3

The Wrong Mistake: Sending a Refugee Home

The Federal Court of Canada often imagines refugee law as a special case, a unique and somewhat peculiar domain of legal decision-making. It notes that Refugee 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.[1] Theirs is, quite simply, "among the most difficult forms of adjudication."[2] Moreover, refugee claimants are not like other litigants.[3] They are a "vulnerable, poor and disadvantaged group"[4] and, for a host of reasons specific 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.[5]

Imagining claimants as vulnerable people whose pleas for protection may be wrongly denied – who may "cry out for help to no avail"[6] – brings squarely into focus

[1] *Sivasamboo v Canada (Minister of Citizenship and Immigration)* (1994), [1995] 1 FC 741 at para 18, 87 FTR 46, Richard J, citing James C Hathaway, *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (Ottawa: Immigration and Refugee Board, 1993) 6–7.

[2] *Ibid.*

[3] *Kabongo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1106 at para 31, 397 FTR 191, Martineau J ("Refugee claimants are not ordinary claimants as in civil matters").

[4] *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paras 587–90, 608, [2015] 2 FCR 267, Mactavish J. See also *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2006 FC 16 at para 90, [2006] 3 FCR 168, rev'd on other grounds 2007 FCA 198, [2008] 1 FCR 385, Blanchard J.

[5] 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 Trish Luker, "Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal" (2013) 25 *International Journal of Refugee Law* 502 at 515.

[6] *Ugalde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 775 at paras 1–2, 90 Imm LR (3d) 141, Shore J (in the context of a decision to stay a removal, but speaking generally). 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 FC 43 at paras 2, 68, 385 FTR 36, Shore J (in the context of a decision denying an application for a Pre-

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the "grave," "significant," "dire,"[7] and "potentially even fatal"[8] consequences of this kind of mistake. The Court reminds Board members that the Convention came into being "after the Second World War with its gas chambers";[9] that, at its core, "the *Act* is all about saving lives and offering protection to the displaced and persecuted";[10] and that Canada is obliged to answer the call not only because of the country's international commitments,[11] but also in order to live up to its own "humanitarian ideals."[12] The Court is deeply concerned about the possibility that claimants may be wrongly rejected, not because this is the more likely kind of mistake, but because the potential consequences are simply "terrifying."[13]

Removal Risk Assessment [PRRA], in which the same statutory test for Convention refugee status applies)).

7 *Zavalat v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1279 at para 72, 183 ACWS (3d) 812, Russell J; *WOA v Canada (Minister of Citizenship and Immigration)*, 2011 FC 827 at para 3, 2 Imm LR (4th) 244, Shore J; *Kamburona v Canada (Minister of Citizenship and Immigration)*, 2013 FC 701 at para 19, 435 FTR 132, Zinn J; *Javed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1458 at para 20, 41 Imm LR (3d) 118, O'Keefe J. The Court makes similar comments in overturning decisions in other contexts in which protection may be wrongly withheld, such as those 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. See e.g. *Level v Canada (Citizenship and Immigration)*, 2010 FC 251 at para 55, [2011] 3 FCR 60, Russell J; *Pineda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 454 at para 27, 367 FTR 211, Gauthier J; *Lu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1112 at para 33, 172 ACWS (3d) 457, Mactavish J; *Haghighi v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 407 at paras 37–38, 189 DLR (4th) 268 (CA), Stone, Evans, & Malone JJA, per Evans JA; *Popovic v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 588 at para 33, 106 ACWS (3d) 725, Lemieux J; *Kennedy v Canada (Minister of Citizenship and Immigration)* (2000), 184 FTR 279 at para 18 (available on QL) (TD), Lemieux J.

8 *Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 841 at para 16, 47 Imm LR (3d) 238, Gibson J (in the context of the Board's decision to declare a claim abandoned). See also *WOA*, above n 7 at para 3; *Kabongo*, above n 3 at para 31; *Thalang v Canada (Minister of Citizenship and Immigration)*, 2007 FC 743 at para 16, 63 Imm LR (3d) 207, Shore J (in the PRRA context).

9 *Bayrak v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1056 at para 5, 440 FTR 317, Shore J. The Court also notes: "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" (*ibid* at para 13).

10 *Januzi v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1386 at para 8, 267 FTR 161, 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*, above n 7 at para 19.

11 See e.g. *Kabongo*, above n 3 at para 31; *Bayrak*, above n 9 at paras 5, 8–9.

12 See e.g. *Januzi*, above n 10 at para 8 (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 FC 870 at para 4, 257 FTR 272, Martineau J; *Sivarajathurai v Canada (Minister of Citizenship and Immigration)*, 2006 FC 905 at para 14, 150 ACWS (3d) 202, Harrington J. See also *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2007 FC 320 at para 23, [2008] 1 FCR 3, O'Reilly J, rev'd on other grounds 2008 FCA 94, [2008] 4 FCR 636. For further discussion, see *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at paras 2, 9, 35–36, [2013] 2 SCR 678, McLachlin CJ & LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, & Wagner JJ, per LeBel & Fish J (in the context of a decision to exclude a claimant from refugee protection).

13 *SSPM v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1262 at para 34, 21 Imm LR (4th) 210, Russell J.

The salience of this kind of mistake, in short, comes across in the vehemence of the Court's language when it addresses the point directly. It is also reflected in a great many judgments in which the Court highlights claimants' particular vulnerability to mistaken denials. As discussed in the remainder of this chapter, the Court often 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; or because her conduct may lead the member to make flawed judgments about her character or to conclude that her fear is implausible; or because she may lack access to key evidence. Even if a member reasonably concludes that the claimant has invented her story, the Court is concerned that he may overlook the possibility that she is nonetheless at risk. And the Court stresses that genuine refugees may be sent home to persecution if the Board enforces its procedural requirements too rigidly.

WRONGLY DISBELIEVING THE CLAIMANT

The Claimant's Testimony

The Court 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, it 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. Giving evidence through an interpreter may further impair the claimant's ability to be understood and believed.

As a result of their experiences of persecution, many claimants will experience what the UN Handbook calls "some degree of mental disturbance."[14] 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.[15] The Court is strongly concerned that the Board may wrongly disbelieve claimants for this reason. It concludes categorically that "many, if

[14] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, revised edn (Geneva: Office of the United Nations High Commissioner for Refugees, 1992) at para 209 [*UN Handbook*].

[15] For discussion see J Herlihy, L Jobson, & S Turner, "Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum" (2012) 26 *Applied Cognitive Psychology* 661; J Herlihy, K Gleeson, & S Turner, "What Assumptions about Human Behaviour Underlie Asylum Judgments?" (2010) 22 *International Journal of Refugee Law* 351; J Herlihy & S W Turner, "The Psychology of Seeking Protection" (2009) 21 *International Journal of Refugee Law* 171; J Cohen, "Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably Be Said to Undermine Credibility of Testimony" (2001) 69 *Medico-Legal Journal* 25; Michael Kagan, "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination" (2003) 17 *Georgetown Immigration Law Journal* 367 at 396.

not most, refugee claimants are vulnerable and as a result have difficulty testifying effectively,"[16] and it overturns decisions in which the Board ignored a psychiatric or psychological report,[17] misunderstood or downplayed it,[18] or failed to consider whether the claimant's trouble testifying could be explained by the mental health factors noted within it.[19] The Court 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."[20]

Qualified psychiatrists and psychologists, on the other hand, do have such expertise, and the Court 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.[21] An expert 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

[16] *Thamotharem*, above n 4 at para 90.

[17] See e.g. *Fernandez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 192 at paras 22–24, 179 ACWS (3d) 1164, Lagacé DJ; *Dhanju v Canada (Minister of Citizenship and Immigration)*, 2004 FC 850 at paras 11–16 (available on QL), Rouleau J; *Csonka v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 915 at para 29, 16 Imm LR (3d) 183, Lemieux J; *Sawadogo v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 497 at para 20, 18 Imm LR (3d) 253, Rouleau J.

[18] See e.g. *Kaberuka v Canada (Minister of Citizenship and Immigration)*, 2011 FC 698 at paras 33–38, 203 ACWS (3d) 616, Russell J; *Alfonso v Canada (Minister of Citizenship and Immigration)*, 2007 FC 51 at para 33, 154 ACWS (3d) 936, Lemieux J.

[19] See e.g. *Reyes v Canada (Minister of Employment and Immigration)*, (1993) 39 ACWS (3d) 674 (available on QL) (CA), Mahoney, Stone, & Linden JJA, per Mahoney JA; *Rudaragi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 911 at paras 5–6 (available on QL), O'Reilly J; *Atay v Canada (Minister of Citizenship and Immigration)*, 2008 FC 201 at paras 30–32, 165 ACWS (3d) 319, O'Keefe J; *Fidan v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1190 at para 12, 33 Imm LR (3d) 63, von Finckenstein J; *Feleke v Canada (Minister of Citizenship and Immigration)*, 2007 FC 539 at paras 14–18, 157 ACWS (3d) 808, Tremblay-Lamer J; *Yahya v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1207 at para 8 (available on QL), Mosley J; *Hidad v Canada (Minister of Citizenship and Immigration)*, 2015 FC 489 at paras 10–13 (available on QL), O'Reilly J.

[20] *Pulido v Canada (Minister of Citizenship and Immigration)*, 2007 FC 209 at para 28, 155 ACWS (3d) 648, Mactavish J. See also *Ors v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1103 at para 22 (available on QL), Mactavish J (in obiter). 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)* (1989), 99 NR 168, 15 ACWS (3d) 44 (CA), Heald, Mahoney, & Hugessen JJA, per Hugessen JA.

