of those who are more timid or more intelligent. Moreover, I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child or a person suffering from a mental disability, he or she was incapable of experiencing fear the reasons for which clearly exist in objective terms.” \textit{Yusuf v Canada (Minister of Employment and Immigration) (CA)} [1992] 1 FC 629, [1991] FCJ 1049 at para 5 in obiter (Marceau, Hugessen and MacGuigan JJ).

\textsuperscript{341} \textit{Han v. Canada (Minister of Citizenship and Immigration)} [2009] FCJ No 1186, 2009 FC 978 at para 22 in obiter (Tannenbaum J).

\textsuperscript{342} \textit{Canada (Minister of Citizenship and Immigration) v. Patel} [2008] FCJ No 950, 2008 FC 747 at para 34, see discussion in paras 26-38 (Lagacé DJ).


\textsuperscript{344} \textit{Jumbe v. Canada (Minister of Citizenship and Immigration)} [2008] FCJ No 691, 2008 FC 543 at para 12 (O’Reilly J): “Indeed, the Board stated that Mr. Jumbe had failed to rebut the presumption that refugee claimants will seek asylum at the first opportunity. As I understand it, there is no such presumption and, therefore, no burden of proof on refugee claimants to rebut it. Rather, a claimant’s behaviour and testimony must be considered by the Board, along with the other evidence, to determine whether he or she has a genuine fear of persecution. The Board was entitled to consider Mr. Jumbe’s evidence and his explanation for coming to Canada and to explain how it negated the existence of genuine fear. But it was not enough for the Board simply to state that the failure to claim elsewhere, in itself, proved an absence of subjective fear.”
claimant’s explanation for why he did not claim sooner;\textsuperscript{345} and that, in any case, “delay in making a claim, while relevant, is not a decisive factor”;\textsuperscript{346} it “cannot, in and of itself, justify the rejection of a claim.”\textsuperscript{347} Where the claimant has returned home despite the alleged danger, the Court stresses that this will not negate her fear without “an element of intent” to move home permanently: “a temporary visit” cannot give rise to a finding of ‘reavailsment.’\textsuperscript{348} The First Stream also rejects the formalistic notion that the mere act of applying for or renewing a passport from her home country means that the claimant has reavailed herself of its protection.\textsuperscript{349} And in addition, and regardless, the Court warns that it is “almost always foolhardy” for the Board to find that the claimant is not afraid unless it has also found that she is not credible.\textsuperscript{350}

Yet even if the claimants were not required to prove her fear as a separate element of the legal test, members would continue to rely on the assumptions that underlie the subjective fear analysis in judging the plausibility of claimants’ stories. The First Stream therefore works hard to

\begin{itemize}
\item \textsuperscript{345} Malaba v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 96, 2013 FC 84 at para 15 (Martineau J); Tariq v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 502, 2005 FC 404 at para 14 (Mactavish J); Ruiz v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 282, 2012 FC 258 at para 57 (Scott J); Dcruze v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 987 at para 6 (Rouleau J).
\item \textsuperscript{346} Huerta v. Canada (Minister of Employment and Immigration) (CA) [1993] FCJ No 271 in obiter (Hugessen, Desjardins and Létourneau JJ). See also for example Ruiz v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 282, 2012 FC 258 at para 56 (Scott J); Junusmin v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 844, 2009 FC 673 at para 44 (Shore J).
\item \textsuperscript{347} Juan v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1022, 2006 FC 809 at para 11 (Dawson J). See also Mendez v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 152, 2005 FC 75 at para 36 (Teitelbaum J).
\item \textsuperscript{348} Camargo v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1830, 2003 FC 1434 at para 35 (O’Keefe J). Under Article 1C(1) of the Refugee Convention, above note 157, a refugee loses the right to international protection if he “has voluntarily reavailed himself of the protection of the country of his nationality.” See discussion in Nsende v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 689, 2008 FC 531 (Lagacé DJ).
\item \textsuperscript{349} See for example Chandrakumar v. Canada (Minister of Employment and Immigration) [1997] FCJ No 615 (Pinard J); Nsede v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 689, 2008 FC 531 at paras 13-19 (Lagacé J). For this same finding in the context of a cessation application, see Canada (Minister of Public Safety and Emergency Preparedness) v. Bashir [2015] FCJ No 36, 2015 FC 51 at paras 65-71 (Bédard J).
\item \textsuperscript{350} Shannugarajah v. Canada (Minister of Employment and Immigration) (CA) [1992] FCJ No 583 (Stone and MacGuigan JJA and Henry DJ); Sukhu v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 515, 2008 FC 427 at para 27 (de Montigny); Rodriguez v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1385, 2012 FC 1291 at paras 60-63 (Shore J).
\end{itemize}
contextualize the idea that people in danger will take prompt and effective steps to save
themselves and will never willingly put themselves at risk. It works hard to give these
assumptions not only a human face, but a vulnerable human face. The Court stresses that there
are plenty of circumstances in which any average person might in fact delay in leaving, delay in
claiming or even return home to danger, and others in which any average person might not, but a
vulnerable person might.

1.1.2.2.1 Generally

The First Stream highlights a number of reasons why, despite a threat to his safety, a person
might chose to stay or to return home. He might feel that the situation, although dangerous, is not
yet "so severe" as to force him into exile, a judgment that the Court stresses must be understood
within its cultural context.351 Or if he has gone into hiding,352 or has taken steps to make himself
less obvious to the agents of persecution,353 he may feel that he is temporarily safe. Or despite
the danger, he may simply conclude that it is worth running the risk in order to care for or protect
his family,354 for example, or to continue his studies,355 or "to wind up the family’s business

351 Although the claimant, in the course of his political activities, had been “attacked several times before” and had
been “threatened and injured,” he had not felt compelled to flee. The Court faults the Board for failing to consider
that his decision to stay was made in the context of a turbulent political situation where this type of risk was a “very
day-to-day matter”: “It happens often. All the time and we have to continue our political activities within that. I was
not threatened to be killed.” Jamil v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1011, 2006
FC 792 at paras 41-44 (Lemieux J). For a discussion of the effect on risk perception of the “familiarity” of everyday
risks, see Cameron 2008, above note 52 at 568-569. See also the Court’s comments in the context of cumulative
harassment amounting to persecution: Ibrahimov v. Canada (Minister of Citizenship and Immigration) [2003] FCJ
No 1497, 2003 FC 1185 at paras 17-19 (Heneghan J).

352 See for example Musharraf v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 852 at para 48
(Lemieux J); Camargo v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1830, 2003 FC 1434 at
para 37 (O’Keefe J).

353 See for example Jumbe v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 691, 2008 FC 543 at
para 10 (O’Reilly J).

354 See for example Shanmugarajah v. Canada (Minister of Employment and Immigration) (CA) [1992] FCJ No 583
(Stone and MacGuigan JJA and Henry DJ); Mohammadi v. Canada (Minister of Citizenship and Immigration)
[2003] FCJ No 1302, 2003 FC 1028 at para 15 (Russell J); Ahanin v. Canada (Citizenship and Immigration) [2012]
FCJ No 188, 2012 FC 180 at paras 85-89 (Russell J); Ribeiro v. Canada (Minister of Citizenship and Immigration)

355 See for example Anwar v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1434 at paras 49-52
(Beaudry J); Gebremichael v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 689, 2006 FC 547
at para 48 (Russell J).
affairs. And where the Board concluded that a person would not risk harm to himself or to his family and friends in order to continue fighting for a political or religious cause, the Court terms this “a gratuitous counsel of cowardice”: "It is never particularly persuasive to say that an action is implausible simply because it may be dangerous for a politically committed person."

The Court similarly points to many plausible explanations for why a person might not make her refugee claim at the first opportunity. It rejects the idea, for example, that a person who is really afraid would make her claim “in transit.” Where a claimant in fleeing her country “had always planned to come to Canada,” the Court faults the Board for suggesting that she should have abandoned these plans – her Canadian visitor’s visa, her hotel reservation, the family waiting for


357  *Giron v. Canada (Minister of Employment and Immigration)* [1992] FCJ No 481 (Mahoney, MacGuigan and Linden JJ); *Roozbahani v. Canada (Minister of Citizenship and Immigration)* [2005] FCJ No 1867, 2005 FC 1524 at para 18 (Blanchard J); *Bains v. Canada (Minister of Employment and Immigration)* [1993] FCJ No 497 (Cullen J).

358  *Samani v. Canada (Minister of Citizenship and Immigration)* [1998] FCJ No 1178 at para 4 (Hugessen J). See for example *Giron v. Canada (Minister of Employment and Immigration)* [1992] FCJ No 481 (Mahoney, MacGuigan and Linden JJ); *Roozbahani v. Canada (Minister of Citizenship and Immigration)* [2005] FCJ No 1867, 2005 FC 1524 at para 18 (Blanchard J); *Juan v. Canada (Minister of Citizenship and Immigration)* [2006] FCJ No 1022, 2006 FC 809 at para 8 (Dawson J); *Kabongo v. Canada (Minister of Citizenship and Immigration)* [2012] FCJ No 367, 2012 FC 313 at para 8 (Rennie J); *Jamil v. Canada (Minister of Citizenship and Immigration)* [2006] FCJ No 1011, 2006 FC 792 at paras 41-44 (Lemieux J); *Arasan v. Canada (Minister of Citizenship and Immigration)* [2010] FCJ No 1562, 2010 FC 1252 at paras 23-24 (O’Keefe J); *Bukaka-Mabiala v. Canada (Minister of Citizenship and Immigration)* [1999] FCJ No 1000 at para 22-23 (Rouleau J). The Court has not always been impressed by dedication to a cause, however. In *Nejad*, the Court held in the context of a *sur place* claim that the claimants’ decision to attend a demonstration in Canada against the Iranian regime, while plausible, was “stupid and negligent” because it put their children in Iran at risk. *Nejad v. Canada (Minister of Citizenship and Immigration)* [1997] FCJ No 1168 at para 7 (Muldoon J).


her here\textsuperscript{361} – in order to make her claim in a country that she was “simply passing through,”\textsuperscript{362} such as, for example, “during a two-hour stopover” in a foreign airport.\textsuperscript{363} Among other problems with this reasoning, the Court notes that it would undermine the claim of any claimant arriving by air from a country from which there are no direct flights to Canada.\textsuperscript{364}

Even when the claimant has spent considerably longer in a so-called “safe third country” before coming to Canada, if he believes that Canada is his safest bet, the Court finds that his failure to make a claim abroad should not speak against his fear.\textsuperscript{365} In such circumstances, the Board must not conclude “in a formulaic and thoughtless way” that the claimant would have claimed at the first opportunity if he were really afraid: “someone who actually fears persecution would want to go to a country where their claim has the best chance of success, since the price of failure is a return to the persecution they fear.”\textsuperscript{366} A person may also, of course, have other convincing

\textsuperscript{361} See for example \textit{Nel v. Canada (Minister of Citizenship and Immigration)} [2014] FCJ No 873, 2014 FC 842 at para 57 (O’Keefe J); \textit{Manege v. Canada (Minister of Citizenship and Immigration)} [2014] FCJ No 418, 2014 FC 374 at para 39 (Kane J).


\textsuperscript{364} \textit{Packinathan v. Canada (Minister of Citizenship and Immigration)} [2010] FCJ No 1033, 2010 FC 834 at para 8 (Snider J). On a similar note see Hathaway 2014, above note 132 at 32, discussing the “opportunities for international movement that did not exist at the time of the Refugee Convention’s drafting” and citing Newman J of the English High Court: “the development of a readily accessible and worldwide network of air travel” means that “there exists a rational basis for exercising choice where to seek asylum.”


reasons for preferring to make his claim in Canada: because he has family here, because he speaks the language, because he believes that in Canada he will have a better chance of being able to bring his family over to join him, or of continuing his studies. The Court explains that while this type of reasoning may expose the claimant to a charge of “forum shopping,” discussed further in Chapter 4, and while “that might be relevant to public policy, it is certainly not something that is incompatible with a subjective fear of persecution.”

In addition, if a person has a valid visitor’s visa, for Canada or for a safe third country, she may be in no rush to make her claim when she arrives. Since she is not at risk of deportation, she may feel free to take her time, to explore her options and to plan her safest course of action, and the First Stream finds that this delay should not count against her. Furthermore, even when a claimant has spent years living precariously without any legal status, the Court finds that her failure to make a claim may be justified regardless if she did not perceive herself to be in any danger. In one case, for example, the claimant had spent years in the United States “in a secure location, working to support herself, becoming involved in a new relationship, and caring for a

367 Ayala v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 494, 2011 FC 385 at para 7 (Campbell J); Ay v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1015, 2010 FC 671 at para 40 (Boivin J); Manege v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 418, 2014 FC 374 at para 39 (Kane J); Dominguez v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 665, 2010 FC 557 at para 6 in obiter (Harrington J); Gopalarasa v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1199, 2014 FC 1138 at paras 33-35 (Diner J).

368 Nduwimana v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1736, 2005 FC 1387 at para 7 in obiter (de Montigny).


370 Ibid.


372 See for example Jumbe v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 691, 2008 FC 543 at para 11 (O’Reilly J); Diallo v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1676 at para 9 (Pinard J); El Balazi v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 80, 2006 FC 38 at paras 9-10 (Pinard J); Gyawali v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1387, 2003 FC 1122 at paras 17-19 (Tremblay-Lamer J); Menjivar v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 5, 2006 FC 11 at para 33 (Dawson J). See also Hue v. Canada (Minister of Employment and Immigration) [1988] FCJ No 283 (Marceau, Teitelbaum and Walsh JJA).
new-born daughter, who is a citizen of the United States.”373 The Court concludes that “these factors, considered in their entirety, might well have suggested” to the claimant that she “had no imminent need to formalize her status.”374

The Court also recognizes that in deciding how and when and indeed whether to make a refugee claim, people rely on the advice of friends and family and those they trust, and that they may not always receive good advice.375 It stresses that if a person believes, rightly or wrongly, that her claim has little chance of success, it is perfectly reasonable for her to prefer to lay low. When the risk of living underground is weighed against the risk of making and losing a refugee claim, there may be nothing implausible in her conclusion that “limbo is better than hell.”376 As the Court notes, “No one in their right mind would seek protection in a country that will not, or which they believe will not, protect them.”377

1.1.2.2.2 Because of vulnerability

In the decades since the Supreme Court’s decision in R. v. Lavallee,378 the First Stream of the Court has often reminded the Board of the realities of what Justice Wilson termed “battered woman syndrome”: that when an abused woman acts in ways that are at odds with what the member might expect from a ‘reasonable man,’ “her vulnerability could explain her


374 Ibid. See also Sukhu v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 515, 2008 FC 427 at para 23 (de Montigny).

375 See for example Robinson v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 588, 2006 FC 402 at para 9 (Gibson J); Liang v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1644, 2006 FC 1315 at para 10 (Gibson J); Jabar v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 744, 2005 FC 602 at para 17 (Phelan J). See also Cameron 2008, above note 52 at s. 2.8 for a discussion of the role of lay knowledge in risk assessment.


behaviour. Her vulnerability could explain, for example, why the claimant remained in a violent relationship, or returned to her abuser, or why she did not disclose the abuse: why she did not report it to the police or to other authorities in her country, why she did not seek medical attention, why she delayed in making a refugee claim in Canada.

The First Stream also faults the Board for judging a claimant’s actions without taking into account her lack of sophistication, her disorientation and fear, and her vulnerability in difficult circumstances. The Board overlooked these factors when it suggested, for example, that if she were truly afraid, a single woman with a baby would not risk returning home so that her family


380 Griffith v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 1142 at paras 26-28 (Campbell J); MFD v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 771, 2011 FC 589 at para 13 (Pinard J); Jones v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 591, 2006 FC 405 at para 28 (Snider J).

381 Ghulam v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 423, 2007 FC 303 at para 11 (Barnes J).

382 Zempoalte v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 331, 2007 FC 263 at para 13 (Tremblay-Lamer J); CBF v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1411, 2011 FC 1155 at paras 59-60 (Kelen J); NGM v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 390, 2013 FC 372 at para 5 in obiter (Gleason J). See also Garcia v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 118, 2007 FC 79 at paras 23-27 (Campbell J), for the same finding with respect to a claimant’s failure to follow up with the police after having made a report.

383 Isakova v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 188, 2008 FC 149 at paras 20-26 (Campbell J); Sukhu v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 515, 2008 FC 427 at para 20 (de Montigny).

384 Griffith v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 1142 at paras 26-28 (Campbell J); Myle v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1127, 2006 FC 871 at paras 41-42 (Shore J); Jones v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 591, 2006 FC 405 at paras 28-30 (Snider J).

385 See for example Robinson v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 588, 2006 FC 402 at para 9 (Gibson J); Melo v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 189, 2008 FC 150 at para 15 (Campbell J); El-Naem v. Canada (Minister of Citizenship and Immigration) [1997] FCJ No 185 at para 30 (Gibson J).
could support her,\(^{386}\) or when it failed to appreciate that a woman who “was held as an indentured servant for several years when she arrived in Canada” would, upon her escape, need a little time to get her bearings before making a refugee claim.\(^{387}\) Lastly, the Court also warns that the Board must be cautious in judging the actions of children. It may be too much to expect, for example, that a child of twelve who is being raped weekly by her stepfather would report her abuse to the police,\(^{388}\) or that a teenager on the run in a foreign country “would know the complexities and subtleties of the administrative apparatus with respect to asylum and be able to gauge the rough waters of the immigration process” so as to make his claim without delay.\(^{389}\)

The Court makes very clear that where the adults caring for a child fail to approach the authorities on her behalf, their “lack of diligence” should not undermine her claim.\(^{390}\)

### 1.1.3 Troubles getting evidence

Refugee claimants are far from home, and as the Court notes, they very often left “with little else than what they could carry in their arms.”\(^{391}\) The First Stream raises the same concern stressed by many others in the field: claimants are often at a great disadvantage in trying to gather evidence to corroborate their stories, and if members fail to appreciate this – if they hold

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\(^{386}\) _MBK v. Canada (Minister of Citizenship and Immigration)_ [1997] FCJ No 374 (Campbell J).

\(^{387}\) _Peter v. Canada (Minister of Citizenship and Immigration)_ [2011] FCJ No 977, 2011 FC 778 at para 34 in obiter (O’Keefe J).


claimants and their evidence to too high a standard – they will wrongly reject too many genuine refugees.  

1.1.3.1 Lack of supporting documents

Persecution may leave no paper trail. The First Stream recognizes that victims may not have sought medical help or gone to the police, and that there may be no reason to expect that an agent of persecution itself would keep a record of its actions. In addition, where a potentially relevant document may once have been available, the claimant may only recognize its helpfulness in hindsight. She may not have thought to keep a sample of the political flyers that she was distributing, for example, or in filing papers, she may not have “understood the importance” of asking for receipts. The Court similarly faults the Board for failing to consider a claimant’s explanation that, in fleeing a warzone, “he had been more concerned with his personal safety…than he had been with collecting his documents,” as well as for concluding that a person at risk would necessarily react this way: that her documents must be fraudulent because “in the midst of confusion, in the midst of killings,” a person fleeing “wouldn’t have

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392 See for example The UN Handbook, above note 203 at para 196: “In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.” Hathaway 2014, above note 132 at 136-137; Macklin 1998, above note 140.

393 See cases in above notes 382 and 383.


395 The Court suggests that “By the very nature of her activity, if she ‘distributed’ flyers during a crackdown, it is unlikely that she would have kept any.” Zheng v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1642, 2007 FC 1274 at para 21 (Shore J).

396 The claimant’s Canadian partner had applied to sponsor her, potentially helping to explain her delay in filing her refugee claim. The Court notes that the Board “did not consider the applicant’s explanation that she was not the one who paid the consultant,” and “did not question the applicant on whether she understood the importance of retaining these kinds of records at the time.” CBF v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1411, 2011 FC 1155 at para 36 (Kelen J).

397 Ali v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1350, 2004 FC 1121 at para 12 (Mactavish J). While the Court goes on to find that the Board would not have been obliged to accept this explanation, it also notes that this explanation “is reasonable on its face” (para 13). The UNHCR similarly warns against expecting that claimants will know before fleeing which documents will be relevant, or that they will be able to keep them safe in transit. Garlick, above note 191 at 59.
thought to bring a birth certificate.” By the time of her hearing, proof may simply be beyond the claimant’s reach. She may be unable to obtain evidence, for example, from people with whom she has lost contact, from a foreign bureaucracy, or from a failed state whose bureaucracy has collapsed. And the Court emphasizes that asking the claimant, or her family and friends back home, to seek corroboration from the agent of persecution may be not only futile but dangerous.

1.1.3.2 ‘Self-serving’ evidence

Indeed, recognizing that friends and relatives will often be the claimant’s only means of accessing supporting evidence, the First Stream warns that this evidence should not be viewed with suspicion simply because a family member or a friend had a hand in getting it. Otherwise, a refugee’s attempt to corroborate her claim “would be severely constrained or would

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399 Owusu-Ansah v. Canada (Minister of Employment and Immigration) (CA) [1989] FCJ No 442 (Heald, Mahoney and Hugessen JJ). See also Touraji v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 979, 2011 FC 780 at paras 13, 27 (O’Keefe J).

400 Buwu v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 893, 2013 FC 850 at paras 8, 47 (Russell J). For a related finding, see Aarabi v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1629, 2006 FC 1309 at paras 33-35 (Rouleau J).


402 Elmi v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 977, 2008 FC 773 at paras 22-23 (Teitelbaum J).

403 EN v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 473, 2013 FC 452 at para 7 (Rennie J); Kalu v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 488, 2008 FC 400 at paras 6-10 (Dawson J). See also the Court’s comments in Jung v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 285, 2014 FC 275 at para 56, where the member was “fully alive” to this issue but erred in other respects (Russell J). For discussion see Hathaway 2014, above note 132 at 157: supporting evidence “should not be requested…where the pursuit of corroboration might expose the applicant or other persons to risk.”

404 Ymeri v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 233, 2006 FC 194 at para 7 (von Finkenstein J); SMD v Canada (Minister of Citizenship and Immigration) [2010] FCJ No 369, 2010 FC 319 at para 37 (O’Keefe J); Ndijízera v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 668, 2013 FC 601 at paras 31-32 (Gagné J); Durrani v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 203, 2014 FC 167 at paras 7-8 (Zinn J).
become impossible.”405 The Court likewise criticizes the Board’s skeptical response when a claimant’s friends and relatives provide their own evidence in affidavits or in letters of support. Such evidence may well be the claimant’s only “source of corroborative testimony,”406 and it may play a particularly important role in cases of gender-based violence, where claimants often “cannot rely on more standard or typical forms of evidence.”407 In rejecting the Board’s finding that such witnesses are “not sufficiently independent or objective,”408 the Court stresses that the fact that they have an interest in the outcome of the hearing does not suggest, on its own, that their evidence is unreliable.409 On the contrary, a claimant’s family and friends may be “the people best-positioned to give evidence” about her situation.410

The First Stream similarly rejects the notion that a statement of support can be dismissed simply because the claimant himself requested it for the purposes of his hearing. While such evidence may indeed be self-serving, “a refugee’s evidence will seldom be otherwise,”411 and rejecting it

405 Ymeri v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 233, 2006 FC 194 at para 7 (von Finkenstein J).


407 AME v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 589, 2011 FC 444 at para 14, citing the Board’s Gender Guidelines (Mosley J).

408 Ndijiza v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 668, 2013 FC 601 at para 31 (Gagné J).

409 See for example Cardenas v. Canada (Minister of Citizenship and Immigration) [1998] FCJ No 242 at para 25, Applicant’s submissions cited with approval (Campbell J); Ndijiza v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 668, 2013 FC 601 at para 32 (Gagné J); LOMT v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1005, 2013 FC 957 at para 26 (Kane J); Demir v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1319, 2014 FC 1218 at para 18 (Zinn J).

410 See for example LOMT v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1005, 2013 FC 957 at para 28 (Kane J); Ndijiza v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 668, 2013 FC 601 at para 32 (Gagné J). See also Ochoa v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1390, 2010 FC 1105 at para 10 (Zinn J). In the context of PRRA decisions, see also Shilongo v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 41, 2015 FC 86 at para 29 (Boswell J); Hernandez v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 605, 2015 FC 578 at para 32 (Russell J); Ugalde v. Canada (Minister of Public Safety and Emergency Preparedness) [2011] FCJ No 647, 2011 FC 458 at para 28 (de Montigny J).

411 Suduwelik v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 445, 2007 FC 326 at para 23 (Barnes J). See also Ahmed v Canada (Minister of Citizenship and Immigration) [2004] FCJ No 276, 2004 FC 226,
for this reason is “perverse,”\textsuperscript{412} for it puts claimants “in an impossible position”: if they had not requested the evidence, the Board “may have questioned their lack of diligence.”\textsuperscript{413}

1.1.3.3 False documents

When judging the authenticity of the claimant’s supporting evidence, the Court cautions the Board to apply the common law maxim that “a document purportedly issued by a foreign authority is presumed to be valid,”\textsuperscript{414} and to remember that when it comes to displacing this presumption, its members have no “particular knowledge or expertise.”\textsuperscript{415} Members err if they assume that foreign documents will resemble their Canadian counterparts,\textsuperscript{416} for example, or if


\textsuperscript{413} \textit{GU v. Canada (Minister of Citizenship and Immigration)} [2005] FCJ No 63, 2005 FC 58 at para 17 (Rouleau J). See also \textit{Mile v. Canada (Minister of Citizenship and Immigration)} [2005] FCJ No 1774, 2005 FC 1450 at para 22 (Dawson J); \textit{Ndjizera v. Canada (Minister of Citizenship and Immigration)} [2013] FCJ No 668, 2013 FC 601 at para 33 (Gagné J). The Court advises that the proper approach to such documents is not to ask whether they are self-serving, but rather whether there is reason to doubt their probative value. See for example \textit{Ahmed v Canada (Minister of Citizenship and Immigration)}, 2004 FC 226, at para 22 (Mactavish J); \textit{Ray v. Canada (Minister of Citizenship and Immigration)}, [2006] FCJ No 927, 2006 FC 731 at para 39, in the PRRA context (Teitelbaum J).


\textsuperscript{416} \textit{Isakova v. Canada (Minister of Citizenship and Immigration)} [2008] FCJ No 188, 2008 FC 149 at paras 42-44 (Campbell J).
they take it upon themselves to conduct a forensic examination of the evidence,\footnote{Where the member compared the colours of a logo in an allegedly original document with the logo as it appeared in a print-out from a website, the Court concluded: “The panel cannot act in such a way. It is not an expert in printing, or an expert in website design.” Quintero v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 686, 2004 FC 568 at para 21 (Harrington J).} or if they conclude that any document containing spelling or grammatical errors must be a fake. \footnote{See for example Njeri v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 350, 2009 FC 291 at para 14 (Phelan J); Liang v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1644, 2006 FC 1315 at paras 11-14 (Gibson J); Gill v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 678, 2005 FC 551 (Rouleau J).} Not only is it “to be expected that a letter written by somebody who may not use English on a regular basis will contain spelling mistakes,”\footnote{Sinnasamy v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 77, 2008 FC 67 at para 33 in the PRRA context (de Montigny).} but in one case, where the member rejected a document because it was “rife” with such errors, the Court observes that “the same literary misfortunes befell the Board’s own decision.”\footnote{Ogunfowora v. Canada (Minister of Citizenship and Immigration) [1997] FCJ No 456 at para 4 (Teitelbaum J).}

Echoing its comments about other kinds of deception, the First Stream also warns that when a claimant has submitted some fake documents to support his claim, the Board cannot conclude as a result that all of his documents are fakes. \footnote{Lin v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 15, 2007 FC 21 at para 39 (O'Keefe J); Jiang v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1661, 2007 FC 1292 at para 9 (Dawson J).} And it stresses, in the strongest terms, that a claimant’s documents cannot be dismissed as fraudulent simply because fraudulent documents are easily obtained in her home country. \footnote{“It may be that fraudulent documents are widely available in the PRC. However, this does not mean that every document that comes out of the PRC is necessarily fraudulent.” Lin v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 167, 2012 FC 157, at para 55 (Russell J). See also Jiang v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 184, 2014 FC 180 at para 16 (Manson J); Halili v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1335, 2002 FCT 999 at paras 4-5 (Heneghan J); VRBL v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 358, 2009 FC 290 at para 21 (Frenette J); Ceco v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 74, 2006 FC 48 at para 15 (Tremblay-Lamer J); Iqbal v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1526, 2006 FC 1219 at para 8 (Campbell J).}

“This faulty reasoning,” the Court warns, “suggests absurd results: that a document produced by the Applicant, even if valid, should be rejected as inauthentic; alternately, this reasoning suggests that the Board is free to arbitrarily choose which
evidence to accept and which to reject.”423 Even if the member has other independent reasons to doubt the claimant’s credibility, concluding as a result that his documents are not genuine is “capricious”424 and can lead to “circular logic”:425: where, having rejected the claimant’s documents because of his lack of credibility, the member then finds that the claimant is not credible because he submitted false documents426 or because he no longer has any documents to support his claim.427

1.1.3.4 ‘Insufficient’ or ‘inconclusive’ documents

Lastly, the First Stream worries that even if the Board accepts that a claimant’s documents are genuine and not prohibitively self-serving, it may nonetheless hold them to too high a standard. It stresses that the Board cannot dismiss a claimant’s evidence “just because the documents did not contain all the details the Board would have preferred.”428 As the Court notes of one sparsely-worded report, for example, “It can hardly be said that the claimant is not credible because the letter is not long enough to suit the Board.”429 Where documents give little detail, this alone is not a reason to discount the information that they do provide. The Board errs if it considers the claimant’s supporting materials “not for what they say, but for what they do not say.”430 Similarly, the Court advises that its warnings about circular reasoning, above, apply

423 Jiang v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 184, 2014 FC 180 at para 16 (Manson J).

424 Iqbal v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1526, 2006 FC 1219 at para 8 (Campbell J). See also Haque v. Canada (Minister of Citizenship and Immigration) [2000] FCJ No 1384 at para 14 (Denault J).


426 Chen v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 335, 2013 FC 311 at paras 19-21 (Rennie J).


430 Mahmud v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 729 at para 11 (Campbell J); Bagri v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 784 at para 11 (Campbell J). See also Arslan v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 246, 2013 FC 252 at para 88 (Russell J); PUA v
equally to judgments about a document’s probative value. If the Board gives a claimant’s
documents little weight because it has already concluded that he is not credible, it has put the cart
before the horse.431

Where medical reports confirm that a claimant has scars consistent with torture, for example –
that “there is a scar on the claimant’s thigh that is consistent with a bullet entry site; there are two
scars on his back that are consistent with being lacerated with a knife; scars on his abdomen are
consistent with the history of burn from an iron; and lesions on his chest and arms are consistent
with cigarette burns” – it is not open to the Board to dismiss this evidence because the claimant
is not credible and these reports are inconclusive: because “they did not determine whether those
wounds were sustained in the manner the claimant described or had been the result of some other
cause.”432 The Board must consider the claimant’s evidence in evaluating his credibility and not
the other way around; it cannot expect a document “to provide information beyond its defined
purpose”;433 and, moreover, while such evidence may be inconclusive, the Board errs if it fails to
appreciate that torture is nonetheless “the logical and obvious cause” of these types of injuries.434

431 See for example Okoli v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 418, 2009 FC 332 at
para 32 (Mandamin J): “In effect, the board member discounted the medical and physiological reports submitted in
support of the Applicant's credibility about the beatings as of little weight because the member already decided the
Applicant was not credible” [emphasis in original].

432 Alfonso v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 72, 2007 FC 51 at para 20 (Lemieux
J). See also for example Charles v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 2131, 2004
FC 1748 at para 10 (Kelen J); Thurairajah v. Canada (Minister of Employment and Immigration) [1994] FCJ No
322 at paras 8, 15 (Tremblay-Lamer J); Okoli v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No
418, 2009 FC 332 at para 32 (Mandamin J); CLJ v. Canada (Minister of Citizenship and Immigration) [2011] FCJ
No 496, 2011 FC 387 at para 6 (Campbell J).

433 Njodzenyuy v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 736, 2014 FC 709 at para 30
(Manson J).

434 Gunes v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 837, 2008 FC 664 at para 33, see also
paras 19, 31-33 (Frenette DJ); Kingsley v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 263 at
paras 7-8 (Campbell J). For a discussion of similar principles under EU law, see Reneman, above note 140 at 248.
1.1.4 Conclusion

In short, the First Stream is deeply concerned that claimants are particularly susceptible to being wrongly disbelieved because, in a number of key respects, they are an exceptionally vulnerable type of litigant. And as the Court makes clear, being wrongly disbelieved not only puts claimants at risk; it is a grave injustice in its own right. “Let us be clear. To say that someone is not credible is to say that they are lying,” and this is no small matter. “Credibility is the most important thing any of us has,” and a truthful claimant simply “deserves better.”

1.2 Overlooking objective danger

In addition, the First Stream of the Court, like many other commentators, warns that even if the member has solid reasons for concluding that the claimant’s story is not credible, this should not blind her to the possibility that he may nonetheless be at risk of persecution.

Even if the claimant has fabricated his entire account of the experiences that caused him to flee his country, if the member accepts that he is who he says he is – a gay man, for example, or a member of minority opposition party, or a young Tamil from the north of Sri Lanka at the


436 *Amiragova v. Canada (Minister of Citizenship and Immigration)* [2008] FCJ No 75, 2008 FC 64 at para 17 (Noël J).

437 See for example, Hathaway 2014, above note 132 at 159-161; Gorlick 2003, above note 60 at 360-361, 364; Kagan, above note 140 at 370-371. As Dauvergne explains, under the Convention, “lying does not exclude anyone from refugee status.” Dauvergne, above note 172 at 62. See also Reneman, above note 140 at 218, for a discussion of this principle under EU law: “when the risk of refoulement follows from the general situation in the country of origin, the credibility of the individual asylum account (except for the person’s nationality or State of habitual residence) is of no importance…In those situations inconsistencies regarding other elements of the asylum account (such as past experiences, age and travel route) cannot lead to refusal of protection.”


height of the country’s civil war—this identity alone may be enough to give him a well-founded fear of returning home. And if the claimant cannot be believed even on the question of her identity, the Court finds that her claim can still succeed if her identity can be established by independent evidence.

### 1.3 Denying claims on procedural grounds

Lastly, the First Stream warns that genuine refugees may be sent home to persecution if the Board fails to take claimants’ vulnerability into account and applies its procedural rules and regulations too strictly. Policies designed to increase the tribunal’s productivity may create significant “opportunity for error.” With this in mind, the Court here stresses that “procedure [should] be the servant of justice and not its mistress.”

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441 The Court similarly overturns decisions in which the Board, having made a general finding of non-credibility, fails to consider the objective evidence of the risks facing a Roma claimant on account of her ethnicity (*Baranyi v. Canada (Minister of Citizenship and Immigration)* [2001] FCJ No 987, 2001 FCT 664 at para 14 (O’Keefe)); a woman wanting to have a second child in contravention of China’s one-child policy (*Tan v. Canada (Minister of Citizenship and Immigration)* [2004] FCJ No 1529, 2004 FC 1280 (O’Keefe J)); and a claimant who would be returning home as a failed asylum-seeker (see for example *Touma v. Canada (Minister of Citizenship and Immigration)* [2003] FCJ No 1624, 2003 FC 1279 (Heneghan J); *Suntharalingam v. Canada (Minister of Citizenship and Immigration)* [2014] FCJ No 1035, 2014 FC 987 at para 49 (Brown J); *Nadarasa v. Canada (Minister of Citizenship and Immigration)* [2012] FCJ No 904, 2012 FC 752 at paras 20-28 (Phelan J)).

442 In *SS v. Canada (Minister of Citizenship and Immigration)* [1999] FCJ No 694 at paras 4-5 (Tremblay-Lamer J), the member disbelieved the claimant’s testimony that she was a young Tamil woman from the north of Sri Lanka. The Court overturns the decision, finding that the member wrongly disregarded a document that appeared to confirm this identity.


444 *Djilal v. Canada (Minister of Citizenship and Immigration)* [2014] FCJ No 848, 2014 FC 812 at para 36 (Locke J); *Andreoli v. Canada (Minister of Citizenship and Immigration)* [2004] FCJ No 1349, 2004 FC 1111 at para 16 (Harrington J); *Emani v. Canada (Minister of Citizenship and Immigration)* [2009] FCJ No 684, 2009 FC 520 at para 21 (Teitelbaum J). For a related discussion, see Reneman’s argument, above note 140 at 225, that under EU law, states should not focus on “marginal issues such as non-compliance with procedural rules or inconsistencies in parts of the applicant’s account which do not relate to the essence of the claim.”
When a claimant submits his evidence late, even after his hearing has ended, as long as the member has not yet decided the case she cannot summarily refuse to accept it. She must first at least consider whether rejecting the evidence will increase the likelihood of mistakenly denying the claim: she must weigh its “relevance and probative value.”445 Similarly, if a claimant files his initial claim form past the deadline, or fails to attend his hearing, the Court warns that the member must bear the law’s humanitarian objectives in mind in deciding whether or not to declare his claim abandoned.446 This decision “has dramatic, potentially even fatal implications,”447 and so the member must be alert to reasons why the claimant may have been “vulnerable and disoriented,”448 and must ask herself whether he “truly intended to abandon his claim,”449 bearing in mind that “the right to be heard is at the heart of our sense of justice and fairness.”450

445 As stipulated in Rules 36 and 43 of the Refugee Protection Division Rules SOR/2012-256. See for example Mbirimujo v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 622, 2013 FC 553 at para 22 (Noël J); Cox v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1337, 2012 FC 1220 at para 26 (Near J); SEB v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 985, 2005 FC 791 at paras 23-25 (O'Keefe J); Mannan v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 164, 2015 FC 144 at paras 41-56 (Shore J).

446 Peredo v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 451, 2010 FC 390 at para 33 (Mosley J); Andreoli v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1349, 2004 FC 1111 at para 17 (Harrington J). See also Januzi v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 2189, 2004 FC 1386 at para 8 (Harrington J), in the related context of an application for review of a decision denying the claimant’s motion to reopen a claim that had been declared abandoned.

447 Gutierrez v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1051, 2005 FC 841 at para 16 (Gibson J). See also, for example, Javed v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1759, 2004 FC 1458 at para 20 (O’Keefe J).


450 Matondo v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 509, 2005 FC 416 at para 18 (Harrington J); Gutierrez v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1051, 2005 FC 841 at para 18 (Gibson J). See also for example Uysal v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1595, 2004 FC 1310 at paras 11-13 (Von Finckenstein J).
In the same vein, the First Stream finds that when a claimant requests an extension of time in which to file his materials, or asks for an adjournment or a postponement of his hearing, “fairness and justice” are at least as important as the Board’s “convenience” and its desire for “efficiency.”

When a claimant seeks to reschedule her hearing because her counsel is unable to attend, for example, the Board must consider all relevant factors, and cannot deny her request simply because she “had sufficient time to retain counsel” and failed to “choose counsel willing and able to proceed on the date scheduled.” And the Court characterizes as inherently unjust the member’s decision to give the claimant a “choice” in such circumstances: “either abandon the claim, or proceed unrepresented.”

At the same time, when a claimant’s counsel is responsible for a procedural error, the Court cites with approval the words of Lord Denning: “We never allow a client to suffer for the mistake of his counsel if we can possibly help it.” The Court refuses to hold a claimant responsible for his

451 See for example Perez v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1578, 2010 FC 1275 at paras 50-54 (Russell J); Vazquez v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 411, 2012 FC 385 at para 19 (Bédard J); Trejo v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1516, 2008 FC 1207 at para 23 (Mandamin J); Cleopartier v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1834, 2004 FC 1527 at para 11 (Campbell J); Biro v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 909, 2006 FC 712 at para 18 (Rouleau DJ).


453 Bryndza v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1380, 2012 FC 1250 at para 6 (Campbell J). See also for example Sandy v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1770, 2004 FC 1468 at paras 27, 31, 54 (O’Keefe J); Perez v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1578, 2010 FC 1275 at paras 10-12, 50-54 (Russell J).

454 “It is very important to note that…absolutely no consideration was given to any possible injustice caused by granting or not granting the adjournment. Indeed, there was no consideration of the injustice caused to the Applicant in forcing her to make the choice between abandoning her claim or proceeding unrepresented.” Cleopartier v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1834, 2004 FC 1527 at para 11 (Campbell J) [emphasis added]. In Cheema v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1154, 2014 FC 1082 at paras 31-33 (Noël J) the Court similarly found that the claimant had been “denied legal representation” in a case where he also had been “forced to make a decision to either proceed without the presence of his lawyer or see his claim declared abandoned,” after his lawyer, at the member’s behest, was escorted off of the premises by security.

counsel’s procedural failings even when the claimant himself was also “negligent” and so is “partly to blame”; even, in fact, when the Court concludes that the claimant has shown “little or no interest in what is happening to his application.” And recognizing that claimants may have trouble finding counsel through no fault of their own, and that the lack of counsel may put them at a real disadvantage, the Court also stresses that unrepresented claimants are “entitled to every possible and reasonable leeway” in presenting their cases and that “strict and technical rules should be relaxed.”