[21] *Unal v Canada (Minister of Citizenship and Immigration)*, 2004 FC 518 at paras 7–10, 130 ACWS (3d) 363, Layden-Stevenson J; *AM v Canada (Minister of Citizenship and Immigration)*, 2011 FC 964 at paras 54–55, 1 Imm LR (4th) 1, Russell J. For more qualified comments by the Court, see *Ameir v Canada (Minister of Citizenship and Immigration)*, 2005 FC 876 at para 27, 47 Imm LR (3d) 169, 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").

the fact that the specialist met with her only once in preparing it.[22] As a result, the Court overturns decisions in which members displayed "unwarranted" skepticism about a report's contents,[23] or substituted their own judgments about the claimant's mental health for that of the experts.[24] 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," 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").[25] 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."[26]

The Court, in fact, goes further. Even absent any psychiatric or psychological evidence, it 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.[27] For victims of torture and victims of sexual violence, in particular, its judgments caution that trauma and its psychological sequelae come standard. "[W]e would expect the legitimate victim of torture to have difficulties testifying," the Court warns, in part because of problems with "memory, consistency and coherence."[28] Women giving evidence about gender-based violence may

[22] 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" (*KK v Canada (Minister of Citizenship and Immigration)*, 2005 FC 873 at para 8, 48 Imm LR (3d) 249, Dawson J.

[23] *Pulido*, above n 20 at para 27; *KK*, above n 22 at paras 6–8; *Kuta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 687 at paras 6–7 (available on QL), Campbell J.

[24] See e.g. *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para 73, 415 FTR 82, O'Keefe J; *KK*, above n 22 at paras 6–8; *RKL v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 17, 228 FTR 43, Martineau J.

[25] *RKL*, above n 24 at para 17.

[26] *Kuta*, above n 23 at para 6.

[27] *Akter v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1205 at paras 16–19, 57 Imm LR (3d) 86, Beaudry J; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2014 FC 713 at para 32 (available on QL), de Montigny J; *Njeri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 291 at para 16, 176 ACWS (3d) 505, Phelan J. In *Zhang*, for example, the Court finds that "[i]t is clear that disturbing events. . .can reasonably alter an individual's recollection" (above at para 32). It bases this finding on previous jurisprudence, which had relied on the Board's Guidelines for accommodating vulnerable persons and victims of torture (*ibid*, citing *Wardi*, below n 28). 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.

[28] *Wardi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1509 at para 15 (available on QL), Rennie J, citing Immigration and Refugee Board of Canada, *Training Manual on Victims of Torture* (Ottawa: Immigration and Refugee Board, 2004).

similarly have trouble telling their stories,[29] not only because of "social, cultural, traditional and religious norms"[30] but also because of "difficulty in concentrating and loss of memory."[31] 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,"[32] "in the context of the allegation contained in the claim,"[33] in order to consider properly "the effects that such an experience might have" on her ability to testify.[34] 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."[35]

In addition, when claimants are testifying about any kind of traumatic experience, "the Board should not have inflated expectations" of what they will remember.[36]

[29] 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" (Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa: Immigration and Refugee Board, 1996) [Gender Guidelines]). For cases referencing this Guideline on this point, see e.g. *Mayeke v Canada (Minister of Citizenship and Immigration)* (1999), 167 FTR 1 at para 13, 90 ACWS (3d) 119, Tremblay-Lamer J; *Elezi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 210 at para 9, 120 ACWS (3d) 1022, Campbell J; *CLJ v Canada (Minister of Citizenship and Immigration)*, 2011 FC 387 at para 3, 98 Imm LR (3d) 144, Campbell J.

[30] *Diallo v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1450 at paras 32–33, 259 FTR 273, Mactavish J (in obiter). See also *Manege v Canada (Minister of Citizenship and Immigration)*, 2014 FC 374 at para 32, 453 FTR 117, Kane J; *Sy v Canada (Minister of Citizenship and Immigration)*, 2005 FC 379 at para 15, 271 FTR 242, Snider J (in obiter); *Nour v Canada (Minister of Citizenship and Immigration)*, 2012 FC 805 at para 41 (available on QL), Scott J.

[31] *Mayeke*, above n 29 at para 14. See also *Myle v Canada (Minister of Citizenship and Immigration)*, 2006 FC 871 at para 20, 296 FTR 307, Shore J; *Akter*, above n 27 at para 17. In *Jones v Canada*, the Court again refers the Board to its own Gender Guidelines: "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 FC 405 at para 15, 54 Imm LR [3d] 128, Snider J, citing Gender Guidelines, above n 29, s D(3). See also *Njeri*, above n 27 at para 16.

[32] *Griffith v Canada (Minister of Citizenship and Immigration)* (1999), 171 FTR 240 at para 3, 90 ACWS (3d) 118, Campbell J.

[33] *Higbogun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 445 at para 56, 367 FTR 114, Russell J (in obiter).

[34] *Mayeke*, above n 29 at para 13. See also *Myle*, above n 31 at para 20.

[35] *Joseph v Canada (Minister of Citizenship and Immigration)*, 2015 FC 393 at para 40 (available on QL), Locke J. See also *Diallo*, above n 30 at para 33 (in obiter); *Sy*, above n 30 at paras 12–16 (in obiter); *Higbogun*, above n 33 at paras 55–62 (in obiter). For similar comments in related contexts, see also *CLJ*, above n 29 at paras 6–7; *Abbasova*, above n 6 at para 61 (in the context of a decision denying an application for a PRRA); *Vijayarajah v Canada (Minister of Citizenship and Immigration)* (1999), 167 FTR 295 at para 20, 50 Imm LR (2d) 113, Tremblay-Lamer J; *Manege*, above n 30 at paras 32–33.

[36] *Zhang* (2014), above n 27 at para 32.

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."[37] It warns members not to "demand more of the applicant's memory than is reasonable" under such circumstances,[38] especially when it comes to the "accuracy and consistency" of the claimant's recollections,[39] and in particular when they concern "peripheral details of a traumatic event."[40] So where the Board finds that the claimant should remember whether his teeth were broken during his arrest or during his subsequent torture;[41] or whether he was tortured with a wooden or an iron instrument;[42] or where the member draws a negative inference from a claimant's "lack of spontaneity" in describing her gang rape;[43] 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,"[44] the Court concludes that this reasoning is unsound.

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. Consistent with a large body of research that suggests that human memory is neither as complete nor as stable as people typically believe,[45] the Court has long

[37] *Ibid.* See also *Bains v Canada (Minister of Employment and Immigration)* (1993), 63 FTR 312, 20 Imm LR (2d) 296, Cullen J ("The trauma of an arrest might shake the memory of anyone"). For discussion, see sources cited in above n 15.

[38] *Dag v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1254 at para 35, 13 Imm LR (4th) 323, O'Keefe J.

[39] *Wardi*, above n 28 at para 19.

[40] *Ibid*; *Zhang* (2014), above n 27 at para 32. See also Hilary Evans Cameron, "Refugee Status Determinations and the Limits of Memory" (2010) 22 *International Journal of Refugee Law* 469 at 483–86, 489–92 (on memory for peripheral information in general, and in particular on 'weapon focus': the article notes that "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" (*ibid* at 485)).

[41] *Wardi*, above n 28 at paras 4, 17–18.

[42] *Dag*, above n 38 at para 35. See also *Okoli v Canada (Minister of Citizenship and Immigration)*, 2009 FC 332 at para 30, 79 Imm LR (3d) 253, Mandamin J.

[43] *Akter*, above n 27 at paras 11, 16–19.

[44] *Liu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 972 at para 3 (available on QL), Campbell J.

[45] As discussed further in Chapter 5, in the text accompanying nn 207–8, 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 n 40; UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report* (Brussels: UNHCR, 2013) ch 3 2.1, online: www.refworld.org/docid/519b1fb54.html. See also sources in above n 15.

cautioned against a "microscopic"[46] or "overzealous"[47] or "over-vigilant"[48] search for gaps or inconsistencies in the claimant's testimony. To be relevant, such problems must be "rationally related" to the question of credibility,[49] and the Court finds that little can be gleaned from a "one day discrepancy" in a claimant's testimony about dates,[50] for example; or from his inability to describe "every single detail" of his identity document;[51] or from her failure to remember aspects of religious "trivia,"[52]

[46] See e.g. *Attakora*, above n 20; *Dong v Canada (Minister of Citizenship and Immigration)*, 2010 FC 55 at paras 23–28, 184 ACWS (3d) 200, Kelen J; *Aria v Canada (Minister of Citizenship and Immigration)*, 2013 FC 324 at paras 12–14 (available on QL), de Montigny J; *Chen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 510 at para 68, 10 Imm LR (4th) 131, Russell J [*Chen* (2012a)]; *Rusznyak v Canada (Minister of Citizenship and Immigration)*, 2014 FC 255 at para 47, 23 Imm LR (4th) 318, Russell J.

[47] See e.g. *Adawi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1193 at para 36 (available on QL), Russell J; *Fatih*, above n 24 at paras 45, 74, O'Keefe J; *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773 at para 24, 168 ACWS (3d) 832, Teitelbaum DJ.

[48] *Attakora*, above n 20; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2006 FC 550 at para 36, 148 ACWS (3d) 283, Russell J; *Elmi*, above n 47 at para 24.

[49] *Fatih*, above n 24 at para 69; *Sheikh v Canada (Minister of Citizenship and Immigration)* (2000), 190 FTR 225 at para 23, 97 ACWS (3d) 306, Lemieux J; *Alfonso*, above n 18 at para 25, Lemieux J; *Shaheen v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 670 at para 13, 106 ACWS (3d) 512, Heneghan J.

[50] *Beltran v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1475 at paras 3–5 (available on QL), Rennie J. See also *Alekozai v Canada (Minister of Citizenship and Immigration)*, 2015 FC 158 at para 8 (available on QL), Rennie J.

[51] *Elhassan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1247 at para 27, 444 FTR 177, de Montigny J. Per the Court:

> [T]he 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.

[52] *Wu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 929 at para 22 (available on QL), Kelen J (in obiter); *Wang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1030 at para 13, 2 Imm LR (4th) 261, Beaudry J; *Dong*, above n 46 at para 21; *Chen* (2012a), above n 46 at paras 66–67; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 503 at para 12, 409 FTR 264, Campbell J. 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 FC 288 at para 59, 406 FTR 175, Russell J). For a recent review, see *Zhang* (2012), above at paras 6–24; *Chen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 545 at paras 9–13, 408 FTR 267, Campbell J [*Chen* (2012b)]; *Wang* (2011), above; *Dong*, above n 46 at paras 18–22; *Huang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 346 at paras 10–11, 69 Imm LR (3d) 286, Mosley J; *Feradov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 101 at para 16, 154 ACWS (3d) 1183, Barnes J; *Chen v Canada (Minister of Citizenship and Immigration)*, 2007 FC 270 at para 16, 155 ACWS (3d) 929, 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* (2012), above at para 23).

or the name of the ship on which he fled his country,[53] or whether he had started dating a former partner at "the beginning of July, the middle of July, or the end of July" several years earlier.[54] The claimant's failure to remember the specific dates even of important events, such as an assault,[55] or an arrest,[56] or even the disappearance of a loved one,[57] "bears a tenuous connection" to her credibility.[58] Quite simply, "A refugee claim should not be determined on the basis of a memory test."[59]

Furthermore, of particular concern to many involved in issues of refugee protection 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 context in particular "the risks of assessing credibility based on demeanor are extreme."[60] Some argue that it ought, in fact, to play no role at all in a refugee hearing.[61]

The Federal Court amply shares this concern, not only because of the possibility for cross-cultural misunderstandings,[62] discussed further below, but also because of

[53] *Goloman v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 797 at para 19, 107 ACWS (3d) 111, Dawson J. See also *Florez v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1230 at para 12, 133 ACWS (3d) 846, Harrington J (in this case, the name of an airline).

[54] *Charles v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1748 at para 9, 136 ACWS (3d) 117, Kelen J.

[55] *Adegbola v Canada (Minister of Citizenship and Immigration)*, 2007 FC 511 at para 31, 157 ACWS (3d) 616), O'Keefe J; *Akter*, above n 27 at paras 16–17. In *Zavalat*, 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" (see *Zavalat*, above n 7 at paras 72, 79).

[56] *Samseen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 542 at para 9, 148 ACWS (3d) 780, Pinar J (in obiter).

[57] *Turcios v Canada (Minister of Citizenship and Immigration)*, 2015 FC 318 at para 21 (available on QL), Rennie J.

[58] *Adegbola*, above n 55 at para 31. See also *Zavalat*, above n 7 at para 72.

[59] *Sheikh*, above n 49 at para 28. See also *Florez*, above n 53 at para 12.

[60] James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd edn (Cambridge: Cambridge University Press, 2014) at 143. See e.g. Herlihy & Turner 2009, above n 15; John Barnes & Allan Mackey, "The Credo Document: Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards" in Carolus Grütters, Elspeth Guild, & Sebastiaan de Groot, eds, *Assessment of Credibility by Judges in Asylum Cases in the EU* (Oisterwijk: Wolf Legal Publishers, 2013) 89 at 139; Henrik Zahle, "Competing Patterns for Evidentiary Assessments" in Gregor Noll, ed, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Boston: Martinus Nijhoff Publishers, 2005) 13 at 16; Kagan, above n 15 at 378–80; Walter Kälin, "Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing" (1986) 20 *International Migration Review* 230 at 231–33; Steve Norman, "Assessing the Credibility of Refugee Applicants: A Judicial Perspective" (2007) 19 *International Journal of Refugee Law* 273 at 289–90; 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 6–11.

[61] Kagan, above n 15 at 378–80; UK Home Office, UK Visas and Immigration, *Asylum Policy Instructions: Assessing Credibility and Refugee Status* (published 30 July 2012, updated 23 January 2015 (v 9.0)) s 5.6.4, online: www.gov.uk/government/publications/considering-asylum-claims-and-assessing-credibility-instruction. See also Hathaway & Foster, above n 60 at 143.

[62] "[P]roblems may arise in interpreting the demeanour of refugee claimants from different cultural backgrounds" (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 24, 208 FTR 267, Muldoon J). See also *Rajaratnam v Canada (Minister of Citizenship and*

the potentially distorting effect of the member's quasi-inquisitorial role.[63] So the Court rejects the Board's assumptions about the demeanour that it would be reasonable to expect, for example, from a political activist (the claimant "did not present as leadership material");[64] or an assault victim (the claimant's testimony was not credible because she "did not display any emotion");[65] or a bereaved parent (to be believable, the claimant's testimony should have been accompanied, in the Court's paraphrase, by an "outburst of cries");[66] or a fisherman ("the panel is not persuaded from the claimant's demeanour that he was [a] fisherman");[67] or simply a genuine refugee (the claimants' "cynical, sarcastic and disrespectful comportment. . .was inconsistent with persons seeking refugee status for legitimate reasons").[68]

Cross-cultural misinterpretation is not only a potential source of errors in the assessment of a claimant's demeanour, however. Decision-makers' own "background, values, beliefs and life experiences" can also lead them to reject the substance of the claimant's testimony.[69] Peering across the cultural divide that

Immigration), 2014 FC 1071 at para 46 (available on QL), O'Keefe J; *Nahimana v Canada (Minister of Citizenship and Immigration)*, 2006 FC 161 at para 26, 146 ACWS (3d) 330, Shore J; *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 416 at para 23, 27 Imm LR (3d) 30, Blanchard J. Per 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" (*ibid*).

63 On this last point, the Court has cited the English Court of Appeal in *Yuill v Yuill*: "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" (*Yuill v Yuill* [1944] P 15 at 20, [1945] All ER 183 (CA), Lord Greene MR, MacKinnon & DuParcq LJJ, per Lord Greene MR. See e.g. *Rajaratnam v Canada (Minister of Employment and Immigration)* (1991), 135 NR 300, 30 ACWS (3d) 891 (CA), Mahoney, Stone, & Linden JJA, per Stone JA; *Olvera-Paoletti v Canada (Minister of Citizenship and Immigration)*, 2008 FC 444 at para 13, 325 FTR 280, Mandamin J.

64 *Fazal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 581 at paras 7–8, 56 Imm LR (3d) 216, Phelan J. See also *Chowdhury*, above n 62 at paras 10, 23.

65 "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)*, 89 ACWS (3d) 1016 at para 10 (available on QL) (TD), Reed J). See also *Kathirkamu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 409 at paras 14, 50, 231 FTR 220, Russell J; *Rajaratnam* (2014), above n 62 at paras 45–46; *Reginald v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 568 at para 22, [2002] 4 FC 523, Gibson J (faulting the Board for drawing a negative inference based on the claimant's "'dispassionate', 'perfunctory' and 'emotionless'" testimony about her gang rape).

66 *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 471 at paras 21–22, 122 ACWS (3d) 533, Rouleau J (in obiter).

67 In the words of the Court: "Without further explanation, it is difficult to determine how the applicant's occupation could be determined from his demeanour" (*Liu v Canada (Minister of Citizenship and Immigration)* (1997), 136 FTR 221 at paras 5, 23–24, 40 Imm LR (2d) 168, Gibson J (in obiter)).

68 *Mitac v Canada (Minister of Citizenship and Immigration)* (1999), 175 FTR 155 at paras 3, 12–13, 91 ACWS (3d) 445, Lutfy J.

69 Madeline Garlick, "Selected aspects of UNHCR's research findings" in *Assessment of Credibility*, above n 60 at 56.

separates them, the member may deem the claimant's story implausible because of mistaken assumptions about life in his home country.[70] The Court warns Board members emphatically about the perils of relying on "North American logic and reasoning,"[71] "Western concepts,"[72] "Canadian paradigms"[73] or "Canadian standards"[74] 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"[75] and "should be made only in the clearest of cases."[76] 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,[77] 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.[78] The Court

[70] For further discussion see *ibid*; *Beyond Proof*, above n 45 at Ch. 3, 2.1; Audrey Macklin, "Truth and Consequences: Credibility Determination in the Refugee Law Context" (Paper for the International Association of Refugee Law Judges, delivered at the conference *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary*, October 1998) 134 (Haarlem: IARLJ, 1999); Luker, above n 5 at 504; Kälin, above n 60 at 233–36; Kagan, above n 15 at 390, 393; Herlihy & Turner 2012, above n 15; Angela Barisic, "Credibility Assessment of Testimony in Asylum Procedures: an Interdisciplinary Analysis," Master's Thesis, Lund University Faculty of Law, Spring 2015 at 30; Marcelle Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Oxford: Hart Publishing, 2014) 183.

[71] *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 at para 22, [2003] 4 FC 771, Martineau J. See also e.g. *RKL*, above n 24 at para 12; *Wang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 610 at para 12 (available on QL) (in the PRRA context), Rennie J; *Rahnema v Canada (Solicitor General)* (1993), 68 FTR 298 at para 20, 22 Imm LR (2d) 127, Gibson J; *Jamil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 792 at paras 25, 41–44, 295 FTR 149, Lemieux J; *Hamdar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 382 at para 51, 387 FTR 203, Russell J; *Alfonso*, above n 18 at para 26.

[72] *Ye v Canada (Minister of Employment and Immigration)*, (1992) 34 ACWS (3d) 241 (available on QL) (CA), Stone & MacGuigan JJA & Henry DJ, per MacGuigan J. See also *Cen v Canada (Minister of Citizenship and Immigration)*, [1996] 1 FC 310 at para 10, 103 FTR 65, Gibson J; *El-Naem v Canada (Minister of Citizenship and Immigration)* (1997), 126 FTR 15 at para 20, 37 Imm LR (2d) 304, Gibson J; *Abdulhussain v Canada (Minister of Citizenship and Immigration)* (1999), 168 FTR 264 at para 17, 89 ACWS (3d) 332, Cullen J.

[73] *Bains*, above n 37; *Valtchev*, above n 62 at para 9; *Musleameen v Canada (Minister of Citizenship and Immigration)*, 2010 FC 232 at para 43, 364 FTR 310, Lemieux J.

[74] *Valtchev*, above n 62 at para 7. See also e.g. *Vodics v Canada (Minister of Citizenship and Immigration)*, 2005 FC 783 at para 10, 276 FTR 95, Campbell J; *Musleameen*, above n 73 at paras 43–44; *Chen* (2012b), above n 52 at para 5; *Arslan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 252 at para 79, 16 Imm LR (4th) 271, Russell J.

[75] *Chen v Canada (Minister of Citizenship and Immigration)*, 2014 FC 749 at para 54, 242 ACWS (3d) 909, Russell J.