1.4 Conclusion

Imagining claimants as vulnerable people whose pleas for protection may be wrongly denied – who may “cry out for help to no avail” – brings squarely into focus the “grave,” “significant,”

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*Canada (Minister for Public Safety and Emergency Preparedness)* [2005] FCJ No 1672, 2005 FC 1374 at para 10 (Harrington J).


459 The Court in *Canadian Council for Refugees v. Canada* [2007] FCJ No 1583, 2007 FC 1262 at para 230, overturned on other grounds (Phelan J), while rejecting the Applicant’s argument, accepted its evidence that “statistics suggest that asylum seekers are six times more likely to succeed when they are represented.” See also for example *Galamb v. Canada (Minister of Citizenship and Immigration)* [2014] FCJ No 582, 2014 FC 563 at paras 25-31 (de Montigny J); *Tocjeva v. Canada (Minister of Citizenship and Immigration)* [1997] FCJ No 1180 at para 17 (Cullen J).


461 *Ugalde v. Canada (Minister of Public Safety and Emergency Preparedness)* [2010] FCJ No 943, 2010 FC 775 at para 1, in the context of decision to stay a removal, but speaking generally (Shore J). The Court suggests that, as a result, the refugee protection system may need to be “the voice of those…who have no voice.” *Abbasova v. Canada (Minister of Citizenship and Immigration)* [2011] FCJ No 40, 2011 FC 43 at para 68, in the context of a PRRA decision but speaking generally (Shore J). See also *Ugalde*, above, at para 2.
“dire” and “potentially even fatal” consequences of this kind of mistake. The Court reminds members that the Convention came into being “after the Second World War with its gas chambers”; that, at its core, “the Act is all about saving lives and offering protection to the displaced and persecuted”; and that Canada is obliged to answer the call not only because of its domestic and international commitments, but also in order to live up to its own “humanitarian ideals.” The salience of the harm of mistaken denials comes across not only in

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462 Zavalat v. Canada (Minister of Citizenship and Immigration) [2009] FC No 1639, 2009 FC 1279 at para 72 (Russell J); WOA v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1060, 2011 FC 827 at para 3 (Shore J); Kamburona v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 769, 2013 FC 701 at para 19 (Zinn J); Javed v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1759, 2004 FC 1458 at para 20 (O’Keefe J). See similar commentary in other contexts in which protection may be wrongly withheld, such as in decisions denying an application for a PRRA, excluding a claimant from refugee protection, or, under the former legislation, denying a humanitarian and compassionate grounds application in which the applicant claims to be at risk if deported: Level v. Canada (Citizenship and Immigration) [2010] FCJ No 290, 2010 FC 251 at para 55 (Russell J); Pineda v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 538, 2010 FC 454 at para 27 (Gauthier J); Lu v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1390, 2008 FC 1112 at para 33 (Mactavish J); Haghighi v. Canada (Minister of Citizenship and Immigration) (CA) [2000] 4 FC 407, [2000] FCJ No 854 at paras 37-38 (Stone, Evans & Malone JJ); Popovic v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 900, 2001 FCT 588 at para 33 (Lemieux J); Kennedy v. Canada (Minister of Citizenship and Immigration) [2000] FCJ No 1081 at para 18 (Lemieux J).

463 Gutierrez v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1051, 2005 FC 841 at para 16 in the context of the Board’s decision to declare a claim abandoned (Gibson J). See also, for example, WOA v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1060, 2011 FC 827 at para 3 (Shore J); Kabongo v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1369, 2011 FC 1106 at para 31 (Martineau J); Thalang v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1002, 2007 FC 743 at para 16, in the PRRA context (Shore J).

464 Bayrak v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1173, 2013 FC 1056 at para 5 (Shore J). See also para 13: “As the proverb wisely states, to forget our history is to repeat it. The Convention is in place to help us prevent such acts from being perpetrated repeatedly.”

465 Januzi v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 2189, 2004 FC 1386 at para 8 (Harrington J), in the related context of an application for review of a decision denying the claimant’s motion to reopen a claim that had been declared abandoned. See also Kamburona v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 769, 2013 FC 701 at para 19 (Zinn J).

466 See for example Kabongo v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1369, 2011 FC 1106 at para 31 (Martineau J); Bayrak v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1173, 2013 FC 1056 at paras 5, 8-9 (Shore J).

467 See for example Januzi v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 2189, 2004 FC 1386 at para 8 (Harrington J), in the related context of an application for review of a decision denying the claimant’s motion to reopen a claim that had been declared abandoned; Guermache v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1058, 2004 FC 870 at para 4 (Martineau J); Sivarajathurai v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1140, 2006 FC 905 at para 14 (Harrington J). See also Carrillo v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 439, 2007 FC 320 at para 23, reversed on other grounds (O’Reilly). See also discussion in Ezokola v. Canada (Citizenship and Immigration) [2013] SCJ No 40,
the vehemence of the Court’s language, but also in the fact that it has never suggested that this is the more likely type of error. Rather, the Court is concerned with the possibility that members may make this type of mistake, for the consequences are simply “terrifying.”

The First Stream of the Court, in short, shares Kagan’s perspective: “The purposes of the Refugee Convention call for erring on the side of protection and belief, with full recognition that this means some people will cheat the system. The alternative is to refuse protection to many people who need it, and betray the commitment states have made to protect people in danger of persecution.” Seen from this angle, it makes sense to depart from the civil law’s default preference for erring against the moving party. It makes sense, as it does in the criminal law, to design the law’s obstacle course to try to avoid a particularly salient harm to a particularly vulnerable kind of litigant.

2 The Second Stream: Refugee fact-finding is an ordinary legal process

The Second Stream of the Court imagines refugee claimants simply as ordinary litigants in a standard legal proceeding. Like the person seeking disability support, or the tenant asking for a rent rebate, or the employee trying to reclaim lost wages – like many different kinds of litigants in many of Canada’s hundreds of other quasi-judicial administrative tribunals – a refugee claimant is simply asserting a statutory right to a remedy.

From this perspective, claimants cannot be assumed to be vulnerable. Like other litigants, if they claim any relevant vulnerability, they must prove it. Like other litigants, they have responsibilities to the legal system, and they must also be assumed to be rational actors who calculate costs and consequences and act in their own self-interest. The Court can therefore expect that claimants will act with reasonable diligence both inside and outside of the hearing

2013 SCC 40 at paras 2, 9, 35, 36, in the context of a decision to exclude a claimant from refugee protection (McLachlin CJ and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ).


room, and also that they may attempt to deceive the Board when it is in their best interests to do so.

This framing also colours the Court’s view of the member and his role. On the First Stream’s framing, the member must accomplish something quite extraordinary. He must assess risk, in a context characterized by exceptional uncertainty, in which obstacles confront him at every turn. From the Second Stream’s perspective, the member must simply do what all other decision-makers do. He must make findings of fact, and nothing in the refugee context implies that this should be unusually daunting. As a matter of law, all tribunal adjudicators have relevant expertise, and Board members are no exception. And regardless, all a member needs in order to decide a refugee claim are the same faculties that any adjudicator would need in order to decide any other kind of matter: common sense and reason. In short, the Second Stream firmly rejects the exceptionalism that lies at the heart of the First Stream’s approach.

2.1 The claimant is an ordinary litigant

2.1.1 Proving vulnerability

As discussed above, the First Stream views refugee claimants as a “vulnerable, poor and disadvantaged group,” and so the member errs if she fails to ask herself whether a claimant’s trouble testifying may have been caused by this underlying vulnerability. For the Second Stream, this assumption is misplaced. Like any other litigant, a claimant will need to prove any relevant psychological conditions or complications. Absent such proof, the Board is free to draw negative conclusions from what might otherwise seem to be strong indicators of vulnerability. The Board is justified in drawing a negative inference from a claimant’s “vague and unresponsive answers” if she has submitted no psychological evidence to explain why, in describing her sexual assault, she “tended to wander off on tangents, offered vague answers, had difficulty recalling specific details, and at times became very animated and began to cry.” Absent proof on point, there is

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471 Shinmar v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 100, 2012 FC 94 at para 14 (O’Reilly J).
no reason for the member even to consider the possibility than an 80-year-old claimant “was confused and stressed when he testified, that he was vulnerable or that his age affected his ability to testify or the quality of his testimony.” 472

In addition, the two Streams of the Court understand the term ‘vulnerable,’ and the relevance of vulnerability, quite differently. The Second Stream takes its cue from the Board’s “Vulnerable Persons” Guideline, which aims to accommodate those claimants who are the most deeply traumatized. The Guideline “distinguishes ordinarily vulnerable refugee claimants from those that are severely vulnerable” and only applies to the latter. 473 Since it is not called the “Severely Vulnerable Persons” Guideline, however, its effect is to raise the bar for what “vulnerable” means. According to the Guideline, claimants are not “vulnerable” merely because they will have difficulty giving their evidence, or because they are at a heightened risk of being misunderstood and wrongly disbelieved, but only if their ability to present their claim is “severely” or “significantly and considerably impaired.” 474

Litigation around the question of vulnerability has become focused on the application of this Guideline, and whether or not the Board ought to have offered the claimant the kinds of procedural accommodations that it envisions (such as allowing her to be accompanied by a support person, or to testify by video or in a more informal setting). 475 In addressing whether or not the member ought to have considered the claimant’s vulnerability in assessing her testimony, the Second Stream now directly imports the Guideline’s higher threshold and conflates the two analyses. So for example, where an elderly applicant argues that the Board should have considered his memory failures in light of his advanced age, the Court finds that he has not


473 Guideline 8 on Procedures with Respect to Vulnerable Persons Appearing before the Immigration and Refugee Board of Canada. The Guideline makes the modest observation that the Board’s work with refugee claimants “inherently involves persons who may have some vulnerabilities” (s. 2.3, emphasis added). See Hurtado v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 345, 2008 FC 270 at para 30 (Frenette DJ).

474 Guideline 8, s. 2.3; Hurtado v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 345, 2008 FC 270 at para 30 (Frenette DJ).

475 Guideline 8, s.4.2.
demonstrated that he was in any way “vulnerable” within the meaning of the Guideline. It then concludes that since he did not apply for recognition under the Guideline, he is now barred from arguing that his vulnerability was otherwise relevant. Since his “supposed vulnerability was never raised at the hearing to justify the taking of special measures,”476 the claimant cannot now argue that the Board should have turned its mind to the possibility that his memory was weak because of his age.477

In another case, a 20-year-old rejected claimant sought to reopen his claim in light of expert evidence that his experiences of childhood trauma had “impeded” his psychological development.478 As a result of these experiences, he was psychologically much younger than he seemed, and was naïve, intensely afraid of authority and highly anxious.479 The member at his hearing had disbelieved his testimony in part because of her finding that he was “a savvy, street-smart, resourceful and flexible individual,” and the claimant argued that she might have reached a different conclusion if she had had the expert evidence before her.480 In rejecting this argument, the Court concludes categorically that since the claimant was not “vulnerable” within the Guideline’s definition, “the existence of the report is immaterial and there was no need for it to have been put before the Panel.”481

2.1.2 Acting rationally and responsibly

Like many areas of Western thought, the law in Canada and in other similar jurisdictions assumes that people make choices by consciously weighing the costs and benefits of each

476 Shmagin v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1345, 2010 FC 1030 at para 15 [emphasis added] (Bédard J). See also for example Peti v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 68, 2012 FC 82 (Scott J).

477 “It is not enough to raise the applicant’s vulnerability after the fact.” Shmagin v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1345, 2010 FC 1030 at para 16 (Bédard J).

478 Applicant’s Memorandum of Argument, Court File No. IMM-2081-07 at para 16.

479 Ibid.

480 Hurtado v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 345, 2008 FC 270 at para 8 (Frenette DJ); Applicant’s Memorandum, Court File No. IMM-2081-07 at paras 16-18.

481 Hurtado v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 345, 2008 FC 270 at para 48 (Frenette DJ).
option. It assumes that they are “motivated by self-interest” and will choose the outcome that yields them the greatest benefit. This assumption lies at the heart of the adversarial system, which relies on litigants to protect and advance their own interests. But the law also makes clear that participants in the legal system owe a duty to the system itself, and that this duty should both reinforce and temper their rational self-interest. It should reinforce their obligation to litigate diligently, which is to the system’s general benefit, and it should temper any inclination to break the rules. The law expects, in short, that litigants will act both rationally and responsibly.

In addition, researchers studying risk perception in Western societies have noted a marked rise in recent decades in the general social preoccupation with minimizing risks to health and safety.


483 Jaeger, above note 44 at 23.

484 Ibid.

Preferentially avoiding these types of dangers (at the expense of other kinds of harms)\textsuperscript{486} is increasingly seen as the only reasonable response, the only rational weighing of costs and benefits. At the same time, guarding against these kinds of risks has become among the most important of social duties. More than ever before in human history, failing to take proper measures to ensure one’s personal safety is seen not only as “foolhardy” and “careless,” but also as “irresponsible, and even ‘deviant’.”\textsuperscript{487} A person at risk, then, like a party in a legal process, is under a strong social imperative to act both rationally and responsibly.

Vulnerable people may act rationally and responsibly, of course. But for the First Stream, if the claimant was not diligent in putting forward her claim, or if she did not respond rationally to danger, her vulnerability may help to explain why. The Second Stream’s focus on the claimant’s role as litigant emphasizes, instead, that she should be expected to demonstrate the reasonable diligence that the law expects from any party to a legal proceeding. It also highlights rationality’s dark side: this framing brings to the fore the concern that the claimant may attempt to deceive the Board if deception stands to yield the biggest pay-off. And in the social risk context in which the Court is operating, and in the context of refugee claims in particular, the notion that claimants should act rationally and responsibly hits twice as hard. In our so-called “risk society,” more than ever before, taking unnecessary risks has “become associated with ‘deserving the consequences.’”\textsuperscript{488} Where a claimant’s conduct has exposed her to danger, either from the agents of persecution at home or else because it has lessened her chances of success at the Board, the

\textsuperscript{486} Such as, for example, risks to “economic status, cultural identity, home ‘memory’ relationships with others, social standing or status and emotional or psychological states.” Tulloch, above note 485 at 41. See discussion in Cameron 2008, above note 52 at 2.9.

\textsuperscript{487} Tulloch, above note 485 at 10. See discussion in D. Lupton, “Introduction: risk and sociocultural theory” in Risk and Sociocultural Theory above note 485, 1 at 4; Stephen Crook, “Ordering risks,” in Risk and Sociocultural Theory, above note 485, 160 at 171; Tulloch, above note 485 at 3-4; Bell, above note 485 at 507; D. Lupton, “Risk and the ontology of pregnant embodiment” in Risk and Sociocultural Theory above note 485,59 at 75; Cameron 2008, above note 52 at 2.12.

Second Stream often concludes that the member is entitled to draw one of two conclusions. Either she did not really act as she claims, because such conduct is simply unbelievable. Or else she was irresponsible, and if she suffers as a result, she has only herself to blame.

2.1.2.1 Within the hearing process

2.1.2.1.1 Reasonable diligence

The Second Stream expects claimants to demonstrate reasonable diligence in bringing their claims forward. Claimants “are responsible for their files,” and they are accountable to the Board’s administration. If a claimant fails to include all relevant facts in her initial statement, or to obtain evidence to support her case, or to establish the subjective element of her claim, she has not merely let herself down. She has also failed in her “duty” to the system. And if the claimant is a litigant like any other, then the member is not required to cut her any slack if she fails to respect the Board’s rules and regulations; to object in a timely fashion to concerns about interpretation; or to act responsibly in obtaining legal representation.

2.1.2.1.1.1 Respecting the rules and regulations

When claimants neglect the Board’s procedural requirements, the First Stream stresses that while the member’s frustration is understandable, and while he must weigh the system’s requirements in the balance, he should always keep front and centre the “dramatic, potentially even fatal implications” of denying protection to a person who genuinely needs it. For the Second Stream, this potential harm is in the background, if not off-stage. Front and centre is the concern that refugee hearings “are proceedings to be carried on with dispatch and reasonable

489 Andreoli v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1349, 2004 FC 1111 at para 20 in obiter (Harrington J).

490 See for example Sanchez v. Canada (Minister of Citizenship and Immigration) [2000] FCJ No 536 at para 6 (Nadon J); Pinon v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 500, 2010 FC 413 at paras 15-16 (Boivin J); Saleem v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1715, 2005 FC 1412 at para 31 (Teitelbaum J). See also Singh v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1475, 2005 FC 1207 at para 30 (Noël J).

491 Gutierrez v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1051, 2005 FC 841 at para 16 (Gibson J).
diligence,”492 and that, as a condition precedent to asking for Canada’s help, claimants must fulfil their “obligation” to respect the Board’s procedures,493 and do their part to “maintain the integrity of the Canadian refugee protection system.”494

The Court here stresses that procedural failures should have “actual consequences.”495 Claimants who fail to respect the Board’s deadlines, for example – or who fail “to keep in touch with their counsel, to actively pursue their claims, and to inform the Board in a timely manner if they cannot attend a hearing”496 – must pay the price for their “wrongdoing.”497 If a claimant has made what he subsequently claims was a procedural error – typically, if he filed his papers late or failed to keep the Board apprised of his current address – the Second Stream, like the First, requires the member to consider his intentions in deciding whether or not to declare his claim abandoned. Yet whereas the First Stream requires evidence that the claimant “truly intended to abandon his claim,”498 the Second frames the test differently: “whether the applicant’s conduct amounts to an expression of his intention to diligently prosecute his claim,”499 and to do so “in a

492 Serrahina v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 622 at para 8 (Kelen J).


495 Ibid.


497 Andreoli v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1349, 2004 FC 1111 at para 20 in obiter (Harrington J).

498 Singh v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1187, 2006 FC 939 at para 14 (Rouleau DJ) [emphasis added]; Revich v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1308, 2004 FC 1064 at para 15 (Blais J) [emphasis added].

499 Emani v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 684, 2009 FC 520 at para 20 [emphasis added] (Teitelbaum DJ); Peredo v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 451, 2010 FC 390 at para 30 [emphasis added] (Mosley J) (although at para 34 the Court also uses the opposite
manner that is respectful of the [Board] process." So, for example, the Court upholds the Board’s decision to declare abandoned the claim of a young Tamil man at the height of Sri Lanka’s civil war who had filed his papers ten days late. He had waited for his Legal Aid application to be processed so that a lawyer could assist him. In another case, the claimant had mailed her papers to the Board on their due date, but they were not received until after the deadline had passed. Following the Board’s standard practice, the claimant had been given, along with her initial forms, a notice explaining that if she did not file her materials on time she would need to attend an abandonment hearing – a procedure that First Stream criticizes as “a convenience for the Board” that “increases…the opportunity for error.” Indeed, believing that she had filed her papers on time, she did not attend her abandonment hearing, and the Board declared her claim to have been abandoned. The Court upholds this decision, finding that the claimant “was aware” that she needed to attend, “or should have been.” For the Second Stream, a claimant who has not been sufficiently diligent, and who consequently loses the right to a hearing, is simply “the author of his own misfortune.”

2.1.2.1.1.2 Objecting to poor interpretation

In some cases, however, a claimant’s misfortune has been helped along considerably by the actions of others. The First Stream, noting that claimants are made even more vulnerable by their reliance on interpreters, emphasizes that both the standard of interpretation and the threshold for framing: whether the claimant demonstrated “an intention not to proceed with her claim”). See also Djilal v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 848, 2014 FC 812 at para 31 (Locke J); Csikos v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 680, 2013 FC 632 at para 25 (Pinard J); Octave v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 609, 2015 FC 597 at para 18 (Boswell J).

500 Zhang v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 910, 2014 FC 882 at para 40 (LeBlanc J). This was admittedly “a highly unusual case” in which the claimant, in a tactical gambit, had refused to answer any further questions from a member when she learned that he “had not approved a single refugee claim in over two years.” Zhang at para 1.


502 Trejo v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1516, 2008 FC 1207 at para 23 (Mandamin J).


504 Dhalla v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1316, 2012 FC 1144 at para 44 (Zinn J); Wackowski v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 315, 2004 FC 280 at para 13 (Mactavish J), in the context of an application to reopen a claim that had been declared abandoned.
waiving the right to competent interpretation are high. Here the Court finds that both standards should be considerably lower.

Since the interpreter has taken an oath to interpret competently, the claimant has a “significant” burden to show that the interpreter “has acted in a manner contrary to the oath.”\(^{505}\) Moreover, in stark contrast to the First Stream’s jurisprudence, to be fatal to the Board’s decision, interpreter errors must be “central”\(^{506}\) and “material”\(^{507}\) – indeed they must “go to the very essence of the rejection of the claim”\(^{508}\) – and they must cause actual prejudice to the claimant.\(^{509}\) In addition, a claimant or her counsel must act with reasonable diligence – and determination – in flagging the issue as soon as it arises. As the Court makes clear, a claimant’s lawyer can waive her client’s right to competent interpretation not only by failing to raise an objection at the first reasonable opportunity,\(^{510}\) but also by failing to pursue it adequately. A claimant should be barred from

\(^{505}\) Xu v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 397, 2007 FC 274 at para 12 (Phelan J); Umubyeyi v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 76, 2011 FC 69 at para 9 (Noël J).

\(^{506}\) See for example Nsengiyumva v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 231, 2005 FC 190 at para 16 (Kelen J); Thsunza v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1195, 2014 FC 1150 at paras 41-42 (Locke J).

\(^{507}\) Rafipoor v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 833, 2007 FC 615 at para 10 (Snider J); Batres v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1031, 2013 FC 981 at para 12 (McVeigh J); Yousif v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 802, 2013 FC 753 at paras 45-47 (Scott J); Sherpa v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 665, 2009 FC 267 at paras 59-60 (Russell J); Nguyen v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1244, 2005 FC 1001 (Teitelbaum J); Roy v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 815, 2013 FC 768 at para 35 (Scott J).

\(^{508}\) Sherpa v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 665, 2009 FC 267 at para 61 (Russell J), citing Huang v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 456 at para 16 (Snider J); Francis v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 643, 2012 FC 636 at para 7 (Snider J).

\(^{509}\) In some cases, the Court makes this finding overtly. See for example Nguyen v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1244, 2005 FC 1001 at 21 (Teitelbaum J); Mosa v. Canada (Minister of Employment and Immigration) (CA) [1993] FCJ No 348 (Stone, Linden and Létourneau JJ). In addition, as the Court recently noted in Bidgoli v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 206, 2015 FC 235 at para 12 (Simpson J), it also imposes this requirement indirectly. The Court in Bidgoli critiques the line of jurisprudence that holds that “although actual prejudice need not be shown, errors in interpretation must be material. In my view, this is a questionable proposition because, in the context of interpretation errors, ‘material’ and ‘prejudicial’ appear to have been given the same meaning; that is, a negative impact on the Board’s decision.”

\(^{510}\) See for example Mohammadian v. Canada (Minister of Citizenship and Immigration) [2000] FCJ No 309, 2000 3 FC 371 at para 17 (Pelletier J); Deng v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1228,
raising problems with the interpretation on review if, after having brought an objection during the hearing, his lawyer then “appeared to be satisfied that her concerns had been addressed.”

2.1.2.1.3 Obtaining legal representation

Indeed, where a claimant’s counsel has been less than diligent in representing him, the First Stream hesitates to hold the claimant responsible, even if he himself was partly to blame. The very fact that he had no choice but to rely on an incompetent or negligent representative is just one more facet of his vulnerability. But when the Second Stream sees the claimant as a litigant like any other, then “as harsh as it may be,” it must assume that he indeed had a choice (and he evidently chose poorly). Now like any other litigant, he is bound by the general civil law principle that a party “must accept the consequences for his choice of counsel.” These consequences can be drastic. In all but “the most exceptional” cases of “extraordinary

2007 FC 943 at para 16 (Hughes J); Ndokwu v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 40, 2013 FC 22 at para 42 in obiter (Shore J).

511 Dhaliwal v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1724, 2011 FC 1097 at para 16 (de Montigny J). See also for example Khatun v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 169, 2012 FC 159 at paras 76-77 (Russell J). Recognizing that this approach departs markedly from the principles that govern in the criminal context, the Court explains that “the volume of workload before the Board necessitates a more flexible approach.” Mah v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 907, 2013 FC 853 at para 13 (Gleason J). See also comments in Mohammadvand v. Canada (Minister of Citizenship and Immigration) (CA) [2001] FCJ No 916, 2001 FCA 191 at para 17 (Stone, Rothstein and Sexton J); Rizlan v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1117, 2013 FC 1022 at para 13 (Roy J).

512 Jouzichin v. Canada (Minister of Citizenship and Immigration) [1994] FCJ No 1886 at para 2 (Reed J). See also in the PRRA context, Dukuzumuremyi v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 349, 2006 FC 278 at para 19 (Martineau J): “as severe as it may seem.”

513 Parast v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 844, 2006 FC 660 at para 11 (Martineau J). See also Robles v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 520 at para 31 (Heenegan J); Jouzichin v. Canada (Minister of Citizenship and Immigration) [1994] FCJ No 1886 at para 2 (Reed J); Huynh v. Canada (Minister of Employment and Immigration) [1993] FCJ No 642 at para 16 (Rothstein J); NKD v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 779 at para 20 (Rouleau J). See also discussion, in other immigration contexts, in Medawatte v. Canada (Minister for Public Safety and Emergency Preparedness) [2005] FCJ No 1672, 2005 FC 1374 at para 10 in obiter (Harrington J); Cove v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 482 at para 5 (Pelletier J); Teganya v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 430, 2011 FC 336 at para 30 (Boivin J).

514 Parast v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 844, 2006 FC 660 at para 11 (Martineau J). The Court will entertain arguments about counsel’s incompetence only when it is “so clear and unequivocal and the circumstances so deplorable that the resulting injustice caused to the claimant is blatantly obvious.” See also Galys v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 245, 2013 FC 250 at para 83 (Russell J); Tjaveru v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 293, 2014 FC 288 at para 15 (Boivin J); Huynh v. Canada (Minister of Employment and Immigration) [1993] FCJ No 642 at para 23 (Rothstein J).
incompetence,” a claimant who has chosen to hire “poor counsel” cannot complain to the Court that he was poorly represented. If his representative fails to identify an issue of procedural fairness, such as inadequate interpretation or the need for an adjournment, the claimant cannot raise it before the Court, for he “is bound by the actions of his counsel, and must be deemed to have waived his right to object.” And where counsel’s failure to meet deadlines, for example, or to keep the claimant informed of hearing dates, has led to the refugee claim being declared abandoned, the Court here finds that even such “egregious negligence” will not justify reopening the claim unless “there has been no contributing negligence or fault” on the claimant’s part.

Where the claimant is unrepresented, the Second Stream is similarly willing to assume that this is simply a question of preference: “Litigants who choose to represent themselves must accept the

515 See for example Tjaverua v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 293, 2014 FC 288 at para 22 (Boivin J); Teganya v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 430, 2011 FC 336 at para 37 (Boivin J).

516 Jouzichin v. Canada (Minister of Citizenship and Immigration) [1994] FCJ No 1886 at para 2 (Reed J). See also Parast v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 844, 2006 FC 660 at para 11 (Martineau J); Tjaverua v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 293, 2014 FC 288 at para 18 (Boivin J). For similar findings in other immigration contexts, see Medawatte v. Canada (Minister for Public Safety and Emergency Preparedness) [2005] FCJ No 1672, 2005 FC 1374 at para 10 in obiter (Harrington J); Dukuzumuremyi v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 349, 2006 FC 278 at para 19 (Martineau J).

517 Singh v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1727, 2006 FC 1352 at para 10 (Mactavish J). See also Rafipoor v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 833, 2007 FC 615 at para 9 (Snider J); Mohamadian v. Canada (Minister of Citizenship and Immigration) [2000] FCJ No 309, [2000] 3 FC 371 at para 17 (Pelletier J); Aquino v. Canada (Minister of Employment and Immigration) (CA) [1992] FCJ No 509 in obiter (Mahoney, MacGuigan and Linden JJ); Huang v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1090, 2012 FC 1004 at para 23 (de Montigny J). See also NKD v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 779 at para 20 (Rouleau J); Frederick v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 870, 2012 FC 649 at para 18 (Tremblay-Lamer J) for similar findings in the context of counsel’s failure to have related claims joined or disjoined. See also Bangoura v. Canada (Minister of Employment and Immigration) [1994] FCJ No 581 at 24-26 (Nadon J).

518 Discussed in Khan v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1067, 2005 FC 833 at para 24 (Mosley J). The Court in Khan in fact goes on, however, to allow some fault on the claimants’ part (paras 28-30). See also Taher v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1327 at paras 2-3 (Pinard J); Shirwa v. Canada (Minister of Employment and Immigration) [1994] 2 FC 51, [1993] FCJ No 1345 at para 11 (Denault J); Masood v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1480, 2004 FC 1224 at para 23 (Lemieux J); Dhalla v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1316, 2012 FC 1144 at para 38 (Zinn J).
consequences of their choice.” Or else the claimant’s lack of representation may be the result of his lack of diligence: if the claimant failed in his “duty” to ensure that his counsel was available on the date of his hearing (in which case, if he is unwilling to proceed unrepresented, there is nothing unfair in declaring his claim abandoned); or if he “was not diligent in meeting his responsibilities” in obtaining Legal Aid, resulting in delays in the processing of his application – delays which, the Court has made clear, “do not, by themselves, provide a sufficient basis for applicants to disregard dates set by the Board.” And whereas the First Stream highlights that the Board should take extra care and give “reasonable leeway” to unrepresented claimants, the Court here rather makes the point that such claimants are, at heart, still just litigants like any other. They are not entitled to any “greater duty of fairness” and the member is not obliged, for example, to advise an unrepresented claimant of the option of asking for an adjournment, or to instruct her in the law.

519 Seyoboka v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 108, 2009 FC 104 at para 51 (de Montigny J). In one case, the Court notes that the claimant “refuses to retain counsel” – notwithstanding the fact that he had twice attended at the Board with his lawyer before losing touch with her, and the Court seems to accept his evidence that he had in fact travelled to Windsor “in a last ditch effort” to contact her. Nguyen v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1244, 2005 FC 1001 at paras 11, 17 (Teitelbaum J). The Court has similarly held that where the claimant has retained an immigration consultant rather than a lawyer, while she is “fully entitled” to make this choice, she cannot then complain that “she was not represented by a lawyer and received bad advice.” Elaweremi v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1691 at para 3 (McKeown J). See also in the PRRA context, Ramos v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 2015, 2005 FC 1635 at para 9 (Harrington J).


521 Lopez v. Canada (Minister of Citizenship and Immigration) [2000] FCJ No 1512 at para 24 in obiter (Teitelbaum J).

522 Suchit v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1004, 2005 FC 800 at para 12 (Mactavish J). See also, for example, Markandu v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1928, 2004 FC 1596 (Snider J); Zylinska v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1250, 2004 FC 1024 (O’Reilly J).


525 Nguyen v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1244, 2005 FC 1001 at para 17 (Teitelbaum J). For related discussion of the scope of a tribunal’s duty to assist unrepresented litigants, see Kelly v.
2.1.2.1.1.4 Conclusion

For the Second Stream of the Court, claimants seeking a remedy from the Board owe it a duty in return, and they must uphold their end of the bargain as a condition for obtaining refugee protection. When claimants fail in this duty, the Board is absolved of its protection obligations, no matter that their claims may be genuine. Or, as the Court recently explained, those who act responsibly are “the very people the [Board] exists to protect: diligent refugee claimants.”

2.1.2.1.2 Deception

A rational litigant may be tempted to lie if the benefits outweigh the costs. The Second Stream therefore stresses the need to avoid “creating circumstances in which claimants have an incentive to lie,” for it is “naive to think that in those circumstances, many claimants who have risked and spent so much to come here would not be seduced by the odds in favour of lying.” Claimants attempting to deceive the Board may enlist the help of their friends and family, and so the Court finds that a member can properly dismiss a document as “self-serving” and give it little weight if it was “written to serve as evidence” at the claimant’s hearing by a friend or family member with “a personal interest in the outcome.” When the Court emphasizes the need for “dispatch” in

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528 Isufi v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1208, 2003 FC 880 at paras 3, 15 (Tremblay-Lamer J). See also for example Trako v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1318, 2011 FC 1063 at para 30 (Crampton J); Araya v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 624 at paras 31, 33 (O’Keefe J); Razzaq v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1104, 2003 FC 864 at paras 19-22 (Snider J). In addition, contrary to the First Stream’s finding, where a letter of support does not contradict the claimant’s story, and in fact generally supports it, the member can still draw a negative conclusion about the claimant’s credibility from its failure to mention specific relevant information. Pararasasingam v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 873, 2013 FC 805 at para 16 (Snider J); JEPG v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 938, 2011 FC 744 at paras 6-10 (Mosley J).
the processing of refugee claims, and for rules with “actual consequences,” it is similarly reflecting the concern that claimants will try to manipulate the legal processes to create delays or otherwise further their goals. And it warns that in watching for signs of deception, the Board must be alert in particular to the possibility that claimants will try to exploit their perceived vulnerability. They may use the Board’s Gender Guidelines, and medical and mental health evidence, to try to play the system. As a result, although members “must be alive and sensitive to the reasons why victims of persecution may have problems in testifying, that responsibility does not oblige the Board to abandon reasonable incredulity at the door.”

2.1.2.1.2 The Gender Guidelines

The Second Stream stresses that the Gender Guidelines “are not intended to serve as a cure for deficiencies in a refugee claim.” So although the Guidelines warn members to be on the alert for the effects of ‘rape trauma syndrome,’ for example, the “mere” fact that the claimant suffers from this syndrome “does not excuse contradictions or omissions of serious incidents in a claimant’s previous statements,” such as her failure to mention at the port of entry that she had

529 Serrahina v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 622 at para 8 (Kelen J). See also for example comments in Pillai v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1944, [2002] 3 FC 481 at para 27 (Gibson J).


531 Rivera v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1120, 2007 FC 862 at para 13 (Barnes J).


533 Kim v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1408, 2005 FC 1168 at para 4 (Martineau J); Flores v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 21, 2011 FC 24 at para 19 (de Montigny J). In the latter case, the Court ostensibly cites with approval the decision in Higbogun v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 516, 2010 FC 445 at paras 48-49 (Russell J), but the
been raped (the Board is therefore free to reject the claimant’s explanation that she was “not ready to talk about it”). In addition, the Court finds that the Guidelines will not apply if expert evidence of the claimant’s gender-based vulnerability is lacking: “there was no psychological evidence of battered women’s syndrome, rape trauma syndrome, or post-traumatic stress disorder. As such, the Guidelines were not applicable.” And regardless, if the member disbelieves a claimant’s account of gender-based violence, then he need not consider what the Guidelines say about the particular troubles that women may have presenting their evidence – the very logic that the First Stream dismisses as “circular.”

2.1.2.1.2.2 Medical and mental health evidence

In the same vein, the Second Stream strongly cautions that medical and mental health evidence should not prevent members from calling claimants out on their lies. Whereas the First Stream stresses that members, lacking expertise, should not substitute their own judgments about a claimant’s mental health for that of a properly qualified mental health professional, here the Court warns, on the contrary, of an approach that would “substitute the psychologist’s opinion for the Board’s mandate” to make findings of fact. Mental health evidence “cannot displace

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534 RG v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 982, 2010 FC 801 at paras 24-25 (Bédard J).

535 Flores v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 21, 2011 FC 24 at para 19, incorrectly citing the Court in Higbogun as noted above (de Montigny J).

536 Munoz v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1591, 2006 FC 1273 at paras 29-36 (Shore J); Semextant v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 20, 2009 FC 29 at para 28 (Shore J).

537 See cases at above note 224.


The role of the decision-maker in assessing the credibility of the witness”\(^5\) and cannot become a “cure-all for any and all deficiencies” in a claimant’s testimony.\(^6\) Whereas the First Stream faults the Board, for example, for concluding that “it was possible” that the claimant suffered from a condition with which he had, in fact, been definitively diagnosed,\(^7\) the Court here finds that the member is free to reach his own conclusions. Despite expert evidence that a claimant with “cognitive difficulties” was taking six different medications to treat her anxiety, depression, and “problems with memory and concentration,”\(^8\) the Court upholds as reasonable the member’s finding, based on his own observations of her testimony, that she “may have had some minor memory issues.”\(^9\)

The member is free to reach his own conclusions because, for the Second Stream, a diagnosis is merely an “opinion,” and this opinion is “only as valid as the truth of the facts on which it is based.”\(^1\) The First Stream emphasizes that mental health professionals do not merely take claimants at their word when they make their diagnoses. They use their clinical judgment.\(^2\) But

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\(^9\) *Ibid.* at para 85 (Russell J). The Court further notes, at para 86, that it should approach this finding with caution “because the Court does not have the advantage of seeing and hearing the witness testify.”

\(^1\) See for example *Arizaj v. Canada (Minister of Citizenship and Immigration)* [2008] FCJ No 978, 2008 FC 774 at para 26 (Teitelbaum DJ); *Danailov v. Canada (Minister of Employment and Immigration)* [1993] FCJ No 1019 at para 2 (Reed J); *Wahid v. Canada (Minister of Citizenship and Immigration)* [2002] FCJ No 745 at paras 18-19 (Nadon J).

for the Second Stream, if the member finds that the claimant’s story is a lie, not only can he reject any inference that her mental health issues were caused by her alleged experiences\textsuperscript{547} – he can disregard the diagnosis itself, presumably on the assumption that she has also duped the clinician.\textsuperscript{548} And the Court here finds, contrary to the First Stream’s conclusions, that a report’s validity is undermined if its author met with the claimant only once,\textsuperscript{549} if he has prepared similar reports for many other claimants,\textsuperscript{550} or if the report was “made under the guidance of counsel.”\textsuperscript{551} In fact, whatever the expert’s credentials, her evidence should “generally should be accorded little weight” if the Court does not have “some means to corroborate” her “reliability” and “neutrality.”\textsuperscript{552} In short, whereas the First Stream cautions that the Board should be “very cautious in arriving at credibility conclusions” where expert evidence confirms a claimant’s


\textsuperscript{548} See for example \textit{Czesak v. Canada (Minister of Citizenship and Immigration)} [2013] FCJ No 1251, 2013 FC 1149 at para 40 (Annis J); \textit{Dimitrijевич v. Canada (Minister of Citizenship and Immigration)} [2014] FCJ No 735, 2014 FC 719 at para 22 in obiter (Annis J); \textit{Rokni v. Canada (Minister of Citizenship and Immigration)} [1995] FCJ No 182 at para 16 (Muldoon J); \textit{Kaur v. Canada (Minister of Citizenship and Immigration)} [2012] FCJ No 1479, 2012 FC 1379 at paras 24-40 (Crampton CJ). As discussed further in Chapter 3 s.2.1, the Second Stream also finds that the member is not required to consider an expert report’s relevance in this context if the claimant herself has not drawn it to the member’s attention.

\textsuperscript{549} See for example \textit{Arizaj v. Canada (Minister of Citizenship and Immigration)} [2008] FCJ No 978, 2008 FC 774 at para 26 (Teitelbaum DJ); \textit{Espinosa v. Canada (Minister of Citizenship and Immigration)} [2003] FCJ No 1680, 2003 FC 1324 at para 19 (Rouleau J).

\textsuperscript{550} \textit{Molefe v. Canada (Minister of Citizenship and Immigration)} [2015] FCJ No 304, 2015 FC 317 at para 33 (Mosley J).

\textsuperscript{551} \textit{Dimitrijевич v. Canada (Minister of Citizenship and Immigration)} [2014] FCJ No 735, 2014 FC 719 at para 22 (Annis J). See also discussion in \textit{Czesak v. Canada (Minister of Citizenship and Immigration)} [2013] FCJ No 1251, 2013 FC 1149 at para 41 (Annis J). The Second Stream has suggested that this more restrictive approach is required in light of the Supreme Court’s move to a unified reasonableness standard of review: \textit{Dunsmuir} and subsequent jurisprudence “have greatly restricted the Court’s ability to intervene in Board findings regarding the import of psychological reports” (\textit{Ors v. Canada (Minister of Citizenship and Immigration)} [2014] FCJ No 1151, 2014 FC 1103 at para 24 (Mactavish J) discussing \textit{Kaur v. Canada (Minister of Citizenship and Immigration)} [2012] FCJ No 1479, 2012 FC 1379 (Crampton CJ). For the First Stream, in contrast, \textit{Dunsmuir} confirms that the Board’s decision will stand if and only if it is reasonable, which will depend in part on how the member engaged with the expert evidence. As a result, the First Stream continues to apply the pre-\textit{Dunsmuir} jurisprudence in force.

fragile mental health, the Court here warns that psychological or psychiatric reports “should not be given exalted status,” and in fact, that “caution should be exercised in accepting them at face value.”