[76] *Valtchev*, above n 62 at para 7. See e.g. *Vodics*, above n 74 at para 10; *Isakova v Canada (Minister of Citizenship and Immigration)*, 2008 FC 149 at paras 11–12, 322 FTR 276, Campbell J; *Chen* (2012b), above n 52 at para 5; *Chen* (2014), above n 75 at para 54. See also *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937 at paras 14–15, 37 Imm LR (3d) 241, Mosley J.

[77] *Udeagbala v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1507 at para 46, 127 ACWS (3d) 1220, Beaudry J (in obiter).

[78] *Sun v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1154 at paras 11–12 (available on QL), Rennie J.

faults the Board for relying on western assumptions about the size and layout of a supermarket,[79] or about the kinds of stories that would likely be reported in a local newspaper,[80] or about how an agent of persecution would go about persecuting. Not only does the Board err in assuming that persecutors will act rationally,[81] but it must take care not to view their conduct "through North American eyes."[82] 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.[83]

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."[84] The Court's judgments look from many angles at the ways in which gender-specific issues and assumptions may lead to mistaken denials. They highlight 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.[85] While the Court's observation

[79] *Hamdar*, above n 71 at para 54.

[80] See e.g. *Musleameen*, above n 73 at paras 41–44; *Nay v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1317 at para 15 (available on QL), Rennie J; *PUA v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1146 at paras 28–30, 4 Imm LR (4th) 333, Rennie J; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1491 at para 25, 143 ACWS (3d) 1094, de Montigny J (noting "there is no evidence as to what the newspapers find newsworthy in India").

[81] See e.g. *Valtchev*, above n 62 at para 13; *Taboada v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1122 at paras 34–35, 172 ACWS (3d) 461, O'Keefe J; *Yoosuff v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1116 at paras 8–11, 141 ACWS (3d) 821, O'Reilly J. See further discussion in Chapter 5, in the text accompanying nn 183–91.

[82] *Baysal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 869 at para 13, 74 Imm LR (3d) 23, Zinn J. See also *Ye*, above n 72; *Chen* (2014), above n 75 at para 53.

[83] *Baysal*, above n 82 at para 13.

[84] Thomas Spijkerboer, "Stereotyping and Acceleration: Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System" in *Proof*, above n 60, 67 at 68. For a review see Rilke Mahieu, Christiane Timmerman, & Dirk Vanheule, "Asylum in Europe from a Gender Angle: An Evaluation of the Gender Sensitivity of European and Belgian Asylum Policies" in Cristina Gortázar, María-Carolina Parra, Barbara Segaert, & Christiane Timmerman, eds, *European Migration and Asylum Policies: Coherence or Contradiction? An Interdisciplinary Evaluation of the EU Programmes of Tampere (1999), The Hague (2004) and Stockholm (2009)* (Bruxelles: Editions Bruylant, 2012) 129. See also Brian Gorlick, "Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status" (2003) 15 *International Journal of Refugee Law* 357 at 365–66; Kagan, above n 15 at 392–93; Reneman, above n 70 at 165–66.

[85] 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 *Shinmar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 94 at paras 18–19, 7 Imm LR (4th) 37, O'Reilly J (in obiter), citing Gender Guidelines, above n 29, s D(2). See also *Nahimana*, above n 62 at paras 23–24.

that "women sometimes have difficulty testifying about matters relating to sexual violence" is perhaps an understatement,[86] 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,[87] 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."[88] Her feelings of shame may explain a claimant's failure to disclose her sexual assault at the first opportunity in the refugee claim process,[89] 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."[90] Echoing its comments above about judging the actions of agents of persecution in other cultures, the Court also stresses that the Board errs if it requires a claimant to try to explain her abuser's conduct,[91] or if it fails to appreciate the power dynamics at play in a domestic abuse situation,[92] or if it imposes its own notions of how an abuser will abuse.

[86] *Shinmar*, above n 85 at para 18 (in obiter).

[87] *Diallo*, above n 30 at paras 32–33 (in obiter). See also *Shinmar*, above n 85 at para 18 (in obiter); *Odia v Canada (Minister of Citizenship and Immigration)*, 2014 FC 663 at para 9 (available on QL) Gagné J.

[88] See e.g. *Reginald*, above n 65 at para 21, citing Gender Guidelines, above n 29, s D(1); *IR v Canada (Minister of Citizenship and Immigration)*, 2013 FC 973 at para 39, [2015] 1 FCR 366, Gleason J, citing Gender Guidelines, above n 29, s D(1). And as the Court has noted, "[w]hile 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" (*Ritchie v Canada (Minister of Citizenship and Immigration)*, 2006 FC 99 at para 3, 146 ACWS (3d) 331, Campbell J). See also *IR*, above at para 40; *Abbasova*, above n 6 at paras 18, 52–53 (in the context of a PRRA decision, but discussing the role of the Guidelines generally).

[89] *Hailu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 908 at para 5, 150 ACWS (3d) 452, Dawson J, citing Gender Guidelines, above n 29, s D(1); *ML v Canada (Minister of Citizenship and Immigration)*, 2012 FC 763 at paras 64–65, 9 Imm LR (4th) 286, Russell J. See also *Camara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 362 at para 19, 167 ACWS (3d) 158, de Montigny J (in obiter). 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 *Ogbebor v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 490 at para 40, 15 Imm LR (3d) 92, Lemieux J.

[90] *RKL*, above n 24 at para 23. In describing a sexual assault, the claimant had testified that the police had "insulted" and "humiliated" her (*ibid* at paras 21–23). See also *Shinmar*, above n 85 at para 19 (for the Court's comments, in obiter, 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).

[91] *Ritchie*, above n 88 at paras 12–18.

[92] See e.g. *ibid*; *AME v Canada (Minister of Citizenship and Immigration)*, 2011 FC 444 at para 18, 388 FTR 122, Mosley J.

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."[93] 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."[94] The member 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 of jealousy"[95] – that the claimant had orchestrated an "elaborate scheme of fabrication based on exaggerations and embellishments."[96] 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.[97]

The Court notes that the Guidelines' observations might explain why a claimant was "too ashamed to seek medical attention"[98] or to make or follow up on a police report.[99] And while it cautions that it is improper to conclude that a woman from any culture will make a "timely complaint" about a sexual assault – the Court explains that in Canada this inference "was abolished by statute in criminal

[93] *TG v Canada (Minister of Citizenship and Immigration)*, 2004 FC 902 at para 18, 255 FTR 152, Mosley J.

[94] *AME*, above n 92 at para 18. [95] *Ibid.* [96] *Ibid.* [97] *Ibid* at para 18. Per Mosley J:

> 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. E. 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.

[98] *Sukhu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 427 at para 20, 166 ACWS (3d) 345, de Montigny J.

[99] See e.g. *Garcia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 79 at para 24, [2007] 4 FCR 385, Campbell J, citing Gender Guidelines, above n 29, s C(2); *EN v Canada (Minister of Citizenship and Immigration)*, 2013 FC 452 at para 19, 227 ACWS (3d) 1137, Rennie J, citing Gender Guidelines, above n 29, s C(2); *Gonzalez de Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 486 at paras 28–30 (available on QL), Shore J; *AME*, above n 92 at para 9, citing Gender Guidelines, above n 29, s C(2). As the Guidelines further note:

> 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 (*ibid*).

matters in 1983"[100] – it stresses that this type of finding is especially flawed where a claimant is subject to a strong cultural imperative to hide her victimization. So the Court overturns a decision, for example, in which the member made a negative inference because the claimant had 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."[101]

The Court is similarly concerned that claimants may be wrongly denied refugee protection because of members' flawed assumptions about human sexuality.[102] Claimants may be wrongly disbelieved if the Board concludes, for example, that "a well-educated man who understood the consequences of being gay" would not "choose a life style which would inevitably cause him problems."[103] A claimant may also be wrongly disbelieved if the member thinks that she 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,[104] or that he will have "distinctive mannerisms" that are different, in the member's words, from those of "any typical young man."[105] The Court also cautions that the member may be misled by what she thinks she knows about the lives of sexual minorities. The member errs if she concludes, for example, that a gay or lesbian person will discover their sexual orientation in adolescence,[106] and will initially have "misgivings" about it;[107] that gay men will not marry women and father children, even if they "are forced to live double lives" in

[100] *IR*, above n 88 at para 37.

[101] 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" (*ibid* at paras 25–26).

[102] 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" (Millbank, above n 60 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 Journal of Human Rights* 391; Hathaway & Foster, above n 60 at 141–42.

[103] *Kravchenko v Canada (Minister of Citizenship and Immigration)*, 2005 FC 387 at paras 3–6, 44 Imm LR (3d) 88, Heneghan J.

[104] *Herrera v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1233 at paras 11–21, 142 ACWS (3d) 304, Teitelbaum J.

[105] *Lekaj v Canada (Minister of Citizenship and Immigration)*, 2006 FC 909 at para 16, 150 ACWS (3d) 451, Dawson J.

[106] *Eringo v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1488 at para 11, 157 ACWS (3d) 813, Blais J; *Dosmakova v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1357 at paras 11–13, 68 Imm LR (3d) 89, Dawson J.

[107] *Dosmakova*, above n 106 at paras 11–13. See also *Kamau v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1245 at para 8, 142 ACWS (3d) 303, Gibson J.

a homophobic society;[108] that the claimant, "if he were homosexual, would dissociate himself from the Roman Catholic church";[109] 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."[110]

Lastly, the potential for misunderstandings of all kinds increases exponentially when claimants give their evidence through an interpreter.[111] The Court notes this explicitly: judging interpreted evidence is "fraught with the possibility of innocent misunderstanding"[112] and the potential for wrongful denials,[113] 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."[114]

A refugee claimant has a right under the Canadian Charter of Rights and Freedoms to interpretation that is "continuous, precise, competent, impartial and contemporaneous."[115] In overturning decisions in which the interpretation fell short

[108] *Leke v Canada (Minister of Citizenship and Immigration)*, 2007 FC 848 at para 20, 63 Imm LR (3d) 264, Lagacé DJ; *Eringo*, above n 106 at para 11. 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 FC 519, 166 ACWS (3d) 550, Harrington J.

[109] *Trembliuk v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1264 at para 5, 126 ACWS (3d) 853, Gibson J.