2.1.2.2 Outside of the hearing process

The Second Stream emphasizes that a member assessing a claimant’s subjective fear of persecution can expect her to have acted rationally and responsibly. The member can expect that if she were genuinely at risk, the claimant would have taken prompt and effective steps to find safety. At times, the Court treats this assumption as a truism that provides helpful insight into how frightened people actually think and act. When claimants’ evidence conflicts with it, their evidence is therefore properly suspect. At other times, however, it treats this assumption as a formal requirement, one that should bar a claimant regardless of whether or not it actually shines any light on her level of distress. In these latter cases, the Second Stream invokes this assumption when the Court’s underlying concern seems rather to be, as above, that the claimant has shown a lack of diligence, has acted irresponsibly, or has simply failed to play by the rules.

2.1.2.2.1 Acting bravely or stupidly

Even after the Supreme Court’s judgment in Ward made “subjective fear” a distinct element of the refugee definition, the First Stream continues to find that there is something off about it. At the very least, the law should not require a claimant who is objectively at risk also to be afraid. The refugee protection system was “certainly not designed to exclude brave or simply stupid

553 Kuta v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 851, 2009 FC 687 at para 6 (Campbell J).
556 This blend of the descriptive and the normative is a hallmark of the rational action paradigm. In law, for example, the “reasonable person” standard is made up of a “complex mixture of descriptive and normative characteristics” and “seamlessly intertwines” these two aspects. Moran, above note 482 at 2. The line between them is blurred in neoclassical economics as well: “theories derived from RAP [Rational Actor Paradigm], such as expected utility theory, combine a normative model of decision making (what people ought to choose to maximize their utility) with a behavioral model (people are rational and actually make such choices).” Jaeger, above note 44 at 153.
persons in favour of those who are more timid or more intelligent.”557 The Second Stream instead reaffirms that a “subjective fear” is necessary in every case,558 and suggests, on the contrary, that the refugee definition was not intended to apply to claimants who “could or should have been fearful” but were not, even if their lack of fear was “due to an inability to appreciate their surroundings.”559 In short, it is indeed proper, in theory, to exclude from the refugee definition “the stout and the stupid.”560

In practice this is a moot point, however, because for the Second Stream, rational and responsible people will not do anything particularly brave or particularly foolish. It is simply not plausible that a claimant “would have sold Christian materials during the Taliban rule by approaching strangers,”561 for example, or would have hung up the phone on the Tamil Tigers.562 A claimant who “disobeys serious threats” from a terrorist group cannot plausibly claim that she acted bravely. Either she was “fabricating or greatly exaggerating” the danger that she was facing, or else, despite the danger, she was not really afraid.563 A reasonable claimant will not support a religious or political cause if this will put his family at risk.564 And using his “own understanding


558 “A lack of evidence going to the subjective element of the claim will, in and of itself, be sufficient for the claim to fail.” Sukhu v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 515, 2008 FC 427 at para 25 in obiter (de Montigny J). See also Maqdassy v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 238 at para 10 (Tremblay-Lamer J); Contreras v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 797, 2007 FC 589 at para 8 in obiter (Snider J).

559 Kanvathippillai v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1172 at para 22 (Pelletier J).

560 Ibid.

561 Baktash v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 691, 2006 FC 549 at para 40 (Russell J).

562 Impett v. Canada (Minister of Citizenship and Immigration) [1996] FCJ No 1137 at para 3 (Wetston J).


564 Araya v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 821 at para 10 (Pinard J); Feng v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 556, 2010 FC 476 at paras 6, 11 (O’Reilly J); Dai
of human behaviour,” the member can reasonably conclude that it is “unlikely” that a gay claimant, “knowing he could be imprisoned or executed for same-sex acts, would kiss a man in a heterosexual club,” even if it was dark, and even if he was drunk.\textsuperscript{565} Indeed, the member can fairly conclude that a rational gay or lesbian person in a dangerous social context will simply remain celibate: having been “arrested, tortured and raped” by the police because of one same-sex relationship, it was not plausible that a claimant would “risk everything to have another.”\textsuperscript{566}

2.1.2.2 Failing to ask for protection at home

In Canadian law, refugee protection is “surrogate” protection, designed to come into play only if a claimant’s own state cannot or will not help her.\textsuperscript{567} While this notion serves primarily to limit Canada’s responsibility,\textsuperscript{568} the Second Stream infers from it that claimants have a corollary “responsibility”: they have “the responsibility to exhaust all courses of action available in their country before seeking international protection.”\textsuperscript{569} A claimant’s failure to approach the authorities at home before fleeing is therefore not merely a bar to a positive decision. It

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\textsuperscript{565} And even if, as the Court also notes, the evidence suggested that homosexuality was “seldom prosecuted.”\textsuperscript{Ndokwu v. Canada (Minister of Citizenship and Immigration)\textsuperscript{}} 2013 FCJ No 40, 2013 FC 22 at paras 15, 34, 16 (Shore J).

\textsuperscript{566} JRN v. Canada (Minister of Citizenship and Immigration\textsuperscript{}} [2005] FCJ No 1983, 2005 FC 1606 at para 17 (Kelen J).

\textsuperscript{567} See discussion in Chapter 3, s.1.2.


\textsuperscript{569} Hernandez v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1397, 2008 FC 1126 at para 18 (Tannenbaum J). See also Gurrola v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 104, 2011 FC 96 at para 32 (Bovin J); Ruszo v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1099, 2013 FC 1004 at paras 33-34 (Crampton CJ); Meci v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 909, 2014 FC 892 at para 38 (LeBlanc J); Salifu v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 29, 2008 FC 14 at paras 10, 20 (Lemieux J), in which the Court upholds the Board’s finding that where “the state is making a serious effort to protect women from domestic violence,” the claimant had “a duty to make herself aware of these services and accept assistance.” For a critique of this approach, see Hathaway 2014, above note 132 at 323-326.
demonstrates a “lack of diligence,” even if she believed that to do so would be futile: “Regardless of whether they thought the police could do nothing, if they were truly fearful they would have attempted to obtain protection from the State.” Further, whereas the First Stream emphasizes that a claimant’s vulnerability might explain her decision not to ask for help, the Court here finds that a claimant must make “all objectively reasonable efforts” to obtain her state’s protection, not merely the efforts that it might be reasonable to expect from her in her circumstances.

2.1.2.2.3 Failing to claim at the first opportunity

Similarly, whereas the First Stream finds that there is “no obligation under the Convention,” nor any legal presumption, that a genuine refugee will make his claim at the first reasonable opportunity, and that a claimant’s delay in claiming “cannot, in and of itself, justify the rejection

570 See for example Marquez v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 355, 2013 FC 325 at para 19 (Snider J); GENO v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 456, 2005 FC 367 at para 7 (Pinard J). See also Hippolyte v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 93, 2011 FC 82 at paras 13, 30 in which the Court upholds the Board’s finding on this point (Kelen J). For a judgment upholding the member’s finding that the claimant showed a “lack of diligence” in failing to pursue a claim in a safe third country, see Rios v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1806, 2006 FC 1437 at paras 14, 27-28 (Gibson J). For a judgment upholding the member’s finding that the claimant showed a “lack of diligence” in failing to obtain status abroad, see also Remedios v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 617 at paras 18-19, upholding the Board’s decision (Snider J).

571 GENO v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 456, 2005 FC 367 at para 7 (Pinard J).

572 See for example Ruszo v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1099, 2013 FC 1004 at paras 32 (Crampton CJ) [emphasis added]; Razburgaj v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 163, 2014 FC 151 at para 24 (Roy J); Merucz v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 497, 2014 FC 480 at para 15 (Roy J); Avagyan v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1064, 2014 FC 1003 at para 47 (LeBlanc J); Ivnaisshvili v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1177, 2014 FC 1056 at para 28 (O’Keefe J); Meci v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 909, 2014 FC 892 at para 33 (LeBlanc J).


574 Jumbe v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 691, 2008 FC 543 at para 12 (O’Reilly J): “Indeed, the Board stated that Mr. Jumbe had failed to rebut the presumption that refugee claimants will seek asylum at the first opportunity. As I understand it, there is no such presumption and, therefore, no burden of proof on refugee claimants to rebut it. Rather, a claimant’s behaviour and testimony must be considered by the Board, along with the other evidence, to determine whether he or she has a genuine fear of persecution. The Board was entitled to consider Mr. Jumbe’s evidence and his explanation for coming to Canada and to explain how it negated the existence of genuine fear. But it was not enough for the Board simply to state that the failure to claim elsewhere, in itself, proved an absence of subjective fear.”
of a claim,”575 the Second Stream sees things differently. Not only is there a “presumption” that claimants will make their claim at the first opportunity,576 but claimants have “an obligation” to do so.577 The “failure to have diligently sought protection at the first opportunity,”578 even “immediately,”579 may therefore be sufficient to deny the claim of an otherwise credible claimant.580

The First Stream suggests a number of reasons – other than bravery or stupidity – why a claimant who is genuinely afraid might not have made her claim at the first opportunity. For the Second Stream, these reasons are not compelling. The fact that a claimant had temporary legal status, and so was at no imminent risk of deportation, does not excuse this failure,581 even if582 – or

575 Juan v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1022, 2006 FC 809 at para 11 (Dawson J). See also Mendez v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 152, 2005 FC 75 at para 36 (Teitelbaum J).


577 Semextant v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 20, 2009 FC 29 at paras 1, 22 [emphasis added] (Shore J).

578 Saleem v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1715, 2005 FC 1412 at para 24 [emphasis added], referencing the respondent’s submissions with approval (see para 22) (Teitelbaum J).


581 See for example Olaya v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 987, 2012 FC 913 (O’Keefe J); Peti v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 68, 2012 FC 82 at para 42 (Scott J); Niyonkuru v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 210, 2005 FC 174 at para 23 (de Montigny J); Correia v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1310, 2005 FC 1060 at paras 10, 29 (O’Keefe J); Hassan v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1706, 2007 FC 1324 at paras 21-22 (Frenette J); Singh v. Canada (Minister of Citizenship and Immigration) [2007]
particularly if she had sought legal advice. At the same time, failing to seek legal advice may suggest a lack of subjective fear. In any case, when a person is advised that she cannot make a refugee claim, or that her claim would have little chance of success, this is no excuse for lying low, especially if this advice comes from family or friends rather than from a lawyer. The Board can reasonably dismiss the claimant’s evidence that she felt safe underground in light of the (supposedly) objective reality that without status she was in a “precarious situation” and “could have been deported…at any time.” On the other hand, the objective reality that “the rate of successful applications may be lower” in a safe third country than in Canada “does not justify the applicants’ failure to seek refugee protection” there regardless. And neither does wanting to reunite with family in Canada, or to make a claim in a country where they speak

FCJ No 97, 2007 FC 62 at paras 25-26 (Shore J); Earl v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 392, 2011 FC 312 at paras 46-48 (Scott J).

582 Correia v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1310, 2005 FC 1060 at paras 10, 29 (O’Keefe J).

583 Hassan v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1706, 2007 FC 1324 at paras 21-22 (Frenette J).

584 Ngwenya v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 195, 2008 FC 156 at paras 20-23 (Frenette DJ).


586 See for example Singh v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 254, 2013 FC 202 at para 16 (Shore J); Amrane v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 13, 2013 FC 12 at para 32 (Noël J).

587 Ramirez v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 820, 2012 FC 809 paras 33-34 (Snider J). As discussed in Cameron 2008, above note 52 at 577, this finding may be questionable. In the United States, for example, the country under discussion in Ramirez, by the turn of the millennium “INS raids ‘had become so rare that even top INS officials acknowledged that there was little risk of arrest for an undocumented worker, once across the border, unless he happened to get turned in by an employer’, and there was not much chance of that: in 2003, of the estimated 6.3 million undocumented workers in the United States, 445 were arrested at work.”

588 Bedoya v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 680, 2007 FC 505 at para 22 in obiter (de Montigny J). See also, for example, Remedios v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 617 at para 23 (Snider J); Rana v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 766, 2012 FC 453 at paras 28-29 (Near J).

589 See Olaya v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 987, 2012 FC 913 at para 54 (O’Keefe J); Gebetas v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1343, 2013 FC 1241 at paras 31-32 (Shore J).
the language, 590 or the fact that they were merely “passing through” on their way to Canada: 591 whether the claimant was in transit through a safe country for “five days,” 592 “three days,” 593 “one day,” 594 or “three hours,” 595 if she did not make a claim, the Board may properly infer that she was not really afraid of returning home.

2.1.2.2.4 “Reavailing”

For the Second Stream of the Court, the mother who risked returning home to her children was not really afraid: “If she had truly feared for her life, she would not have returned.” 596 Notwithstanding that he “missed his family,” a person who had fled persecution “would not return to his homeland because he was lonely.” 597 Whereas the First Stream stresses that a brief return home is not what the drafters of the Convention intended by the term ‘reavallment,’ the Court here rather concludes that “the technical definition” is not the point. 598 A brief return home may logically imply that the claimant was not afraid.

590 Khan v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 501, 2005 FC 403 at para 13 (Blais J).

591 See for example Saleem v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1715, 2005 FC 1412 at paras 22, 28 (Teitelbaum J); Gilgorri v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 701, 2006 FC 559 at paras 23-27 (Shore J). See also Pissareva v. Canada (Minister of Citizenship and Immigration) [2000] FCJ No 2001 at para 27 (Blanchard J).


594 Toure v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1668, 2004 FC 1388 at para 12 (Snider J); Priadkina v. Canada (Minister of Citizenship and Immigration) [1997] FCJ No 1769 at para 13 (Nadon J). See also the comment in obiter in Karakaya v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 805, 2014 FC 777 at para 17, that a failure to claim during a one-day stopover “may or may not be significant” (Strickland J).

595 Toure v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1668, 2004 FC 1388 at para 12 (Snider J).

596 Dzimba v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 676, 2007 FC 500 at para 58 (Martineau J).

597 JPHQG v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1713, 2008 FC 1329 at para 27 (Kelen J).

2.1.2.2.5 Conclusion

In some cases, the Court finds that the claimant’s failure to act rationally and responsibly provides real insight into his psychological state. This failure is genuinely “incompatible with the fear that he has put forward in making his claim.” In others, however, instead of focusing on their psychological validity, the Court emphasizes that these notions have a solid legal pedigree. The claimant’s return home supports a negative inference because the UN Handbook “states clearly that a refugee who voluntarily re-avails herself of the national protection of her country is no longer in need of international protection,” and in Canada this is now “trite law.” Similarly, the idea that a delay in claiming undermines a claimant’s allegation of fear is “a well established principle,” a “legitimate factor” and indeed an “important” one.

599 Fernando v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1129 at para 3 (Nadon J). See also for example Bobic v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1869, 2004 FC 1488 at para 6 (Pinard J); Niyonkuru v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 210, 2005 FC 174 at para 23 (de Montigny J); Peti v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 68, 2012 FC 82 at para 42 (Scott J); Amrane v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 13, 2013 FC 12 at para 31 (Noël J); Taruvinga v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1627, 2007 FC 1264 at para 11 in obiter (Snider J); Saleem v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1715, 2005 FC 1412 at para 30 (Teitelbaum J); Assadi v. Canada (Minister of Citizenship and Immigration) [1997] FCJ No 331 at para 14 (Teitelbaum J); Dzimba v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 676, 2007 FC 500 at para 58 (Martineau J); JPHQG v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1713, 2008 FC 1329 at para 27 (Kelen J).

600 Saeed v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 623, 2005 FC 496 at para 6 (Strayer DJ).

601 Houssou v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1730, 2006 FC 1375 at para 3 (Shore J). See also for example Khan v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 501, 2005 FC 403 at para 14 (Blais J); Mughal v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1952, 2006 FC 1557 at paras 33-34 (Lemieux J).

602 See for example Singh v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 97, 2007 FC 62 at para 24 (Shore J); Semextant v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 20, 2009 FC 29 at para 22 (Shore J); Handzo v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1125, 2004 FC 887 at para 8 (Pinard J).


604 See for example Semextant v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 20, 2009 FC 29 at para 22 (Shore J); Saeed v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 623, 2005 FC 496 at para 6 (Strayer DJ); Heer v. Canada (Minister of Employment and Immigration) [1988] FCJ No 330 (Heald, Marceau and Lacombe JJ).
In pressing these assumptions into service in cases where their psychological merit is questionable, the Court seems less concerned with the claimant’s fear and more concerned, as it is throughout, with her obligations, with her diligence and with notions of due process – concerns that take precedence when the Court imagines the claimant as a litigant like any other, rather than as a vulnerable person asking for help.

2.2 The member is an ordinary decision-maker

The Second Stream’s framing similarly shapes its view of the Board member and his role. The vulnerability highlighted by the First Stream – the claimant’s heightened susceptibility to being wrongly denied – arises, in the First Stream’s view, because the member must predict the future, an inherently uncertain exercise, and also because cultural and psychological factors combine to create a deep divide between the member and the claimant. The First Stream’s jurisprudence repeatedly makes the same fundamental point: that judging credibility across this chasm is a perilous undertaking. The member may have trouble getting a good read on the claimant because her experiences, and as a result her psychological make-up, are so different from his own.

Imagining claimants simply as litigants, however, changes this picture. As a matter of law, all tribunal adjudicators are assumed to have fact-finding expertise, so when it comes to assessing risk or judging credibility across cultures, Board members are not merely competent. They are experts. In addition, and regardless, the Second Stream emphasizes that like any adjudicator a Board member will make his decisions using the intellectual tools at his disposal: “common sense and reason.”

The Court here sees no reason why these tools should not be up to the task.

2.2.1 Expertise

The Supreme Court established in Dunsmuir that judges on review must assume as a matter of law that an administrative tribunal answering a question of fact has relevant expertise.

605 See cases in below note 616.


607 In Dunsmuir, the Court departed from the tenet that judges should defer to tribunals whose relevant expertise has been established. Instead, when tribunals are answering questions of “fact, discretion or policy” they will be
Second Stream applies this principle in force, finding as a result that members have “specific expertise” in “the assessment of risk,”608 and that they have “specialized expertise” in determining credibility609 – they have nothing less, in fact, than “full competence to appreciate the proof and the truthfulness of the applicant’s allegations.”610

Even before Dunsmuir made it a principle of law, however, the Second Stream had long held as a matter of fact that Board members are fact-finding experts.611 Their day-to-day experience in the hearing room not only leads them to develop “a well-established expertise” in determining credibility,612 and in assessing the conditions in a claimant’s home country,613 but also, contrary to the First Stream’s findings, it gives them expertise in assessing the genuineness of claimants’ presumed to have relevant expertise: “deference will usually apply automatically.” Ibid. at para 53. For discussion, see Cameron 2014, above note 194 at 4-14.


610 Singh v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 644 at para 12 (Lagacé DJ).

611 See for example Xin v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1769, 2007 FC 1339 at para 8 (Mandamin J).

612 See for example Dzey v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 181, 2004 FC 167 at para 19 (Mactavish J); Mohacsi v. Canada (Minister of Citizenship and Immigration) [2003] 4 FC 771, [2003] FCJ No 586 at para 18 (Martineau J). See also for example KKL v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 162 at para 7 (Martineau J); Toshia v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 2160, 2005 FC 1741 at para 22 (Rouleau DJ).

documents. In particular, the Board is “entitled to rely upon its knowledge regarding the availability of forged documents in a particular region to question their probative value.”

2.2.2 Common sense and reason

If the claimant is simply a litigant like any other, however, a member does not need expertise in order to decide her claim. If there is nothing special about her situation that puts it beyond the reach of his ordinary powers of understanding, he needs nothing other than his everyday “common sense and reason.” In judging the claimant’s demeanour, or the plausibility of her account, the member, like any other adjudicator, will do the best he can with what he has, and the Court here stresses the need to let him get on with it. Whereas the First Stream is concerned that a “microscopic analysis” of the claimant’s testimony may lead to a mistaken denial, the Second Stream is rather concerned that a “microscopic analysis” of the member’s reasoning – and in

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615 Gasparyan v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1103, 2003 FC 863 at para 7 (Kelen J); Lin v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 211, 2010 FC 183 at para 21 (Near J). In other judgments, the Court limits this principle by finding that the member is entitled to rely on the availability of false documents if she has other reasons to doubt the claimant’s credibility. See for example Tan v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 956, 2013 FC 911 at para 9 (Mactavish J); Khuabi v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 159, 2012 FC 141 at para 13 (Martineau J); Ali v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1419, 2004 FC 1180 at para 17 (Beaudry J).

616 See for example Ahamat v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 541, 2009 FC 422 at para 25 (Frenette DJ); Kaur v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 2112, 2005 FC 1710 at 17 (de Montigny J); Ahmad v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 995, 2004 FC 808 at para 23 (Rouleau J). See also for example Shahamati v. Canada (Minister of Employment and Immigration) (CA) [1994] FCJ No 415 (Pratte, Hugessen and McDonald J); Singh v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1754; 2004 FC 1448 at para 14 (Beaudry J); Chavarro v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1397; 2010 FC 1119 at para 30-32 (O’Keefe J); Francis v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1336; 2011 FC 1078 at paras 2, 7 (Shore J); Kiyarath v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1529, 2005 FC 1269 at 22 (Rouleau J); Zheng v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 919, 2007 FC 673 at para 17 (Shore J).

617 See for example Ayala v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1572, 2008 FC 1258 at paras 8-10 (Hughes J); Osaru v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 2109; 2005 FC 1656 at para 6 (Pinard J); Martinez v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 933, 2009 FC 798 at para 16 (Martineau J); AMH v. Canada (Minister of Citizenship and Immigration) [1997] FCJ No 820 at para 6 (Heald DJ); Rodriguez v. Canada (Minister of Employment and Immigration) [1993] FCJ No 890 at para 11 (Wetson J); Medina v. Canada (Minister of Employment and Immigration) (CA) [1990] FCJ No 926 (Iacobucci CJ
particular with an analysis that does not give his common sense its proper due – is overstepping the judge’s role on judicial review.618

2.2.2.1 Demeanour

The Second Stream concludes that there is no inherent danger in drawing credibility inferences based on a reading of the claimant’s demeanour. On the contrary, in refugee claims as in any other type of litigation – at the Board as “in every Court in the land”619 – these types of findings are perfectly proper.620 Members can reasonably doubt a claimant, for example, because of her “cautious and guarded manner”,621 or because her testimony was “laborious and hesitant”,622 or because he “showed a propensity for emotional outburst” and was “overly dramatic”;623 or, conversely, because his testimony was “totally devoid of any emotion or personal

and Heald; Stone JJ dissenting). See also Jiang v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 979, 2008 FC 775 at paras 12-14 (Teitelbaum DJ).

618 For a recent discussion see Mudrak v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 180, 2015 FC 188 at paras 52-72 (Annis J).

619 King-Adjei v. Canada (Minister of Employment and Immigration) [1992] FCJ No 285 (Jerome ACJ).

620 See for example Boye v. Canada (Minister of Employment and Immigration) [1994] FCJ No 1329 at para 4 (Jerome ACJ); Sommariva v. Canada (Minister of Citizenship and Immigration) [1996] FCJ No 410 at para 6 (Jerome ACJ); Monindra v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 1485 at paras 13-15 (Blais J); Zheng v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 919, 2007 FC 673 at para 17 (Shore J); Rahal v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 369, 2012 FC 319 at para 45 (Gleason J). Moreover, the fact that the member alone had the advantage of watching the claimant testify is often given as a primary reason for judicial deference to credibility findings. See for example Sanaei v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 449, 2014 FC 402 at para 63 (Strickland J); Gutierrez v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1251, 2010 FC 1010 at para 15 in obiter (Mandamin J); Zheng, above at para 17; Mofrad v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 974, 2012 FC 901 at para 10 (Gleason J). See Cameron 2014, above note 194 at 17-25 for a discussion and critique of the role of this so-called “observer advantage.”


623 Hristov v. Canada (Minister of Employment and Immigration) [1995] FCJ No 32 at paras 14, 24 (Cullen J). See also Shinmar v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 100, 2012 FC 94 at para 14 (O’Reilly J).
involvement.”624 The member is entitled to rely on the claimant’s “body language,”625 on “the inflection of the voice,” “the look in the eye.”626 And nothing in the Gender Guidelines purports to “preclude credibility findings based on demeanour” when a claimant testifies, for example, about her alleged gang-rape.627

2.2.2.2 Implausibility

Similarly, the Court here finds that the First Stream goes “too far” 628 in warning that the member should only make implausibility findings “in the clearest of cases.”629 Implausibility findings are “entirely within [the Board’s] field of expertise,”630 and are, regardless, simply a matter of “common sense and rationality.”631

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624 Ankrah v. Canada (Minister of Employment and Immigration) [1993] FCJ No 385 at paras 5, 9 (Noël J).

625 Singh v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 1312, 2009 FC 1070 at para 19 (de Montigny J).

626 King-Adjei v. Canada (Minister of Employment and Immigration) [1992] FCJ No 285 (Jerome ACJ).

627 SGVB v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 453, 2013 FC 401 at para 16 (Phelan J).

628 KK v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 74, 2014 FC 78 at para 69 (Annis J).

629 Valtchev v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1131 at para 7 (Muldoon J). See also for example Vodics v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1000, 2005 FC 783 at para 10 (Campbell J); Isakova v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 188, 2008 FC 149 at paras 11-12 (Campbell J); Chen v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 630, 2012 FC 545 at para 5 (Campbell J); Chen v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 778, 2014 FC 749 at 54 (Russell J). See also Santos v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1149, 2004 FC 937 at paras 14-15 (Mosley J).


631 See for example Khan v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 501, 2005 FC 403 at para 19 (Blais J); Chavarro v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1397, 2010 FC 1119 at para 32 (O’Keefe J); Pena v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 559; 2009 FC 455 at para 12 (Lagacé DJ).
The “general principles” that govern implausibility findings in law “apply equally to inferences in whatever context they are found,” and so the Court looks for guidance to the criminal and civil jurisprudence, most notably to a decades-old appeal of “a judgment giving damages for a libel imputing unchastity to the plaintiff respondent.” The Court concludes from this jurisprudence that, while any tribunal “should show some restraint” in making plausibility findings, for the line between “reasonable inferences and impermissible speculation” may be difficult to draw, the process is essentially an exercise in logic and “inductive reasoning.”

And whereas the First Stream emphasizes the differences in human experience, warning that the member might wrongly assume that his own culturally-specific experiences are universal, the Court here stresses that this “inductive reasoning process...utilizes the uniformity of prior human experience as its benchmark.” Since human experience is uniform, a member can rely on common sense and on his “own understanding of human behaviour” to judge the plausibility of a claimant’s story. In fact, when he puts himself in her shoes, its plausibility should be “readily” apparent: if her story is true, it will accord with what “a reasonable and informed person would readily recognize as reasonable in that place and in those conditions.”

632 KK v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 74, 2014 FC 78 at para 60 (Annis J).
633 Faryna v. Chorny (CA) [1951] BCJ No 152, [1952] 2 DLR 354 (O’Halloran, Robertson and Bird JJA) cited for example in Gonzalez v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 805 at para 27 (Sharlow J); Li v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 470 at para 9 (McKeown J); Canada (Minister of Citizenship and Immigration) v. Soltesz [2002] FCJ No 606 at para 8 (upholding the Board’s positive credibility finding) (Martineau J); Khan v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 501, 2005 FC 403 at para 19 (Blais J); Baktash v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 691, 2006 FC 549 at para 40 (Russell J); Vorobieva v. Canada (Solicitor General) [1994] FCJ No 1193 at para 8 (Rouleau J).
634 KK v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 74, 2014 FC 78 at para 68 (Annis J).
635 Ibid., at para 61.
636 Ibid.
637 Ibid.
638 Gonzalez v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 805 at para 27 (Sharlow J).
To the Second Stream, as discussed above, the conduct that “a reasonable and informed person would readily recognize as reasonable” is that which reflects a rational weighing of costs and benefits with an eye, above all, to minimizing health and safety risks. This notion not only colours how the Court interprets the claimant’s actions in the subjective fear context. In judging the plausibility of her story, the Court also applies this litmus test to the actions of others: to her family, to strangers, and even to the agents of persecution. In addition, the Second Stream’s understanding of how people testify relies heavily on a popular common sense theory of memory that the First Stream soundly rejects: that the human mind functions like a video recorder.

2.2.2.2.1 Rational action

2.2.2.2.1.1 Family

The First Stream suggests that parents who expose their children to danger through their own dedication to a political or religious cause are being “stupid and negligent.” The Second Stream rather finds that such conduct is simply implausible. A devoutly Christian parent in China would not ask his daughter to mail him prohibited Bibles from abroad; a freelance journalist would not involve his daughter in a risky investigation; Iranian parents would not support their son’s perilous decision to convert to the Baha’i faith. Since “any reasonable parent would do anything possible” to keep her children safe, and since people are presumed

640 Nejad v. Canada (Minister of Citizenship and Immigration) [1997] FCJ No 1168 at para 7 (Muldoon J).

641 The claimant testified that her father “felt the Chinese-drafted Christian bibles were incomplete.” Huang v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1090, 2012 FC 1004 at paras 8, 12, 30 (de Montigny J).

642 Vorobieva v. Canada (Solicitor General) [1994] FCJ No 1193 at paras 6, 11 (Rouleau J).

643 Hemmati v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 478, 2008 FC 383 at paras 18-21 (Frenette DJ).

644 Hazell v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1639, 2012 FC 1501 at para 32 (Noël J). The Court made this comment in reference to a mother who had allowed her children to return to her ex-partner, whom she claimed had abused her but had never abused the children. The Court concluded that “a mother who cares for her children would try to find any possible means to keep them safe from an abusive caregiver,” even if he had never hurt them. See also Rani v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 94, 2006 FC 73 at paras 7-8 (O’Reilly J). See, however, Lopez v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1648, 2011 FC 1349 at paras 17-18 (Martineau J), in which the Court upheld the Board’s finding that it was not believable that “for more than six years the principal claimant would continue to meet her former spouse, as much as 24 times per year, in order to simply appease him so that he would not try to abduct the children” (17). If she were
to be reasonable, the member can fairly conclude that such conduct is not merely “stupid and negligent” – it is too stupid and negligent to be believed.

2.2.2.2.1.2 Strangers

Common sense similarly dictates that a reasonable person would not endanger herself to save a stranger’s life. “While stories of a person helping a stranger are not unheard of;”\textsuperscript{645} such conduct is so exceptional that the Board is free to conclude, for example, that it is not believable that a “government official would have risked his position to provide false documents” to a person at risk,\textsuperscript{646} that “the neighbour of a friend would put himself at risk to smuggle out a stranger”\textsuperscript{647} or that a police officer charged with guarding a prisoner would have allowed him to escape.\textsuperscript{648} The Court in the latter case suggests, for example, that the officer’s conduct would only be believable if he had a personal or political interest in the outcome, if there was “evidence that the police officer was the Applicant’s close friend or that he was committed to anti-government activities.”\textsuperscript{649} On the other hand, common sense also suggests that once a person has begun to help another, he will “logically” see the project through to its conclusion. If the claimant’s neighbour had really helped her to escape to the United States, for example, “he, or his acquaintance there, would also have logically helped her seek asylum.”\textsuperscript{650}

\textsuperscript{645}Ghreibi v. Canada (Minister of Citizenship and Immigration) [1998] FCJ No 1583 at para 4 (Rothstein J). The Court notes that “the panel is on less firm footing on this implausibility finding,” but that it was ultimately “not unreasonable for the panel to find it implausible that a total stranger would put himself at risk to help the principal applicant in Libya without further explanation.”

\textsuperscript{646}Yogorajah v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1809 at paras 10, 22 (Rouleau J).


\textsuperscript{648}Ayerro v. Canada (Minister of Employment and Immigration) [1994] FCJ No 1240 at para 13 (Simpson J).

\textsuperscript{649}Ibid., at para 13.

\textsuperscript{650}DK v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1156, 2012 FC 1078 at para 69 (O’Keefe J).
2.2.2.1.3 Persecutors

For the First Stream, as noted above, it is an error of law to expect persecutors to act “rationally or justifiably.” The Court in fact makes the firm pronouncement that “terrorist groups often act irrationally,” and also the more nuanced observation that a persecutor’s actions, though they “may not seem reasonable at first blush,” may yet be understandable within their social context. As a result, the member should be very careful both in assuming that persecutors will choose the most reasonable way of persecuting, and in imagining from outside of the claimant’s social context what that would look like. The First Stream overturns decisions, for example, in which the Board doubted the claimant’s evidence because it found, in the judge’s paraphrase, that a “reasonable extortionist” would have extorted differently; or because it felt that her persecutor’s alleged demands were unreasonable; or because the agents of persecution either failed to carry out their threats when to do so would have been “reasonable,” or else unreasonably continued to persecute a claimant who was already complying with their wishes;

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652 Yoosuff v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1394, 2005 FC 1116 at para 8 (O’Reilly J); Selliah v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 614, 2006 FC 493 at para 6 (Harrington J).


655 Anthonimuthu v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 162, 2005 FC 141 at paras 47-48 (De Montigny J).

656 The Court notes that “common sense does not dictate that those who make threats always carry them out. Sometimes threats are carried out, sometimes they are not.” Zhou v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1394, 2012 FC 1252 at para 18 (Zinn J). See also ATI v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1192, 2011 FC 970 at para 11 (De Montigny J); Zacarias v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1252, 2012 FC 1155 at paras 14, 22 (Gleason J).

657 The Court rejects the Board’s conclusion that since the purpose of the first attack was “to keep the principal applicant quiet,” and since “it had succeeded,” there was therefore “no reason for a second attack.” Taboada v.
or because “it was reasonable to believe” that a persecutor “would have killed the applicant on the spot rather than taking the trouble of detaining him, torturing him and having him executed in a field approximately a month later.”658 And if an agent of persecution will “arrest or detain innocent people,” then the First Stream finds that it is perfectly plausible that the claimant was arrested for “no good reason.”659

The Second Stream, however, believes that people are rational, and so the member is free to assume that a persecutor, in persecuting, will act rationally. The member can properly infer that a claimant’s account is implausible because he suffered overly “harshly treatment” from his persecutors.660 Or else because he was not treated harshly enough: after repeated warnings, for example, the agents of persecution would have acted on their threats;661 having found “compromising documents” on his person, the security forces would not have released him;662 having begun to kiss the claimant, her partying kidnappers would not have fallen into a drugged stupor until they had finished sexually assaulting her (as the member asked, in a passage cited in full by the Court to demonstrate the soundness of this implausibility finding, “They were men or not men?”).663 In one case, while expressly recognizing that his country’s security forces engage in “arbitrary arrest,” the Court upholds the Board’s finding that it was implausible that the claimant was arrested given his testimony “that he had done nothing wrong.”664

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659 Yoosuff v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1394, 2005 FC 1116 at paras 8-9 (O’Reilly J).
660 Ayerro v. Canada (Minister of Employment and Immigration) [1994] FCJ No 1240 at para 10 (Simpson J). See also for example Culinescu v. Canada [1997] FCJ No 1200 (Joyal J).
662 Monteiro v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1720 at para 17 (Martineau J).
664 Ayerro v. Canada (Minister of Employment and Immigration) [1994] FCJ No 1240 at para 10 (Simpson J).
A rational persecutor will not ask a claimant for information that he cannot realistically be expected to provide. For the Second Stream, it is therefore implausible that a terrorist organization would continue to harass the claimant for information about his family members “though he affirmed on a number of occasions that he could provide no information.”665 One claimant testified that government agents had questioned him about a dissident from his region who had fled the country years earlier. Although the two had attended the same school, “they were not childhood friends,”666 and so the Court upholds the member’s finding that the government would not have bothered questioning him on this point.667 On the other hand, the member can infer from his “own understanding of human behaviour” that an agent of persecution, in interrogating the claimant under torture, would hardly fail to ask all of the proper relevant questions.668

Holding persecutors to the standard of rational action leaves little place for suboptimal decision-making and no place for ineptitude. Since a rational persecutor will seek the highest reward for the lowest investment, it is implausible that a criminal gang would try to kidnap the claimant rather than his “well-known and affluent” grandfather, for example (although the claimant had suggested that the gang’s purpose in kidnapping him might have been to extort his grandfather).669 And the claimant’s story that his attackers wore masks on one occasion but not

665 Faour v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 562, 2012 FC 534 at para 33 (Boivin J). See also Ariyaputhiran v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1775 at para 16 (Blanchard J), in which the Court upholds the finding that the Tamil Tigers (LTTE) would not continue to try to extort food and money from a woman with family abroad, since she “had informed the LTTE that she had no food to give them” and that “her children did not financially support her so she had no money to provide.” Since the claimant had lived beside an army base, the Board found that attempting to extort her would have put the Tiger soldiers at risk. The Court upholds the finding that the Tigers “would likely not risk life by targeting the applicant merely for food and shelter.”

666 Ayerro v. Canada (Minister of Employment and Immigration) [1994] FCJ No 1240 at para 12 (Simpson J).

667 Ibid.

668 The Court upholds the member’s finding that it was implausible “that Indian police did not question the Applicant on his trips abroad although he was suspected of recruiting Sikh youth for terrorist purposes.” Singh v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 254, 2013 FC 202 at para 37 (Shore J).

669 Gudino v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 560, 2009 FC 457 at paras 8, 18 (Teitelbaum DJ).
on another is too irrational to be believed. The First Stream, on similar facts, had stressed that “all kinds of possibilities may be imagined to explain this apparent contradiction,” including the possibility that on one occasion “the kidnappers simply made a mistake by not wearing masks.” Indeed, the First Stream notes that if some aspects of the claimant’s evidence are at odds with “the idea one may have of a kidnapping,” this could be because this particular crime was carried out by inexperienced criminals and was poorly planned and executed.

In short, whereas the First Stream finds that a claimant cannot be required “to explain logically the illogical actions” of his persecutors, here, the claimant’s evidence will not be believed unless she can provide a rational explanation for her persecutor’s conduct.

671 Quevedo v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1585, 2006 FC 1264 at para 17 (de Montigny J).
672 Ibid., at para 16.
673 Valtchev v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1131 at para 13 (Muldoon J). See also Taboada v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1395, 2008 FC 1122 at para 35 (O’Keefe J); Quevedo v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1585, 2006 FC 1264 at para 18 (de Montigny J): “The applicant cannot be required to explain the conduct of his kidnappers.”
674 See Cedillo v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 752, 2012 FC 492 at paras 25-27 (Scott J); Iyer v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1544, 2012 FC 1435 at paras 12, 25 (Boivin J). On a related note, the two Streams also disagree on whether and to what extent the member can take a group’s standard method of operation into account. The First Stream warns that, while country of origin information may give a sense of how a terrorist group, a gang or a police force normally operates, members should be very careful when basing plausibility findings on what persecutors “are likely to do” when they persecute. Members should not assume that a group’s “practices will be consistently uniform.” Weng v. Canada (Minister of Citizenship and Immigration), (25 October 2012), Ottawa IMM-1536-12 (FC) at para 6 (Barnes J), cited in Xu v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1024, 2013 FC 924 at para 14 (Annis J). See also for example Zacarias v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1252, 2012 FC 1155 at paras 13-14 (Gleason J); Quevedo v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1585, 2006 FC 1264 at para 16 (de Montigny J). The Second Stream, in contrast, stresses that the member can properly doubt the claimant’s evidence if it does reflect the agent of persecution’s usual practices, even if the relevant country evidence is merely silent on the point in question: the fact that “there is no evidence in the documentary record to indicate that the [Tamil Tigers] attempted to recruit Muslims for the purposes of spying,” for example, supports the Board’s decision to disbelieve the claimant’s evidence that the group had attempted to recruit her, a Muslim, for these purposes. Impett v. Canada (Minister of Citizenship and Immigration) [1996] FCJ No 1137 at para 3 (Wetston J). See also for example Pararasasingam v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 873, 2013 FC 805 at para 11 (Snider J); Wang v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 360, 2011 FC 229 at para 23 (Scott J); Monteiro v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1720 at para 17 (Martineau J).
2.2.2.3 Memory

Researchers studying the history of ideas about memory have observed that when we imagine how our memories work, we tend to make metaphors of the tools that we use to preserve our thoughts and experiences. These metaphors, in turn, inform our ideas about our own cognition. As our tools change, as we come up with new ways of recording information, so too do our ideas about memory.

In Plato’s time, people wrote by making impressions on wax tablets. When Plato describes memory as a wax tablet in the mind that can be stamped with ideas, this metaphor carries within it the notion that minds can have individual qualities that make them more or less capable of retaining information – whether the wax is soft or hard, grainy or smooth, will affect how clear the impression will be. Since wax melts, this metaphor also suggests that these impressions are malleable and impermanent. Several millennia later, we record our experiences with video cameras. As a result, in the popular imagination, “Memory is like a video recording of your observations that can be played back at will to remind you of what you saw.” Since a video recording has two essential qualities – it is complete (the camera captures everything within its ambit) and it is stable (over time the quality of the picture may degrade, but the picture itself will not change) – this image brings with it the idea that our minds record all aspects of the events that we experience, and that our memories remain unchanged over time.