[110] *Essa v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1493 at para 30, 3 Imm LR (4th) 162, Boivin J.

[111] For a general discussion, see Kagan, above n 15 at 393; Kälin, above n 60 at 233; Barnes & Mackey, above n 60 at 142–43; Luker, above n 5 at 504. For a related discussion of EU law see Reneman, above n 70 at 162–64.

[112] *Owusu-Ansah v Canada (Minister of Employment and Immigration)* (1989), 98 NR 312, 8 Imm LR (2d) 106 (CA), Heald, Mahoney, & Hugessen JJA, per Mahoney JA (a comment referring both to the difficulties inherent in judging interpreted evidence, and to problems with the former refugee determination system more broadly). See also *Owochei v Canada (Minister of Citizenship and Immigration)*, 2012 FC 140 at para 60 (available on QL), Russell J; *Castro v Canada (Secretary of State)* (1994), 86 FTR 138 at para 9, 51 ACWS (3d) 907 (TD), Jerome ACJ.

[113] See e.g. *Yoon v Canada (Minister of Citizenship and Immigration)*, 2012 FC 193 at para 4, 405 FTR 139, Shore J. As the Court notes: "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" (*ibid*). See also *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 57, 128 DLR (4th) 213, La Forest, L'Heureux-Dubé, & Gonthier JJ, per La Forest J, dissenting.

[114] The Court makes this observation in the context of abandonment decisions. See *Peredo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 390 at para 33, 363 FTR 300, 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 FC 1111 at para 17, 138 ACWS (3d) 148, Harrington J ("the applicants do not speak French or English, which made them particularly vulnerable and depend[e]nt on their interpreter"). In the refugee hearing context, see e.g. *Liang v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1315 at para 8, 153 ACWS (3d) 189, Gibson J; *El Romhaine v Canada (Minister of Citizenship and Immigration)*, 2011 FC 534 at para 38, 389 FTR 288, Shore J.

[115] *Canadian Charter of Rights and Freedoms*, s 14, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11. See *Mohammadian v Canada (Minister of Citizenship and*

of this standard,[116] the Court holds that, to be fatal, an interpreter's errors "need not be central" to the claim,[117] need not be "material, in the sense of being intertwined with key findings,"[118] and need not cause any actual prejudice to the claimant.[119] While it is possible for a 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."[120] 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.[121] Even where a claimant does speak enough English or French to appreciate that her testimony is not being properly interpreted, the Court finds that she cannot be expected, while testifying, to monitor the situation and bring it to the Board's attention. "[I]t 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."[122] The Court even refuses to apply the waiver doctrine in cases where one might expect that the interpretation problems would "be reasonably apparent" to the claimant regardless,[123] such as where the claimant "could tell right away" that the interpreter spoke an unfamiliar dialect.[124]

Immigration), 2001 FCA 191 at para 4, [2001] 4 FC 85, Stone, Rothstein, & Sexton JJA, per Stone JA (in obiter).

[116] See e.g. *Elmaskut v Canada (Minister of Citizenship and Immigration)*, 2005 FC 414, 44 Imm LR (3d) 45, Mactavish J; *Zaree v Canada (Minister of Citizenship and Immigration)*, 2011 FC 889 at paras 9–10, 2 Imm LR (4th) 237, Martineau J; *Khalit v Canada (Minister of Citizenship and Immigration)*, 2007 FC 684, 325 FTR 172, Harrington J; *Umubyeyi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 69, 382 FTR 252, Noël J; *Neheid v Canada (Minister of Citizenship and Immigration)*, 2011 FC 846, 99 Imm LR (3d) 293, Phelan J; *Huang v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 326, 231 FTR 61, Snider J.

[117] *Mah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 853 at para 23, 438 FTR 50, Gleason J (in obiter).

[118] *Ibid* at paras 22–23.

[119] See e.g. *Mohammadian* (2001), above n 115 at para 4 (in obiter); *Zaree*, above n 116 at para 8. See also *Mohammadian v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 371 at para 12, 185 FTR 144, Pelletier J (in obiter). In the words of 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.

[120] *Elmaskut*, above n 116 at para 6; *Thambiah v Canada (Minister of Citizenship and Immigration)*, 2004 FC 15 at para 23, 11 Admin LR (4th) 203, Lemieux J. The Court in these cases expressly adopts the reasoning of the Supreme Court in *Tran*, which in fact went further: "Where waiver of the right to interpreter assistance is possible, the threshold will be *very* high" [emphasis added] (*R v Tran*, [1994] 2 SCR 951 at 996, 133 NSR (2d) 81, Lamer CJ & La Forest, Sopinka, Cory, McLachlin, Iacobucci, & Major JJ, per Lamer CJ).

[121] *Elmaskut*, above n 116 at para 16; *Zaree*, above n 116 at paras 9–10; *Huang*, above n 116 at para 10; *Yoon*, above n 113 at paras 38–39. See also *Mohammadian* (2000), above n 119 at para 28 (in obiter).

[122] *Khalit*, above n 116 at para 17.

[123] For discussion, see *Umubyeyi*, above n 116 at para 10.

[124] *Elmaskut*, above n 116 at para 11.

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.[125] 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,[126] or to refuse to order a new hearing when an audit reveals that the interpreter at the first hearing was incompetent.[127] The Court reminds the Board, in short, that a claimant "deserves to have his story told,"[128] and that where the member is aware of a problem with the interpretation, the member has the responsibility to fix it.[129]

Where the claimant alleges that poor interpretation has affected her testimony, the Board must at least consider this possibility.[130] The Court 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, the Court concludes that there is simply no "sufficient basis. . .on which the Board could reasonably question the applicants' credibility."[131] 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.[132] As a consequence, the member should always bear in mind

[125] See e.g. *Singh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 267 at para 40, 155 ACWS (3d) 922, Teitelbaum J; *Chen v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 308 at para 12, 202 FTR 268, Lemieux J.

[126] *Singh*, above n 125 at para 40.

[127] 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 FC 275 at paras 3, 5, 46 Imm LR (3d) 123, Lutfy CJ).

[128] *Batres v Canada (Minister of Citizenship and Immigration)*, 2013 FC 981 at para 21 (available on QL), McVeigh J.

[129] "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* (2001), above n 125 at para 12, Lemieux J). See also *Singh*, above n 125 at para 40.

[130] *Owochei*, above n 112 at paras 57–63; *VRBL v Canada (Minister of Citizenship and Immigration)*, 2009 FC 290 at paras 18–19, 80 Imm LR (3d) 260, Frenette J. See also *Sandoval v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1273, 13 Imm LR (4th) 332, O'Keefe J.

[131] *Shkabari v Canada (Minister of Citizenship and Immigration)*, 2012 FC 177 at para 63 (available on QL), O'Keefe J. See also *Fatih*, above n 24 at para 67.

[132] See e.g. *Garcia v Canada (Minister of Citizenship and Immigration)*, 2014 FC 871 (available on QL), Strickland J. In *Zhang*, for example, the Board disbelieved the claimant because her story was "strikingly 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* (2006), above n 48 at para 26). See also *Bao v Canada (Minister of Citizenship and Immigration)*, 2006 FC 301, 147 ACWS (3d) 281, Campbell J. The Court has also

the fact that the claimant's evidence has been interpreted,[133] and should exercise caution in identifying inconsistencies and contradictions.[134]

The Claimant's Conduct

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

For many claimants attempting to flee to Canada, every legal route to entering the country is blocked by design. To reach safety, they must sidestep the barriers put in place by the Canadian immigration system.[135] To qualify for a visitor's visa, a claimant must convince an immigration official that she intends to stay in Canada only temporarily. The Court 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."[136] 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?"[137] Simply put, "a refugee claimant may need to lie in order to obtain

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*, above n 52 at para 18).

[133] See e.g. *Arslan*, above n 74 at para 90 ("It has to be remembered that the Applicants testified through an interpreter").

[134] See *Attakora*, above n 20; *Owochei*, above n 112 at para 59; *Owusu-Ansah*, above n 112; *Rajaratnam* (1991), above n 63; *Arslan*, above n 74 at paras 89–90.

[135] 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 5, 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" (Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008) 61–62). For a related discussion of the failure of the international community to establish a right to asylum (as opposed to *non-refoulement*), see Daphné Bouteillet-Paquet, *L'Europe et le droit d'asile: La politique d'asile européenne et ses onsequences sur les pays d'Europe centrale* (Paris: L'Harmattan, 2001) at 89–97; Guy S Goodwin-Gill, "Europe: A Placed to Seek, to Be Granted, and to Enjoy Asylum?" in *European Migration*, above n 84 at 35.

[136] *Quinteros v Canada (Minister of Citizenship and Immigration)* (1998), 82 ACWS (3d) 980 at para 1 (available on QL) (FCTD), Campbell J. See also e.g. *Fajardo v Canada (Minister of Employment and Immigration)* (1993), 157 NR 392 at para 5, 21 Imm LR (2d) 113 (CA), Mahoney, Robertson, & McDonald JJA, per Mahoney JA; *Kukhon v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 69 at paras 21–23, 227 FTR 195, Beaudry J; *Bhatia v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 2010 at para 16, 230 FTR 191, Layden-Stephenson J.

[137] *Fajardo*, above n 136 at para 5.

a Canadian visa,"[138] 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 authorities in the future "even though he had no intention of doing so."[139] While the Board drew a negative inference from this dishonesty, the Court rather finds that it was "not surprising" under the circumstances.[140]

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 "fears and vulnerability" rather than any intrinsic disrespect for the rule of law.[141] 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:[142] "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."[143] 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."[144] 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,"[145] and that even if the member disbelieves some part of the claimant's story, she must nonetheless assess the rest of his claim with an open mind. The fact that the claimant has been "caught in one lie" should not summarily "discredit all of his evidence."[146] In short, the Court cautions in the strongest terms that a claimant who has attempted to mislead the Board about some aspects of his claim may not deserve

[138] *JRN v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1606 at para 13, 144 ACWS (3d) 518, Kelen J (in obiter).

[139] *Hedayati v Canada (Minister of Citizenship and Immigration)*, 2006 FC 577 at paras 9, 34, 148 ACWS (3d) 778, O'Keefe J.

[140] *Ibid.*

[141] *Ameir*, above n 21 at para 16; *Takhar v Canada (Minister of Citizenship and Immigration)*, 86 ACWS (3d) 579 at para 14 (available on QL), Evans J (in obiter); *Rasheed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 587 at para 18, 251 FTR 258, Martineau J. See also e.g. *Gulamsakhi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 105 at para 9 (available on QL), Brown J.

[142] *Joseph v Canada (Minister of Citizenship and Immigration)*, 2011 FC 548 at para 11, 202 ACWS (3d) 806, O'Reilly J (in obiter). See also *Wardi*, above n 28 at para 21; *Zoja v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1079 at para 19, 4 Imm LR (4th) 247, O'Reilly J.

[143] *Ozer v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1257 at para 12, 76 Imm LR (3d) 98, O'Reilly J.

[144] *Quevedo v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1264 at para 21, 306 FTR 74, de Montigny J.

[145] See *Wardi*, above n 28 at para 21.

[146] *Guney v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1134 at para 17, 172 ACWS (3d) 1013, Zinn J. See also *Rasheed*, above n 141 at para 24.

to be branded an inveterate liar, and may still warrant a positive determination if he is otherwise credible.[147]

A claimant whose evidence is otherwise credible may also run into trouble, however, because of how he responded when he found himself at risk. In Canadian law, to qualify for refugee status, a claimant must not only be in danger, he must also be afraid. Since the Convention speaks of a "well-founded fear," the Supreme Court in *Ward* concluded that refugee claimants must have a "subjective fear of persecution."[148] As discussed in Chapter 5, the Court is often convinced that a claimant's fear, or the lack of it, can be inferred from his 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: he will flee as soon as he is threatened; he will ask for protection in the first safe country that he reaches; and he will never return home for any reason.

This approach has been much criticized, both as a matter of legal interpretation,[149] 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.[150] In a number of judgments, the Court is evidently uncomfortable with this 'subjective fear' requirement. It tries 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 *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 that a claimant demonstrate fear when, regardless, she is objectively at risk.[151] The Court continues to rely on this reasoning even

[147] See e.g. *Djama v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 531 (QL) (CA), Marceau, MacGuigan, & Décary JJA, per Marceau JA; *Yaliniz v Canada (Minister of Employment and Immigration)* (1988), 7 Imm LR (2d) 163, 9 ACWS (3d) 369 (CA), Marceau, Teitelbaum, & Walsh JJA, per Marceau JA; *Joseph*, above n 142 at para 11 (in obiter); *Wardi*, above n 28 at para 21; *Ozer*, above n 143 at para 13.

[148] *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at paras 25, 52, 103 DLR (4th) 1, La Forest, L'Heureux-Dubé, Gonthier, & Iacobucci JJ, per La Forest J.

[149] See Hathaway & Foster, above n 60 at 91–105; James C Hathaway, "The Michigan Guidelines on Well-founded Fear" (2005) 26 *Michigan Journal of International Law* 492 at 497; Michael Bossin & Laila Desmirdache, "A Canadian Perspective on the Subjective Component of the Bipartite Test for "Persecution": Time for Re-evaluation" (2004) 22 *Refuge* 108; Atle Grahl-Madsen, *The Status of Refugees in International Law* (Leiden: A W Sijthoff, 1966) 173–74, cited in Gorlick, above n 84 at 360, n 7.

[150] Hilary Evans Cameron, "Subjective Fear and Risk Theory: The Role of Risk Perception, Risk Assessment and Risk Management in Refugee Status Determinations" (2008) 20 *International Journal of Refugee Law* 567.

[151] *Yusuf v Canada (Minister of Employment and Immigration)* (1991), [1992] 1 FC 629 at para 5, 133 NR 391 (CA), Marceau, Hugessen, & MacGuigan JJA, per Hugessen JA (in obiter):

> I find it hard to see in what 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

after *Ward*, finding that "a particularly brave or foolhardy claimant will not be punished for lacking a subjective fear"[152] and that requiring a child, or mentally incompetent person, to prove that she is afraid is "absurd."[153] The Court finds that there is no obligation under the Convention,[154] nor any legal presumption,[155] that a genuine refugee will make his claim at the first reasonable opportunity; that the Board must consider the claimant's explanation for why he did not claim sooner;[156] and that, in any case, while relevant, "delay in making a claim. . .is not a decisive factor"[157] – it "cannot, in and of itself, justify the rejection of a claim."[158] 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 reavailment.[159] The Court also

> 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.

[152] *Han v Canada (Minister of Citizenship and Immigration)*, 2009 FC 978 at para 22, 84 Imm LR (3d) 236, Tannenbaum DJ (in obiter), citing *Yusuf*, above n 151 at para 5.

[153] *Canada (Minister of Citizenship and Immigration) v Patel*, 2008 FC 747 at paras 26–38, [2009] 2 FCR 196, Lagacé DJ (such a requirement "would create an absurd result" at para 34).

[154] *Menjivar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 11 at para 33, 144 ACWS (3d) 1077, Dawson J; *Priadkina v Canada (Minister of Citizenship and Immigration)* (1997), 78 ACWS (3d) 372 at para 12 (available on QL) (FCTD), Nadon J (in obiter).

[155] *Jumbe v Canada (Minister of Citizenship and Immigration)*, 2008 FC 543 at para 12, 167 ACWS (3d) 576, O'Reilly J. The Court explains:

> 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.

[156] *Malaba v Canada (Minister of Citizenship and Immigration)*, 2013 FC 84 at para 15 (available on QL), Martineau J; *Tariq v Canada (Minister of Citizenship and Immigration)*, 2005 FC 404 at para 14, 44 Imm LR (3d) 256, Mactavish J; *Ruiz v Canada (Minister of Citizenship and Immigration)*, 2012 FC 258 at para 57 (available on QL), Scott J; *Dcruze v Canada (Minister of Citizenship and Immigration)* (1999), 171 FTR 76 at para 6, 89 ACWS (3d) 1011, Rouleau J.

[157] *Huerta v Canada (Minister of Employment and Immigration)* (1993), 157 NR 225, 40 ACWS (3d) 487 (FCCA), Hugessen, Desjardins, & Létourneau JJA, per Létourneau JA (in obiter). See also e.g. *Ruiz*, above n 156 at para 56; *Junusmin v Canada (Minister of Citizenship and Immigration)*, 2009 FC 673 at para 44, 81 Imm LR (3d) 97, Shore J.

[158] *Juan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 809 at para 11, 149 ACWS (3d) 1103, Dawson J. See also *Mendez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 75 at para 36, 307 FTR 48, Teitelbaum J.

[159] *Camargo v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1434 at paras 33–37, 127 ACWS (3d) 733, O'Keefe J. Under Article 1C(1) of the 1951 Refugee Convention, a refugee loses the right to international protection if he "has voluntarily reavailed himself of the protection of the

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.[160] 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.[161]

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

The Court highlights a number of reasons why, despite a threat to his safety, a person might choose 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.[162] Or if he has gone into hiding,[163] or has taken steps to make himself less obvious to the agents of persecution,[164] he may feel that he is temporarily safe. Or despite the danger, he may simply conclude that it is

country of his nationality" (*Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, art 1C(1), Can TS 1969 No 6 (entered into force 22 April 1954, accession by Canada 4 June 1969)). For further discussion, see *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531, [2009] 1 FCR 49, Lagacé DJ.

160 See e.g. *Chandrakumar v Canada (Minister of Employment and Immigration)*, [1997] FCJ No 615 (QL) (TD), Pinard J; *Nsende*, above n 159 at paras 13–19. For this same finding in the context of a cessation application, see *Canada (Minister of Public Safety and Emergency Preparedness) v Bashir*, 2015 FC 51 at paras 65–71, [2015] 4 FCR 336, Bédard J.

161 *Shanmugarajah v Canada (Minister of Employment and Immigration)* (1992), 34 ACWS (3d) 828 (available on QL) (CA), Stone & MacGuigan JJA & Henry DJ, per MacGuigan JA; *Sukhu*, above n 98 at para 27; *Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1291 at paras 60–63, [2014] 2 FCR 254, Shore J.

162 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*, above n 71 at paras 41–44). For a discussion of the effect on risk perception of the "familiarity" of everyday risks, see Cameron 2008, above n 150 at 568–69. For the Court's comments in the context of cumulative harassment amounting to persecution, see also *Ibrahimov v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1185 at paras 17–19, 32 Imm LR (3d) 135, Heneghan J.

163 See e.g. *Musharraf v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 662 at para 48, 29 Imm LR (3d) 312, Lemieux J; *Camargo*, above n 159 at para 37.

164 See e.g. *Jumbe*, above n 155 at para 10.

worth running the risk in order to care for or protect his family,[165] for example, or to continue his studies,[166] or "to wind up the family's business affairs."[167] 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":[168] "It is never particularly persuasive to say that an action is implausible simpl[y] because it may be dangerous for a politically committed person."[169]

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."[170] Where a claimant in fleeing her country "had always planned to come to Canada,"[171] the Court faults the Board for suggesting that she should have abandoned these plans – her Canadian visitor's visa, her hotel reservation, her family waiting to greet her on arrival[172] – in

[165] See e.g. *Shanmugarajah*, above n 161; *Mohammadi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1028 at para 15, 30 Imm LR (3d) 130, Russell J; *Ahanin v Canada (Citizenship and Immigration)*, 2012 FC 180 at paras 85–89, [2013] 4 FCR 23, Russell J; *Ribeiro v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1363 at para 11, 143 ACWS (3d) 147, Dawson J (in obiter).

[166] See e.g. *Anwar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1077 at paras 49–52, 117 ACWS (3d) 791, Beaudry J; *Gebremichael v Canada (Minister of Citizenship and Immigration)*, 2006 FC 547 at para 48, 148 ACWS (3d) 284, Russell J.

[167] *Jumbe*, above n 155 at para 10.

[168] *Giron v Canada (Minister of Employment and Immigration)* (1992), 143 NR 238, 33 ACWS (3d) 1270 (CA), Mahoney, MacGuigan, & Linden JJA, per MacGuigan J; *Roozbahani v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1524 at para 18, 143 ACWS (3d) 1088, Blanchard J; *Bains*, above n 37.