Board members are often guided by this common sense notion in their assessment of a claimant’s evidence. The First Stream finds this problematic, as discussed above, but for the Second Stream, the member is entitled to rely on common sense in deciding how memory works, as he is entitled to rely on common sense in all aspects of his decision-making.

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677 See for example “Beyond Proof,” above note 234; Herlihy 2010, above note 204; Cameron 2010, above note 147.

678 At least absent evidence to the contrary – and the Court has yet to engage with the evidence that challenges this assumption. In one recent case, counsel referred the Court to “a study demonstrating the inaccuracy of memory” to
If memory functions like a video camera, then any gaps and inconsistencies in a claimant’s testimony are properly suspect. It is “logical” to expect that a former prisoner will recall the names of his fellow detainees, and proper to disbelieve a claimant’s evidence if he can remember only the first name of the police officer who helped him, and the post where he was stationed, but not his family name or address. The Board can reasonably rely on the fact that the claimant gave inconsistent evidence about his aunt and cousin’s ages, notwithstanding the fact that birthdays are not celebrated in his culture (and the claimant’s professed “inability to do math”). The member can properly draw a negative inference from the fact that the claimant testified on one occasion that an attack had occurred at “around 9-10 pm,” and on another that it had occurred at “around 8 pm” (the member rejected his explanation “that it was dark and that he simply testified to an approximate time,” since the claimant had “asserted that his testimony would be the truth”).

Moreover, if the member’s common sense suggests that a claimant’s mental recording will come with a date stamp then it is reasonable for him to conclude from her inability to recall the date of an event that she did not really experience it. It is proper to disbelieve a claimant because she

challenge the member’s finding that the claimant was not credible based on a single inconsistency in dates. The Court finds that this evidence, “though interesting,” was not properly admissible on review: as it had not been part of the body of evidence in the case, it could not affect the question of whether or not the Board’s common sense was reasonable. *Alfaro v. Canada (Minister of Citizenship and Immigration)* [2011] FCJ No 1118, 2011 FC 894 at paras 13, 16 (Near J).


682 *Sanaei v. Canada (Minister of Citizenship and Immigration)* [2014] FCJ No 449, 2014 FC 402 at para 12 (Strickland J). The Court notes that while this inconsistency “might be considered to be minor,” when it is considered “in the context of the evidence as a whole” it was not unreasonable for the member to rely on it (para 41).

cannot remember the dates of important events,\textsuperscript{684} or even of arguably unimportant ones. It is reasonable to disbelieve a claimant because he cannot specify, for example, “the dates of his short-lived relationship with his girlfriend” (in the claimant’s words, “it was a teenage relationship long ago”).\textsuperscript{685} If the member’s common sense suggests that the claimant will remember the date of a traumatic event “because it was traumatic,” this is reasonable.\textsuperscript{686} And where the claimant explains that his memory for dates is poor, the Court upholds the Board’s logical inference that this allegation is fatally undermined if he can remember \textit{any} dates at all: if the claimant can remember his own birthday,\textsuperscript{687} for example, or the date that she came to Canada.\textsuperscript{688} In one case, the Court points out that, despite his allegedly poor memory for dates, the claimant was able to specify that several of his friends had been murdered at Easter\textsuperscript{689} – a recollection perhaps aided by the fact that they were killed “while attending Easter events.”\textsuperscript{690}

2.3 Conclusion

The Second Stream prefers to err against the claimant, and not because the harm of mistakenly granting her claim is particularly salient. Rather, since the Court views the claimant as a litigant like any other, in a process like any other, it simply sees no reason to depart from the civil and administrative law’s long-standing preference for erring against the moving party.


\textsuperscript{685} \textit{Lopez v. Canada (Minister of Citizenship and Immigration)} [2014] FCJ No 123, 2014 FC 102 at paras 27-28 (Kane J).


\textsuperscript{687} \textit{Lopez v. Canada (Minister of Citizenship and Immigration)} [2014] FCJ No 123, 2014 FC 102 at para 28 (Kane J).

\textsuperscript{688} \textit{Navaratnam v. Canada (Minister of Citizenship and Immigration)} [2003] FCJ No 672 at para 37 (O’Keefe J).

\textsuperscript{689} \textit{Lopez v. Canada (Minister of Citizenship and Immigration)} [2014] FCJ No 123, 2014 FC 102 at para 28 (Kane J).

\textsuperscript{690} \textit{Ibid.}, at para 7.
Chapter 3  
The Obstacle Course

1 The First Stream: Tipping the balance in the claimant’s favour

To reflect its strong concern with the possibility of mistaken denials, the First Stream of the Court designs fact-finding in refugee law to reverse the default preference for erring against the moving party.

In civil and administrative law generally, the moving party bears the burden of proving her case. She must convince the decision-maker that her factual claims are more likely than not to be true. And while she may benefit from any number of presumptions specific to a particular doctrine, the general long-standing principle that a person’s sworn testimony is true will likely be of little help to her, because for centuries it has not been taken literally. In the First Stream’s obstacle course, in contrast, the member shares the burden of proof with the claimant. There is a very low standard of proof on the two factual questions at the heart of the claim, on the “twin elements of harm and failure to protect.” And the presumption of truthfulness gives her a meaningful leg-up in establishing the facts of her case. If these structures were the only ones at play, taken together they would trade more mistaken grants for fewer mistaken denials.

1.1 Burden of proof

For the First Stream, while the claimant retains the legal onus, and while she bears the burden of proof in the practical sense that she alone will suffer the consequences if her case cannot be proven, the Board member has a significant role to play in helping her to meet her evidentiary burden. This approach is universally supported in academic commentary, and follows the guidance of the UN Handbook, which advises that “while the burden of proof in principle rests

on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.”

The Handbook notes that at times a decision-maker may need “to use all the means at his disposal to produce the necessary evidence in support of the application.” The Board maintains a database of its own country conditions research, and the First Stream finds that members “should be expected to be aware” of its contents. In addition, when it comes to the claimant’s own evidence, the Court notes that it is “reasonable to expect that the panel would check information which is important to the refugee status claim if it is able to do so.” So the First Stream overturns decisions in which the member disbelieved the claimant’s testimony about his travel itinerary, for example, or his US immigration status, finding that this type of information was easily verifiable. In the same vein, it concludes that the Board erred in deciding that a claimant’s documents were likely fakes without first sending them to be tested. In one case, the Court suggests in obiter that the Board should “perhaps” have investigated whether or not the claimant’s father had in fact died, in light of the member’s own observation that officials

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692 The UN Handbook, above note 203 at para 203; UNHCR, “Note on Burden and Standard of Proof in Refugee Claims” (1998) at II.6 (online: http://www.refworld.org/docid/3ae6b3338.html); Credo, above note 60 at 192-193 (6.2) (“UNHCR Note”). For academic commentary see for example Hathaway 2014, above note 132 at 118-121; Gorlick 2003, above note 60 at 361-362; James A. Sweeney, “Credibility, Proof and Refugee Law” (2009) 21 International Journal of Refugee Law 700 at 724; Aleksandra Popovic, “Evidentiary Assessment and Non-Refoulement: Insights from Criminal Procedure” in Proof, above note 129, 27 at 52: “The applicant has the burden of proof for establishing a right to asylum only in the sense that s/he bears the risk of losing the case if the non-refoulement rule is found to be inapplicable.” See also Reneman, above note 140 at 195-208 for discussion of the burden of proof in the EU context.

693 The UN Handbook, above note 203 at para 196.

694 Chen v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1787 at para 24 (MacKay J).


696 Sitoo v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1850, 2004 FC 1513 at paras 17-18 (Harrington J).

697 Florez v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1478, 2004 FC 1230 at para 13 (Harrington J).

at the Canadian embassy could easily have confirmed or denied this allegation.\(^{699}\) In short, for the First Stream, “If the Panel raises something which it says is verifiable, and it can verify it easily, then it should verify it.”\(^{700}\)

The shared nature of the burden of proof is most often discussed, however, in the context of the member’s responsibility to identify the facts and arguments that may help the claimant to meet the definition of a refugee. For the First Stream, the member, unlike other decision-makers in other legal contexts, must do more than simply judge the case that is presented to him. He must also consider on his own initiative any potential winning arguments “that arise on the evidence”\(^{701}\) and that the claimant has failed to put forward. The Supreme Court, referencing the UN Handbook, has explained that “it is not the duty of a claimant to identify the reasons for the persecution,”\(^{702}\) and so the Court here finds that “the Board must consider all of the grounds for making a claim to refugee status, even if the grounds are not raised during a hearing by a claimant.”\(^{703}\) If the claimant frames her case in a way that focuses the Board’s attention on a losing argument, the member’s failure to look into it further is “perhaps not surprising,”\(^{704}\) but it


is nonetheless a serious error.\textsuperscript{705} In one case, where the member held that it was “not the duty of the panel to sift through the documentary evidence and make a case for any claimant when the claimant himself fails to make his own case,”\textsuperscript{706} the Court concludes, on the contrary, that this is “precisely” the Board’s duty.\textsuperscript{707}

Many have suggested that splitting the burden of proof in this way reflects “the manifest difficulties” that claimants have in proving their cases, as well as “the gravity of the possible consequences of a wrong determination.”\textsuperscript{708} As the UN Handbook explains, if refugee claimants bore the burden of proof in the same way as other litigants, “the majority of refugees would not be recognized.”\textsuperscript{709} For the First Stream, the shared burden of proof is “critical”\textsuperscript{710} because of what is at stake in a mistaken denial: the member must share the claimant’s burden, the Court explains, because “refugee claims involve fundamental human rights.”\textsuperscript{711} A shared burden of proof is critical, in other words, because it readjusts the error balance. If claimants bore their burden alone, the cost in rights violations would be too great.

1.2 Standards of proof

At the heart of every refugee claim is a question of fact: is the claimant at risk if she returns home? Whether or not the harm that she fears qualifies as persecution, and whether or not it

\textsuperscript{705} Ibid. See also in a related context, Bhuya v. Canada (Minister of Employment and Immigration) [1993] FCJ No 825 at para 13 (MacKay J).

\textsuperscript{706} Kathirkamu v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 592 at para 46 (Russell J).

\textsuperscript{707} Ibid.

\textsuperscript{708} Garlick, above note 191 at 57. See also comments of the British Upper Tribunal (Immigration and Asylum Chamber) in KS (benefit of the doubt) [2014] UKUT 00552 (IAC) at paras 59-60 (Storey J).

\textsuperscript{709} The UN Handbook, above note 203 at para 203.

\textsuperscript{710} Varga v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 531, 2013 FC 494 at para 5 (Rennie J).

\textsuperscript{711} Ibid. See also discussion at para 7, and the Court’s citation with approval of the following from the English Court of Appeal in Kerrouche, R (on the application of) v Secretary Of State For Home Department [1997] EWCA Civ 2263, [1997] Imm AR 610 (31st July, 1997): “The anxious scrutiny which has to be exercised in relation to all issues which could affect the safety of a refugee means that a more relaxed approach should be adopted in relation to procedural failures than would be the case if a less important issue were at stake.”
would befall her for one of the reasons recognized under the Convention, are subsequent questions of law. The claimant must first establish as matters of fact what Hathaway and Foster call the “twin elements of harm and failure to protect.”

In Canadian law, unlike in other jurisdictions, the standard of proof on this ultimate factual question combines two separate fact-finding thresholds, one for each of these “twin elements.” Since a claimant cannot be returned home if her fear of persecution is “well-founded,” Canadian law asks how much of an objective possibility of harm is needed to validate her fear. In other words, how much risk is risk enough? As discussed in the first section below, the First Stream answers this question with one of the very lowest standards of proof in Canadian law. But as well, the Supreme Court has made clear that refugee protection is only intended to act “as a back-up,” as “surrogate protection.” Even where a claimant is clearly and seriously threatened in her homeland, Canada is only obliged to shelter her if her own state is either “unable or unwilling” to do so. Canadian refugee law therefore asks what kind of help the

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135 Hathaway 2014, above note 132 at 295; see discussion at 292-297.

136 Article 1A of the Refugee Convention, above note 157; IRPA, above note 171, s. 96.

137 Article 1A(2) of the Refugee Convention, above note 157, and s. 96 of the IRPA, above note 171, stipulate that to qualify for refugee status a claimant must not only have a “well-founded fear,” he must also be either “unable or, by reason of that fear, unwilling to avail himself of the protection” of his home state. In practice, to investigate this requirement, the Court reverses the angle and looks at whether the state is “unwilling or unable” to protect the claimant. See for example Jiménez v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1837, 2011 FC 1523 at para 33 (Russell J); Mares v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 330, 2013 FC 297 at 41 (Gagné J); Orsos v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 310, 2015 FC 248 at para 18 (Rennie J); Cheema v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 494, 2015 FC 441 at para 29 (LeBlanc J). See also Canada (Attorney General) v. Ward [1993] 2 SCR 689, [1993] SCJ No 74 at para 18 (La Forest, L’Heureux-Dubé, Gonthier, Stevenson and Iacobucci JJ).
claimant can expect to receive from the authorities at home. How much protection is enough protection? As discussed in the second section below, in keeping with its preference for erring in the claimant’s favour, the First Stream answers this question in a way that ties it directly to the notion of risk.

1.2.1 The “well-foundedness” threshold: How much risk is risk enough?

Any risk assessment system will need to answer the fundamental normative question of where to draw the line between acceptable and unacceptable levels of exposure. The First Stream answers this normative question with “a special threshold unique to the refugee protection context,” one that is “meant to capture the concept of risk.” The Court does not require the claimant to prove, as the civil law would, that she is “more likely than not” to suffer the harm that she fears, but only that there is “more than a minimal or mere possibility” that she will. This novel standard of proof is “well-known and widely accepted” in Canadian law, but “notoriously difficult to express in simple terms,” and so the Court accepts a number of similar wordings, finding that a claimant will have met the risk threshold if there is a “reasonable

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717 For discussion, see Jaeger, above note 44 at 118: “…thresholds of acceptable risk are a matter of subjective preferences which cannot be decided on the basis of technical computations, optimization procedures or any form of “objective” expert knowledge. How safe is safe enough, then, is a question each actor must decide for himself.”

718 Alam v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 15, 2005 FC 4 at para 8 (O’Reilly J).

719 Muthuthevar v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 8, 2015 FC 1 at para 11 (O’Reilly J).


possibility,” a “reasonable chance,” a “serious possibility,” or “good grounds for believing” that she will come to harm.\(^{723}\)

All of these expressions describe a “low threshold, well below a balance of probabilities.”\(^{724}\) In fact, to say that this threshold is “relatively low” seems somewhat of an understatement:\(^{725}\) it is one of the very lowest standards in Canadian law, arguably surpassed only by the “air of reality” test in criminal law.\(^{726}\) Indeed, if it were any lower – if the claimant were required to show only a “mere possibility” – then she would succeed as long as her assertion was not impossible. The Court has explained that this low threshold reflects refugee law’s “humanitarian purpose,”\(^{727}\) an observation echoed by the UNHCR and in academic writings: “If we accept that the concept of ‘persecution’ should be interpreted and applied in a generous manner, then there is an inherent logic in not setting too high a standard in order for a victim of persecution to prove his or her claim.”\(^{728}\) And as the British Court has recently noted, refugee law’s low standard of proof “helps insure against the particularly grave consequences of ‘getting it wrong’ in a context in which the stakes are high.”\(^{729}\)

\(^{723}\) Ibid., at para 6. For a recent review, see Ramanathy v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 538, 2014 FC 511 at paras 15-17 (Mosley J).

\(^{724}\) Canada (Minister of Citizenship and Immigration) v. B272 [2013] FCJ No 957, 2013 FC 870 at para 81, citing the Board’s reasons with approval (de Montigny J).

\(^{725}\) Elbaker v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 780, 2014 FC 759 at para 17 (Locke J); Barreto v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1158, 2006 FC 913 at paras 7-9, citing the Board’s reasons with approval (Phelan J).


\(^{727}\) Carrillo v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 439, 2007 FC 320 at para 23, reversed on other grounds (O’Reilly J).

\(^{728}\) Gorlick 2003, above note 60 at 360 [emphasis in original]. In the EU context, Reneman similarly argues that while no standard of proof is specified in the Qualification Directive, “It follows from the principle of effectiveness that Member States cannot require asylum applicants to prove something which is impossible or excessively difficult to prove. In particular, it is argued that Member States may not require that a future risk of persecution or serious harm be proved.” Reneman, above note 140 at 85. See generally Hathaway 2014, above note 132 at 113-115; Reneman, above note 140 at 187-89; UNHCR Note, above note 692 at para 17; Norman, above note 132 at 279-80; Sweeney, above note 692 at 719.

\(^{729}\) British Upper Tribunal (Immigration and Asylum Chamber) in KS (benefit of the doubt) [2014] UKUT 00552 (IAC) at paras 59-60 (Storey J).
1.2.2 The state protection threshold: How much protection is enough protection?

The courts and legal authorities in other jurisdictions, like many academics and indeed like the UNHCR, have accepted that the “twin elements of harm and failure to protect” are two sides of the same coin. A failure of state protection is subsumed within the very notion of persecution under the Convention, and so a claimant facing a serious threat will be safe enough if, thanks to her state’s actions, her fear is not “well-founded,” and a claimant with a “well-founded fear,” by definition, is not getting the protection that she needs.

Canadian refugee law approaches this question differently. While the Supreme Court explains that the lack of state protection “is a crucial element in determining whether the claimant’s fear is well-founded,” in practice, both Streams of the Federal Court tend overwhelmingly to ask the “well-foundedness” and state protection questions separately and in sequence. Instead of considering the failure of state protection as a “crucial element” of the claimant’s risk of being persecuted, the Court asks whether the availability of state protection ought to disentitle a claimant who might otherwise be found to be at risk.

This difference is crucial from the standpoint of error preference. If the decision-maker investigates state protection in order to answer the risk question, then while a separate state protection analysis is required, a separate analytical threshold is not (because the low standard of proof on the risk question is already established). But if this question is an end unto itself – if the decision-maker first investigates the risk of persecution, and then looks into the availability of state protection as a potential bar to refugee status – this raises a new threshold question: against what standard should he judge a state’s willingness or ability to protect its citizens? Should he

730 Hathaway 2014, above note 132 at 295-6, in particular note 39.

731 For discussion see ibid., s. 4.2 (“Failure of state protection as an element of ‘being persecuted’”).


evaluate it in keeping with the low threshold for demonstrating a risk of persecution, or should some other standard apply? This has become one of the most enduring and heated debates in Canadian refugee law.

The First Stream, while treating the “failure to protect” question as one that requires its own analytical threshold, nonetheless sets this threshold in a way that makes this investigation part and parcel of the broader risk analysis. It finds that for a state’s protection efforts to negate a refugee claim, these efforts must be “effective.”734 The claimant’s home state must “actually provide adequate protection.”735 While it need not guarantee her safety, its actions must nonetheless make a tangible difference to her level of risk exposure.736 The fact that the country is willing to help, and is making “serious efforts” to protect people like her, is not sufficient.737 Where a state tries to combat domestic violence by passing laws or by training its police forces, for example, a “reality check”738 is needed. The Board must look at “what is actually happening”


736 See for example Csurgo v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1239, 2014 FC 1182 (Noël J); Orgona v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1545, 2012 FC 1438 at paras 5-16 (Zinn J); Kemenczei v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1457, 2012 FC 1349 at paras 57-60 (Russell J); Tatarski v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 798, 2010 FC 660 at para 10 (Beaudry J); Garcia v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 118, 2007 FC 79 at para 16 (Campbell J).

737 Ferko v. Canada (Citizenship and Immigration) [2012] FCJ No 1377, 2012 FC 1284 at para 55 (Kane J); Koky v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1715, 2011 FC 1407 at para 63, see generally paras 60-71 (Russell J). See also for example JB v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 358, 2011 FC 210 at para 47 (Scott J).

as a result of these efforts: whether these laws have had a “practical positive effect.” Whether the police now take the matter seriously. A state’s “good intentions,” in other words, “are simply not enough.”

1.2.3 Conclusion

The First Stream’s approach to establishing the “twin elements” at the heart of a refugee claim reflects its vision of fact-finding in refugee status determination as a risk assessment, one that should have little tolerance for mistaken denials. The member’s job, at the end of the day, is to decide whether or not the claimant faces “more than a mere possibility” of harm, and if she does, her country’s protection efforts will only matter if they actually make her safer.

By tying the state protection question to the risk question, the Court aims to keep the latter’s very low threshold firmly in place. For as the Court warns, in a related context discussed further below, a higher threshold on the state protection question could intervene to raise the low risk threshold indirectly. It “could mean that claimants who had discharged the general burden, by proving a genuine fear and a reasonable chance of persecution, would be denied refugee protection if they failed to establish an absence of state protection at a high standard of proof. In other words, claimants could be denied refugee protection even though they had met the definition of a refugee.”

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740 Tatarski v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 798, 2010 FC 660 at para 10 (Beaudry J).

741 As the Court explains, “when a woman calls the police at 3:00 am to say that her estranged husband is coming through the window, the question is, are the police ready, willing, and able to make serious efforts to arrive in time to protect her from being killed?” Garcia v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 118, 2007 FC 79 at para 16 (Campbell J).


743 Carrillo v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 436, 2007 FC 320 at para 26, reversed on other grounds (O’Reilly J). When the Court here refers to the “standard of proof” it is not referring to the “effective protection” threshold, but to the fact, discussed in s.2.2.2 below, that claimants are required to establish the facts of their cases on the “balance of probabilities” standard. The Court makes this comment in
1.3 Presumption of truthfulness

In the jurisprudence discussed in Chapter 2, the First Stream’s concern with mistaken denials is reflected not only in the conclusions that it reaches but also in its analytical approach. Throughout, the Court begins its analysis by assuming for the sake of argument that the claimant is telling the truth, in order to see what follows. Assuming that the claimant is a vulnerable person seeking protection, what can the Board expect – and what should it not expect – from her testimony and her conduct and her documents? This approach is reflected in the law’s fact-finding structures. Because the claimant has sworn to tell the truth, her testimony is presumed to be credible unless there are “valid reasons” to doubt her. On its face this is hardly surprising, for the presumption that unchallenged sworn testimony is true is found throughout Canadian civil and administrative law. It dates back at least to the Code of Hammurabi, and some rejecting the argument that this “balance of probabilities” standard of proof should be raised, but the same reasoning applies equally to raising the “effective protection” threshold, as discussed further below.

In the same vein, the Court typically begins its judgments by setting out the facts as put forward by the claimant, often without using qualifying words like “allege” or “claim,” and may continue in this manner throughout its judgment. So the Court comments in the context of its legal analysis, for example, that the claimants “fled their home as youth facing threats of violence,” even though the Board had found that they were not credible on this point (see for example Manege v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 418, 2014 FC 374 at para 38 (Kane J)). If the Court’s belief for the sake of argument on occasion sounds like belief plain and simple, it has explained that this is not its intent: “In quoting the applicant’s story as follows, I am not directing the [Board] on the redetermination to accept the applicant's evidence; it is for members of the panel to make their own findings of fact. Instead, my purpose is to simply stress the point that, in considering a story such as the one the applicant tells and in making a finding of credibility, a decision maker must consider the evidence from the perspective of the teller.” Griffith v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 1142 at para 3 (Campbell J).

Maldonado v. Canada (Minister of Employment and Immigration) (CA) [1979] FCJ No 248, [1980] 2 FC 302 at para 5 (Heald and Ryan JJ; MacKay DJ dissenting); Villarroel v. Canada (Minister of Employment and Immigration) (CA) [1979] FCJ No 210 at footnote 6 (Pratte, Urie JJ and Kelly DJ). See also for example Vodics v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1000, 2005 FC 783 at paras 10-11 (Campbell J); Valtchev v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1131 at paras 6, 26 (Muldoon J); Mahmud v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 729 at para 9 (Campbell J); Yotheeswaran v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1379, 2012 FC 1236 at para 4 (Campbell J). The Board is not obliged, by operation of this presumption, to accept a claimant’s inferences or opinions, only her testimony about the facts of her case. See for example Derbas v. Canada (Solicitor General) [1993] FCJ No 829 at para 3 (Pinard J); Ramos v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1496, 2012 FC 1372 at para 37 in obiter (Mandamin J).

have suggested that “the system itself could not survive” without it. Yet within the First Stream’s jurisprudence, this presumption has taken on very different dimensions from those found elsewhere. It has become a uniquely powerful means of expressing the Court’s preference for avoiding mistaken denials by tipping the error balance in the claimant’s favour.

1.3.1 In the civil and administrative law generally

Some have suggested that in earlier times, the presumption of truth was taken literally. It was believed that a person who had sworn an oath would very likely tell the truth because they would otherwise risk divine retribution. As this conviction fell to secularism – and, as one writer suggests, to empirical evidence in the form of a long history of litigation “without a single reported smiting on the witness stand” – the presumption lost much of its appeal as a guide to what to believe. Instead, as it now appears elsewhere in the law, the presumption that sworn testimony is true absent good reasons to find otherwise has become one part of a much larger conversation about judicial decision-writing and the sufficiency of reasons. Sworn testimony cannot be “wholly ignored” and “it cannot be swept away simply by the judge saying he disbelieves a witness.” To make a solid finding, the judge must have “some basis,”

39 at para 84 (Lamer CJ and La Forest, L’Heureux-Dubé, Gonthier and Cory JJ); Westmore v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1109, 2012 FC 1023 at para 45 (Russell J). For a review of the history of this presumption in other jurisdictions, see Singer, above note 84.


750 Singer, above note 84 at 353.


reasons” for dismissing sworn evidence, and she must share her reasoning with the witness so that he can understand why he was disbelieved even though he swore to tell the truth.

One of the principal reasons that the courts have endorsed for disbelieving sworn statements is that the person testifying has not provided sufficient evidence to corroborate her story. Elsewhere in the immigration context, for example, the Court has held that where a party has an interest in the outcome of the case, a lack of supporting documents may be reason enough to doubt her sworn evidence. In such cases, there may be “the need for further information to tip the balance in the Applicant’s favour.” In applying for permanent residence, for example, “the applicant is responsible for supplying enough supporting documents” to allow the government,

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756 As Zahle notes, for example, writing in the context of EU law, “In civil disputes about payments, a statement from the debtor will usually be available. The debtor may be credible, but the judge will regularly demand some evidence that the disputed payment actually took place. Credibility is not enough...In civil cases the explicit or implicit requests for evidence are widespread and form the basis for most of the evidentiary activity.” Zahle, above note 249 at 17.

757 See for example Mohan v. Canada (Citizenship and Immigration) [2012] FCJ No 1534, 2012 FC 1426 at para 50 in obiter (Shore J); Singh v. Canada (Citizen (Minister of Citizenship and Immigration) [2012] FCJ No 962, 2012 FC 855 at paras 29-30 (O’Keefe J); Lohat v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1542, 2012 FC 1432 at para 39 (Shore J). In other immigration contexts, the Court has held that a decision-maker is not making a credibility finding at all in dismissing sworn evidence that is uncorroborated, but is merely making a determination as to the weight to be given to it: “an affidavit unsupported by corroborating evidence often has limited probative value” (Mohan, above, at para 50); “Since such corroborating evidence was not before the Officer, there was no negative credibility finding. In short, the Officer was unconvinced by (but not in disbelief of) the evidence” (Lohat, above, at para 48). Since the affiants in these cases were giving evidence about their own family relationships, this reasoning seems unconvincing. If their evidence had been accepted as credible, it could hardly have failed to prove its point. Of note, in the US, recent changes to the law of evidence in the refugee context expressly allow claims to be denied where a claimant’s evidence is credible but uncorroborated. See Melanie A. Conroy, “Real Bias: How REAL ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants” (2013) 24 Berkeley Journal of Gender, Law & Justice 1 at 24-26.

758 Lohat v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1542, 2012 FC 1432 at para 44 (Shore J).
among other things, “to verify…the accuracy” of his testimony. Where this hard evidence is lacking, his unchallenged sworn statements can be rejected for this reason alone.

If a person’s credibility depends not on his oath, in other words, but on the evidence that he can gather to corroborate his claims, the law has come a long way from any real presumption that his sworn evidence is true. In addition, outside of refugee law, this presumption is rarely invoked, likely because the majority of litigation is adversarial, and in adversarial litigation any point of interest will either be conceded or challenged, leaving little room for it to operate. As noted above, it has been suggested (without further explanation) that this presumption still plays a vital role in the civil law. Yet as Hathaway and Foster note, it is not found in all legal cultures, and the Canadian criminal justice system is surviving despite having largely abandoned it: while the courts on rare occasion still apply this presumption to the evidence of the accused and of witnesses for the defense, they have held that it is inconsistent with the presumption of innocence when applied to the evidence of witnesses for the Crown. In the US, federal appellate courts broadly regard this instruction in the criminal context as not only “improper” but

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760 Hathaway 2014, above note 132 at 137.


“confusing and useless,” and some have suggested that in civil law, too, it “might well be dispensed with entirely.”

1.3.2 Within refugee law

The presumption of truthfulness entered refugee law through two sentences in a footnote. In discussing arbitrariness, in obiter and without citing authority, the Court of Appeal in *Villarroel* mused that a decision-maker would act arbitrarily if it were, for example, to reject sworn testimony without “valid reasons.” Shortly after, the same Court in *Maldonado* picked up on this reasoning, repeating it without elaboration to make a finding that the Board had in fact acted arbitrarily. This decision has become one of the cornerstones of Canadian refugee law.

How and why did a seemingly “useless” presumption come to be so important? The answer is that the First Stream of the Court, gravely concerned by the possibility of mistaken denials, recognized that if properly reinterpreted this presumption had the potential to tip the error balance, to make it less likely that a genuine refugee would be disbelieved. As this presumption now operates within the First Stream’s jurisprudence, it gives a tie to the runner. Since the claimant no longer bears the legal burden of proving his credibility, if the member cannot determine whether or not he is telling the truth, she must accept his evidence. It also tips the

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763 See n. 67 in Singer, above note 84 at 354. The US Federal courts have cautioned that the presumption of truthfulness “may ‘dilute,’ ‘conflict with,’ ‘seem to collide with,’ or ‘impinge upon’ a criminal defendant’s presumption of innocence; ‘clash with’ or ‘shift’ the prosecution's burden of proof; or ‘interfere’ with or ‘invade’ the province of the jury to determine credibility.” *Cupp v. Naughten*, 414 US 141 (1973) at 145 cited in Singer, above, at 353.

764 *State v. Kessler* 458 P.2d 432 (Oregon Supreme Court) (1969) at 435 (McAllister PJ, O’Connell and Denecke JJ), cited in Singer, above note 84 at 352. See also Singer at 370-1.

765 *Villarroel v. Canada (Minister of Employment and Immigration) (CA)* [1979] FCJ No 210 at footnote 6 (Pratte, Urie JJ and Kelly DJ).


767 See for example *Igbalajobi v. Canada (Minister of Citizenship and Immigration)* [2001] FCJ No 593 at para 6 (McKeown J). Because it serves this tie-breaker function, some have suggested that “the presumption of truth is merely a way ‘to get the jury off dead center’.” *Cupp v. Naughten*, 414 US 141 (1973), cited in Singer, above note
error balance in other more subtle ways that are equally significant: it increases the Board’s ‘burden of explanation’ and limits it to negative findings; it lightens the claimant’s evidentiary burden; and it instructs the decision-maker about the law’s error preference.

1.3.2.1 The presumption increases the Board’s “burden of explanation” and limits it to negative findings

Any tribunal decision-maker making any kind of decision must give reasons that allow judges on review to determine whether its conclusions are justified, transparent and intelligible. The First Stream makes clear that when it comes to displacing the presumption of truthfulness in a refugee hearing, in order to meet this standard of review, the Board must do more than identify “some basis” for its decision. The member must set out his thinking in “clear and unmistakeable terms,” giving “specific and clear reference to the evidence.” He will typically need to provide “examples or illustrations” of the kinds of factors that led him to doubt the claimant, and to explain their relevance. The Court holds, for example, that in finding that the claimant “was not straightforward,” that she “took long pauses to answer certain questions” and was

84 at 352. This is overlooking the fact, however, that a tie-breaker mechanism was already in place. The presumption has merely shifted the legal onus, not created it.


769 Hilo v. Canada (Minister of Employment and Immigration) (CA) [1991] FCJ No 228 at para 6 (Heald, Stone and Linden JJ). See also for example Isakova v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 188, 2008 FC 149 at para 10 (Campbell J); Martinez v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1017, 2005 FC 939 at paras 7-8 (Mactavish J).

770 Leung v. Canada (Minister of Employment and Immigration) [1994] FCJ No 774 at para 14 (Jerome ACJ); Assouad v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 121, 2006 FC 955 at para 1 (Shore J). See also for example Younes v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1210, 2013 FC 1122 at para 2 (Campbell J); Keqaj v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 495, 2008 FC 388 at paras 2, 63 (Shore J).

771 Gonzalez v. Canada (Minister of Employment and Immigration) [1993] FCJ No 1256 at para 5 (Simpson J);Ccanto v. Canada (Minister of Employment and Immigration) [1994] FCJ No 149 at para 27 (Cullen J); Shamlou v. Canada (Minister of Citizenship and Immigration) [1995] FCJ No 1537 at n. 4 (Teitelbaum J); Babchine v. Canada (Minister of Citizenship and Immigration) [1996] FCJ No 204 at para 4 (Cullen J).
“vague in her responses,” the Board used “ambivalent terms” that were not sufficiently clear. Indeed, in some decisions, the member’s “very clear duty to justify its credibility finding” looks less like the “burden of explanation” that it bears in its fact-finding generally, and more like the evidentiary burden normally born by a party. The Board must not only explain its reasoning but must provide the decision-maker – in this case, the judge on review – with sufficient “evidence to support its findings.”

Were it not for the presumption of truthfulness, the Board would also be required to provide cogent reasons to justify its positive credibility findings. Instead, with positive findings, the presumption does all of the work: the member can simply conclude in a sentence that he has found no reason to displace it. In short, by requiring the member to justify its displacement, the presumption makes negative decision-making more onerous than positive decision-making, and ensures, all else being equal, that negative decisions are more susceptible than positive ones to being overturned on review.

1.3.2.2 The presumption lightens the claimant’s evidentiary burden

The First Stream interprets the credibility presumption in keeping with its working assumption that the claimant’s testimony is actually true. Seen from this angle, as long as the presumption remains in place, the fact that the claimant has an interest in the outcome of the hearing is

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772 RKL v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 162 at para 16 (Martineau J).

773 Leung v. Canada (Minister of Employment and Immigration) [1994] FCJ No 774 at para 14 (Jerome ACJ).

774 “The Board has a burden of explaining why it did not consider objective documentary evidence that appears to squarely contradict its finding of fact.” Sekeramayi v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1066, 2008 FC 845 at para 25 (Kelen J). See also Chavi v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 63, 2008 FC 53 at para 14 (Kelen J); Maimba v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 296 2008 FC 226 at para 24 (Kelen J).See also Hinzman v. Canada (Minister of Citizenship and Immigration); Hughey v. Canada (Minister of Citizenship and Immigration) (CA) [2007] FCJ No 584, 2007 FCA 171 at para 60 (Décary, Sexton and Evans JJJA). In addition, the Board’s “burden of explanation increases with the relevance of the evidence in question.” Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration) [1998] FCJ No 1425 at para 17 (Evans J).

775 Valtchev v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1131 at paras 13, 17, 26 (Muldoon J).
irrelevant.\textsuperscript{776} Since her evidence is true, it must be accepted even though she may have a motive to lie. And since her evidence is true, it must be accepted whether it is corroborated or not.\textsuperscript{777} Both as a matter of legal logic, and in light of comments to this effect in the UN Handbook,\textsuperscript{778} the Court finds that the Board cannot draw a negative inference from the claimant’s failure to provide corroborating evidence unless and until it doubts her testimony. The member cannot disbelieve the claimant simply because she has failed to call a witness, for example, and the Court expressly notes that in this respect the presumption operates differently in refugee law than elsewhere, including elsewhere in the immigration law context.\textsuperscript{779} In addition, and crucially, the Court stresses that the very fact that supporting documents are lacking cannot be what displaces the presumption, even if the claimant’s reasons for the lack of documents are unconvincing.\textsuperscript{780} Such circular reasoning “circumvents the presumption that sworn testimony is truthful” by working backwards to “reverse engineer” a negative decision: the “failure to produce documents would create a credibility concern allowing the Board to consider his failure to produce

\textsuperscript{776} See for example Coelho v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1269, 2004 FC 1037 at para 7 (Snider J); Sanchez v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1673, 2008 FC 1336 at para 58 (Russell J); Razzak v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 951, 2005 FC 752 at para 13 (Shore J); Ramsaywack v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 999, 2005 FC 781 at para 14 (Mactavish J); Naqvi v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 982, 2008 FC 779 at para 16 (Lagacé DJ); Naqvi v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 951, 2005 FC 781 at para 14 (Mactavish J); Naqvi v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 882, 2008 FC 689 at para 16 (Mandamin J).

\textsuperscript{777} See for example Ahortor v. Canada, [1993] FCJ No 705 at para 50 (Teitelbaum J); Mahmud v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 729 at para 10 (Campbell J); Al Ismaili v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 78, 2014 FC 84 at para 36-60 (Strickland J); Vodics v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1000, 2005 FC 783 at para 17 (Campbell J); EN v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 473, 2013 FC 452 at para 6 (Rennie J); Durrani v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 203, 2014 FC 167 at para 6 (Zinn J); Canadian Council for Refugees v. Canada [2007] FCJ No 1583, 2007 FC 1262 at para 222, overturned on other grounds (Phelan J); Zheng v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1267, 2007 FC 974 at para 9 (Dawson J).

\textsuperscript{778} UN Handbook, above note 203 at paras 196, 203, 204, discussed further below in s.1.3.2.3.

\textsuperscript{779} Naidu v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 719, 2007 FC 527 at para 28 (Tremblay-Lamer J). See also Nezhalskyy v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 265, 2015 FC 299 at para 17 (Tremblay-Lamer J). The Court explains in Naidu, a judgment in the immigration law context, that in “the refugee context…it is an important principle that there is a presumption of truth that whatever a claimant swears to is true and the truthfulness of a claimant’s allegations cannot be rebutted through negative inferences. The case at hand is not a refugee case and the Board was entitled to draw a negative inference.”

\textsuperscript{780} See for example Dayebga v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 965, 2013 FC 842 at para 27 (O’Keefe J); Ayala v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 758, 2011 FC 611 at paras 20-21 in obiter (Near J); Al Ismaili v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 78, 2014 FC 84 at paras 51-55 (Strickland J); Ahortor v. Canada, [1993] FCJ No 705 at para 50 (Teitelbaum J).
documents as a reason to doubt credibility.” The Court has concluded, as a result, that the member may only start down the path of drawing a negative inference from the lack of supporting evidence once some other credibility concern has “opened the door.”

1.3.2.3 The presumption instructs decision-makers: the “benefit of the doubt”

Despite the presumption of truthfulness, the claimant retains the burden of persuasion as a practical matter. From the start of the hearing to the end, she will likely be trying with every breath to persuade the member that she is telling the truth. She likewise retains a strong practical evidentiary burden. Where corroborating evidence is available, unless she makes every effort to get it, she risks being disbelieved if the member doubts her for some other reason and the door is opened (or if, as discussed below, the member follows a different school of thought on the corroboration question). But because of the presumption, fewer claimants will be wrongly disbelieved than would have been without it. In exchange, of course, more claimants will be wrongly believed – or rather, will be wrongly accepted as credible, whether they are believed or not. For the presumption, as interpreted by the First Stream, may require a member to err on the side of the claimant even in the face of significant misgivings.

The UN Handbook explains that a decision-maker will often need to give the claimant “the benefit of the doubt.” This “has become one of the most frequently quoted phrases in refugee

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781 Dayebga v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 965, 2013 FC 842 at para 27 (O’Keefe J). See also Ayala v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 758, 2011 FC 611 at para 20 in obiter (Near J): this type of reasoning “plants as the seed of incredibility the lack of corroborating documentary evidence instead of using the lack of documentary evidence to buttress an existing adverse credibility finding.”

782 Al Ismaili v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 78, 2014 FC 84 at para 43, see also paras 54-56 (Strickland J).