[169] *Samani v Canada (Minister of Citizenship and Immigration)*, 82 ACWS (3d) 547 at para 4 (available on QL) (TD), Hugessen J. See e.g. *Giron*, above n 168; *Roozbahani*, above n 168 at para 18; *Juan*, above n 158 at para 8; *Kabongo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 313 at para 8, 9 Imm LR (4th) 344, Rennie J; *Jamil*, above n 71 at paras 41–44; *Arasan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1252 at paras 23–24, 94 Imm LR (3d) 302, O'Keefe J; *Bukaka-Mabiala v Canada (Minister of Citizenship and Immigration)* (1999), 170 FTR 269 at paras 22–23, 89 ACWS (3d) 771, 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)*, 73 ACWS (3d) 1017 at para 7 (available on QL) (TD), Muldoon J).

[170] See e.g. *Tung v Canada (Minister of Employment and Immigration)* (1991), 124 NR 388, 26 ACWS (3d) 711 (CA), Heald, Stone, & Linden JJA, per Stone JA; *Ilunga v Canada (Minister of Citizenship and Immigration)*, 2006 FC 569 at paras 13–14, 148 ACWS (3d) 779, Pinard J; *Packinathan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 834 at paras 7–8, 90 Imm LR (3d) 205, Snider J; *Nel v Canada (Minister of Citizenship and Immigration)*, 2014 FC 842 at paras 57–59 (available on QL), O'Keefe J; *Musharraf*, above n 163 at para 47, Lemieux J; *Bahdon v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ No 887 at para 4 (QL), Snider J; *Jarma v Canada (Minister of Citizenship and Immigration)*, 2011 FC 265 at para 17, 200 ACWS (3d) 834, Mosley J (in obiter).

[171] *Packinathan*, above n 170 at para 7. See also *Ilunga*, above n 170 at para 14.

[172] See e.g. *Nel*, above n 170 at para 57; *Manege*, above n 30 at para 39.

order to make her claim in a country that she was "simply passing through,"[173] such as, for example, "during a two-hour stopover" in a foreign airport.[174] 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.[175]

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 there should not speak against his fear.[176] 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."[177] A person may also, of course, have other convincing reasons for preferring to make his claim in Canada: because he has family here,[178] because he speaks the language,[179] because he believes that in Canada he will have a better chance of being able to bring his family over to join him,[180] or of continuing his studies.[181] The Court explains that while this type of reasoning may expose the claimant to a charge of "forum shopping," discussed further in Chapter 5, and while "that might be relevant to public policy, it is certainly not something that is incompatible with a subjective fear of persecution."[182]

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

[173] *Dominguez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 557 at para 6, 190 ACWS (3d) 1205, Harrington J (in obiter). See also *Nel*, above n 170 at para 58.

[174] *Packinathan*, above n 170 at para 8. See also *Nel*, above n 170 at para 57; *Manege*, above n 30 at para 39; *Sharma v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1240 at para 27, 126 ACWS (3d) 494, Martineau J (in obiter); *Toma v Canada (Minister of Citizenship and Immigration)*, 2014 FC 121 at para 18 (available on QL), Kane J (in obiter).

[175] *Packinathan*, above n 170 at para 8. On a similar note, see Hathaway & Foster, above n 60 at 32 (discussing the "opportunities for international movement that did not exist at the time of the Refugee Convention's drafting"), citing *R v Uxbridge Magistrates' Court; Ex parte Adimi* [2001] QB 667 at 688, [2000] 3 WLR 434, Newman J (noting "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").

[176] See e.g. *Jumbe*, above n 155 at para 11; *Gurusamy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 990 at para 36 (available on QL); *Florez*, above n 53 at para 14; *El-Naem*, above n 72 at para 20; *Tung*, above n 170; *Nel*, above n 170 at paras 53–55.

[177] *Nel*, above n 170 at para 55.

[178] *Ayala v Canada (Minister of Citizenship and Immigration)*, 2011 FC 385 at para 7, 200 ACWS (3d) 1126, Campbell J; *Ay v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 671 at paras 39–40, 192 ACWS (3d) 259, Boivin J; *Manege*, above n 30 at para 39; *Dominguez*, above n 173 at para 6 (in obiter); *Gopalarasa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1138 at paras 33–35, 469 FTR 71, Diner J.

[179] *Nduwimana v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1387 at para 7, 153 ACWS (3d) 190, de Montigny J (in obiter).

[180] *Jumbe*, above n 155 at para 11. [181] *Ibid.* [182] *Nel*, above n 170 at para 55.

plan her safest course of action, and the Court finds that this delay should not count against her.[183] 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 new-born daughter, who is a citizen of the United States."[184] The Court concludes that "[t]hese factors, considered in their entirety, might well have suggested" to the claimant that she "had no imminent need to formalize her status."[185] 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.[186] 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. 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."[187]

In addition, in the decades since the Canadian Supreme Court's landmark decision in *R v Lavallee*,[188] the Court has often reminded the Board of the realities of what Justice Wilson in that judgment termed "battered wife 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 behaviour."[189] Her vulnerability could explain, for example, why the claimant remained in a violent

[183] See e.g. *Jumbe*, above n 155 at para 11; *Diallo v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 2004 at para 9, 120 ACWS (3d) 844, Pinard J; *El Balazi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 38 at paras 9–10, 57 Imm LR (3d) 9, Pinard J; *Gyawali v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1122 at paras 17–19, 125 ACWS (3d) 1054, Tremblay-Lamer J; *Menjivar*, above n 154 at para 33. See also *Hue v Canada (Minister of Employment and Immigration)*, [1988] FCJ No 283 (QL) (CA), Marceau, Teitelbaum, & Walsh JJA, per Marceau JA.

[184] *Cabrejos v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1143 at para 17, 142 ACWS (3d) 321, O'Reilly J.

[185] *Ibid.* See also *Sukhu*, above n 98 at para 23.

[186] See e.g. *Robinson v Canada (Minister of Citizenship and Immigration)*, 2006 FC 402 at para 9, 54 Imm LR (3d) 237, Gibson J; *Liang*, above n 114 at para 10; *Jabar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 602 at para 17, 139 ACWS (3d) 120, Phelan J. See also Cameron 2008, above n 150 at s 2.8 (for a discussion of the role of lay knowledge in risk assessment).

[187] *Gurusamy*, above n 176 at para 36, Russell J. For a related discussion, see *Florez*, above n 53 at para 14; *El-Naem*, above n 72 at para 20.

[188] *R v Lavallee*, [1990] 1 SCR 852, 108 NR 321, Dickson CJ & Lamer, Wilson, L'Heureux-Dubé, Gonthier, & McLachlin JJ, per Wilson J.

[189] *Zempoalte v Canada (Minister of Citizenship and Immigration)*, 2007 FC 263 at para 13, 164 ACWS (3d) 673, Tremblay-Lamer J, citing *Lavallee*, above n 188 at paras 31, 45. See e.g. *Ritchie*, above n 88; *Garcia* (2007), above n 99 at paras 23–27, citing Gender Guidelines, above n 29, s C(2); *MFD v Canada (Minister of Citizenship and Immigration)*, 2011 FC 589 at para 13, 390 FTR 193, Pinard J; *CBF v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1155 at paras 59–60, 5 Imm LR (4th) 14, Kelen J, citing *Lavallee*, above, at paras 35, 59; *Jones*, above n 31 at para 28.

relationship,[190] or returned to her abuser,[191] or why she did not disclose the abuse: why she did not report it to the police or to other authorities in her country,[192] why she did not seek medical attention,[193] why she delayed in making a refugee claim in Canada.[194]

The Court also faults the Board for judging a claimant's actions without taking into account her lack of sophistication, her disorientation and fear,[195] 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 could support her,[196] 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.[197] Lastly, the Court 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,[198] 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.[199] 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.[200]

[190] *Griffith*, above n 32 at paras 26–28; *MFD*, above n 189 at para 13; *Jones*, above n 31 at para 28.

[191] *Ghulam v Canada (Minister of Citizenship and Immigration)*, 2007 FC 303 at para 11, 156 ACWS (3d) 428, Barnes J.

[192] *Zempoalte*, above n 189 at para 13; *CBF*, above n 189 at paras 57, 59–60; *NGM v Canada (Minister of Citizenship and Immigration)*, 2013 FC 372 at para 5 (available on QL), Gleason J (in obiter). See also *Garcia* (2007), above n 99 at paras 23–27 (for the same finding with respect to a claimant's failure to follow up with the police after having made a report), citing Gender Guidelines, above n 29, s C(2).

[193] *Isakova*, above n 76 at paras 20–26; *Sukhu*, above n 98 at para 20.

[194] *Griffith*, above n 32 at paras 26–28; *Myle*, above n 31 at paras 41–42; *Jones*, above n 31 at paras 28–30.

[195] See e.g. *Robinson*, above n 186 at para 9; *Melo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 150 at paras 15–16, 165 ACWS (3d) 335, Campbell J; *El-Naem*, above n 72 at paras 19–20.

[196] *MBK v Canada (Minister of Citizenship and Immigration)* (1997), 70 ACWS (3d) 525 (available on QL) (TD), Campbell J.

[197] *Peter v Canada (Minister of Citizenship and Immigration)*, 2011 FC 778 at para 34 (available on QL), O'Keefe J (in obiter).

[198] *Lorne v Canada (Minister of Citizenship and Immigration)*, 2006 FC 384 at paras 16–18, 289 FTR 282, von Finckenstein J, citing *Zhu v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 884 at para 28, 16 Imm LR (3d) 227, Muldoon J.

[199] *Ruiz*, above n 156 at para 61, Scott J. See also *Manege*, above n 30 at para 39; *El-Naem*, above n 72 at para 20.

[200] *Basak v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1496 at paras 11–12, 143 ACWS (3d) 1084, Mactavish J. See also *Lorne*, above n 198 at paras 16–18; *SDJ v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1283 paras 21–30, 195 ACWS (3d) 1105, Bedard J (in obiter). For a related discussion in the context of EU law, see Reneman, above n 70 at 166–68, 222.