783 For discussion of this distinction, see Kagan, above note 140 at 381-383; Sweeney, above note 692 at 703-704.

784 “[I]f the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.” The UN Handbook, above note 203 at para 196. “After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to “prove” every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.” Ibid. at para 203.
law,” and it has been the subject of much legal and academic debate. Some argue that it should be interpreted broadly, in a way that adds to the scope of the law’s duty to protect: “If there is doubt about the applicability of the non-refoulement rule it should be applied. When in doubt, abstain from removal! This is the proper meaning of the term ‘benefit of the doubt’ in the asylum context.” Others suggest, however, that this phrase aims to ensure that claimants are properly “deemed credible” where corroborating evidence is lacking, and indeed, this is the context in which it appears in the Handbook. If the claimant’s testimony is otherwise believable – if it is “coherent and plausible” and in keeping with “generally known facts” – the decision-maker should give it “the benefit of the doubt” and accept it as true, even if it cannot be independently proven.

In keeping with this latter approach, the First Stream of the Court uses the notion of the “benefit of the doubt” to emphasize the consequences of the strong presumption of truthfulness. It uses this phrase to highlight the fact that credible claimants are not required to corroborate their

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786 For a review and discussion see Kagan, above note 140 at 371-374; Sweeney, above note 692 at 714-719; KS (benefit of the doubt) [2014] UKUT 00552 (IAC); Allan Mackey, “Introduction to the Credo Project” in “Assessment of Credibility,” above note 60, 67 at 79; Credo, above note 60 at 147-150 (3.7. (D) “Residual doubts and Article 4 QD”); Popovic, above note 692 at 52; Hathaway 2014, above note 132 at 120-121.
787 Popovic, above note 692 at 52.
789 “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.” The UN Handbook, above note 203 at para 204. See also discussion in Sedigheh et al. v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 239, 2003 FCT 147 at paras 54-56 (Snider J); Ariayputhiran v. Canada (Minister of Citizenship and Immigration) (2002) FCJ No 1775, 2002 FCT 1301 at para 27 (Blanchard J).
790 The UN Handbook, above note 203 at para 204. See also Credo, above note 60 at 147-150 (3.7. (D) “Residual doubts and Article 4 QD”); Sedigheh et al. v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 239, 2003 FCT 147 at paras 54-56 (Snider J); Ariayputhiran v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1775, 2002 FCT 1301 at para 27 (Blanchard J). As such, the Court suggests that these passages in the Handbook “do no more than repeat the principle that the Refugee Division can be guided by informal rules of evidence.” Ndumiana v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1084, 2002 FCT 812 at para 18 (Lutfy ACJ); Anwar v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1434, 2002 FCT 1077 at para 61 in obiter (Beaudry J).
statements.\textsuperscript{791} It uses it to stress that members need solid grounds for displacing the presumption, noting that unreasonable credibility findings deprive the claimant of the “benefit of the doubt.”\textsuperscript{792} In the same vein, it uses a modified version of the phrase – that the claimant’s testimony should be given “the benefit of any unsupported doubt”\textsuperscript{793} – to underscore the Board’s duty to give sufficient reasons for its negative determinations. The Court makes no judgments using this language, in other words, that it could not have made without it. As a fact-finding tool, “the benefit of the doubt” is superfluous.\textsuperscript{794}

But like the seemingly superfluous presumption of innocence, the power and usefulness of this notion lies instead in its ability to instruct decision-makers about which is the wrong kind of mistake. Garlick argues that the “benefit of the doubt” wording in the Convention reflects the drafters’ concern with mistaken denials: it “reflects recognition of the considerable difficulties applicants face in obtaining and providing evidence to support their claim, as well as the

\textsuperscript{791} See for example Kulasekaram v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 433, 2013 FC 388 at paras 23-25 (Shore J); Ngarah v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1882, 2005 FC 1525 at paras 25-27 in obiter (Blanchard J).

\textsuperscript{792} Mohacsi v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 586, [2003] 4 FC 771 at para 31 (Martineau J); Garande v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1735, 2006 FC 1383 at para 19 (Shore J); Utrera v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1572, 2007 FC 1212 at paras 19-20, 71-73 (Shore J).

\textsuperscript{793} See for example Vodics v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1000, 2005 FC 783 at para 11 (Campbell J) [emphasis added]; Mahmood v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1883, 2005 FC 1526 at para 18 (Blanchard J); Roozbahani v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1867, 2005 FC 1524 at para 28, see generally paras 26-28 (Blanchard J); Chen v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 630, 2012 FC 545 at para 5 (Campbell J); Herrera v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1499, 2005 FC 1233 at para 18 (Teitelbaum J); Rojas v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 90, 2011 FC 710 at para 4 (Campbell J); Pinzon v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1411, 2010 FC 1138 at para 5 (Campbell J). See also Horvath v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1649, 2011 FC 1350 at para 29 (Mandamin J). See also Canada (Minister of Citizenship and Immigration) v. Zhang [2008] FCJ No 869, 2008 FC 686 at paras 12, 17 (Zinn J), in which the Court appears willing accept the Board’s decision to apply the “benefit of the doubt” directly to the burden of proof (although the Court overturns the decision on other grounds). In the words of the panel, “This case is very close to the wire and I’m going to, however, give you the benefit of the doubt and I’m going to find that you are a Convention refugee.”

\textsuperscript{794} Hathaway and Foster similarly argue that this notion “adds little to the intentionally low threshold of the test of well-founded fear.” Hathaway 2014, above note 132 at 120. See also the concurring comments of the UK Upper Tribunal (Immigration and Asylum Chamber) in KS (benefit of the doubt) [2014] UKUT 00552 (IAC) at para 75: that this wording is “no more than [a] useful particularisation of the lower standard of proof.”
potentially grave consequences” of denying protection to genuine refugees. Indeed, giving “the benefit of the doubt” is one of the few examples in everyday language of an expression of error preference. When the First Stream of the Court uses this wording, it highlights the fact that when all is said and done, the member may be left in doubt. Since the presumption of truthfulness decrees that this doubt may not harm the claimant unless the member can support it with valid reasons, if she cannot quantify her suspicions, she will simply have to accept evidence that she distrusts – she may even have to accept evidence that she strongly believes is untrue. Wherever this phrase appears in the Court’s judgments, it serves to reassure a member who suspects that she is about to make this kind of mistake that this is better than the alternative.

In short, the Court suggests that the presumption that sworn testimony is true is “trite law” and it is – but not as it appears in refugee law. On the contrary, the First Stream has departed from the principles elaborated elsewhere because of its view that refugee claims are a special case, and because of its concern about the possibility of mistaken denials. In its reinterpreted guise, the presumption of truthfulness becomes a powerful tool for readjusting the error balance. It is also, as Hathaway and Foster note, “Perhaps the strongest affirmation” in refugee law internationally of the need to approach the claimant’s evidence “with an open mind.”

1.4 Conclusion

The UN Handbook suggests that if the same approach to evidence that governs other areas of law were to apply to refugee status determination, “the majority of refugees would not be recognized.” This same concern has been raised by legal academics and indeed by Justice

795 Garlick, above note 191 at 53.

796 If the Board “is unable to articulate why it is suspicious of the sworn testimony,” it must find that the claimant is credible despite its suspicions. Mahmood v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1883, 2005 FC 1526 at para 18 (Blanchard J). See also Vodics v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1000, 2005 FC 783 at para 11 (Campbell J).

797 Gjeta v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 915, 2014 FC 905 at para 31 (Mandamin J); Kumar v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 186, 2010 FC 161 at para 16 (Zinn J).

798 Hathaway 2014, above note 132 at 137.

799 The UN Handbook, above note 203 at para 203.
LaForest of the Supreme Court, in dissent: refugees should not be “thwarted by an unduly stringent application of exacting legal proof.”

The First Stream of the Court cites Hathaway: in refugee status determination, “evidentiary and contextual concerns make departure from traditional modes of adjudication imperative.” In designing refugee law’s fact-finding obstacle course, it therefore departs from the typical civil and administrative blueprint. It seeks to tip the balance in the claimant’s favour by splitting the burden of proof; by imposing a uniquely low standard of proof and keeping it firmly in place; and by breathing new life into the presumption of truthfulness. If these structures were the only ones at play, they would trade more mistaken grants for fewer mistaken denials. In addition, as discussed below, they would make fact-finding in refugee law reflect the logic of a risk assessment, rather than the logic of a legal proceeding: members would genuinely seek to evaluate the risk facing claimants. Yet these structures only tell half of the story. They come up against a set of others that reflect a very different vision of refugee claimants and refugee status determination and that have the opposite effect.

2 The Second Stream: Tipping the balance against the claimant

For the Second Stream of the Court, the claimant is the moving party in a standard quasi-judicial proceeding and so should bear the error burden. The Court therefore gives the claimant the burden of proof, either by flatly denying that it is shared at all, or else by whittling away at the member’s portion of the responsibility until little, if any, remains. It tries to raise refugee law’s

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800 Chan v. Canada (Minister of Employment and Immigration) [1995] 3 SCR 593, [1995] SCJ No 78 at para 57 (Sopinka, Cory, Iacobucci and Major JJ; La Forest, L'Heureux-Dubé, Gonthier JJ dissenting). The English Court of Appeal in Kerrouche, R (on the application of) v Secretary Of State For Home Department [1997] EWCA Civ 2263, [1997] Imm AR 610 (31st July, 1997) similarly speaks of the “anxious scrutiny which has to be exercised in relation to all issues which could affect the safety of a refugee” and the consequent need for a “relaxed approach” to certain questions of evidence. The Court cites this judgment with approval in Varga v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 531, 2013 FC 494 at para 7 (Rennie J); Galyana v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 305, 2011 FC 254 at para 9 in obiter (Zinn J).

own very low standard of proof on the ultimate risk question, and also to side-step it: by imposing the civil law’s much higher standard of proof on all underlying questions of fact, it ensures that evidence that would not pass muster in a regular civil proceeding is done in long before the lower standard ever has the chance to operate. In addition, legal decision-makers are rarely asked to assess risk in the way that the First Stream imagines that members should. Instead, decision-makers are typically asked to assess responsibility and liability, and so the Second Stream approaches the state protection question as a measure of the state’s responsibility, rather than as a measure of the claimant’s level of risk exposure – and it emphasizes that in any investigation into their liability, states should be presumed innocent. Lastly, it works to bring the presumption of credibility back into line with the much weaker version that operates in civil proceedings generally. On all fronts, the Second Stream tries to counteract the First Stream’s exceptionalism, to make fact-finding operate in refugee law as it does elsewhere, and, in particular, to make it reflect the logic of a legal proceeding rather than the logic of a risk assessment.

2.1 Burden of proof

For the First Stream, the cost of imposing the full burden of proof on vulnerable claimants is too steep. Too many genuine claims would collapse under its weight. If the claimant is a litigant like any other, however, then it is “trite law” that he bears the burden of proof;\(^\text{802}\) the member must “not lose sight” of this fact;\(^\text{803}\) and a claimant who has failed to “fulfill his obligations and assume his burden of proof” has only himself to blame.\(^\text{804}\) Whereas the First Stream holds that

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\(^{802}\) Samseen v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 727, 2006 FC 542 at para 14 (Pinard J); Gulabzada v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 572, 2014 FC 547 at para 14 (Strickland J). See also for example Al Ismaili v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 78, 2014 FC 84 at para 32 (Strickland J); Radics v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 146, 2014 FC 110 at para 33 (Noël J); El Jarjouhi v. Canada (Minister of Employment and Immigration) [1994] FCJ No 466 at para 6 (Nadon J); Gill v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1828, 2004 FC 1498 at para 25 (Noël J); SI v Canada (Minister of Citizenship and Immigration) [2004] FCJ No 2015, 2004 FC 1662 at para 9 (Snider J).

\(^{803}\) SI v Canada (Minister of Citizenship and Immigration) [2004] FCJ No 2015, 2004 FC 1662 at para 9 (Snider J).

\(^{804}\) Ranganathan v. Canada (Minister of Citizenship and Immigration) (CA) [2000] FCJ No 2118, [2001] 2 FC 164 at para 11 (Létourneau, Sexton and Malone JJA); Khan v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1481, 2006 FC 1183 at para 18 (Gibson J); Adams v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 721, 2007 FC 529 at para 25 (Barnes J); Davila v. Canada (Minister of Citizenship and Immigration)
the member must “sift through the documentary evidence” and where appropriate “make a case” for a claimant who has not made it himself.\textsuperscript{805} Here the Court stresses, on the contrary, that the claimant “cannot and should not” expect the member “to make his case.”\textsuperscript{806} For the Second Stream, it is rather the member who is vulnerable, who “is performing a difficult function under time constraints and stressful conditions.”\textsuperscript{807} Establishing the claimant’s case, therefore, is “entirely up to him.”\textsuperscript{808}

The First Stream stresses the Supreme Court’s finding in \textit{Ward} that the claimant is not required to articulate the reasons for his persecution,\textsuperscript{809} and warns that, as a consequence, the member must turn her mind to all potential Convention grounds that “arise on the evidence.”\textsuperscript{810} She must

\footnotesize{\begin{itemize}
\item \textsuperscript{805} \textit{Kathirkamu v. Canada (Minister of Citizenship and Immigration)} [2003] FCJ No 592 at para 46-47 (Russell J).
\item \textsuperscript{806} \textit{El Jarjouhi v. Canada (Minister of Employment and Immigration)} [1994] FCJ No 466 at para 6 (Nadon J); \textit{Abilio v. Canada (Minister of Citizenship and Immigration)} [1994] FCJ No 1528 at para 12 (Richard J). See also related comments in the context of the new Refugee Appeal Division: “It is not the RAD’s function to supplement the weaknesses of an appeal before it, or, for that matter, of the refugee protection claim presented in the first place. It is also not its role to come up with new ideas that might assist appellants in succeeding with their appeal and, ultimately, their refugee claim.” \textit{Dhillon v. Canada (Minister of Citizenship and Immigration)} [2015] FCJ No 286, 2015 FC 321 at para 20 (LeBlanc J).
\item \textsuperscript{807} \textit{Ranganathan v. Canada (Minister of Citizenship and Immigration)} (CA) [2000] FCJ No 2118, [2001] 2 FC 164 at para 11 (Létourneau, Sexton and Malone JJA).
\item \textsuperscript{808} \textit{Gill v. Canada (Minister of Citizenship and Immigration)} [2004] FCJ No 1828, 2004 FC 1498 at para 25 (Noël J).
\end{itemize}}
do so even if the claimant himself does not raise or rely on them, and indeed, even if he expressly relies on other grounds. The Second Stream rather notes that the member is not required to undertake a “microscopic examination” of the evidence in order “to try to uncover a risk.” On the contrary, she need only consider a potential ground if it is “readily discernable.” As the Court further makes clear, for the member to have to consider a potential ground, not only must the objective basis be evident on the record, but also the claimant’s subjective fear. In one case, for example, the claimant had testified that she feared for herself and her young daughter because she had refused a criminal gang’s extortion attempts. Although she did not present their claims as gender-based, the Court agrees with her counsel on review that the evidence “clearly reflects” that “a high level of violence is directed at women” in her country and, in addition, that “women are less likely to receive the protection of the law.” But since the claimant had testified that she was afraid of being murdered, and had not raised a fear of sexual assault, the Court concludes categorically that she “did not fear gender-based violence.” Had the claimant been questioned on this point, and had she testified that she feared that she and her daughter might be raped as well as killed, this would arguably have brought their claims within the Convention. Yet since this fear was not apparent, the member had no obligation to canvass the issue.

FC 584 at 26 in obiter (O’Keefe J); Mohajery v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 252, 2007 FC 185 at paras 27-34 (Blanchard J).


814 Walcott v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 612, 2010 FC 505 at paras 21-25 (Gibson DJ). See also Thiyagarajah v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 1055 at paras 2, 5 (McKeown J); Wa Kabongo v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 453, 2008 FC 348 at para 16 (Mosley J).

815 The Court elsewhere concludes that even in the context of otherwise generalized criminality, “while women are targeted for kidnapping just like men, they are raped because they are women.” Josile v. Canada (Minister of
Indeed, the Court goes further. It finds that the member is only obliged to consider grounds that the claimant himself has expressly put forward, and only if he has done so “sufficiently.” In stark contrast to the First Stream, the Court here finds that a refugee claimant has “a legal right to have the asserted grounds for a claim considered, if sufficiently raised.” So where, for example, the claimant had raised a potential ground of persecution at his hearing – where his lawyer had “made submissions and presented two articles” about it – the member was not required even to consider it, for it seemed to have been “an afterthought as opposed to the central basis of his claim.” And noting that members will “naturally focus primarily on the cases which are presented before them,” the Court here finds that if the claimant “went out of her way to inform the [Board] that her claim had an altogether different basis,” this relieves the member of his responsibility to consider any other grounds potentially suggested by the evidence. This

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Nadarasa v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 904, 2012 FC 752 at para 24 [first emphasis added; second emphasis in original] (Phelan J). See also Varga v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 531, 2013 FC 494 at para 7 in obiter (Rennie J), citing the English Court of Appeal in Kerrouche, R (on the application of) v Secretary Of State For Home Department [1997] EWCA Civ 2263, [1997] Imm AR 610 (31st July, 1997): members “cannot be expected to carry out an investigation themselves to see whether there are points which have not been relied upon by an appellant that could have been relied upon. They are not required to engage in a search for new points.”


Ibid., at para 18. The Court, at paras 16-18, relies for this principle on Mersini v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1364, 2004 FC 1088 at para 8 (Snider J). In Mersini, the claimant had listed “family membership” as a ground of persecution in his initial claim forms, had not addressed this basis in his testimony or submitted any evidence to support it, but then argued on judicial review that this ground was “central” to his claim. In that context, the Court concluded that this ground in fact “was not ‘central’ to his claim” and “appears to have been an afterthought that was not supported by any evidence” [emphasis added]. In Paramanathan, the Court relies on this precedent but omits the final clause. While the Court comments that the claimant’s evidence was “limited” and potentially unpersuasive, it does not suggest that there was no evidence on point.


Plaisimond v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1261, 2010 FC 998 at para 88 (Russell J). The Court in does note additionally that there was “no evidence to infer that gender-based violence could, for her, be a consideration” (at para 91 [emphasis added]). The Court here refers to the fact that the claimant’s counsel “specifically advised the RPD” that her claim had solely a political basis, and that this “concession must
finding implicitly relieves the member of this responsibility in every case. Since every claimant will have been asked, on many occasions both before her hearing and during it, to identify the Convention grounds upon which she is relying, a claimant who has failed to raise a potentially relevant ground will in all cases have asserted “that her claim had an altogether different basis.” But for good measure, the Court also makes this explicit: “the legal duty or onus remains on a claimant to make out his or her claim in clear and unmistakeable terms.”

The Second Stream takes a similarly restrictive view of the member’s fact-finding responsibilities generally. The member should not be forced, as the previous stream had suggested, to “sift through the evidence.” The member cannot be faulted, for example, for overlooking “specific passages in the ‘brick’ of documentary evidence” that the claimant has submitted, or a point “buried in one sentence at line 79 of a 91 line narrative.” If the claimant wants the Board to consider his evidence, in other words, he must not only properly submit it; he must also bring it to the member’s attention and make its relevance clear.

surely be taken to mean that, as far as she was concerned, there was no evidence to support a gender based claim in her case” (at para 92 [emphasis added]). The record indeed contained evidence addressing gender-based violence in Haiti, including evidence that “women who are sexually assaulted receive little or no support in the police stations and have little or no access to legal mechanisms” (at para 62; see also paras 45, 60). See also for example Varga v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 531, 2013 FC 494 at para 7 in obiter (Rennie J); the member is not required to “re-characterize the evidence in an effort to fit it into a recognized ground of persecution.” Paramanathan v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 377, 2012 FC 338 at para 18 (Near J); Walcott v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 612, 2010 FC 505 at para 24 (Gibson DJ).

Piber v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1117 at para 14 (Gibson J). In this case, in fairness, counsel’s standard package of country materials was over a thousand pages long and the Board’s administration had previously requested that he make it more user-friendly “by providing a better and more detailed index, by eliminating duplication and by leaving out the unnecessary materials” (para 9).

In Al-Jamel v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1216, 2005 FC 979 (Snider J), for example, the claimant mentioned his memory problems in his initial written statement and submitted expert medical evidence on point, but the member was not obliged to consider this evidence in assessing his testimony because the claimant’s counsel failed to address its relevance in his closing submissions. See also related discussion.
addition, whereas the First Stream finds that members “should be expected to be aware” of the contents of the Board’s own database of country conditions research, the Court here reaches the opposite conclusion. Where this database contained a more recent report than the one that the Board’s administration had included in the member’s package of evidence – a more recent report that was already several months old at the time of the claimant’s hearing – the member had no “legal duty to search it out,” for the claimant himself could have found it and submitted it.

For the First Stream, it is “reasonable to expect that the panel would check information which is important to the refugee status claim if it is able to do so,” including verifying the claimant’s documents. Here, the Court finds that the member has “no such duty.” He can reject documents as fraudulent without verifying them as long as he has identified “sufficient evidence…to cast doubt upon their authenticity.” This “sufficient evidence” may arise from the documents themselves – where, for example, they show signs of having been altered – but it may also arise because the member concludes that the claimant’s testimony is otherwise not credible. The Court in these cases does not share the First Stream’s concern, in other words,
that evaluating the claimant’s documents in light of her credibility, and not the other way around, is putting the cart before the horse.

In addition, the Court here concludes that the member’s portion of the burden of proof is significantly reduced when the claimant is represented. If the claimant has counsel, this may relieve the member of any obligation to ask the claimant to clarify perceived inconsistencies or contradictions: “counsel ought to have asked the relevant questions. The Board cannot bear any responsibility for counsel’s failure to ask questions.”\textsuperscript{832} The First Stream stresses in no uncertain terms that the member is ultimately responsible for ensuring that the claimant’s evidence is properly interpreted. If the member recognizes that there is a problem with the interpretation, he cannot proceed with the hearing: “Everyone was aware of it; the panel members, counsel, the applicant and the interpreter. It required immediate resolution and it was the presiding member who had the responsibility to clear it up.”\textsuperscript{833} Here the Court finds that the member may be free to proceed, despite obvious problems, unless and until counsel has raised an objection. In one case, the member spoke Spanish and “interrupted the interpreter on several occasions to correct the translation.”\textsuperscript{834} Yet in finding that the claimant had waived his right to raise the question on review, the Court concludes that his counsel, and not the member, bore the responsibility for ensuring that his evidence was competently interpreted. Although his counsel may not have spoken Spanish, he “was clearly on notice, \textit{as a result of the member’s interventions}, that there

\textsuperscript{832} Miyir v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 653 at para 25 (Nadon J). For a general discussion of the Board’s duty (or not) to confront the claimant with inconsistencies and contradictions, see Awolaja v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1556, 2010 FC 1240 at paras 43-54 (Russell J). As the Court notes at para 45, “While it is true that some decisions say there is a duty and others say there is not, it seems to me that most judges recognize expressly that their analysis is dependent on the facts of the matter before them.”

\textsuperscript{833} Chen v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 536, 2001 FCT 308 at para 12 (Lemieux J). See also Singh v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 394, 2007 FC 267 at para 40 (Teitelbaum J).

\textsuperscript{834} Aquino v. Canada (Minister of Employment and Immigration) (CA) [1992] FCJ No 509 in obiter (Mahoney, MacGuigan and Linden JJ).
were problems.” 835 The Court explains, in fact, that ensuring proper interpretation is part and parcel of the claimant’s “onus to establish his/her entitlement to refugee status.” 836

In short, even when the Second Stream acknowledges that the burden of proof is shared in principle, it finds that this (paradoxically) should not “detract from the basic proposition that the onus rests squarely on the claimants to make out their claim.” 837 And it also makes clear that to the extent that the burden of proof is shared, sauce for the goose is sauce for the gander. While the UN Handbook explains that a decision-maker may need “to use all the means at his disposal to produce the necessary evidence in support of the application,” 838 the Court here finds that a member may properly rely on evidence undermining a claim that he has uncovered through his own independent research. 839

2.2 Standards of proof

The First Stream tries to ensure that the law will err in the claimant’s favour when it sets the thresholds that her evidence must cross in order to establish the “twin elements of harm and failure to protect.” It also attempts to ensure, as discussed below, that the member will be making a genuine risk assessment, an unusual mandate in a legal system overwhelmingly concerned with establishing past facts. The Second Stream, in contrast, uses both thresholds to restore the default preference for erring against the claimant, and also to allow the member to make a legal decision like any other, one governed not by alien risk assessment concepts but by the comfortable and familiar logic of a regular civil proceeding.

835 Ibid. [emphasis added].


838 The UN Handbook, above note 203 at para 196 [emphasis added].

839 Wankhede v. Canada (Minister of Citizenship and Immigration) 2015 FC 265 at para 25 in obiter (Boswell J).
2.2.1 The “well-foundedness” threshold: How much risk is risk enough?

2.2.1.1 Raising the low threshold directly

As noted above, one of several long-accepted formulations of the standard of proof on the ultimate risk question is that a claimant must prove that she faces “more than a mere possibility” of harm. The Supreme Court has endorsed this wording. 840 Nevertheless, the Second Stream suggests that this formulation “misstates the test handed down by the Court of Appeal” in the leading case on the well-foundedness threshold. The Court of Appeal in Adjei 842 did not intend, the Court explains, to extend protection to all claimants who face a risk of persecution that is greater than a minimal possibility, but only those who face a risk that “lies somewhere between more than a minimal possibility and a probability.” 843 The Court suggests that the proper standard is best expressed, instead, using the language of “reasonable chance” or “reasonable possibility” – in fact “any test not containing the term ‘reasonable’ as a limitation should be shunned” 844 – for two reasons. First, these formulations describe a higher threshold: “‘more than a mere possibility’ sounds like a threshold that is close to a possibility” and this simply cannot be right, because “nearly anything is possible.” 845 Second, the Court’s proposed wording makes clear that refugee status determination is a legal proceeding like any other and not a risk assessment. Using the familiar term ‘reasonable’ has the express advantage of “shifting the

840 “The claimant must establish…that there is more than a ‘mere possibility’ of persecution.” Chan v. Canada (Minister of Employment and Immigration) [1995] 3 SCR 593, [1995] SCJ No 78 at paras 120, 149 (Sopinka, Cory, Iacobucci and Major JJ; La Forest, L’Heureux-Dubé, Gonthier JJ dissenting on other grounds).


843 Sivaraththinam v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 171, 2014 FC 162 at para 46 (Annis J) [emphasis in original].

844 Ibid., at para 49.

845 Ibid., at para 47.

846 Ibid.
language in this field back to that normally employed in the legal world”\textsuperscript{847} and “avoiding the language of risk.”\textsuperscript{848}

2.2.1.2 Raising the low threshold indirectly

The Court, above, is right to note that there is an important difference between how the “legal world” works and how risk assessment works. The goal of legal fact-finding is to create certainty, or at the very least, “the comfortable illusion of certainty.”\textsuperscript{849} As many have noted, “it is a hallmark of the legal process that once a fact is established at trial as sufficiently probable, it is thereafter treated as if it were absolutely true.”\textsuperscript{850} Final judgments in legal proceedings are made by drawing inferences from the established facts as though these factual determinations reflect “objective reality.”\textsuperscript{851} There is no room, in this final analysis, for recognizing any possibility of error in the fact-finding process: “To think of truth as a matter of degree, as though facts could be partly true and partly false, is alien to this perspective.”\textsuperscript{852} This is precisely the perspective of a risk assessment, however, which carries any fact-finding uncertainty forward into the final analysis.

\textsuperscript{847} Ibid., at para 55. As the Court notes, “Reasonableness is a ubiquitous measure or standard used throughout our legal system, be it with respect to facts or law. It is a standard that combines human experience with rational logic. It is implemented through the pragmatic fiction of the reasonable person to provide an objective measure of decision-making in a world of unlimited circumstances. What is more, it connotes reasonableness, a notion which a fair legal system must be based upon.” Ibid., at para 52.

\textsuperscript{848} Ibid., at para 55.

\textsuperscript{849} Radford, above note 12 at 856. See also, for example, Posner 1999, above note 12 at 1512; Kaplan, above note 12 at 1073; Ligertwood, above note 29 at 387.

\textsuperscript{850} Radford, above note 12 at 856. See also Ligertwood, above note 29 at 387; Kaplan, above note 12 at 1073. The merits of this illusion have been hotly debated. For a review see Tribe, above note 66 at 1372-5.

\textsuperscript{851} Ibid., above note 12 at 856.

\textsuperscript{852} Ibid. For a remarkable exception in the refugee law context, see Liu v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 932, 2013 FC 896 at para 43 (Russell J). The Court here finds that the member, having concluded that one of the claimant’s documents was a fake, should not have dismissed the rest of his evidence on this basis: “this is faulty logic,” the Court notes, because the Board “does not know that the summons is fraudulent; it simply finds it to be so on a balance of probabilities.” In Canadian refugee law, this judgment is extraordinary if not unique in calling attention to the “illusion of certainty.”
To illustrate the difference, imagine that a person picks a wild mushroom and identifies it as a chanterelle. She asks herself “Are chanterelles dangerous?” and she is quite certain that they are not. Assuming that she is right, legal logic suggests that eating this mushroom poses very little risk: it is a chanterelle, and there is very little chance that chanterelles are dangerous. The logic of a risk assessment, on the other hand, suggests that her level of risk exposure will depend, as well, on how certain she is that the mushroom is actually a chanterelle. If she is very certain of this initial finding of fact, then her risk exposure is indeed very low. But if she is only just convinced – if she believes that it is likely to be a chanterelle, but she still has serious doubts – then her risk exposure is much higher.

When refugee status determination follows the logic of a risk assessment, as it does elsewhere in the world, the decision-maker measures the claimant’s case against the threshold for acceptable risk exposure. Taking all of the evidence into account, at the end of the day, what are the chances that she will be harmed? The laws and guidelines of several European states follow this logic. They set a low standard of proof on the risk question and then leave it to the decision-maker to test the sum of the claimant’s evidence against this threshold, factoring in any doubts and uncertainties. In England and Wales, for example, a decision-maker who concludes that an event likely did not occur will still “take into account the possibility that the event took place in deciding the ultimate question.” As long as the decision-maker is to some degree uncertain

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853 The laws and guidelines in these jurisdictions “are silent on any threshold for establishing facts” leading up to the final determination. UN High Commissioner for Refugees (UNHCR), Summary of Deliberations on Credibility Assessment in Asylum Procedures, Expert Roundtable, 14-15 January 2015, Budapest, Hungary, 5 May 2015 (online at: http://www.refworld.org/docid/554c9aba4.html) (“Summary of Deliberations”) at para 55. See discussion at below notes 855-856 and 868-871 in the context of the United Kingdom. See also the judgment of the Federal Court of Australia in Minister for Immigration and Multicultural Affairs v Rajalingam [1999] FCA 719 at para 64 (Sackville, North and Kenny JJ), and discussion in Norman, above note 132 at 279-282. Another non-European system, indeed, “has no standard of proof whatsoever, neither for credibility assessment and/or establishing facts, nor for determining whether there is a [well-founded fear] of persecution – adjudicators are required to decide whether they are ‘satisfied’ as to their findings.” Summary of Deliberations, above, para 55.

854 See also discussion in Hathaway 2014, above note 132 at 121-122; Gorlick 2003, above note 60 at 367-369; Sweeney, above note 692 at 720-724.

855 Karanakaran v. Secretary of State for the Home Department [2000] EWCA Civ. 11, United Kingdom: Court of Appeal (England and Wales), 25 January 2000 at 21 (LJ Brooke, LJ Robert Walker, LJ Sedley), summarizing with approval the judgment of the Federal Court of Australia in Minister for Immigration and Multicultural Affairs v Rajalingam [1999] FCA 719 at para 64 (Sackville, North and Kenny JJ). See also for example the judgment of the UK Immigration Appeal Tribunal in Kaja [1995] Imm AR 1, summarized with approval in Karanakaran, above, at
about the claimant’s evidence – leaving aside only those cases in which she has “no real doubt” that it is false\(^{856}\) – all of that evidence, and all of her uncertainty, remains in the mix when she makes the final determination on the low standard of proof.

Canadian refugee law, in striking contrast, requires decision-makers to apply the civil law standard of proof (‘on the balance of probabilities’) to each and every one of “the facts underlying the claim”\(^{857}\) before going on to consider the final risk question. Each alleged fact must clear this hurdle before the member can consider it in the final analysis. When the member listens to the claimant’s story, he must decide as a preliminary step which of its individual elements are more likely than not to be true. And when he then proceeds to decide whether or not she is at risk, he will not take into account all of her evidence, but only those elements that he has accepted as credible. In a refugee claim, as in any typical civil proceeding, evidence that is likely to be false is false, even if there is still a good chance that it is true.

This leads to decisions that are logical from a legal perspective but illogical from a risk assessment perspective. If the member is not quite convinced by the claimant’s story she will deny his claim, even if there is a real possibility that he is telling the truth, and even if, had she believed him, she would easily have concluded that he is almost certain to come to harm. On the other hand, she will accept a claimant who faces a situation that is unacceptably dangerous, but

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10: decision-makers must consider “evidence to which they are willing to attach some credence, even if they could not go so far as to say it is probably true.”

\(^{856}\) *Karanakaran v. Secretary of State for the Home Department* [2000] EWCA Civ. 11, United Kingdom: Court of Appeal (England and Wales), 25 January 2000 at 21 (LJ Brooke, LJ Robert Walker, LJ Sedley), citing with approval the Federal Court of Australia in *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719 at para 64 (Sackville, North and Kenny JJ). See also the concurring reasons of Sedley LJ in *Karanakaran*, above, at 33 (para 18): “No probabilistic cut-off operates here: everything capable of having a bearing has to be given the weight, great or little, due to it. What the decision-makers ultimately make of the material is a matter for their own conscientious judgment…The facts, so far as they can be established, are signposts on the road to a conclusion on the issues; they are not themselves conclusions.”

much less so, even if she only reluctantly accepts his evidence despite serious misgivings. From a risk assessment perspective, the first claimant is in much greater danger.858

The Court misses the mark when it suggests that “more than a mere possibility of persecution” is the “legal test” in refugee law, as distinct from the “standard of proof,” which is proof “on a balance of probabilities.”859 For as the Court also notes, whether or not the claimant is at risk of harm is a finding of fact, and whether or not this harm meets the definition of persecution under the Convention is a question of law.860 The “more than a mere possibility of persecution” test therefore combines the standard of proof on the ultimate question of fact (is there more than a mere possibility of harm?) with the legal question (does this harm amount to persecution?). As the Court rightly recognizes elsewhere, the “standard of proof” in refugee law is therefore a “mixture”861 of both thresholds. This distinction is crucial, because treating the “more than a

858 To illustrate with numbers, somewhat artificially, if there is a 49% chance that the first claimant’s story is true and a 98% chance that he will come to harm on the facts as he alleges them, then there is a 48% likelihood that he will come to harm (the conditional probability of the harm multiplied by the probability of the triggering condition). If there is a 51% chance that the second claimant’s story is true and a 20% chance that he will come to harm on the facts as he alleges them, then there is a 10% chance that he will come to harm. Assuming that both claimants face harms of equal magnitude, a risk analysis, by multiplying the likelihood and magnitude of the negative outcome, would conclude that the first claimant is at much greater risk.

859 The Court makes this distinction in for example: Hinzman v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 521, 2006 FC 420 at para 184 (Mactavish J); Hughey v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 522, 2006 FC 421 at para 171 (Mactavish J); Nageem v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 933, 2012 FC 867 at para 24 (Rennie J); Alomari v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 640, 2015 FC 573 at paras 21-22 (LeBlanc J); AB v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 420, 2015 FC 450 at para 20 (Shore J). Elsewhere the Court uses the terms “legal test” and “standard of proof” interchangeably. See for example Mugadza v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 147, 2008 FC 122 at para 20 (Mandamin J); Paramsothy v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1071, 2012 FC 1000 at para 24 (Mandamin J); Pararajasingham v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1582, 2012 FC 1416 at para 46 in the PRRA context (Russell J).

860 For this reason, the question that ultimately combines the two – does the claimant face more than a mere possibility of persecution? – is a question of “mixed fact and law.” See for example Sagharichi v. Canada (Minister of Employment and Immigration) (CA) [1993] FCJ No 796 at para 3 (Isaac CJ and Marceau and MacDonald JJ); Khokhar v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 602, 2002 FCT 452 at para 12 (Gibson J); SAH v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 760, 2011 FC 613 at para 9 (Nair J) in the PRRA context; Vasallo v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 911, 2012 FC 673 at para 11 (Bédard J).

861 Muthuthevar v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 8, 2015 FC 1 at para 11 (O’Reilly J). As the Court explains, “the applicable standard of proof combines both the usual civil standard and a special threshold unique to the refugee protection context.” Alam v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 15, 2005 FC 4 at para 8 (O’Reilly J); Ramanathy v. Canada (Minister of Citizenship
mere possibility” wording as an element of the legal test, rather than as a fact-finding threshold, obscures what the “balance of probabilities” standard has done. It has intervened to raise an exceptionally low standard of proof.

By putting a higher hurdle in front of a lower one, the Court has expressly and dramatically shifted the error burden. As discussed in Chapter 1, proof “on a balance of probabilities” puts the error burden on the moving party, and imposing it here reverses the preference embodied in refugee law’s own very low “special threshold.” It also brings fact-finding in this context back into line with fact-finding in civil and administrative law generally. As the Court has made clear, this standard applies in refugee law because as a rule “the standard of proof in civil cases is always proof on a balance of probabilities.” And it settles any debate about whether and to what extent refugee status determination should be conducted as a risk assessment. By firmly imposing the law’s fact-finding logic, this intervening standard of proof takes refugee status

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862 The “on a balance of probabilities” standard not only tips the decision against the moving party in the case of a tie. It also brings the other side, the counterargument, squarely into focus. When this standard is in play, a decision-maker “judges two cases against each other and decides which of the two to accept.” When “a fixed, abstract, external standard” is used instead – like ‘proof beyond a reasonable doubt’ or ‘more than a mere possibility of persecution’ – the decision-maker “judges one case only and decides whether or not to accept it.” The former approach “is like deciding which of two people is taller,” the latter “like deciding whether a person is more than six feet tall.” Wexler and Cameron argue that the “balance of probabilities” standard is therefore incompatible with the presumption of innocence not only because it gives a tie to the prosecution, but also because it holds up the accused’s and the prosecution’s cases side-by-side for comparison. Wexler, above note 89 at 176.

863 Alam v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 15, 2005 FC 4 at para 8 (O’Reilly J).

864 “Unless the words of a statute or the context requires otherwise, the standard of proof in civil cases is always proof on a balance of probabilities.” Lawal v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 673, 2010 FC 558 at para 13 in obiter with regards to the Convention definition (case decided on the basis of the Board’s finding under s. 97 of the IRPA, above note 171, a section granting non-refugee protection to persons at risk for non-Convention reasons) (de Montigny J). See also Alam v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 15, 2005 FC 4 at para 8 (O’Reilly J): “Obviously, claimants must prove the facts on which they rely, and the civil standard of proof is the appropriate means by which to measure the evidence supporting their factual contentions.” See also for example Carrillo v. Canada (Minister of Citizenship and Immigration) (CA) [2008] FCJ No 399, 2008 FCA 94 at para 24 (Létourneau, Nadon and Sharlow JJA); Pacasum v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1024, 2008 FC 822 at para 22 (de Montigny J). See also in the PRRA context Ferguson v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1308, 2008 FC 1067 at para 22 (Zinn J).
determination out of the realm of a risk assessment and locates it comfortably within the realm of a typical civil proceeding.

The “on a balance of probabilities” standard, in short, is a creature of the Second Stream. And somewhat oddly, the First Stream has not fought back against it. For lawyers and judges working within the Canadian system, the fact that the civil standard of proof should govern the first stage of fact-finding is simply a given. This is as firmly a part of Canadian refugee law as the lower threshold on the ultimate risk question, and indeed, it first makes its appearance in the same judgment in which this lower standard was fully elaborated for the first time. But whereas the Court of Appeal in Adjei discusses the lower threshold at length, it simply notes the Board’s one-sentence conclusion on the civil standard – that the ‘balance of probabilities’ is the “appropriate” threshold to use for deciding the facts “in a case of this kind” – and adopts it without further comment, and obliquely: “although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not.” In the more than two decades since, the Court has not given the question much further thought, other than to reaffirm that this standard must certainly apply because it is the norm in civil cases, and because the only other option that the Court envisions – applying the lower threshold to individual findings of fact – simply “will not suffice.”

Yet as noted above, a number of systems do not specify any preliminary fact-finding threshold, and indeed in the UK, where the Courts have given this matter a great deal of attention, refugee status determination consciously adopts the risk assessment logic described above. In a lengthy judgment that considers and squarely rejects the Canadian model, the Court of Appeal of England and Wales concludes that requiring two fact-finding thresholds would not only be “quite

865 Adjei v. Canada (Minister of Employment and Immigration) (CA) [1989] FCJ No 67, [1989] 2 FC 680 at para 3, citing the reasons of the first-level tribunal, the then Immigration Appeal Board (Mahoney, Stone and MacGuigan JJ).

866 Ibid., at para 5.

867 Hinzman v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 521, 2006 FC 420 at para 185 (Mactavish J); Hughey v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 522, 2006 FC 421 at para 172 (Mactavish J). Of note, one European state at least does apply the lower threshold to both levels of decision-making. Summary of Deliberations, above note 853 at para 55.
impracticable,” 868 it would also be “quite wrong”: “it would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision-maker believes, on what may sometimes be somewhat fragile evidence, that they probably did not occur.” 869
Since refugee status determination is “certainly…unlike ordinary civil litigation,” 870 the decision-maker is not required to apply the civil standard of proof. What is needed instead is an approach that allows for “a more positive role for uncertainty.” 871

One need not look so far afield, in fact, for an example of this approach. It applies in Canadian refugee law as well, when the shoe is on the other foot: when the Minister intervenes before the Board to argue that a claimant is guilty of severe wrongdoing and should be excluded from refugee protection. The standard of proof in such cases is another “unique evidentiary standard,” one that is well below the civil law’s ‘balance of probabilities’, let alone the criminal law’s ‘beyond a reasonable doubt.’ 872 The Minister must show only that there are “serious reasons for

868 Karanakaran v. Secretary of State for the Home Department [2000] EWCA Civ 11, United Kingdom: Court of Appeal (England and Wales), 25 January 2000 at 21 (LJ Brooke, LJ Robert Walker, LJ Sedley). See also para 19: refugee status determination should not be an obstacle course “on which hurdles of varying heights are encountered by the asylum seeker with the decision-maker acting as umpire.”

869 Karanakaran v. Secretary of State for the Home Department [2000] EWCA Civ 11, United Kingdom: Court of Appeal (England and Wales), 25 January 2000 at 22 (LJ Brooke, LJ Robert Walker, LJ Sedley). See also Kaja [1995] Imm AR 1, summarized as follows in Karanakaran at para 10: “The majority considered that if there was a first stage (proof of present and past facts) followed by a second stage (assessment of risk) then any uncertainties in the evidence would be excluded at the second stage, and that this could not be right.”

870 KS (benefit of the doubt) [2014] UKUT 00552 (IAC) at para 57. See also discussion in Karanakaran v. Secretary of State for the Home Department [2000] EWCA Civ 11, United Kingdom: Court of Appeal (England and Wales), 25 January 2000 at 16-18 (LJ Brooke, LJ Robert Walker, LJ Sedley), about the “distinction between the task of a judge in civil litigation and the task of an administrative decision-maker in an asylum case” (16). The Court highlights similar findings in British and Australian jurisprudence, including the judgment of the Australian High Court in Wu Shan Liang (1996) 185 CLR 259, cited at 18: “The present context of administrative decision-making is very different and the use of such terms [borrowed from the universe of discourse which has civil litigation as its subject]...provides little assistance”; and the judgment of the Federal Court of Australia in Epeabaka [1999] FCA 1, cited at 19, in which the Court, “referring to the difficulties of proof which beset asylum-seekers,” concludes that “the civil standard cannot be universally applied to the fact finding process in claims of this kind. It is necessary to recognise the risk of error in adopting such a fact finding process, and to make allowance for it.”


872 Ezokola v. Canada (Citizenship and Immigration) [2013] SCJ No 40, 2013 SCC 40 at paras 101-102 in the context of a decision to exclude a claimant from refugee protection (McLachlin CJ and LeBel, Fish, Abella,
considering” that the claimant has committed the alleged act.\textsuperscript{873} Here, however, no higher fact-finding threshold intervenes to raise this low standard of proof. The Minister is not required to prove each alleged fact on a balance of probabilities. Instead, the Board will consider \textit{globally all} of the evidence that is “credible and trustworthy in the circumstances”\textsuperscript{874} and measure it against this low standard.\textsuperscript{875}

Applying the low standard in this way ensures that claimants accused of grave wrongdoing retain the error burden, and the Court suggests why this is appropriate. Not only do “these most serious crimes deserve extraordinary condemnation,”\textsuperscript{876} but the low standard also reflects the fact that an exclusion determination is of less consequence to the claimant than a finding of guilt in the

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\textsuperscript{873} This language comes out of Article 1F of the Refugee Convention, above note 157, and is incorporated into Canadian law in s. 98 of the \textit{IRPA}, above note 171. For general discussion, see \textit{Ezokola v. Canada (Citizenship and Immigration)} [2013] SCJ No 40, 2013 SCC 40 (McLachlin CJ and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ); \textit{Mugesera v. Canada (Minister of Citizenship and Immigration)} [2005] SCJ No 39, 2005 SCC 40 (McLachlin CJ and Major, Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ). In the pre-\textit{Ezokola} jurisprudence, the Courts often referred to this standard as requiring “reasonable grounds to believe,” wording that they held was equivalent to the Convention’s “serious reasons for considering.” See for example \textit{Mugesera}, above; \textit{Ramirez v. Canada (Minister of Employment and Immigration) (CA)} [1992] 2 FC 306, [1992] FCJ No 109 (Stone, MacGuigan and Linden JJ); \textit{Moreno v. Canada (Minister of Employment and Immigration) (CA)} [1993] FCJ No 912, [1994] 1 FC 298 at paras 25-27 and note 1 (Mahoney, Robertson and McDonald JJA). The Supreme Court in \textit{Ezokola}, however, at para 101, finds that this wording should be abandoned as it adds nothing to the clear language of the Convention.

\textsuperscript{874} This is a statutory prerequisite for all evidence in any proceeding before the Board. In conferring its powers on the tribunal, the \textit{IRPA} stipulates that the members of its various divisions must consider, and may only consider, evidence that is “credible and trustworthy under the circumstances.” \textit{IRPA}, above note 171, s. 170 (Refugee Protection Division); s. 171 (Refugee Appeal Division); s. 173 (Immigration Division); s. 175 (Immigration Appeal Division).

\textsuperscript{875} “Overall, the Board must assess and weigh the evidence that it has accepted as credible or trustworthy in the circumstances and determine whether or not the threshold test of ‘serious reasons for considering’ has been met.” \textit{Lai v. Canada (Minister of Citizenship and Immigration)} [2005] FCJ No 584, 2005 FCA 125 at para 25 (Richard CJ, Sharlow and Malone JJA); \textit{Deng v. Canada (Minister of Citizenship and Immigration)} [2007] FCJ No 1228, 2007 FC 943 at para 11 (Hughes J); \textit{Escorca v. Canada (Minister of Citizenship and Immigration)} [2007] FCJ No 891, 2007 FC 644 at para 11 (Snider J); \textit{Kovacs v. Canada (Minister of Citizenship and Immigration)} [2005] FCJ No 1810, 2005 FC 1473 at para 17 (Snider J). See also for example \textit{Mugesera v. Canada (Minister of Citizenship and Immigration)} [2005] SCJ No 39, 2005 SCC 40 (McLachlin CJ and Major, Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ); \textit{Moreno v. Canada (Minister of Employment and Immigration) (CA)} [1993] FCJ No 912, [1994] 1 FC 298 at paras 25-27 (Mahoney, Robertson and McDonald JJA); \textit{Ishaku v. Canada (Minister of Citizenship and Immigration)} [2011] FCJ No 58, 2011 FC 44 at para 29 (Shore J).

criminal system, where the much higher “beyond a reasonable doubt” standard would apply. After all, the Court notes, this finding ultimately does not decide “whether the person concerned is criminally responsible, but only whether they may claim refugee protection in Canada.”

2.2.2 The state protection threshold: How much protection is enough protection?

Treating the state protection question as one that requires a separate analytical threshold gives the Court the opportunity to use this area of inquiry to address concerns unrelated to the issue of risk. The First Stream refuses this opportunity. It answers the underlying normative question – “Against what standard should a member judge a state’s willingness or ability to protect its citizens?” – with a threshold tied directly to the risk question. Any protection that a state offers will only disentitle a claimant if it will be “effective,” if it will tangibly reduce her level of risk exposure. Here, in contrast, the Court sets a threshold that makes the likelihood of potential harm irrelevant.

As long as the authorities in her home country will make efforts that are “reasonable, having regard to the circumstances,” the claimant cannot ask for more. In the past, the Second Stream went so far as to find that state protection would be available to a claimant if the government of her home country “is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens.” The Court applied this notion – one derived from a broad reading of a pre-Ward Court of Appeal judgment in the context of terrorism – to a claim in which, for example, the police had refused to investigate an alleged “honour killing.” The Court upheld the Board’s finding of adequate state protection not only because the


878 Mudrak v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 180, 2015 FC 188 at paras 37, 68, citing the Board’s reasons with approval (Annis J). See also for example Paradi v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1095, 2013 FC 996 at para 47 (Noël J); Diaz v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 2056, 2004 FC 1697 at para 14 (MacKay J); Diaz v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 652, 2004 FC 497 at para 6 (Dawson J); Smirnov v. Canada (Secretary of State) [1994] FCJ No 1922, [1995] 1 FC 780 at para 15 (Gibson J); Aguilar v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1877, 2005 FC 1519 at para 25, 27 (Rouleau J).

879 Canada (Minister of Employment and Immigration) v. Villafranca (CA) [1992] FCJ No 1189 (Marceau, Hugessen and Décary JJ).
police response was reasonable on the facts, but also because “even if one may criticize the
police for being unwilling to pursue an investigation in these circumstances,” the government
was in control of the country and was making genuine attempts to offer protection to its citizens
generally.880 Yet in recent years, the Court rather accepts that as long as the claimant has done
her part to engage them,881 the authorities cannot remain passive where some action is
reasonably required.882

This action need not, however, make the claimant any safer. It is after all “a reality of modern-
day life” that protecting people from those who are determined to hurt them is often very
challenging,883 and in particular, “assaults involving unknown assailants are difficult to
effectively investigate, police, and protect against.”884 So while she is entitled not to be “rebuffed
or ignored by the authorities,”885 the claimant cannot reasonably expect “perfect” protection,886

880 Kashif v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 793, 2007 FC 586 at para 25 (Mosley
J).

881 As the Court has made clear, a claimant must show that she made “all objectively reasonable efforts, without
success, to exhaust all courses of action reasonably available” in her home country, and her claim will fail if she is
“doubting the effectiveness of state protection without reasonably testing it.” Ruszo v. Canada (Minister of
Citizenship and Immigration) [2013] FCJ No 1099, 2013 FC 1004 at paras 32-33 (Crampton CJ). See also, for
example, Razburgaj v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 163, 2014 FC 151 at paras
22-37 (Roy J); Namweya v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 355, 2015 FC 383 at
para 8 (Hughes J); Merucza v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 497, 2014 FC 480
at paras 14-17 (Roy J).

882 See for example KKG v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 211, 2014 FC 202 at
paras 43-44 (Shore J); Paguada v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 401, 2009 FC
351 at para 22 (de Montigny J); Zhuravlev v. Canada (Minister of Citizenship and Immigration) [2000] FCJ No


884 Aguilar v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1877, 2005 FC 1519 at para 27
(Rouleau J). See also Monzon v. Canada (Minister of Citizenship and Immigration) [1996] FCJ No 647 at para 22
(Rouleau J); Mejia v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1493, 2003 FC 1180 at para
12 (Tremblay-Lamer J); Smirnov v. Canada (Secretary of State) [1994] FCJ No 1922, [1995] 1 FC 780 at para 11
(Gibson J); Tenorio v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 98, 2007 FC 63 at para 25
(Shore J); Danquah v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1063, 2003 FC 832 at para
22 (Blanchard J).

885 Pacasum v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1024, 2008 FC 822 at para 26 in
obiter (de Montigny J).

886 See for example Sefa v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1660, 2010 FC 1190
at para 36 (Kelen J); Razburgaj v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 163, 2014 FC
or “effective” protection,887 or even protection that is “at least minimally effective.”888
“Adequate protection,” the Second Stream’s choice of threshold, will be made out, for example, if the police “did not remain inactive” after the murder of the claimant’s half-brother: if officers “informed the family of the tragic event,” “questioned several people at the scene of the crime” and even “took the trouble” of returning to ask more questions.889 In one particularly well-documented claim, the Board accepted that the claimant had acted as a witness in a criminal trial and had thereafter survived several attempts on his life. The Board accepted that the police had informed him that, since his country did not have a witness protection program, he “would be safest if he were in an isolated cell or left the country.”890 Notwithstanding, the Court upholds the Board’s finding that the claimant did not require Canada’s protection, for he had “provided evidence of active police investigation.”891 The police had not only taken the attempts on his life seriously, they had also, of course, successfully investigated the criminal whom his testimony

887 See for example Mendez v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 771, 2008 FC 584 at para 19 (Mosley J); Smirnov v. Canada (Secretary of State) [1994] FCJ No 1922, [1995] 1 FC 780 at para 11 (Gibson J); Velazquez v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 975, 2011 FC 775 at para 27 (Nair J); Hippolyte v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 93, 2011 FC 82 at para 27 (Kelen J); Flores v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 969, 2008 FC 723 at paras 8-11 (Mosley J).

888 Monjaras v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 939, 2010 FC 771 at para 18 (Kelen J); Flores v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 969, 2008 FC 723 at paras 9-10 (Mosley J).


890 The claimant had “supported his claim with the witness subpoena from the assault trial, photographs of his bullet-riddled car, medical reports…security services reports…and a letter from his former employer…stating that two suspicious men had been demanding to know the applicant’s whereabouts.” Al-Awamleh v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 953, 2013 FC 925 at para 7 (Annis J).

891 Ibid., at para 28.
had initially helped to convict. The fact that those who wanted him dead were still at large was not evidence “that the police failed to respond” or that this response was “inadequate.”

The Second Stream focuses not on the claimant and his risk, in other words, but on the state and its responsibilities. To succeed in his claim, the claimant must do more than show that his state’s best efforts may be futile. In fact, he must do more than show that its efforts could have been better, that “perhaps more could have been done more quickly.” For the Court here stresses that the Board should take care not to “blame” or “criticize” a foreign state unfairly, or to hold it to “too high a standard.” In particular, the Board “should not impose on other states” the requirement to offer better protection than a person could expect to receive in Canada.

892 Ibid., at paras 27-28.

893 Ibid., at para 28.

894 For a critique of this approach, see Hathaway 2014, above note 132 at 307-315. As Hathaway and Foster note at 309, the notion that a state must meet a standard of “due diligence” in protecting its citizens is not grounded in the Refugee Convention, but one that “was rather imported by the House of Lords into refugee law from international and regional human rights law, which in turn borrowed the concept from the law of diplomatic relations.”


896 See for example Gonzalez v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1394, 2011 FC 1132 at para 26 (de Montigny J); Del Real v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 170, 2008 FC 140 at para 44 (Shore J); Villasenor v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1359, 2006 FC 1080 at para 19 (de Montigny J). Indeed, the Court has gone so far as to suggest that the Board should take similar care in deciding whether or not a state’s actions amount to persecution: finding that the Sri Lankan police are persecuting Tamils by detaining and beating them, for example, is “presumptuous, moral and philosophical imperialism,” for while this conduct would never be accepted from Canadian police, “Canada is not Sri Lanka.” Jebanayagam v. Canada (Solicitor General) [1994] FCJ No 1435 at para 13 (Muldoon J); Ravimohan v. Canada (Minister of Citizenship and Immigration) [1995] FCJ No 1252 at para 23 (Muldoon J).


member sitting in judgment on a foreign government and its police must take care not “to ask of
them what our own country is not always able to provide.” A Roma claimant who had
repeatedly appealed to the Hungarian police to protect her from her estranged husband had not
demonstrated a failure of state protection, for example, merely because his attacks continued –
even though the police response “could certainly have been better,” and even though the
evidence “may suggest that abused women do not receive much help from authorities, and that
Roma do not in general receive the same level of protection as others.” Noting that “the police
in Canada are frequently unable to fully protect an abused spouse from her abuser,” the Court
concludes that the police response was not “much different from the protection that she would
have received in Canada,” and that the Board had therefore erred in concluding that it was
inadequate.

Tying the state protection threshold to the state’s degree of fault rather than to the claimant’s
degree of risk reflects the concern that refugee protection is and should remain an extraordinary
remedy. What the Refugee Convention demands of a host country – that it offer “surrogate”
protection to people who are not its own citizens – is an exceptional imposition, and one that
should only be triggered in circumstances where the home country’s “failure” is similarly

899Flores v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 969, 2008 FC 723 at para 11 (Mosley J); Velasquez v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 112, 2009 FC 109 at para 19 (de Montigny J); Cosgun v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 458, 2010 FC 400 at para 50 (Crampton J). See also for example Samuel v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 963, 2008 FC 762 at para 13 (Lagacé DJ).

900Canada (Minister of Citizenship and Immigration) v. Olah [2002] FCJ No 785 at para 9 (McKeown J). The Court, at para 4, notes the Board’s finding that “The Department of State Report states that spousal abuse is believed to be common...and that victims who step forward often receive little help from the authorities. Women’s rights organizations claim that one woman in ten is a victim of spousal abuse and that the societal attitudes towards spousal abuse are ‘archaic.’”

901Ibid. The applicant’s spouse was taken into custody on one occasion and, on another occasion, was required to pay a fine. It is unclear from the decision whether, on a separate occasion following another assault, the applicant’s spouse (para 8), or the applicant herself (para 7), was detained for three days.

902For the “surrogate” nature of refugee protection, see Chapter 3, s. 1.2. See also for example Flores v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 969, 2008 FC 723 at para 10 (Mosley J); Velasquez v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 112, 2009 FC 109 at paras 17-19 (de Montigny J); IMPP v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 308, 2010 FC 259 at para 39 (Mosley J).
exceptional. It also reflects an overarching concern with ensuring that the stigma of such a “failure” should only attach to those countries that truly deserve it. If states are held to too high a standard, the Second Stream warns, then “there is not a country in the world which could not be a refugee generating country.” This not only rings “floodgates” alarms, it is unacceptable on principle because some countries – the good, the capable – should not be made to bear this shame. They should not be mistaken for “refugee generating countries” simply because a particular claimant may, in fact, come to harm upon return. This same notion underlies the Court’s finding that it is improper to require another state to provide a level of protection that “we, in Canada, are not always able to achieve ourselves.” Decency dictates that we should not blame others for failures that we share. But more importantly, since Canada is surely not a “refugee generating country,” the fact that such lapses occur in Canada means that under the Convention they are not really failures at all.

2.3 Presumptions

2.3.1 State protection presumption

The Second Stream’s preference for erring against the claimant helps to explain one of Canadian refugee law’s more puzzling aspects: its seemingly superfluous state protection presumption. In

903 “The state failure which engages such an extraordinary international commitment must be one commensurate with the commitment.” Zhuravlvev v. Canada (Minister of Citizenship and Immigration) [2000] FCJ N 507, [2000] 4 FC 3 at para 24 (Pelletier J). The Court made these comments in holding that the state’s failure must extend beyond the failure of local police forces to reflect the failure of the national government.


905 See cases in below note 1150. See also discussion in Audrey Macklin, “Refugee Women and the Imperative of Categories” (1995) 17 Human Rights Quarterly 213 at 219-220.

906 Samuel v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 963, 2008 FC 762 at para 13 (Lagacé DJ); Cosgun v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 458, 2010 FC 400 at para 51 (Crampton J).

907 Indeed as discussed in Chapter 1, one of the reasons proposed to explain the civil law’s preference for erring against the moving party is that it resonates with “basic principles of civility” that stipulate that we should not lightly accuse one another of wrongdoing. Redmayne, above note 12 at 173; Dale A. Nance, “Civility and the Burden of Proof” (1994) 17 Harvard Journal of Law and Public Policy 647; Zamir, above note 37 at 187; Winter, above note 12 at 335, 343 note 1.

908 For a full discussion and critique of this reasoning, see Macklin 1995, above note 905 at 264-274.
Canada it is “trite law” that states are presumed to be willing and able to protect their citizens, and that claimants must “rebut that presumption with clear and convincing evidence.” This presumption is a cornerstone of fact-finding in Canadian refugee status determination, and yet at first glance the law would seem to function identically without it. The claimant already bears the onus of proving all of the facts of her claim, including the fact that her country cannot protect her, and she could hardly hope to do so with evidence that was unclear or not convincing. As a fact-finding structure, therefore, the presumption of state protection is redundant: it simply restates the burden of proof. In this respect it is like the criminal law’s presumption of innocence, and this helps to explain its appeal. Like the presumption of innocence, the state protection presumption has endured not because it shapes fact-finding directly but because it functions as a warning. It makes very clear to decision-makers what the Second Stream’s error preference is, and why.

As Thayer noted over a century ago, the presumption of innocence is an “emphatic caution” about the law’s preference for erring on the side of the accused. This preference is grounded in the notion that people should, simply by virtue of their personhood, be deemed to be “decent and

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911 The Court has explained that the “clear and convincing evidence” requirement does not impose on the claimant a standard of proof higher than a balance of probabilities. This wording is rather intended to emphasize that the claimant’s evidence, to meet the balance of probabilities standard, must be “relevant, reliable and convincing”; Carrillo v. Canada (Minister of Citizenship and Immigration) (CA) [2008] FCJ No 399, 2008 FCA 94 at para 30 (Létourneau, Nadon and Sharlow JJA). It is difficult to imagine how evidence that would succeed in convincing a decision-maker could ever be otherwise.

912 Thayer 1896, above note 67 at 193.
law-abiding members of the community until proven otherwise.”\textsuperscript{913} The state protection presumption “serves to reinforce the underlying rationale of international protection as a surrogate.”\textsuperscript{914} This rationale is similarly grounded in the notion that states, simply by virtue of their statehood, should be deemed to be good and capable members of the international community, which at a minimum means assuming that they are willing and able to protect their own citizens: “Security of nationals is, after all, the essence of sovereignty.”\textsuperscript{915} Moreover, the state protection presumption is premised on the idea, as one of the First Stream’s champions has wryly noted, that stable democracies “automatically enjoy a guaranteed rule of law and the services of an honest and professional police force.”\textsuperscript{916} Indeed, the claimant’s “burden of proof” is “directly proportional to the level of democracy in the state in question.”\textsuperscript{917} The more “developed” and “robust” the democracy,\textsuperscript{918} “the heavier is the burden upon the claimant to displace the presumption.”\textsuperscript{919}

\textsuperscript{913} \textit{R v. Oakes} [1986] 1 SCR 103, [1986] SCJ No 7 at para 29 (Dickson CJ and Estey, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ). As the Supreme Court notes, this presumption “confirms our faith in humankind.” See also Thayer 1896, above note 67 and the text accompanying above notes 118 to 120.


\textsuperscript{919} \textit{Nicolai v. Canada (Minister of Citizenship and Immigration)} [2010] FCJ No 1557, 2010 FC 1245 at para 29 (Kelen J). See generally \textit{Carrillo v. Canada (Minister of Citizenship and Immigration) (CA)} [2008] FCJ No 399,
The Second Stream suggests that the reason for this heavier burden is “obvious”: “There is obviously a strong relationship between the citizens’ participation in the institutions of the state on the one hand, and the effectiveness and fairness of the state’s apparatus to protect them.”

But while common sense may suggest that democratic governments are less likely to persecute their citizens, it is hardly “obvious” that a claimant fearing non-state actors in Jordan or Iran or Cuba or China should expect less help from the police than a gay man facing intimate partner violence in Jamaica, where homophobia among police officers is rampant, or than a woman in Guatemala, where in one recent decade there were 11 convictions for over 5000 murders of women and girls, or than a claimant in Mexico, where, as the country has become more democratic, the “corruption and lawlessness among the security forces” have gotten worse (underpaid officers, no longer able to rely on bribes from corrupt politicians, have turned, instead, to doing favours for the drug lords, and as a result “Mexicans are less able than ever to gain protection from the police”). Common sense might, in fact, suggest the opposite, that a more oppressive state apparatus might be better able to provide protection – as the Court seems

920 Alassouli v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1247, 2011 FC 998 at para 42 in obiter (de Montigny J). The Court makes this comment in critiquing the notion that democracy should be used as a “proxy” for state protection, noting that while there is “obviously a strong relationship,” there is “no automatic equation between the two.”


923 Villicana v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 1499, 2009 FC 1205 at para 74, summarizing a report by Dr. Judith Hellman (Russell J).
to recognize when it finds, for example, that “surely every rational person understands that not even the most totalitarian State can protect everyone 24 hours per day.”924

A more compelling explanation for the decision to impose a heavier burden on claimants who are trying to show that a democracy has failed them is that the state protection presumption is not only “similar to the presumption of innocence,” as the Court has astutely noted,925 it is a presumption of innocence. It reinforces the notion that members should avoid wrongly condemning ‘innocent’ states, and stresses that they should err mostly strongly on the side of those states that are most worthy of being deemed ‘innocent.’ This presumption casts the claimant in the role of an accuser, and highlights the fact that she may be accusing wrongly. As a result, as Popovic and others have noted, fact-finding in refugee law often treats the state as though it were an “alleged victim,”926 and treats the claimant as though she were “accused of false incrimination.”927

2.3.2 Presumption of truthfulness

Some have suggested that, in courtrooms generally, “statements are deemed guilty until proven innocent.”928 This phrase rightly captures the fact that “the onus is placed on all positive assertions to prove themselves,”929 for as a rule, as noted in Chapter 1, decision-makers are

924 De Connick v. Canada (Minister of Citizenship and Immigration) [1996] FCJ No 492 at para 14 (Muldoon J). See also discussion in Allassouli v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1247, 2011 FC 998 at para 40 (de Montigny J); Shaka v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 263, 2012 FC 235 at para 9 (Rennie J): “It is quite possible that states which lack a democratic election process for choosing their leaders, such as monarchies, may nevertheless enjoy effective mechanisms of state protection, at least to repress common criminality and anti-social behaviour.”

925 Carrillo v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 439, 2007 FC 320 at para 16, reversed on other grounds (O’Reilly J).

926 Popovic, above note 692 at 33.

927 Ibid., at 32; see also discussion at 31-33. See also Zahle, above note 249 at 24. Noll goes further: “Measured against the standards of penal procedure, it emerges that asylum applicants are put in the same position as an accused whose guilt is presumed.” Gregor Noll, “Salvation by the Grace of the State? Explaining Credibility Assessment in the Asylum Procedure” in Proof, above note 129, 197 at 200.

928 Gaskins, above note 11 at 2.

929 Ibid.
expected to approach a statement blind to its prior probabilities. At the beginning of the proceeding a statement’s truth is unknown, and if this is still the case at the end of the proceeding, the statement is considered unproven. But unless a presumption tells them otherwise, decision-makers cannot approach a statement with the assumption that it is untrue. They cannot deem it “guilty” before they hear it.\footnote{See for example comments in Gonzalez v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 210, 2014 FC 201 at para 15, in the immigration law context (Harrington J).} And in civil and administrative law generally, despite the presumption of truthfulness that attaches to sworn testimony, neither can they deem it “innocent.” As discussed above, this presumption has come to reflect notions of what a good and just decision should look like, rather than suggesting that a decision-maker should enter the courtroom actually assuming, even for the sake of argument, that a witness’s sworn evidence is true.

The Second Stream interprets the presumption in this light, as discussed below. But unless and until it is displaced, even the civil law’s weak presumption of truthfulness does the work of proving the claimant’s statement. Unless and until the presumption is displaced, the claimant’s testimony will be accepted, whether it is true or not.\footnote{Wexler and Cameron argue that this is a key distinction between criminal and civil law. The criminal law seeks to learn the “truth,” whereas the civil law seeks only to make a fair decision: “Proof of guilt is thus about moral certainty. Ordinary legal proof is not. Proof of guilt is a method used for finding what we call the “truth.”” Ordinary legal proof is merely a means to make a decision.” Wexler, above note 89 at 175.} As a result, under either Stream’s version of the presumption, the member’s role is not to conduct a “credibility assessment” or a “credibility determination,” although it is almost universally described this way in Canadian refugee law. A member does not assess credibility any more than a judge or jury in a criminal matter assesses innocence. Credibility is presumed, and the member assesses deception, just as a judge or jury assesses guilt. Where the strong and weak versions of the presumption differ is in what it will take to displace them, to allow the member to conclude that he has identified deception.

Strong indicators of deception – indicators that the Court finds very compelling – will be needed to displace a strong presumption. If the member must genuinely presume that the claimant is telling the truth, this presumption will hold unless the member has identified a strong reason to
believe that he is lying. A weak presumption, on the other hand, can be displaced by weak indicators. If the presumption of truthfulness is really about the business of writing good and just decisions, then it can be displaced by factors that may suggest that the claimant is lying, but that need not do so very convincingly as long as they can otherwise justify themselves in the interests of a good and just decision.

2.3.2.1 Requiring “reasonable diligence”

The First Stream emphasizes that the mere fact that the claimant’s evidence is uncorroborated is not a strong enough indicator of deception. Not only do claimants typically have trouble gathering supporting evidence, but the claimant may not have recognized a particular document’s potential importance. For the Second Stream, a member may disbelieve a claimant whose story otherwise appears credible if it is suspiciously uncorroborated – if the member disbelieves her explanation for why supporting documents were unavailable – but also if it is unreasonably uncorroborated – if she has not provided documents that “could reasonably have been expected to be available” and if she has not shown “reasonable diligence” in trying to obtain them. This is “only a matter of common sense” and to suggest otherwise, the Court finds, is “simply startling.”

932 See discussion in Chapter 2, s.1.1.3.1.

933 See for example Canadian Council for Refugees v. Canada [2007] FCJ No 1583, 2007 FC 1262 at para 222-223, overturned on other grounds (Phelan J); Singh v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 755 at para 9 (O’Reilly J); Balayah v. Canada (Minister of Citizenship and Immigration) [1996] FCJ No 1029 at paras 12-13 (Simpson J). The Second Stream also finds, contrary to the First, that the member can draw a negative credibility inference if a letter that generally supports the claimant’s story fails to mention specific relevant information. In other words, the member can consider a document for what it does not say, rather than for what it does say. Pararasasingam v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 873, 2013 FC 805 at para 16 (Snider J); JEPG v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 938, 2011 FC 744 at paras 6-10 (Mosley J).

934 Lopera v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 828, 2011 FC 653 at para 31, see also para 32 (Kelen J). See also for example Wokwera v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1433, 2012 FC 132 (Boivin J).


936 Ortiz Juarez v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 365, 2006 FC 288 at para 7, see paras 7-9 (Phelan J). In this case, the member’s other credibility concerns would arguably have “opened the
A lack of diligence is a poor proxy for deception however, especially since the Court has made clear that the test for reasonableness is an objective one. The member is not to consider whether the claimant made the efforts she truly (if mistakenly) believed were required, but rather whether she made “the reasonable efforts that could objectively be expected on the part of a person in the applicant’s position.”937 The credibility presumption can be displaced, in other words, not because there are strong reasons to believe that the claimant is lying, but because the member finds that she has been irresponsible: because she “should have known the importance of corroborating documents,”938 whether she did or not, and so failed in her “duty” to provide evidence to prove her claim.939

2.3.2.2 Not allowing liars to profit

The First Stream also suggests that lies about “irrelevant or peripheral” matters should not generally undermine a claimant’s overall credibility.940 Members must not become focused on “minor or peripheral inconsistencies,”941 thereby losing sight of the “substance” of the claim.942

door” to a requirement for corroboration regardless, in keeping with the First Stream’s approach. But the Court does not make this point. Instead it relies on the stand-alone fact that the evidence in question was reasonably available and that the claimant did not make sufficient efforts to obtain it.

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937 Mercado v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 311, 2010 FC 289 at para 38 (Gauthier J).

938 Hao v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 64, 2015 FC 119 at paras 10, 16 (Rennie J).

939 See Pinon v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 500, 2010 FC 413 at para 16 (Boivin J). Despite the presumption, “the onus is always upon the claimant to prove its claim,” Al Ismaili v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 78, 2014 FC 84 at para 32 (Strickland J). See also SI v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 15, 2004 FC 1662 at para 9 (Snider J): “It is important that we do not lose sight of the fact that, at the end of the day, the Applicant bears the burden of proving her claim of persecution.”

940 See for example RKL v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 162 at para 11 (Martineau J); Gebremichael v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 689, 2006 FC 547 at para 37 (Russell J).

To support a finding of non-credibility, problems with a claimant’s testimony should be related to “central aspects” 943 of the claim, to elements that “go to the heart of the applicant’s story,”944 rather than “details of no real consequence”945 (such as, for example, the claimant’s initial “failure to mention that he raised ducks on his farm as well as fish”).946 In particular, when a claimant has lied to a visa officer abroad, or has lied to the Board about how she came to Canada, this is “of very limited value to a determination of general credibility”:947 “whether a person has told the truth about her or his travel documents has little direct bearing on whether the person is indeed a refugee,”948 and a claimant’s “inability to present a smooth and coherent travel story” is not a reason to doubt the basis for his fear.949 Moreover, the fact that the claimant has

942 In the words of the Court of Appeal, “It seems to us that their fixation on the details of what [the claimant] stated to be his history caused them to forget the substance of the facts on which he based his claim.” Djama v. Canada (Minister of Employment and Immigration) (CA) [1992] FCJ No 531 (Marceau, MacGuigan and Décary JJ). See also Sheikh v. Canada (Minister of Citizenship and Immigration) [2000] FCJ No 568 at para 24 (Lemieux J); Taire v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 1522 at para 30 (Hansen J); Sadeghi v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1435 at para 18 (Rouleau J); Menjivar v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 5, 2006 FC 11 at para 26 (Dawson J); Nour v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 761, 2012 FC 805 at para 44 (Scott J).


945 Kinyomvyi v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 737, 2009 FC 607 at para 17 (Lagacé J). In the same vein, Reneman argues that under European law “the determining authority should focus on the credibility of the essence of the asylum account” and should not focus on “marginal issues such as...inconsistencies in parts of the applicant’s account which do not relate to the essence of the claim.” Reneman, above note 140 at 214, 225. See also Credo, above note 60 at 131 (3.4.6. A.6: “Materiality”) and 133 (“3.4.9. A.9: “Excessive or unreasonable concentration on details”).


947 Gebremichael v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 689, 2006 FC 547 at para 37 (Russell J); RKL v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 162 at para 11 (Martineau J); Gulamsakhi v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 271, 2015 FC 105 at para 9 (Brown J).

948 Takhar v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 240 at para 14 in obiter (Evans J).

949 RKL v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 162 at para 18 (Martineau J).
submitted false documents, or has been “caught in one lie” should not summarily “discredit all of
his evidence.”

For the Second Stream, on the contrary, “If one lies on how one got to Canada the whole claim
becomes very suspect,” and where a claimant once submitted fraudulent documents in support
of a visa application, for example, this is good enough reason to disbelieve her testimony in her
refugee hearing, for it is “compelling evidence that she is prepared to say or do anything to
obtain permanent Canadian residency.” And if the claimant has attempted to deceive the
Board, the member is free to reject his “evidence as a whole” – including any and all objective
evidence that he may yet be at risk – even if the claimant himself voluntarily brought his own
misconduct to the Board’s attention before the start of his hearing.


951 Bashir v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 184, 2005 FC 170 at para 6 (Harrington J). See also for example Nsabimana v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 873, 2007 FC 645 at paras 7-8 (Snider J), in which the Court upholds the relevance of a claimant’s lies on his application for a US student visa.


953 Rahaman v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1287, 2007 FC 1008 at para 14 (Beaudry J). See also Osayande v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 511 at para 21 (Kelen J): “Where a witness before the [Board] is found to have severely damaged his own credibility in a specific instance, such as supplying a false document to the [Board], that can reflect on other findings regarding his credibility”; Sanaei v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 449, 2014 FC 402 at paras 36-38 (Strickland J). See also Shahzad v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1131, 2011 FC 905 at para 39, in the context of a decision to vacate a claimant’s refugee status (Bédard J).

954 As the Second Stream makes clear, “A negative credibility finding is fatal to a refugee claim.” Paul-Laforest v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 948, 2012 FC 815 at para 18 (Mosley J). If the claimant is not credible, the member is “not required to further assess other evidence” to determine whether or not she might yet be at risk. Ndlovu v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1091, 2003 FC 851 at para 9, citing the respondent’s submissions with approval (Rouleau J). See also Djouadou v. Canada (Minister of Citizenship and Immigration) [1999] FCJ No 1568 at para 4 (Pinard J). See also discussion in Fernando v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1714, 2006 FC 1349 at paras 29-33 (Blais J). The Court’s reasoning is that, since the claimant must not only demonstrate that he is in danger but also that he is afraid, country conditions evidence alone “does not supply the element of subjective fear.” Kanvathipillai v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1172 at para 23 (Pelletier J).

955 The claimant had retracted fraudulent elements of his narrative at the outset of his hearing, explaining that he was following the advice of his pastor. The Court concludes: “Even if the Board had accepted that the Applicant’s furtherance of his Christian faith while in Canada had resulted in his desire to approach the hearing with a clean slate, it was not compelled to find that this alone was sufficient to overcome its overall credibility finding arising.
If a previous lie, especially one told under different circumstances, does not actually suggest very strongly that each of the claimant’s subsequent statements is also a lie – if it seems a stretch, in other words, to suggest that this is “compelling evidence” that nothing else that she says can ever be believed – for the Second Stream of the Court it is nonetheless hardly “irrelevant or peripheral.” It confirms that the claimant is, by definition, a liar, and liars cannot be trusted and should not be rewarded.956

2.3.2.3 Respecting the member’s expertise and common sense

Lastly, the First Stream, keenly aware of the uncertainty inherent in the refugee determination process, is always alive to the possibility that the member may have made a mistake in doubting the claimant’s credibility. If the member spots a potential indicator of deception in the claimant’s testimony, it is therefore incumbent upon him to test it thoroughly. He will need to consider it in the context of the rest of her evidence, which may cast it in a different light. If the claimant’s testimony contains troubling inconsistencies, for example, psychiatric evidence may suggest a reason why they should not count against him. Or the member may decide, given medical reports confirming that the claimant’s scars are consistent with torture, that he should not draw a negative inference from the fact that she delayed in making her claim. The member must always, in other words, assess the claimant’s credibility in light of her evidence and not the other way around.

But for the Second Stream, as discussed above, the member is an expert at credibility determination, and will, regardless, make good use of his own common sense. If, after listening from the Applicant’s prior deception.” Sanaei v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 449, 2014 FC 402 at para 38 (Strickland J). See also for example Chandra v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 799, 2012 FC 751 at para 21 (Boivin J).

956 The Court has noted in a related context, for example, that a refugee claimant must “bear full responsibility for any perjury he may have committed before the panel” and should not be allowed to “profit here from his own turpitude.” Parast v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 844, 2006 FC 660 at para 15 (Martineau J); Jaouadi v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1714, 2003 FC 1347 at para 19 (Martineau J). See also the Court’s comment, in the context of applications to vacate refugee status, that the refugee determination system should not “reward deception”: Coomaraswamy v. Canada (Minister of Citizenship and Immigration) (CA) [2002] FCJ No 603, [2002] 4 FC 501 at para 15 (Rothstein, Sexton and Evans JJA); Canada (Minister of Public Safety and Emergency Preparedness) v. Gunasingam [2008] FCJ No 234, 2008 FC 181 at para 16 (Harrington J).
to her testimony, the member decides that he does not believe the claimant, not only is he entitled to dismiss the sum total of her supporting documents, including any expert psychiatric or medical evidence that is “not consistent with [his] own findings,” the Court has held that it is “settled law” that he need not even refer to this evidence in his decision. So if the member does not believe that the claimant was tortured (if he had been, he would surely have sought medical attention), he can properly give no weight to a medical report confirming that the claimant’s scars were caused by cigarette burns. And if the member believes that the claimant’s story is a lie, her psychiatric evidence is irrelevant – not only can he reject any inference that her mental health issues were caused by her alleged experiences, he can disregard the diagnosis itself, and need not consider it in deciding what weight to give any problems with her testimony. If the member’s expertise and common sense allow him to conclude that the claimant is lying without engaging with all of her evidence, the member’s

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957 See for example Songue v. Canada (Minister of Citizenship and Immigration) [1996] FCJ No 1020 at paras 13-14 (Rouleau J); Kadder v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1047, 2005 FC 837 at para 6 (Martineau J); Meyer v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1120, 2003 FC 878 at paras 11, 20 (Blanchard J); Bouaouni v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1540, 2003 FC 1211 at paras 12, 22 (Blanchard J).

958 Sarker v. Canada (Minister of Citizenship and Immigration) [2001] FCJ No 806 at para 48, citing the Board’s reasons with approval (para 50) (Blais J). See also for example Bula v. Canada (Secretary of State) [1994] FCJ No 937 at paras 6-7 (Noël J). See also in the context of an exclusion finding Mpia-Mena-Zambili v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1645 at paras 60-61 (Shore J).

959 Vassilieva v. Canada (Minister of Citizenship and Immigration) [1998] FCJ No 1323 at paras 3-4 (Blais J). See also for example Songue v. Canada (Minister of Citizenship and Immigration) [1996] FCJ No 1020 at para 13 (Rouleau J).

960 Meyer v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1120, 2003 FC 878 at paras 11, 20 (Blanchard J). See also for example Bouaouni v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 1540, 2003 FC 1211 at paras 12, 22 (Blanchard J).

961 See for example Solomon v. Canada (Minister of Citizenship and Immigration) [2004] FCJ No 1511, 2004 FC 1252 at paras 12-14 (Blais J); Peter v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 977, 2011 FC 778 at para 40 (O’Keefe J); Mylvaganam v. Canada (Minister of Citizenship and Immigration) [2000] FCJ No 1195 at para 8 (Gibson J); Mubiala v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1368, 2011 FC 1105 at paras 14-15 (Martineau J); Arizaj v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 978, 2008 FC 774 at para 26 (Teitelbaum DJ).

962 See for example Czesak v. Canada (Minister of Citizenship and Immigration) [2013] FCJ No 1251, 2013 FC 1149 at para 40 (Annis J); Dimitrijevic v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 735, 2014 FC 719 at para 22 in obiter (Annis J); Rokni v. Canada (Minister of Citizenship and Immigration) [1995] FCJ No 182 at para 16 (Muldoon J); Kaur v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1479, 2012 FC 1379 at paras 24-40 (Crampton CJ).
expertise and common sense, as much as the claimant’s evidence, are what are displacing the presumption of truthfulness.

In short, the factors that will properly displace the weak presumption of truthfulness reflect the concerns that run through the whole of the Second Stream’s judgments. This presumption can only be displaced if there is some indication that the claimant is lying. But it need not be a very convincing indication as long as a negative credibility finding will, regardless, hold the claimant to account for her lack of diligence or for her misconduct. And in light of the member’s expertise and common sense, it need not be tested against her evidence.

2.4 Conclusion

The Second Stream designs the obstacle course in refugee law to tip the error balance against the claimant. Throughout, it uses the law’s fact-finding structures to answer questions about responsibility, as they do elsewhere in civil and administrative law, rather than about risk, as they do under the First Stream’s approach. As discussed in the next chapter, the stark contrast in these two approaches gives members exceptional leeway to choose how they would prefer to err, which often allows them to choose which decision they would prefer to make.
Chapter 4
At the Board

Because the two Streams of the Court imagine refugee claimants and refugee law very differently, they have come to different conclusions about which type of mistake to prefer. Their opposing preferences are reflected in the law’s fact-finding structures, which seek to tip the error balance in both directions at once. As a result, while the law’s burdens of proof, standards of proof and presumptions are intended to constrain decision-makers, members could hardly be freer to follow their own preferences. As long as a member is in doubt or can credibly claim to be, she can decide whether her doubts will help or harm the claimant – and since fact-finding in refugee law is saturated with doubt, this will often allow her to reach whichever conclusion she would rather.

This chapter looks in more detail at how and why members may be using the law’s fact-finding structures. The first half discusses the mechanics of how a member can reach a desired conclusion. The second half looks at the factors that may be influencing the members’ error preferences, and argues that the division within the Court maps onto a wider debate, one with a very different tone. Within the context of this larger debate, there are good reasons to fear, in particular, that members may be motivated to err against claimants for unlawful reasons.

1 How members can use these structures

Noll has sounded the alarm that the rules that govern fact-finding in refugee law may “provide a back door for unfettered discretion.”963 This section aims to give an idea of what this looks like in practice.

For a start, a Board member is free to decide which Stream’s obstacle course she would rather see the claimant run. If she is inclined to err in his favour, she will conclude from the shared burden of proof that she should take an active helping role. She will look for grounds that might support a positive decision even if the claimant has not raised them. She will “sift through the

evidence” to find support for his case, even if he himself has not done so. And she may send his documents for verification if she has doubts about them. Throughout, she will see her role as determining whether or not the claimant is at risk. She knows that a very low degree of risk is needed in order for her to accept his claim, and his state’s protection efforts will not matter to her unless they will actually make him safer. And she will enter the hearing room genuinely assuming for the sake of argument that the claimant is telling the truth. She will only conclude otherwise if she is strongly convinced that he is lying, and even then, she will revisit this conclusion in light of his evidence. At the end of the day, even if she does not believe his story, she will still ask herself whether or not he needs protection.

If the member is inclined to err against him, however, the claimant will find himself in a very different hearing room. The member will conclude from the fact that he bears the legal onus that he alone is responsible for making his case. She need only judge the claim as he presents it, and only then if he articulates it clearly enough. She need only consider the evidence that he submits, and only then if he draws it to her attention and explains its relevance. And if his documents seem suspicious, there is no need to have them verified. She can use her own expertise to conclude that they are fraudulent. She will enter the hearing room genuinely assuming for the sake of argument that the claimant’s state is able to protect him, and she will be careful not to ask too much of authorities who are trying their best. Throughout, she will see her role as getting to the bottom of the claimant’s allegations, and she knows that to accept any of his statements, she must be convinced that they are more likely than not to be true. She will be alert to the possibility that he is trying to deceive her and if she sees any potential signs of deception she will not hesitate to conclude that he is lying. And if she does, she will look no further. She will dismiss all of his supporting evidence, and will not consider whether or not he may yet be at risk.

The fact that members are free to read from either Stream’s playbook, then, may lead to different outcomes in similar cases. Moreover, at any time, and for any reason, a member can switch playbooks. Even if a member has a strong personal preference for one kind of error, this preference may change on the particular facts of a case. This is, indeed, the principal reason why the law seeks to impose its own error preference on decision-makers: “controlling the jury’s rationality” is important precisely because decision-makers will naturally be tempted to tip the
balance in certain cases and not in others, whereas the law prefers that the same rules should apply universally.\textsuperscript{964}

In addition, as discussed below, there are two perhaps less obvious ways that members can use the law’s fact-finding structures to tip the error balance at will. Members will often be able to frame their findings in order to take advantage of either the lower or the higher of the law’s two standards of proof. And the debates within the Court about rational action and memory have created two very powerful ‘permissible inferences’ that allow members to preserve or displace the presumption of truthfulness largely at will.

1.1 Conflicting standards of proof

As described in Chapter 3, Canadian refugee law uses two standards of proof that pull in opposite directions. The civil standard of proof (“on the balance of probabilities”) tips the error balance against the claimant, whereas refugee law’s very low “more than a mere possibility” standard tips it strongly in her favour. If there is flexibility to choose which of these standards to apply to the claimant’s evidence, there is flexibility to choose which way to err. Since there is a deep division in the law on the question of which standard should govern which types of findings, members will very often have just such flexibility.

The Court has tried to allocate categories of findings to either standard along two axes. On the one hand, it has held that these two standards should reflect the distinction between findings of fact and findings of law. It has suggested that the civil standard will apply to “the evidence,”\textsuperscript{965} to “the factual basis for the claim,”\textsuperscript{966} and that the lower standard will then apply to the sum of

\textsuperscript{964} As Kaplan explains, while the law’s preference for erring on the side of the accused is a “fundamental tenet” of the criminal law, the accused’s reputation and the nature of the crime (in particular, whether it is one with a high likelihood of recidivism) are factors that might reasonably inflate the jury’s perception of the harm of a false acquittal. Since these are eminently rational considerations, the problem that the law faces in trying to ensure that all cases are decided according to the same set of decision-making principles – “one of the basic dilemmas of our criminal system” – is in essence how to stop jurors from reasoning rationally. Kaplan, above note 12 at 1074-7.

\textsuperscript{965} \textit{Nageem v. Canada} (Minister of Citizenship and Immigration) [2012] FCJ No 933, 2012 FC 867 at para 24 (Rennie J).

\textsuperscript{966} \textit{El Achkar v. Canada (Minister of Citizenship and Immigration)} [2013] FCJ No 500, 2013 FC 472 at para 28 (Strickland J).
the established facts. As discussed in Chapter 3, on this interpretation, the “more than a mere possibility” standard is not a standard of proof at all, but rather “the legal test for persecution.” On the other hand, the Court has found that both standards apply to questions of fact, and it has tried to distinguish among them. On this interpretation, “the facts grounding the claim” or simply “what happened in the past” should be decided on the civil standard, whereas “what will happen in the future” should be decided on the lower standard. And at times the Court has mixed these two approaches, contrasting “the facts underlying the claim” with the “legal test for persecution.”

Assigning standards of proof along the lines of fact and law misses the mark in theory, and it collapses in practice. The risk question subsumed within the test for refugee status – Does the claimant face a serious enough degree of harm? – is squarely a question of fact. If the civil standard applies to the “factual basis for the claim,” it applies to this question as well, leaving no room for the “more than a mere possibility” standard to operate. And while there is an intuitive appeal to a distinction between “past” or “underlying” facts, on the one hand, and “future” or risk-oriented facts, on the other, and while this division may hold for many categories of fact, it too breaks down in ways that leave it open to flexible interpretation.

At the heart of every refugee claim is the question of the agent of persecution’s intent. If the claimant alleges that someone intends to harm her, how should the member assess this claim? Is the agent of persecution’s desire to harm the claimant an underlying fact or part of the future risk question? If the state will not protect her from her abusive ex-husband, does the claimant need to

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967 Pacificador v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1380, 2007 FC 1050 at para 74 (de Montigny J).

968 Ibid.

969 Ibid.

970 See for example Hinzman v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 521, 2006 FC 420 at para 184 (Mactavish J); Hughey v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 522, 2006 FC 421 at para 171 (Mactavish J); Alomari v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 640, 2015 FC 573 at paras 21-22 (LeBlanc J); AB v. Canada (Minister of Citizenship and Immigration) [2015] FCJ No 420, 2015 FC 450 at para 20 (Shore J).

971 See discussion in Chapter 3, s.2.2.1.1.2.
show on a balance of probabilities that he wants to kill her, or only that there is more than a mere possibility that he does? Does she need to show that she is a target of the guerrillas or only that there is more than a mere possibility that she is?

In addition, if the claimant is not yet on the agent of persecution’s radar, how should the member assess her fear that she may come to be if she returns home? Does the claimant need to establish on the balance of probabilities that she will be recognized as a dissident or an apostate, or perceived as gay? Or only that there is a “serious chance” that she will be? On the one hand, these are clearly findings about “what will happen in the future” and may be closely tied to the ultimate risk question. On the other hand, they can also be framed as a present condition: is she, as a matter of current fact, the kind of person who is likely to be of concern to the agent of persecution? And even if the agent of persecution wants to harm her, he will not be able to do so unless he can find her. Is his ability to locate the claimant an element of the risk question, or, as a prerequisite for persecution rather than an aspect of it, is it part of the claim’s underlying facts?

Not surprisingly, the two Streams of the Court answer these questions differently. For the First Stream, the member errs if he requires the claimant to prove on a balance of probabilities that she “will be targeted,”972 or “would be pursued,” 973 or “will be arrested.”974 These future facts are simply part and parcel of the risk question. Even if this claim is framed using the present rather than the future tense, the question of the agent of persecution’s interest in the claimant is an element of the risk of future persecution. Whether or not the claimant “is…a target” of the guerrillas, 975 whether or not the authorities “perceive him to have ties” to the Tamil Tigers,


973 Ospina v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 887, 2011 FC 681 at paras 15, 30-31 (Mandamin J).

974 Gopalarasa v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1199, 2014 FC 1138 at paras 25-26 (Diner J).

whether or not they “wish to arrest him”; these are questions to be answered using the lower standard of proof. They speak directly to whether or not the claimant is at risk, and so the higher standard is inappropriate. The Board “cannot put itself into the Applicant’s shoes and apply the civil balance of probabilities to decide if the Applicant’s subjective fear is well founded or not.”

Likewise, where persecution requires a triggering event, the likelihood that this event will occur is one part of the risk question. The member uses the wrong standard, for example, if she doubts whether the claimant’s political rivals “would happen to notice” him if he were to return, or “would recognize him in a dense metropolis.” By applying the balance of probabilities to this finding of fact, the member “seems to have required the Applicant to prove that persecution would more likely than not occur.” And if a claimant can establish that she will be at risk of persecution if her government learns of her religious conversion, then the member is required to ask himself whether her conversion “might come to the attention of state authorities,” not whether it would. Gay claimants are entitled to protection as long as they face a serious risk of persecution “if their identity becomes known,” even if there is little chance that it will. The First Stream goes so far as to find, in fact, that this question is so entirely subsumed within the ultimate risk question that as long as the claimant faces a serious chance of harm if she is

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977 Gopalarasa v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1199, 2014 FC 1138 at paras 25-26 (Diner J).


979 Ghose v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 464, 2007 FC 343 at para 18 (Snider J).

980 Ibid., at para 22.

981 AB v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 386, 2009 FC 325 at para 25, in the PRRA context (Gibson DJ) [emphasis in original]; Sadeghi v. Canada (Minister of Citizenship and Immigration) [2002] FCJ No 1435 at para 18 (Rouleau J). See also Sheikh v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 283, 2014 FC 264 at paras 9-14 in obiter (Zinn J).

discovered, she is not even required to establish this factual precondition on the lower standard of proof: as long as it is possible that she might come to the agent of persecution’s attention, “it is irrelevant how likely or unlikely it is.”

For the Second Stream, on the contrary, any precondition to persecution is part of a claim’s factual underpinnings. The claimant must establish that it will be met, on a balance of probabilities, before she can go on to make any further claims, on the lower standard, about “what will happen in the future.” A claimant on the run from her abusive husband, for example, must show that he will likely be able to locate her. And any questions about the agent of persecution’s intentions are subsumed within a larger question of underlying fact: whether or not the claimant “has a profile of someone at risk.” Before she can claim to be in danger, the claimant must show that her profile is such “that she would personally come to the attention of authorities,” or that the agent of persecution “would perceive him” as a target. Indeed, the member must be “convinced” on the civil standard not only that the claimant’s criticisms would be of concern to his government, for example, but also that this concern would lead to action: whether or not the government, as a result, “would make arrangements to put his life at risk” is not an element of the risk question but simply a question of underlying fact.

983 As the Court explains, “any analysis on the part of the Board on this question would largely be an exercise in speculation.” 984 Ibid.

984 Pacificador v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1380, 2007 FC 1050 at para 74 (de Montigny J).


986 Pararajasingham v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1582, 2012 FC 1416 at para 50 in the PRRA context, although the judgment refers throughout, erroneously, to the Board as decision-maker (Russell J). See also Esmailzadeh v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1519, 2006 FC 1207 at paras 17-20 in the PRRA context (Rouleau DJ).

987 Damte v. Canada (Minister of Citizenship and Immigration) [2008] FCJ No 1420, 2008 FC 1137 at para 12 in the PRRA context (Tannenbaum DJ).

988 Esmailzadeh v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 1519, 2006 FC 1207 at para 17, see paras 17-20 in the PRRA context (Rouleau DJ); see also Pararajasingham v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1582, 2012 FC 1416 at paras 26, 49 in the PRRA context (Russell J).

989 Avagyan v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 1063, 2014 FC 1004 at para 36 (LeBlanc J). See also for example Pararajasingham v. Canada (Minister of Citizenship and Immigration) [2012]
interpretation, if the decision-maker finds that there is not enough evidence that the claimant “would be detained,” or that he “will be arrested, harmed or otherwise targeted,” this use of the civil standard for these findings of future fact is not an error because it is “not a comment upon the degree of risk.” Rather, the decision-maker is simply requiring the claimant “to establish the facts upon which he relied (i.e. his profile).”

In short, in a great many cases, the member will have some degree of doubt about how the agent of persecution will respond to the claimant. And he will very often be free to choose whether or not that doubt should stand in the way of a positive decision.

### 1.2 Permissible inferences: rational action and memory

While burdens of proof, standards of proof and presumptions aim to oblige the decision-maker to follow the law’s error preference, a “permissible” or “justifiable inference” is a fact-finding structure of a different stripe. The law creates a permissible inference when it gives its stamp of approval to an assumption, but stops short of making it mandatory. Like a presumption, then, a permissible inference will shift the error burden – but only if the decision-maker wants it to. Rather than constraining him, in other words, a permissible inference expressly allows the decision-maker to err as he chooses.

In the refugee context, not only do the law’s other fact-finding structures leave the member largely free to decide whether his doubts should harm or help the claimant, but he can take

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FCJ No 1582, 2012 FC 1416 at paras 48-50, in the PRRA context, upholding the finding that there was insufficient evidence that the applicant “would attract undue attention or reprisal” (Russell J).

Pararajasingham v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1582, 2012 FC 1416 at paras 26, 49, in the PRRA context (Russell J).

Ibid. See also, for example, Jimenez v. Canada (Minister of Citizenship and Immigration) [2014] FCJ No 817, 2014 FC 780 at para 31 (Strickland J): “Nor did the Board err in considering the Applicants’ profile in determining that they were not likely to be targeted.”

See also for example Pararajasingham v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 1582, 2012 FC 1416 at para 50, in the PRRA context (Russell J).

Ibid., at para 49.

While the latter are often referred to as “permissive presumptions” or “presumptions of fact,” confusing them with true legal presumptions “is misleading and can be dangerous.” Delisle, above note 17 at 127-128.
advantage of two very powerful permissible inferences. As discussed in Chapter 2, the Second Stream views the actions of claimants and others through the lens of a classical theory of rational action, and, in keeping with a popular lay notion, it assumes that human memory is complete and stable. The First Stream has no comparable overarching theories of its own about human judgment and memory, but instead pokes holes in these models, countering with insights arising out of the social sciences. The upshot is that members are expressly permitted, but equally expressly not obliged, to apply these governing theories. They can, with the Court’s blessing, draw either contrary inference from the claimant’s testimony on a wide range of aspects about how she responded to danger and about what and how she remembers.

One pair of contrary inferences in particular deserves special attention. The “inconsistency heuristic” – the notion that “consistency implies truth, whereas inconsistency implies deception”995 – is a very weak decision-making tool. In fact, the popular tendency to rely on this notion is one of the commonly proposed explanations for why our credibility assessments are so unreliable.996 But it is an exceptionally strong decision-writing tool, particularly in the refugee determination context.

1.2.1 The inconsistency heuristic

With a little effort, an attentive Board member can usually count on being able to identify inconsistencies between a claimant’s written statement and her testimony at her hearing. Not only are memories unstable at the best of times,997 but the circumstances under which claimants give their evidence can be expected to produce especially high levels of inconsistency. As a number of researchers have pointed out, the “social context” of a refugee hearing – including the power dynamic at play between the claimant and the member, and the fact that the claimant may well be stressed, fatigued and traumatized – makes it difficult for many claimants to remember


997 See discussion in Chapter 2, s.1.1.1.2.
their experiences clearly. Moreover, even leaving this stark reality aside, researchers have long recognized that the method that the Board uses to gather evidence is one that will reliably cause subjects in memory studies to have memories that change significantly from one account to the next.

A person making a refugee claim in Canada is asked to provide a written account of the basis for her claim. This statement is put before the member at her hearing, who questions her about it. Two of the main types of questions asked of subjects in memory studies are ‘free recall’ questions, in which they are asked to set out what they remember in as much detail as possible (“Describe all of the significant events and reasons that led you to seek protection in Canada,” in the words of the initial refugee claim form), and ‘cued recall’ questions, in which the researcher or investigator guides the subjects’ recollection with specific prompts (“And then what did he say?” “Did she do anything else?” “Was anyone else there?”). These different types of cues will elicit different types of information. As a result, researchers looking to measure levels of inconsistency are expressly warned to use “exactly the same” retrieval method on both test occasions, otherwise “different recollections will emerge on the two tests.”

When researchers use an initial free-recall prompt and then follow it up with cued questions, they can expect their subjects to remember many further details, even if they have tried to give a

998 For a review see sources in above note 204.

999 For a general review see Cameron 2010, above note 147, from which this section has been adapted.


complete and full account on the first occasion.\textsuperscript{1002} This reflects a general phenomenon called “hypermnesia,” the tendency to remember more details each time a memory is brought to mind,\textsuperscript{1003} as well as the fact that specific events will often slip subjects’ minds entirely on an open-ended survey question, often leading to “gross under-reporting of even distinctive events.”\textsuperscript{1004} In addition, using different kinds of questions, or differently-worded questions, will reliably produce “quite different estimates” of dates,\textsuperscript{1005} of frequency,\textsuperscript{1006} of duration,\textsuperscript{1007} of the


\textsuperscript{1006} Belli 1998, above note 1004 at 384.

sequence of events, and researchers have also suggested that these effects may be compounded when the retrieval method shifts between “face-to-face” interviews and “self-administered questionnaires.” In short, one likely could not design a retrieval methodology that would produce greater inconsistencies than one that gives its subjects a self-administered free recall form to fill out and then invites them to a face-to-face interview and asks them cued recall questions – even leaving aside the fact that their evidence will likely have been filtered on the two different occasions through two different interpreters.

A claimant’s testimony will therefore typically be a rich source of inconsistencies, real and perceived – for as researchers have also observed, determining whether or not two statements are in fact inconsistent is a notoriously subjective enterprise. All too often, the hunt for inconsistencies becomes a game, and not a very sporting one. At its worst, it can bring to mind the words attributed to Cardinal Richelieu: “If you give me six lines written by the hand of the most honest of men, I will find something in them which will hang him.”

In short, a member who is not in the market for an efficient and effective way to deny a refugee claim can conclude that a claimant cannot be expected to act perfectly rationally, or to recall her experiences in complete detail. Moreover, he can understand the claimant’s evidence as consistent; or he can accept her explanation for why it is inconsistent; or he can, regardless,

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1011 Several studies looking at consistency have observed that there was often “substantial disagreement” among the researchers and their assistants as to whether or not the subjects’ statements were consistent. For one set of statements, for example, half of the seventy-eight assistants found them to be consistent and half found them to be inconsistent. Granhag 2000, above note 151 at 211, 215. See also S. Porter, J. C. Yuille & D. R. Lehman, “The nature of real, implanted and fabricated memories for emotional childhood events: Implications for the recovered memory debate,” (1999) 23 Law and Human Behavior 517 cited in Granhag 1999, above note 149.

1012 Suzy Platt (ed.), Respectfully quoted: a dictionary of quotations requested from the Congressional Research Service, No 908 (Washington DC: Library of Congress, 1989). This quote struck a chord with Norman as well, who uses it to begin his article on credibility assessment in the Australian refugee determination system. Norman, above note 132 at 274.
forgive any inconsistencies as minor or peripheral. On the other hand, the claimant’s same evidence may well be all that the member needs in order to find that she is not credible, which, if he follows the Second Stream’s reasoning, is all that he needs in order to deny her claim.

1.3 Conclusion

The fact-finding structures in Canadian refugee law help to explain the “massive disparities” in the Board’s acceptance rates.\textsuperscript{1013} Yet while some of these structures are unique to the Canadian refugee law context, uneven decision-making is decidedly not. Noll begins his book on the assessment of evidence in refugee status determination by observing: “The law is expected to treat like cases alike. In asylum law, this poses veritable challenges.”\textsuperscript{1014} And indeed, in other jurisdictions the disparities in grant rates among decision-makers are even greater.\textsuperscript{1015} Whether and to what extent this problem elsewhere also reflects a fundamental disagreement in the law about the right kind of error is a question for others to answer, if they see fit.

Outside of courts and hearing rooms, however, a broader debate is taking place around the world about which mistake is worse when it comes to deciding who gets refugee protection. As discussed below in the Canadian context, this other debate may be affecting how and why Board members make their decisions. If the rules that govern fact-finding in refugee law elsewhere also “provide a back door for unfettered discretion”\textsuperscript{1016} as they do in Canada, this other debate may well be having similar repercussions in other jurisdictions.

2 The right kind of mistake: The other debate

This project has sought to demonstrate that the Court is divided in its approach to refugee claimants and refugee law, and it is hard not to see reflected in this division the broad traditional

\textsuperscript{1013} Rehaag 2011, above note 3.

\textsuperscript{1014} Noll “Introduction,” above note 129 at 1.

\textsuperscript{1015} See generally discussion in Refugee Roulette, above note 7. In particular, Macklin suggests that in comparison with the disparities recently observed in the US asylum system, “the Canadian data appear almost benign.” Macklin 2009, above note 7 at 136.

\textsuperscript{1016} Noll, “Introduction,” above note 129 at 2.
socio-political split between those on the Left, who emphasize caring for the vulnerable, and those on the Right, who place a premium on personal responsibility. The political leanings of the Court’s judges are the stuff of legend among refugee lawyers, and have also received some academic attention.  

Similar divisions have been observed at the Board level, and Macklin suggests that the members’ profoundly divergent approaches are, in part, “proxy wars that erupt because of an inability or unwillingness to directly engage this ideological conflict.” This would seem to apply equally to the Court’s judgments. Political ideologies are stepping in to fill the void left by the Convention’s deliberate lack of guidance, as well as by the fact that refugee law is very young and it has not yet thought everything through: Noll notes “the lack of tangible norms” in this area and “the absence of theoretical underpinnings explaining its characteristic features.”

Much of this legal debate, however, may be happening out of Board members’ earshot. Members do not need to engage very deeply with the jurisprudence to get the Court’s mixed messages about the right kind of mistake, but they may not be aware of, or much moved by, the Court’s reasoning, let alone by academic commentary. By design, few members are lawyers, and their legal instruction at the Board is “perfunctory” – so as the Senior Advisor of the Board’s Legal Services Branch explained, “These guys aren’t exactly Bora Laskin.” But beyond the law, another battle is being fought for the members’ hearts and minds and error preferences, one that rages around them every day as they make their decisions. As set out in the first and second

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1021 Ibid. at 3. Macklin suggests, in particular, that “the process of credibility determination remains opaque and undertheorized…an uncultivated field of normativity,” in refugee law as indeed it is elsewhere in the law. Macklin 2009, above note 7 at 138.

1022 Hamlin, above note 144 at 95-98.

1023 Ibid., at 97.
sections below, both sides in this sharper and more desperate debate believe that refugee protection is malfunctioning. On the one side are those who believe that it is in crisis because too few people are getting the protection that they need. On the other are those who believe that it is in crisis because too many people are getting status that they do not deserve. While members may only be tuned in to portions of this debate, there is reason to believe, as set out in the third section below, that these portions may be coming through loud and clear.

2.1 Too few people are getting the protection that they need

Like the First Stream of the Court, those on the first side of this broader public debate are concerned about mistaken denials in refugee law. But more generally, they are worried that refugee law itself is “in danger of being rendered irrelevant.”1024 Dauvergne observes that “refugee law has officially been in crisis” since at least the turn of this century.1025 Indeed, many have warned over the last two decades that its role has become “increasingly marginal,”1026 as national governments, many of whom were leery of it from the start,1027 are ever less motivated to comply with it.1028 Some states, such as the UK and Australia, have openly argued that it is


1025 Dauvergne, above note 172 at 54. See also Lewis, above note 131 at 78; Hathaway, “Relevant,” above note 180.


1028 Lewis, above note 131 at 99.
“outmoded.”¹⁰²⁹ This has led some observers to suggest that “the Geneva Convention, as we know it, is probably on its deathbed.”¹⁰³⁰

Researchers propose many potential reasons for this global hardening toward the very notion of refugee protection.¹⁰³¹ They note the loss of “the ideological consensus that existed post World War II when the vast majority of refugees were Europeans fleeing ideologies hostile to liberal democracies,”¹⁰³² when there was “strategic value” in accepting them,¹⁰³³ and when, to boot, many countries were facing labour shortages.¹⁰³⁴ They argue that states have grown frustrated with the limits that refugee law imposes on their national autonomy in an increasingly globalized world in which migration control is their “last bastion of sovereignty”,¹⁰³⁵ — especially, as Hathaway highlights, since the Convention makes no attempt to address or accommodate their legitimate concerns.¹⁰³⁶ In addition, refugee law has “always been at the mercy of economic and political cycles,”¹⁰³⁷ and global economies have recently taken some hard hits. Governments and

¹⁰²⁹ Liz Curran, “Global Solutions” in Refugees Convention, above note 180 at 314.


¹⁰³¹ For an overview see Lewis, above note 131 at 81-85.

¹⁰³² Liz Curran & Susan Kneebone, “Overview,” in Refugees Convention, above note 180 at 11. See also Hathaway, “Preface,” above note 1026 at xviii: “Most refugees who seek entry to developed states today are from the poorer countries of the South: their “different” racial and social profile is seen as a challenge to the cultural cohesion of many developed states.”

¹⁰³³ Hathaway, “Preface,” above note 1026 at xviii.


¹⁰³⁵ Dauvergne, above note 172 at 5, 62-63. See also for example Mary Crock, “The Refugees Convention at 50: Mid-Life Crisis or Terminal Inadequacy? An Australian Perspective” in Refugees Convention, above note 180, 47 at 48.


¹⁰³⁷ Levy, above note 1030 at 130. See also Matthew J. Gibney, “The State of Asylum: Democratisation, Judicialisation and Evolution of Refugee Policy” in Refugees Convention, above note 180, 19 at 33.
their citizens have responded predictably, with distrust and fear of asylum seekers reaching “moral panic” levels.\footnote{See for example Dauvergne, above note 172 at 2; Beaudoin, above note 5 at 14. Gorlick cites the popular notion in refugee receiving states “that the vast majority of asylum-seekers are undeserving of legal protection and of society’s attention and assistance,” and notes that “a recent survey conducted in Switzerland found that Swiss citizens are more fearful about an influx of foreigners than they are about terrorism or war.” Gorlick 2003, above note 60 at 66. See also for example Crock, above note 180 at 54; Penelope Mathew, “Safe for Whom? The Safe Third Country Concept Finds a Home in Australia” in Refugees Convention, above note 180, 133 at 172.}

The result is that refugee law “serves fewer and fewer people, less and less well, as time goes on,”\footnote{Hathaway, “Preface,” above note 1026 at xxv.} because states simply find ways around it. Over the last three decades, national governments have put in place “all the barriers they could think of to prevent refugees from coming.”\footnote{Francois Crépeau: “The Fight against Migrant Smuggling: Migration Containment over Refugee Protection” in Refugee Convention at Fifty, above note 1027, 173 at 174.} They have closed their borders with razor wire and with visa requirements. They have imposed heavy sanctions on airlines that carry refugee claimants, and have turned boats back at sea. When ships have made it past their blockades, they have prevented their passengers from disembarking. And they have tried to make themselves as unappealing as possible by denying claimants access to medical and social services, or simply by confining them, often in brutal conditions, sometimes in detention centres abroad.\footnote{For a general review of “non-admission and non-arrival policies” see Rosemary Byrne, Gregor Noll & Jens Vested-Hansen, “Introduction” in Rosemary Byrne, Gregor Noll & Jens Vested-Hansen (eds.) New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union (The Hague: Kluwer Law International, 2002) 1 at 10-28; Lewis, above note 131 at 83-85; Brian Gorlick, “(Mis)perception of Refugees, State Sovereignty, and the Continuing Challenge of International Protection” in Anne F. Bayefsky (ed.) Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Honour of Joan Fitzpatrick and Arthur Helton (Leiden: Martinus Nijhoff Publishers, 2006) 65; Hathaway 2014, above note 132 at 26-32; Bill Frelick, “Afterword: Assessing the Prospects for Reform of International Refugee Law” in Reconceiving, above note 1026, 147 at 147-8; Crépeau 2003, above note 1040 at 174; Hathaway, “Preface,” above note 1026. See also Gibney, above note 1037 at 22-33. As Byrne et al. note, “The increasing role of such policies is well documented, and can be considered an undisputed fact.” Byrne, above, at 10-11. For a detailed insider account of the battle to implement these types of restrictions in the US, see Philip G. Schrag, A Well-Founded Fear: The Congressional Battle to Save Political Asylum in America (New York: Routledge, 2000).} Even states like Canada that take pride in their record of refugee protection have moved to restrict claimants’ medical coverage\footnote{See Canadian Doctors for Refugee Care v. Canada (Attorney General) [2014] FCJ No 679, 2014 FC 651 (Mactavish J).}
and have sealed off “each and every crack through which refugees may arrive in the country on their own to find protection.”

At the same time, when these strategies fail “to keep refugees away from us,” states have made good use of the “gaps and ambiguities” in the Convention to ensure that fewer than ever are able to obtain refugee status. Researchers observe that states worldwide are interpreting the Convention “ever more narrowly,” making greater use of legally dubious principles “such as first country of asylum, safe third country and safe country of origin,” and are also limiting rejected claimants’ rights to appeal, as well as “the scope or intensity of judicial review of such decisions.” And, as scholars have recently noted, evidentiary principles that make it harder for claimants to prove their cases play a key role in what Dauvergne calls “the refugee law race to the bottom.” In a decision-making context widely characterized by “presumptive skepticism,” they “operate as a de facto mechanism for the deflection of asylum seekers.” Many claimants who have made it to a country of asylum against all odds, and have cleared a host of other legal hurdles, discover that fact-finding is the wall that they cannot scale.

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1043 Crépeau 2003, above note 1040 at 174. See also Dauvergne, above note 172 at 5, who notes “the recent state moves to restrict refugee protection while expanding refugee rhetoric.”

1044 Hathaway, “Preface,” above note 1026 at xx [emphasis in original].

1045 Lewis, above note 131 at 86.

1046 Frelick, above note 1041 at 147. See also discussion in Lewis, above note 131 at 83-84.

1047 Lewis, above note 131 at 84.

1048 Jens Vedsted-Hansen, “The Borderline Between Questions of Fact and Questions of Law” in Proof, above note 129, 57 at 57; Lewis, above note 131 at 84. In Canada, for example, the Court has held that if a claimant has lied to the Board, this alone is reason enough to refuse to review the decision: Parast v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 844, 2006 FC 660 at para 14 (Martineau J); Mwesigwa v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 1670, 2011 FC 1367 at paras 18-20 (Rennie J).

1049 Dauvergne, above note 172 at 51.


The failure of refugee law to protect those in need is deeply alarming to many worldwide, in universities, in courtrooms, and within the refugee protection sector. In Canada, non-governmental organizations and advocacy groups have worked hard to bring attention to the ways in which government policies are preventing people fleeing persecution from reaching safety. But the notion that this is any kind of a problem, let alone a crisis, has yet to take hold of the popular imagination.

2.2 Too many people are getting status that they do not deserve

On the contrary, many Canadians imagine that refugee protection is facing a crisis of a different kind. For many, the harms widely associated with accepting too many claimants have never been more worrying. The easier it is to get refugee status, the more claimants will come, and the country will be overrun and overburdened. Mistaken grants reward liars and allow us to be played for fools; they cost Canada financially and politically and endanger our security; and they are unfair to other would-be immigrants and to genuine refugees. These concerns have dogged the international refugee protection project from the start and are gaining momentum world-wide.

These fears were front and centre in the rhetoric of the Immigration Minister who recently overhauled Canada’s refugee determination system, bringing about “the most dramatic change

1052 See for example “Rights advocates decry detention of refugee claimants from MV Sun Sea” (10 Feb 2011), Media Release, Amnesty International, Canadian Council for Refugees, Canadian Tamil Congress, International Civil Liberties Monitoring Group (online: http://ccrweb.ca/en/bulletin/11/02/10); “One year on, Canada's refugee system is failing some of the most vulnerable refugees” (9 Dec 2013), Media Release, Canadian Council for Refugees (online: http://ccrweb.ca/en/2013-12-09); “New refugee system does not treat refugees fairly or protect those most at risk” (14 Dec 2012) Media Release, Canadian Council for Refugees (online: http://ccrweb.ca/en/bulletin/12/12/14).

1053 See for example Daniel Stoffman, “Truths and Myths about Immigration” in Alexander Moens & Martin Collacott (eds.) Immigration Policy and the Terrorist Threat in Canada and the United States (Fraser Institute: www.thefraserinstitute.org, 2008) (“Immigration Policy”): “They come because of what migration experts call the ‘pull factor.’ The ease of gaining refugee status in Canada attracts economic migrants who may not qualify under the regular immigration program or may have to wait for years before being accepted.” Diane Francis, Immigration: The Economic Case (Toronto: Key Porter Books, 2002) 116-123.

1054 See discussion in Macklin 2009, above note 7 at 159.
since the Second World War and making it markedly more difficult for claimants to win their cases. For Minister Jason Kenney, and for those who share his perspective, the refugee determination system needed to be revamped in order to avoid giving protection to those who do not need it. Put another way, the system needed to be revamped because the Minister preferred to assume, as one reported noted perceptively, that claimants were “guilty until proven innocent.”

Kenney saw Canada as awash in a flood of “bogus” refugee claimants. He blamed this situation on a number of “pull factors,” chief among them the fact that claimants were entitled to social services, and that they could remain in the country for years while their claims were being processed. But in addition, he claimed time and again that the Board’s “extremely generous” acceptance rate was “an invitation to come in through the back door.” Although he proudly


1056 See Beaudoin, above note 5 at 18-19. The new legislation imposes very tight timelines, making it difficult for claimants to retain counsel and obtain evidence in time for their hearings. In addition, as McDonald notes, under the new law entire classes of claimants from presumptively “safe” countries are “treated with skeptical dispatch and allowed virtually no right of appeal before being deported.” McDonald, above note 1055 at 37. For further overview and general discussion, see Debra Black and Nicholas Keung, “Immigration and refugee system: Canada made controversial changes in 2012” (The Toronto Star, TheStar.com: Dec 29 2012); Canadian Council for Refugees, “Canada Rolls Back Refugee Protection: Bill C-31 receives Royal Assent” (Media release, ccrweb.ca: Jun 29 2012).

1057 For arguments in support of this position see generally Immigration Policy, above note 1053; Francis, above note 1053 at 125-176.

1058 McDonald, above note 1055 at 27.


1060 Comments to the Citizenship and Immigration Committee on Oct 6 2009 (Evidence of Meeting #26 for Citizenship and Immigration in the 40th Parliament, 2nd Session). See also for example comments on the Balanced Refugee Reform Act in the House of Commons, Apr 26 2010 (https://openparliament.ca/debates/2010/4/26/jason-kenney-15/only/); comments to the Citizenship and Immigration Committee on March 10th, 2009 (Evidence of Meeting #6 for Citizenship and Immigration in the 40th Parliament, 2nd Session); comments during the debates of 208
claimed that the Canadian refugee determination system was head and shoulders above the rest, “the model system in the world for refugee protection,” when our Board recognized more refugees than the authorities in other countries, this did not suggest to Kenney that this “model” system was working, catching those who elsewhere were slipping through the cracks. It rather implied, on its face, “a fairly significant degree of abuse.” The Board’s surplus positive decisions were not merely exceptional, in other words, they were mistakes. And as he went about overhauling the system, Kenney repeatedly stressed that these mistakes were coming at a high price, as discussed further below. In addition to their financial, social, political and security costs, they were simply embarrassing. As Kenney once noted, back before he was Minister and even notionally encumbered in his ability to speak freely: “We are the laughingstock of the world because of our incredibly high acceptance rate for refugee claimants.”

2.3 Locating Board members within this debate

If a Board member is deciding in good faith – if, whatever her error preference, she would prefer to make a correct decision of either kind – then she may use the flexibility in the law’s fact-

Oct 20 2009, House of Commons Hansard #96 of the 40th Parliament, 2nd Session. Kenney made this criticism while ostensibly recognizing that the minister responsible for staffing the Board ought not to criticize its decision-making. “Obviously the IRB is an independent, quasi-judicial agency and I can’t comment on their decisions,” he explained in one newspaper interview, before going on to “note, as a point of interest, however, that the average acceptance rate for Sri Lanka asylum claimants in other Western democracies is about 20-25 per cent...The IRB’s acceptance rate, so far this year, is 86 per cent.” “On the record: Jason Kenney” (The Globe and Mail, www.theglobeandmail.com: Nov 1 2010). In another example, at a time when the Board was accepting many Czech Roma claimants, Kenney commented publicly that the Czech Republic was “hardly an island of persecution in Europe.” The Court held that this and similar comments did not raise a reasonable apprehension that the members whose reappointments Minister Kenney would be deciding would be predisposed to reject the claims of Czech Roma claimants. Cervenakova v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1591, 2010 FC 1281 at para 46 (Crampton J).

1061 Comments during the debates of Apr 23 2012, House of Commons Hansard #108 of the 41st Parliament, 1st Session. See also testimony to the Citizenship and Immigration Committee on Apr 26 2012 (Evidence of Meeting #31 for Citizenship and Immigration in the 41st Parliament, 1st Session). Kenney explained that this is in part because Canada, unlike “virtually any other developed country,” guarantees every claimant a full quasi-judicial hearing: “we will allow every asylum claimant – regardless of which country they come from or the means of their arrival – access to the same high-quality decision in front of an independent decision maker...consistent with natural justice, due process and the Charter of Rights and Freedoms.” Testimony to the Standing Senate Committee on Social Affairs, Science and Technology on Jun 18 2012.

1062 Comments to the Citizenship and Immigration Committee on Dec. 1st, 2009 (Evidence of meeting #37 for Citizenship and Immigration in the 40th Parliament, 2nd Session.)

1063 Quoting with approval a comment from an immigration lawyer cited in the National Post during the debates of Sept. 18th, 2001, House of Commons Hansard #80 of the 37th Parliament, 1st Session.
finding structures to reach the conclusion that she believes is the right one, conciously or otherwise. If she becomes convinced that the claimant is lying, for example, but is unable to articulate why, the fact that he delayed in making his refugee claim or cannot remember his dates may seem significant enough to displace the presumption of truthfulness. In another case with a believable claimant, these same factors would be immaterial. This ability to reverse-engineer a conclusion also leaves refugee status decisions open to other influences, as discussed further below. And of course it raises the spectre of abuse. If the member is committed to reaching a conclusion for improper purposes, she has a way to get where she wants to go.

Noll notes that this kind of flexibility could “produce rejections by design.” But it could, of course, cut in either direction. The member could be moved by compassion to want to help a claimant who does not require protection but whose situation is nonetheless compelling. Or he could choose to err on the side of the devoutly Christian claimant because he feels that Canada needs more devout Christians. Or, in a decision that has to be read to be believed, he could decide that, since he had just accepted the claim of the claimant’s husband, and “as it is today your wedding anniversary…the panel has no intention of separating what love has united, I will also grant you the benefit of the doubt and recognize you as a ‘convention refugee’ and a ‘person in need of protection.’” And the desire to find in the claimant’s favour could also be driven by baser motives. One member was recently caught trying to extort sex from a claimant in exchange for a positive decision.


1067 See above note 170.
At the same time, the member could, consciously or otherwise, be trying to avoid the harms widely associated with too many grants. As the Supreme Court has made clear, broader social policy concerns have no place in the hearing room. In determining a claimant’s entitlement to refugee status, the member has a legitimate interest in establishing whether or not she is telling the truth. But he has no role in furthering a political agenda, and he is not tasked with balancing costs and benefits. He has no broader mandate to save Canada money or embarrassment or to promote a particular vision of the social order, by taking into account, for example, the potential impact of his decision on the number of future claimants.

Are the Board’s decisions being motivated by these kinds of unlawful factors? If so, which? And to what extent? Answering these questions empirically is complicated not only by the fact that members’ written reasons may not fully reflect their reasoning, but also by the fact that the Board’s judgments are not available to the public. And as long as doubt is available in a refugee hearing, the discrepantly high or low grant rates of individual members say nothing about their motivations. These rates show that these members are resolving their doubt consistently in one direction or the other, but they say nothing about why. Yet each side in the debate has its strong suspicions.

For those concerned with avoiding mistaken grants, the Board’s high acceptance rate is not only proof that many members are gullible and naïve. It also suggests that they are making positive decisions out of a misguided sense of compassion, because “It is nicer that way.”

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1068 Pushpanathan v. Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982 at para 48, 28. See also for example Canada (Minister of Citizenship and Immigration) v. Pearce [2006] FCJ No 646, 2006 FC 492 at para 31, in the context of a vacation determination (Blanchard J): “The refugee protection provision of the IRPA provides for the adjudication of rights and entitlements in respect to refugee claimants and not the balancing of competing interests.” But see Diagana v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 448, 2007 FC 330 at para 17 (Gibson J), where the Court finds, for the purposes of ascertaining the proper standard of judicial review, that the Board is a “specialized tribunal empowered by a policy-laden statute.”

1069 See also for example Geza v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 477, 2006 FCA 124 (CA) (Décary, Evans & Sharlow JJA).

1070 While the QuickLaw database does include a selection of the Board’s redacted decisions, this database is small and unrepresentative. It contains no decisions for 2015, 10 decisions for 2014, and 112 decisions for 2013, for example. And it is unclear upon what basis (or on whose authority) its decisions are selected.

1071 Former Board member Lubomyr Luciuk, cited in Francis, above note 1053 at 163. Luciuk has claimed that during his time on the Board he “rarely encountered a real refugee;” Francis, above, at 163.
refugee lawyer recently offered his opinion to a researcher that because they “don’t get training in being bound by law,” members will often grant claims that are “not a solid fit with the legal definition of a refugee” if they feel sympathy for the claimant. Some have also argued that members are making positive decisions because it is easier. Positive determinations can be delivered orally, whereas negative decisions must be issued in writing, and members have heavy workloads and “are only human.”

At the same time, refugee advocates and others have long raised the concern that members may be taking a hard line with claimants for policy reasons. They note that these decisions are not made in a vacuum, far from it. As Macklin writes, “it would be naïve to suggest that decision makers are impervious to the political currents circulating around them.” She suggests, for example, that the members who recently rejected the claims of American soldiers deserting from the Iraq war “were not blind the political ramifications of their decisions.” Many have noted that the Board’s acceptance of Tamil claims “plummeted” the month after a ship carrying hundreds of Tamil claimants arrived in British Columbia, and indeed that the Board’s

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1072 Interview with one Canadian lawyer, unnamed, cited in Hamlin, above note 144 at 95.

1073 Popovic suggests that this practice has a solid legal foundation. If the member believes that the claimant is a refugee, he is not required to subject this belief to “any further testing” because “it follows from the non-refoulement rule that the host-country may not remove a refugee, while at the same time it does not preclude the host-country from applying the same rule to other categories of immigrants. However, if this subjective conviction is that the asylum seeker is not a refugee, then the officials’ subjective conviction is not enough to justify removal,” and must be supported with solid reasons. Popovic, above note 692 at 45.

1074 Luciuk, cited in Francis, above note 1053 at 163, 168.

1075 Macklin 2009, above note 7 at 140.

1076 Ibid.

1077 Douglas Quan, “Sri Lankan refugee acceptance rate plummets after migrant ship docks” (www.vancouversun: Vancouver Sun, 24 Nov 2010). See also Brian Lilley, “Canada accepting fewer Tamil refugees” (www.torontosun.com: Toronto Sun, Nov 23 2010). When the ship docked in August 2010, 75% of claims were being accepted at the Board. In September 2010, the acceptance rate was 47%. Given the Board’s processing times, none of these latter decisions were with respect to claimants who had arrived onboard the ship. Shortly afterwards, the Board also took the unusual step of designating a negative judgment in a Tamil case as having particular precedential value: “A senior IRB manager subsequently called attention to the ruling in a notice to all refugee-claim adjudicators…The notice deemed the ruling to be “persuasive” and encouraged adjudicators to follow it in similar cases.” Douglas Quan, “Refugee board notice ‘smacks of political interference,’ lawyer says” (Vancouver Sun: www.vancouversun, 12 Jan 2011). See also Sunny Dhillon, “Tamils likely safe from persecution in Sri Lanka, Refugee Board says” (www.theglobeandmail: The Globe and Mail, 10 Feb 2011).
acceptance rates overall “have declined substantially since 2006 when the Conservative Party took office.”

At times, the Board’s administration seems to have shared popular anxieties about its members’ high acceptance rates. Warned by the Ministry that the country was facing a potential surge of claimants from Hungary, for example, the Board responded with a case management strategy that crossed the line: the Court of Appeal found that it was fair to conclude that this strategy “was not only designed to bring consistency to future decisions and to increase their accuracy, but also to reduce the number of positive decisions that otherwise might be rendered” and thereby “to reduce the number of potential claimants.” And while some laud the Board as an institution for taking a progressive stand on a number of legal issues, others point out that although its guidelines and the like “mainly instruct decision makers about ‘getting to yes’ on the law,” they “mainly counsel decision makers about ‘getting to no’ on the evidence.”

For many years, however, the principle reason for fearing that members were making their decisions on policy grounds was their obvious lack of independence from the Minister. Since under the old system the Minister personally oversaw the members’ reappointments, when critics alleged that Minister Jason Kenney was causing a “significant amount of damage” to the Board’s decision-making, they typically argued that he was undermining its independence. They pointed out that when he publicly lambasted claimants from Mexico or the Czech Republic, for example, the members hearing such claims “might be fearful when their time

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1078 Debra Black, “Acceptance rates for refugees to Canada decline substantially since 2006” (thestar.com; The Toronto star, 01 Nov 2012).


1080 See Hamlin, above note 144 at Chapters 7-9.

1081 Macklin 2009, above note 7 at 158.


1083 See for example Beaudoin, above note 5 at 40-41; Audrey Macklin and Peter Showler, cited in Gabor v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1446, 2010 FC 1162 at para 31 (Zinn J). See also discussion in Macklin 2009, above note 7 at 139-144.
comes up for reappointment that he will examine their acceptance rates” and reappoint accordingly. And indeed, there were troubling indications. The Board’s acceptance rate for Czech Roma claims dropped precipitously immediately following the Minister’s public comments disparaging them, for example, and in fact its grant rate overall reached record lows at the height of his tenure.

Under the new system, Board members are civil servants who work directly for the Ministry. As a consequence, the Board as an institution is formally less independent than it was when its members were appointed by the Governor in Council: it now operates at something less than arms’ length from the government. On the other hand, since they depend for their job security on their employment contracts and their union, rather than on the Minister’s good graces, the members themselves may well be more independent. Yet concerns persist about the institutional culture at the Board in the “general climate” that Minister Kenney helped to create. The remainder of this chapter adds two further points to the reasons to be concerned that members may be particularly motivated to avoid mistaken grants for unlawful reasons, even under the new system.

As Rehaag, the foremost authority on the Board’s decision-making, has recently noted, “Ever since Jason Kenney became minister there has been a focus on enforcement and preoccupation with fraud or ‘bogus’ refugees. It wouldn’t be surprising if it has an impact on decision makers.” As set out in the first section below, the literature on risk perception suggests that this is right on point. This literature helps to explain how and why the former Minister’s (and his


1085 Gabor v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1446, 2010 FC 1162 at para 22 (Zinn J): “The Board’s statistics show that such refugee claims had a 94% acceptance rate in 2008 and an 81% acceptance rate between January and March 2009, the first full quarter prior to the impugned statements. The acceptance rate in the quarter after the statements were made (July to September 2009) dropped to 30%, and the rate dropped to 0% in the last quarter of 2009.”

1086 Black, above note 1078.

1087 Sean Rehaag, cited in ibid.

1088 Ibid.
heirs’) rhetoric may continue to have an impact on members, even though they no longer rely on him for their reappointments. In addition, this apprehension is only strengthened by the fact, discussed in the second section below, that these unlawful considerations have long influenced the decision-making of judges, who are legally trained to ignore them and who enjoy a much higher degree of personal and institutional independence.

2.3.1 Rhetoric and risk perception

To convince Canadians of the need for an overhaul of the refugee system, Kenney had to decrease their concern with mistaken denials, or else make the harms of mistaken grants so salient that they would eclipse the fact that his changes were increasing the risk that people would be sent back to persecution (as noted by the United Nations Committee Against Torture).\(^{1089}\) His rhetoric did both of these things, in several ways.

For a start, sheer repetition is a powerful tool. The more often we hear a statement, the more familiar it feels and the more it starts to ring true.\(^ {1090}\) In the lead-up to the legislative changes, Minister Kenney highlighted the harms of mistaken grants using “such inflammatory language that it has changed the terms of the national debate.”\(^ {1091}\) He began what was perhaps his most famous and controversial speech as Minister by highlighting the “floodgates” problem to good effect. He cited a poll that found “that more than half of the adults of the world’s 24 leading economies” would immigrate to Canada if they could: “more than 77 percent of people in China, 71 percent in Mexico, 68 percent of India, 58 percent of Saudi Arabia, and 53 percent of Russia

\(^{1089}\) The UN Committee explained that it was “deeply concerned” that the law had been changed to “exclude ‘irregular arrivals’ as well as individuals who are nationals of designated ‘safe’ countries from having an appeal hearing of a rejected refugee claim. This increases the risk that those individuals will be subject to refoulement.” Cited in Terry Milewski, “Canada accused of ‘complicity’ in torture in UN report: UN body says changes to Canada's immigration laws risk human rights violations” (CBC News, www.cbc.ca: Jun 1 2012).

\(^{1090}\) “A reliable way to make people believe in falsehoods is frequent repetition, because familiarity is not easily distinguished from truth.” Kahneman, above note 181 at 62; see discussion at 61-62.

\(^{1091}\) McDonald, above note 1055 at 27. As one reporter noted, for example, in describing on an open letter that Kenney wrote to Amnesty International in response to the organization’s criticisms of his ministry, “The tone of Mr. Kenney’s letter…feels personal. It reads like the kind of letter we sometimes write when we feel wronged, but then delete before sending. The tone makes sense only if Mr. Kenney recently broke up with Amnesty International.” Tabatha Southey, “Look out, Unicef. Next Jason Kenney might be gunning for you” (The Globe and Mail, theglobeandmail.com: Aug 12 2011).
would come to Canada if given the choice. All told, that’s well over two billion people.”

And as Kenney made very clear, Canada’s refugee system was not merely attracting record numbers of claimants; it was staggering beneath the weight of a “massive surge” of cheats and liars. This is “the inevitable consequence of having an asylum system that’s too easy to abuse”: these “lawbreakers and queue-jumpers” were arriving in droves to “violate our fair rules, “game our system and abuse our generosity.”

Kenney warned that “the average cost for a failed asylum claimant who uses social assistance while in Canada is $50,000” – in more complicated cases “taxpayers can be on the hook for hundreds of thousands of dollars” and in some “the cost can run into millions of dollars” – and he painted a vivid picture: claimants were “asking where they can get their welfare cheque” upon arrival at the airport. In addition, Canada’s by-the-book treatment of obviously fraudulent claimants from obviously safe countries was harming our international relations. An influx of Mexican and Czech claimants, for example, had forced Kenney to impose visas on

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1095 Cited in Köhler, above note 1094.

1096 Cited in McDonald, above note 1055 at 35.

1097 Cited in Clark, above note 1094.

1098 Kenney, “Speech at Western,” above note 1059. Elsewhere, Kenney put the average cost at $29,000 (McDonald, above note 1055 at 38), and others have set it at $64,000 (James Bissett, Director of the Centre for Immigration Policy Reform, cited in McDonald, above note 1055 at 38).

1099 Kenney, “Speech at Western,” above note 1059. For discussion of the “unfair” costs to Canadian taxpayers of medical benefits for refugee claimants, see the Minister’s arguments in Canadian Doctors for Refugee Care v. Canada (Attorney General) [2014] FCJ No 679, 2014 FC 651 at paras 912-928 (Mactavish J).

1100 Cited in Chase, above note 1094. For similar comments, see Francis, above note 1053 at 119-120.
these friendly countries, causing a “diplomatic row” that had hurt Canada’s image. The fact that people can come to Canada and make a refugee claim inland, rather than “patiently waiting in the queue” to immigrate, was “an insult to the millions of people who aspire to come to Canada legally,” and was also jeopardizing their warm welcome: “when Canadians don’t think the government can control its own borders, public support for generous levels of immigration drops significantly.” It was likewise “an insult to the important concept of refugee protection” and kept us from doing more to help genuine refugees, who in Kenney’s esteem were not those who arrive “illegally…on dangerous vessels across the oceans,” but rather those “living in UN refugee camps by the millions.” Moreover, our security was

101 See Kenney’s comments in Cervenakova v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1591, 2010 FC 1281 at para 46 (Crampton J). See also Prime Minister Stephen Harper’s comments, cited in Campbell Clark, “Ottawa announces deal to fast-track Mexican refugees” (The Globe and Mail, www.theglobeandmail.com: Feb 14 2013): “On a visit to Mexico in 2009, Mr. Harper even told the Mexicans the visa restrictions were not their fault, but Canada’s. ‘This is a problem in Canadian refugee law which encourages bogus claims,’ he said.” See discussion in Köhler, above note 1094.

102 Cited in Cervenakova v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1591, 2010 FC 1281 at para 46 (Crampton J).

103 See discussion in Köhler, above note 1094; Carl Meyer, “Where’s the beef? Sizing up Canada-Mexico relations” (Embassy, www.embassynews.ca: May 26 2010). As Hathaway notes, states “often view refugee protection as an irritant to political and economic relations with the state of origin.” Hathaway, “Preface,” above note 1026 at xix. But Macklin suggests that this concern may be exaggerated: “A finding of refugee status does not reverberate in the official domain of international human rights law. At best, countries are embarrassed when their citizens are recognized as refugees elsewhere. Mostly, they are indifferent, dismissive, or disdainful.” Macklin, above note 905 at 254.

104 Cited in Köhler, above note 1094. See also Kenney, “Speech at Western,” above note 1059.

105 Cited in Köhler, above note 1094. See also Kenney, “Speech at Western,” above note 1059.


107 Cited in Cervenakova v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1591, 2010 FC 1281 at para 46 (Crampton J).


109 Cited in Cervenakova v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 1591, 2010 FC 1281 at para 46 (Crampton J). See also discussion in McDonald, above note 1055 at 38. On Kenney’s analysis, when a claimant comes to Canada without authorization “rather than applying for refugee status at a United Nations High Commissioner for Refugees office abroad,” even if her claim is genuine, not only is she diverting resources that could be put to better use resettling refugees from abroad, but “the integrity of our immigration system is compromised, it undermines the entire immigration process, and it undermines the confidence and respect for that process that we require amongst all of those law-abiding immigrants.” Kenney, “Speech at Western,” above note
compromised. We had become an obvious destination for “any serious criminal, any terrorist, any dictator” with a fake passport.\textsuperscript{1110} And, of course, handing out refugee status to cheats and liars was rewarding their deception and allowing them to “play this country for fools.”\textsuperscript{1111}

This type of rhetoric not only suggests how Board members should view claimants, it also suggests how they should view themselves and their role in the hearing room. As discussed in Chapter 1, a risk’s salience may be affected by a decision-maker’s “self-categorization,” by how she conceives of her own identity in relation to it.\textsuperscript{1112} Macklin observes that some members “conceive of their mandate in terms of fulfilling Canada’s human rights obligations under the Refugee Convention and Canadian law.”\textsuperscript{1113} Others, however, “understand themselves as gatekeepers, tasked with protecting Canada’s borders from unscrupulous and undeserving migrants who abuse the asylum system to gain entry.”\textsuperscript{1114} Reminding members of their role in protecting Canada from fraudulent claimants strongly emphasizes the latter identity and increases concern with the harms of mistaken grants.

At the same time, emphasizing the price that Canada is paying to protect genuine refugees also decreases the salience of the risk of sending them back to persecution. Drawing attention to the

\textsuperscript{1059} For discussion and critique of this argument see Andy Lamey, \textit{Frontier Justice: The Global Refugee Crisis and What to Do About It} (Toronto: Anchor Canada, 2013) 243-47.


\textsuperscript{1111} Quoting with approval from an editorial in \textit{The Globe and Mail}, in comments to the Citizenship and Immigration Committee on May 4th, 2010 (Evidence of Meeting #12 for Citizenship and Immigration in the 40th Parliament, 3rd Session). See also Kenney’s testimony to the Standing Senate Committee on Social Affairs, Science and Technology, Jun 18 2012: “I do not like us being taken for suckers.”

\textsuperscript{1112} As discussed in above notes 46-48, when reminded of their role as parents, for example, subjects perceived strangers to be more dangerous and trusted them less. When reminded of their own mortality, subjects were more inclined to support harsh measures to counter the risk of terrorism. For a discussion of “the importance of self-categorization in risk perception” see also Diederik A. Staple, Stephen D. Reicher & Russell Spears, “Social identity, availability and the perception of risk” (1994) 12 \textit{Social Cognition} 1.

\textsuperscript{1113} Macklin 2009, above note 7 at 158. See also Crépeau 2008, above note 1018 at 112-113.

\textsuperscript{1114} \textit{Ibid.}
costs inherent in reducing a risk – bringing these harms “on-screen” 1115 – is a very effective way of decreasing its salience. In one study, for example, parents were very worried about the asbestos in their children’s schools and demanded that it be removed, even though experts assured them that it posed only a minimal risk. Once it became clear that removing the asbestos would cause the schools to be closed for weeks, however, “parental attitudes turned right around” and asbestos no longer seemed very dangerous. 1116 Such studies have led Sunstein to predict, for example, “that if people were informed that eliminating pesticides would lead to a significant cost in the price of apples and oranges, the perceived risk would go down.” 1117 This effect suggests a possible explanation for the drop in the Board’s acceptance of Tamil claims following the arrival of the boatload of Tamil claimants and the public outcry that it caused. Once accepting these claims became politically risky, Sri Lanka started to look like a much safer place for Tamils.

In addition, Kenney sought to decrease concern about mistaken denials by creating the impression of a high base rate of fraudulent claims. No one knows what percentage of refugee claimants lie to the Board, including the former Minister. As Kenney’s then Director General recently admitted, “We never really had quantifiable information on how much fraud there was.” 1118 But if most claimants are frauds, then mistaken grants are unlikely. This suggestion may not have much effect on those who find the consequences of this kind of mistake to be “terrifying” 1119 – when a risk is salient, “degrees of unlikeliness seem to provide no comfort” 1120 – but it will have an evident effect on those who judge its cost, instead, based on some sense of its magnitude and its likelihood. Moreover, if members can be made to believe that most

1115 See discussion in Sunstein 2005, above note 27 at 47-49.

1116 Ibid. at 47-48.

1117 Ibid. at 49.

1118 Quoted in McDonald, above note 1055 at 37.


claimants are liars, then since they will be more likely to view claimants with suspicion, they will be more likely to conclude that they are lying: “investigator bias” is the well-noted tendency of those looking for deception to find it where none exists.1121 More negative decisions, in turn, only strengthen the popular conviction that many claimants are frauds.

Kenney used several effective methods of creating this impression a high base rate of lying claimants. His rhetoric brought the ‘bogus’ refugee claimant squarely to the forefront of the popular imagination, and one of his most obvious rhetorical strategies was what psychologists call “imaging the numerator”:1122 he illustrated his arguments with numerous concrete examples of actual lying claimants.1123 Allowing us to picture a particular person is one of the most effective ways of increasing our impression that there are many more people like her. It is why advertisements for lotteries always show a photograph of the winner holding the cheque: so that we can “image” him, the numerator, and neglect the denominator, the millions of people who played and lost. And time and again, Kenney used a tactic that has become a prominent feature of the refugee protection debate worldwide,1124 one that the Court has recently noted is “both unfair and inaccurate”1125 and that reflects “a grossly simplistic understanding of the refugee process,”1126 implying that any and all rejected claims must have been fraudulent.1127


1123 See for example Kenney, “Speech at Western,” above note 1059.

1124 For a discussion, see Patricia Tuitt, False Images (London, UK: Pluto Press, 1996) at 20: claimants who “fall outside the legal definition of refugee” are seen “increasingly…as ‘bogus’ or ‘fraudulent.’”


1126 Ibid. at para 840 (Mactavish J). As the Court goes on to explain at para 842, “Refugee claims are often brought on the basis of real hardship and genuine suffering. Amongst those whose claims do not succeed will be individuals who may well have come to Canada because of a real fear of persecution in their country of origin, but who were
In short, Kenney made skilful use of rhetoric to reduce popular concern with wrongly rejecting genuine refugees, and to raise the alarm about harms that were already very worrying to many Canadians. Even without coming under direct pressure from the Minister, Board members may be particularly sensitive to the “general climate” that this rhetoric has created. As the Court has recognized, the Board makes its decisions “in the glare of the political and public attention attracted both by individual decisions and more systemic issues.”\textsuperscript{1128} And in an observation that surely resonates within the Canadian context, Lord Sedley of the Court of Appeal of England and Wales points out that refugee status determination is unlike many other areas of legal adjudication: “You can attend fifty social gatherings, you can drink in a hundred bars, where the conversation never comes remotely near the problems of eviction or bankruptcy; but it’s unusual to be in any gathering where immigration does not sooner or later come up, and with it the view that asylum is a tolerated gateway for illegal economic migrants.”\textsuperscript{1129} Lord Sedley warns that some decision-makers will succumb to the “ambient pressure to put a finger in the dyke, to stem the tide, to stop the rot; to reject the stories they hear from asylum-seekers so that they can be sent home.”\textsuperscript{1130}

Lord Sedley is perhaps overly optimistic when he goes on to suggest, however, that “There is just as much risk that conscientious judges will overcompensate for the pressures they sense around them.”\textsuperscript{1131} Some conscientious judges may. On the other hand, even conscientious judges are not immune to the power of salience. Indeed, one of the strongest reasons to fear that Board

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\textsuperscript{1130} \textit{Ibid}.

\textsuperscript{1131} \textit{Ibid}.
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members are being motivated by unlawful considerations is the fact that some of the Court’s judges, despite their legal training and personal and institutional independence, are not able to guard against their influence. While the large bulk of the Second Stream’s judgments reflect a preference for erring against the claimant as the moving party, some seem rather to have been motivated by the judges’ evident concern with stemming the tide.

2.3.2 In the Court: The salience of mistaken grants

The First Stream’s concern with mistaken denials leads it to imagine refugee claimants as genuine refugees – for genuine refugees, by definition, are those who stand to suffer this kind of harm.\textsuperscript{1132} The Court imagines that claimants are asking for Canada’s “protection”\textsuperscript{1133} rather than for any of the benefits that may come along with it, and suggests, for example, that the claimant “is often a bewildered and resourceless refugee,”\textsuperscript{1134} and that because of their past experiences of persecution “refugee claimants may be frightened and hesitant to interact with authorities.”\textsuperscript{1135} Imagining refugee claimants simply as litigants, however, leads the Second Stream to associate them instead with other types of petitioners, and in particular with those whom they most closely resemble: potential immigrants. Seen from this angle, claimants are trying to obtain what many others pursue through other processes – processes that give Canada more control over who is allowed to live here – and they may simply be looking for “a quick and convenient route to

\textsuperscript{1132} As Dauvergne explains, there is also a sound legal basis for treating refugee claimants as though they were genuine refugees: “Refugee claimant is not a status recognized even in the Refugee Convention. By interpretive practice, and to avoid breaching refugee rights, claimants ought to be extended the same rights and protections as refugees...In addition to the potential ambiguity of claimant status, the formal structure of refugee law renders the act of refugee determination declarative. This means that one is not a refugee because of the act of a bureaucrat or a judicial officer in a host country but, rather, because of one’s life circumstances. This raises the possibility that one is a refugee but no one knows it, or perhaps worse, no one acknowledges it.” Dauvergne, above note 172 at 61.


\textsuperscript{1134} Carrillo v. Canada (Minister of Citizenship and Immigration) (CA) [2008] FCJ No 399, 2008 FCA 94 at para 24 (Létourneau, Nadon & Sharlow JJ).

\textsuperscript{1135} Tsymbalyuk v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1683, 2007 FC 1306 at para 17 in obiter (Frenette J). See also RKL v. Canada (Minister of Citizenship and Immigration) [2003] FCJ No 162, 2003 FCT 116 at para 13 (Martineau J).
The Court cautions that the refugee determination system must not be allowed to become “an easy means for immigrants to find a new and more desirable country of residence,”

a shortcut to permanent residence for those who “cannot or will not obtain it in the usual way.”

When the Second Stream warns of the possibility that claimants may be trying to deceive the Board, as discussed in Chapter 2, its language is at times forceful. But its concern with detecting deception, and with limiting claimants’ incentives to lie or to manipulate the system, is legitimate. The Court goes further, however. Like Kenney and those who share his vision, who see claims for refugee status “as appeals to charity rather than as appeals to justice,”

the Court has framed the granting of refugee status as an act of “generosity,”

and has stressed the need, in structuring the system, to avoid imposing “an unnecessary burden on Canadian taxpayers.”

Its warning that the Board should take care in “blaming” or “criticizing” other states for failing to protect their citizens, as discussed in Chapter 2, reflects the concern that granting a claimant refugee protection is an insult to her country’s government. And some within the Court have also echoed Kenney’s notion that a claimant with a genuine fear of persecution may yet be committing an abuse by coming to Canada to ask for protection.

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1139 Macklin 2009, above note 7 at 157.


While the First Stream emphasizes that the law will “allow bona fide refugees and refugee claimants to use false passports and supporting documents…for the purpose of making their way into Canada,”1142 some within the Second Stream stress, instead, that although claimants cannot be prosecuted for it, using a false identity to enter the country nonetheless remains illegal.1143 Likewise, for the First Stream, if claimants are choosing to come to Canada rather than to ask for protection in other safe havens en route, this concern “might be relevant to public policy” but should have no place in an individual status determination.1144 For the Second Stream, on the contrary, a claimant who fails to claim in the first safe country through which she passes is not playing by the rules. She is “asylum shopping” or “forum shopping” (terms that elsewhere are used, instead, to refer to a claimant voluntarily renouncing the protection that she has already obtained in one country in order to try again in a second).1145 Such behaviour is simply unacceptable and a refugee claim can – and indeed must – be denied on this basis: “We cannot allow ‘forum shopping,’ i.e. we cannot give the claimant the luxury of deciding which country would be the most convenient for claiming refugee status, whatever the reason may be.”1146 Indeed, this concern forms the backdrop for one of the very rare judgments in which the Court

1142 Uppal v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 455, 2006 FC 338 at para 21 in obiter (Layden-Stevenson J). See also Geneva Convention, article 31(1). As Dauvergne explains, “Although the Refugee Convention does not specify a right to enter another country, it is widely understood to prohibit turning claimants away from a state party’s borders, and it explicitly prevents states from punishing refugees for illegal entry.” Dauvergne, above note 172 at 50. See also Hathaway 2014, above note 132 at 28-30.


1145 See for example Wassiq v. Canada (Minister of Citizenship and Immigration) [1996] FCJ No 468 at para 10 (Rothstein J); Shahrpari v. Canada (Minister of Citizenship and Immigration) [1998] FCJ No 429 at paras 13-14 (Rothstein J); Mai v. Canada (Minister of Citizenship and Immigration) [2010] FCJ No 217, 2010 FC 192 at para 35 (Lemieux J).

1146 Saleem v. Canada (Minister of Citizenship and Immigration) [2005] FCJ No 1715, 2005 FC 1412 at para 27 (Teitelbaum J). While the Court in this case goes on to uphold the Board’s negative credibility finding, it makes clear that its finding on “forum shopping” was determinative: “Mr. Saleem’s failure to seek refugee protection when he was passing through countries that are signatories of the Geneva Convention, i.e. England and the United States…quickly disposes of the judicial review” (para 22). See also Samseen v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 727, 2006 FC 542 at para 22 (Pinard J); Ahamat v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 541, 2009 FC 422 at para 27 (Frenette DJ): “‘Asylum shopping’ is not a permitted course of conduct for refugee claimants. The applicant could have sought protection in the United States, but did not do so. Why Canada? The applicant should have sought protection at the first opportunity.”
expressly considers the harms of both potential kinds of error – and decides that it is preferable to avoid accepting a claimant who “isn’t entitled to be here” because he failed to make his claim in a safe third country: “Just as I would not wish to send back to his country a person who stood in jeopardy of a reasonable chance of persecution, so I just do not wish to leave in Canada a person who isn’t entitled to be here; a person who passed through a country which was a signatory to the convention and did not think to claim refugee status there.”¹¹⁴⁷

And lastly, while Justice LaForest of the Supreme Court has commented in dissent that “the possibility of a flood of refugees may be a legitimate political concern, but it is not an appropriate legal consideration,”¹¹⁴⁸ the Court here finds, on the contrary, that our “legal system…has always discouraged floodgate consequences,”¹¹⁴⁹ and indeed, in some judgments this concern looms large.¹¹⁵⁰ The Court has gone so far as to suggest, for example, at the height of the Sri Lankan civil war, that being subject to “violent” interrogation by the authorities, of a kind that would “never be justified on the part of Canadian police,” should not give rise to refugee protection. “Canada is not Sri Lanka,” and if the Board were to hold the Sri Lankan police to the Canadian standard, “a large number of Tamils could expect to be granted such

¹¹⁴⁷ Leul v. Canada (Secretary of State) [1994] FCJ No 833 at para 12 (Muldoon J); Gilgorri v. Canada (Minister of Citizenship and Immigration) [2006] FCJ No 701, 2006 FC 559 at para 26 (Shore J); Zapata v. Canada (Minister of Citizenship and Immigration) [2011] FCJ No 195, 2011 FC 156 at para 21 (Boivin J).

¹¹⁴⁸ “To incorporate such concerns implicitly within the Convention refugee determination process, however well meaning, unduly distorts the judicial-political relationship.” Chan v. Canada (Minister of Employment and Immigration) [1995] 3 SCR 593, [1995] SCCJ No 78 at para 57, in dissent (Sopinka, Cory, Iacobucci and Major JJ; La Forest, L’Heureux-Dubé, Gonthier JJ dissenting). See also Padda v. Canada (Minister of Employment and Immigration) [1988] FCJ No 293, [1988] 3 FC 147 (Collier J), in the context of an application for a stay of removal. In Padda, in rejecting this kind of “floodgates” reasoning, the Court expressly distinguishes refugee law litigation from litigation in the civil law context. It responds to the Ministers argument that “200 to 400 applicants may be in the same position as the plaintiff here,” by noting that “This is a type of ‘flood gates’ argument, somewhat akin to those advanced in certain tort claims… I do not give effect to it. The Plaintiff’s legal rights have been infringed. If there are many others, whose rights have been similarly infringed, they too are entitled to relief.”


¹¹⁵⁰ See for example ibid.; Jebanayagam v. Canada (Solicitor General) [1994] FCJ No 1435 at paras 8, 12-13 (Muldoon J); Ravimohan v. Canada (Minister of Citizenship and Immigration) [1995] FCJ No 1252 (Muldoon J); Kandasamy v. Canada (Minister of Citizenship and Immigration) [2007] FCJ No 1033, 2007 FC 791 at para 17 (Barnes J). See also the Court’s commentary in the related context of claims under s. 97: Perez v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 1275 at para 35 (Kelen J); Michaud v. Canada (Minister of Citizenship and Immigration) [2009] FCJ No 1112, 2009 FC 886 at para 40 (Kelen J); Fuentes v. Canada (Minister of Citizenship and Immigration) [2012] FCJ No 253, 2012 FC 218 at para 24 (Boivin J).
status in Canada – a wholesale migration of population.”\textsuperscript{1151} In fact, “As more and more of the countries come under the rule of tyrants, more and more of the whole world’s population could claim refuge here,” which “could only result in too many people flocking into Canada for Canada to absorb, because of Canada’s own potentially impossibly kind-hearted, but soft-headed view of who would be a refugee. That would be unfair to Canada.”\textsuperscript{1152}

2.4 Conclusion

In her recent analysis of the Board’s institutional culture, Hamlin acknowledges that members may come under considerable pressure to make negative decisions on policy grounds.\textsuperscript{1153} But she suggests that “there is no clear mechanism for how politicians or policymakers can force the [Board] to crack down and be less generous.”\textsuperscript{1154}

Manipulating Board members’ error preferences is the next best thing. Increasing their perception of the harms of mistaken grants and decreasing their perception of the harms of mistaken denials may not force them to err against the claimant, but it gives them a strong push in that direction, and there is no way to know how many of them will be able or inclined to push back. And there is good reason to be concerned that some at least will use the structures available to them to err against claimants for the wrong reasons. As discussed in this project’s Conclusion, this is a reason to prefer the First Stream’s approach, even leaving aside its other merits.

\textsuperscript{1151} Jebanayagam \textit{v. Canada (Solicitor General)} [1994] FCJ No 1435 at para 13, see also paras 8, 12 (Muldoon J).

\textsuperscript{1152} \textit{Ibid.} at para 13.

\textsuperscript{1153} Hamlin, above note 144 at 96-100.

\textsuperscript{1154} \textit{Ibid.} at 97.
Chapter 5
Conclusions: Which Mistake Is Worse?

To avoid a situation that guarantees that the Board’s decisions will be characterized by “massive disparities in recognition rates”\(^\text{1155}\) and leaves them open to abuse, the institution of Canadian refugee law would need to think through its error preference and commit to preferring one type of mistake or the other.

When the reasoning that underlies the two Streams’ approaches is held up to the light of day, it seems hard to justify treating claimants as the law would any other litigants. It seems hard to deny that fact-finding in the refugee status determination context poses exceptional challenges, that it makes sense to treat claimants as presumptively vulnerable, and that sending a person home to be persecuted or tortured should weigh very heavily. But if the law were ever to try to settle the error preference question, it would need to look beyond the terms on which the Court has been debating it. It would need to take ‘the other debate’ into account. Thinking of the law’s structures as decision-writing tools, in the context in which refugee status decisions are written, suggests another reason why the law should prefer mistaken grants.

If members were routinely choosing to prefer one kind of mistake or the other for illegitimate reasons, the cost of this kind of mistake would be greater than the sum of its parts: a glut of unlawfully mistaken grants or a glut of unlawfully mistaken denials would both be profoundly damaging to the institution of refugee protection. But as discussed in Chapter 4, while suspicions abound, there is no way to know how often improper considerations are influencing members’ decisions. On the other hand, taking the broader context into account makes clearer the relative cost of individual mistakes. A mistaken denial arising from the notion that too many claimants are cheats and frauds comes at a cost to the claimant that is different in kind from the harm to the system of a mistaken grant based on a misguided excess of compassion, or on laziness, or even on criminal lasciviousness.

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\(^{1155}\) Rehaag 2011, above note 3.
Dworkin argues persuasively that, while any person imprisoned for a crime will suffer the harms inherent in incarceration, a person who has been wrongly convicted suffers an additional moral harm.\footnote{Dworkin, above note 22 at 80: “We must distinguish, that is, between what we might call the bare harm a person suffers through punishment, whether that punishment is just or unjust – for example, the suffering or frustration or pain or dissatisfaction of desires that he suffering just because he loses his liberty or is beaten or killed – and the further injury that he might be said to suffer whenever his punishment is unjust, just in virtue of that injustice. I shall call the latter the “injustice factor” in his punishment, or his “moral” harm…an objective notion which assumes that someone suffers a special injury when treated unjustly, whether he knows or cares about it, but does not suffer that injury when he is not treated unjustly, even though he believes he is and does care. It is an empirical question whether someone who is punished unjustly suffers more bare harm when he knows that the officials have made a mistake than when he knows that they have deliberately framed him. But it is a moral fact, if the assumption in the last paragraph is right, that the injustice factor in his injury is greater in the second case.” Dworkin argues, at 92, that this same principle applies equally in civil cases.} He suggests that in weighing the costs of both kinds of error, this “injustice factor” stands apart: the law should properly “show special concern for moral harm, not only by paying a high price for accuracy, but also, and especially, by paying a price in accuracy to guard against a mistake that involves greater moral harm than a mistake in the other direction.”\footnote{Ibid. at 89.}

Any claimant who is mistakenly returned to face a serious risk of persecution suffers harm under Canadian law, even if the danger that she fears never in fact materializes. As the Supreme Court has made clear, even if no physical harm were to come from it, wrongly denying a well-founded claim violates a claimant’s Charter rights: the right to security of the person under s. 7 includes “freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself.”\footnote{Singh v. Canada (Minister of Employment and Immigration) [1985] 1 SCR 177, [1985] SCJ No 11 at para 47 (Dickson CJ, Beetz, Estey, McIntyre, Lamer and Wilson JJ).} But if this mistake arises because of unlawful considerations, the claimant suffers an additional moral harm. And this additional moral harm is further magnified if these considerations, in turn, arise because of the decision-maker’s negative perception of people like her. Like a racialized person wrongly convicted because of racial prejudice, she suffers a further and deeper level of injustice. In the Board’s current decision-making context, allowing members to err against claimants is like allowing all-white juries to err against black accused. It gives decision-makers a tool that allows them to make profoundly unjust decisions, in a context in which there is good reason to fear that some will use it.

\footnote{\textit{Ibid.} at 89.}
Even leaving aside its other merits, then, the First Stream’s approach should govern because the present situation is untenable, and because the Second Stream’s approach lets in by the back door the very agenda that has opposed the refugee protection project from the start. And there are at least three reasons why erring in the claimant’s favour would not lead to the popular end-of-days scenario in which Canadian refugee law “gives anyone protection who comes here and asks for it.”

First, while fact-finding in the criminal law context is different in many relevant respects, there is very often ample room for doubt in such cases as well, and its deeply-entrenched preference for erring on the side of the accused in all aspects of fact-finding is orders of magnitude stronger than what even the First Stream’s most ardent flagbearers would suggest for refugee law. And yet our jails are far from empty. Second, the legal structures that seek to tip the balance in the claimant’s favour are not the fantasy of starry-eyed advocacy groups or of those who reject any form of border control. A good number of judges think that erring in the claimant’s favour is reasonable within a functioning refugee system. And lastly, international refugee law gives those looking for ways to accept fewer claimants a great deal of wiggle room in interpreting the refugee definition, assuming they are willing to ignore the spirit of the Convention. This is not to suggest for a minute that the Court should put more legal barriers in claimants’ paths, but only that there is an appeal to forcing judges who would restrict the scope of refugee protection to do so through the law’s substantive doctrine rather than through its fact-finding structures. Telling claimants that Canada will not protect them on dubious legal principle is shameful, but it is more honest than casting about for reasons to call them liars to their faces.

1159 James Bissett, cited in Francis, above note 1053 at 58.

1160 Kaplan, above note 12 at 1088.