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."[201] Its judgments raise 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 decision-makers fail to appreciate this – if they hold claimants and their evidence to too high a standard – they will wrongly reject too many genuine refugees.[202]

Persecution may leave no paper trail. The Court recognizes that victims may not have sought medical help or gone to the police,[203] and that there may be no reason to expect that an agent of persecution itself would keep a record of its actions.[204] 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,[205] for example, or in filing papers, she may not have "understood the importance" of asking for receipts.[206] 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,"[207] 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 thought to

[201] *Zhuravlvev v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 3 at para 24, 187 FTR 110, Pelletier J. See e.g. *Carrillo*, above n 12 at para 26; *Bastos v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 662 at para 29, 15 Imm LR (3d) 167, O'Keefe.

[202] "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents" (UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, rev'd edn (Geneva: Office of the United Nations High Commissioner for Refugees, 1992) at para 196 [*UN Handbook*]. See also e.g. Hathaway & Foster, above n 60 at 136–37; Macklin 1998, above n 70.

[203] For representative judgments, see above nn 192 and 193.

[204] See e.g. *Zheng v Canada (Minister of Citizenship and Immigration)*, 2007 FC 974 at para 9, 160 ACWS (3d) 854, Dawson J.

[205] "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 FC 1274 at para 21, 68 Imm LR (3d) 72, Shore J).

[206] 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*, above n 189 at para 36).

[207] *Ali v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1121 at para 12, 133 ACWS (3d) 161, 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" (*ibid* at 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 n 69 at 59.

bring a birth certificate."[208] By the time of her hearing, proof may simply be beyond the claimant's reach.[209] She may be unable to obtain evidence, for example, from people with whom she has lost contact,[210] from a foreign bureaucracy,[211] or from a failed state whose bureaucracy has collapsed.[212] 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.[213]

Indeed, recognizing that friends and relatives will often be the claimant's only means of accessing supporting evidence, the Court warns that this evidence should not be viewed with suspicion simply because a family member or a friend had a hand in getting it.[214] Otherwise, a refugee's attempt to corroborate her claim "would be severely constrained or would become impossible."[215] 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,"[216] and it may play a particularly important role in cases of gender-based violence, where claimants often "cannot rely on the more standard or typical forms of evidence."[217] In rejecting the Board's finding that such witnesses are "not sufficiently independent or objective,"[218] the Court stresses that the fact that they have an interest in the outcome of the hearing

[208] *Nur v Canada (Minister of Citizenship and Immigration)*, 2004 FC 779 at paras 13, 29, 131 ACWS (3d) 501, Lemieux J.

[209] *Owusu-Ansah*, above n 112. See also *Touraji v Canada (Minister of Citizenship and Immigration)*, 2011 FC 780 at paras 13, 27, 206 ACWS (3d) 160.

[210] *Buwu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 850 at paras 8, 47 (available on QL), Russell J. For a related finding, see *Aarabi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1309 at paras 33–35, 152 ACWS (3d) 1112, Rouleau J.

[211] *Ghebremichael v Canada (Minister of Citizenship and Immigration)*, 2012 FC 873 at paras 13–14, 10 Imm LR (4th) 67, Mosley J, citing *Kalu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 400 at para 12, 166 ACWS (3d) 326, Dawson J.

[212] *Elmi*, above n 47 at paras 22–23.

[213] *EN*, above n 99 at para 7; *Kalu*, above n 211 at paras 6–10. For related comments, see *Jung v Canada (Minister of Citizenship and Immigration)*, 2014 FC 275 at para 56, 451 FTR 25, Russell J (where the member was "fully alive" to this issue but erred in other respects). For discussion, see Hathaway & Foster, above n 60 at 157 (supporting evidence "should not be requested. . .where the pursuit of corroboration might expose the applicant or other persons to risk").

[214] *Ymeri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 194 at para 7, 146 ACWS (3d) 324, von Finkenstein J; *SMD v Canada (Minister of Citizenship and Immigration)*, 2010 FC 319 at para 37 (available on QL), O'Keefe; *Ndjizera v Canada (Minister of Citizenship and Immigration)*, 2013 FC 601 at paras 31–33, 433 FTR 287, Gagné J; *Durrani v Canada (Minister of Citizenship and Immigration)*, 2014 FC 167 at paras 7–8, 448 FTR 252, Zinn J.

[215] *Ymeri*, above n 214 at para 7.

[216] *Cardenas v Canada (Minister of Citizenship and Immigration)* (1998), 144 FTR 282 at paras 25, 27, 78 ACWS (3d) 129 (TD), Campbell J (citing Applicant's submissions with approval). For discussion, see *Ndjizera*, above n 214 at para 32, citing *Gilani v Canada (Minister of Citizenship and Immigration)*, 2013 FC 243 at paras 26–28 (available on QL), Kane J.

[217] *AME*, above n 92 at para 14, citing Gender Guidelines, above n 29.

[218] *Ndjizera*, above n 214 at para 31.

does not suggest, on its own, that their evidence is unreliable.[219] On the contrary, a claimant's family and friends may be "the people best-positioned to give evidence" about her situation.[220]

The Court 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,"[221] and rejecting it for this reason is "perverse,"[222] for it puts claimants "in an impossible position": if they had not requested the evidence, the Board "may have questioned their lack of diligence."[223]

In addition, 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,"[224] and to remember that when it comes to displacing this presumption, its members have no "particular knowledge or expertise."[225] Members err if they assume that foreign

[219] See e.g. *Cardenas*, above n 216 at paras 25, 27 (citing Applicant's submissions with approval); *Ndjizera*, above n 214 at para 32; *LOMT v Canada (Minister of Citizenship and Immigration)*, 2013 FC 957 at para 26 (available on QL), Kane J; *Demir v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1218 at para 18 (available on QL), Zinn J.

[220] See e.g. *LOMT*, above n 219 at para 28; *Ndjizera*, above n 214 at para 32. See also *Ochoa v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1105 at para 10, 93 Imm LR (3d) 113, Zinn J. In the context of PRRA decisions, see also *Shilongo v Canada (Minister of Citizenship and Immigration)*, 2015 FC 86 at para 29, 474 FTR 121, Boswell J; *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2015 FC 578 at para 32, 34 Imm LR (4th) 281, Russell J; *Ugalde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 458 at para 28, 202 ACWS (3d) 144, de Montigny J.

[221] *Suduwelik v Canada (Minister of Citizenship and Immigration)*, 2007 FC 326 at para 23, 156 ACWS (3d) 676, Barnes J. See also *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 226 at para 31, 40 Imm LR (3d) 50, Mactavish J; *SMD*, above n 214 at para 37; *Ndjizera*, above n 214 at para 32.

[222] *Mile v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1450 at para 22, 143 ACWS (3d) 907, Dawson J. See also *Kosta v Canada (Minister of Citizenship and Immigration)*, 2005 FC 994 at para 33, 140 ACWS (3d) 1024, Teitelbaum J (in obiter).

[223] *GU v Canada (Minister of Citizenship and Immigration)*, 2005 FC 58 at para 17, 136 ACWS (3d) 731, Rouleau J. See also *Mile*, above n 222 at para 22; *Ndjizera*, above n 214 at para 33. 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 e.g. *Ahmed*, above n 221 at para 32; *Ray v Canada (Minister of Citizenship and Immigration)*, 2006 FC 731 at para 39, 149 ACWS (3d) 292, Teitelbaum J (in the PRRA context).

[224] "*Omnia praesumuntur rite et solemniter esse acta*": "All things are presumed to have been done rightly" (JA Ballentine, *A Law Dictionary of Words, Terms, Abbreviations and Phrases Which are Peculiar to the Law and of Those Which Have a Peculiar Meaning in the Law* (Indianapolis: The Bobbs-Merrill Company, 1916). See e.g. *Gulamsakhi*, above n 141 at para 7; *Ramalingam v Canada (Minister of Citizenship and Immigration)* (1998), 77 ACWS (3d) 156 at para 5 (available on QL), Dubé J; *Trujillo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1643 at para 9 (available on QL), Harrington J; *Osipenkov v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 57 at para 4, 120 ACWS (3d) 111, Layden-Stephenson J; *Masongo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 39 at para 12, 67 Imm LR (3d) 194, Harrington J (in the PRRA context).

[225] *Halili v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 999 at para 5, 117 ACWS (3d) 458, Heneghan J. See also *Ramalingam*, above n 224 at para 6; *Aliaj v Canada (Minister of*

documents will resemble their Canadian counterparts,[226] for example, or if they take it upon themselves to conduct a forensic examination of the evidence,[227] or if they conclude that any document containing spelling or grammatical errors must be a fake.[228] 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,"[229] 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."[230]

Echoing its comments about other kinds of deception, the Court also warns that when a claimant has submitted some fake documents to support her claim, the Board cannot conclude as a result that all of her documents are fakes.[231] 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.[232] "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."[233] Even if the member has other independent reasons to doubt the claimant's credibility, concluding as a result that her documents are not genuine is "capricious"[234] and can lead to "circular

Citizenship and Immigration), 2003 FC 1356 at para 12, 127 ACWS (3d) 330, Pinard J; *Nika v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 656 at paras 12–13, 106 ACWS (3d) 715, Hansen J; *Kabashi v Canada (Minister of Citizenship and Immigration)*, 79 ACWS (3d) 800 at para 11 (available on QL), Gibson J (in obiter).

226 *Isakova*, above n 76 at paras 42–44.

227 Where the member compared the colours of a logo in an allegedly original document with the logo as it appeared in a printout 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 FC 568 at para 21, 261 FTR 312, Harrington J).

228 See e.g. *Njeri*, above n 27 at para 14; *Liang*, above n 114 at paras 11–14; *Gill v Canada (Minister of Citizenship and Immigration)*, 2005 FC 551 at paras 6, 18, 23, 138 ACWS (3d) 1139, Rouleau J.

229 *Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 at para 33, 68 Imm LR (3d) 246, de Montigny (in the PRRA context).

230 *Ogunfowora v Canada (Minister of Citizenship and Immigration)* (1997), 129 FTR 141 at para 4, 47 Admin LR (2d) 182 (TD), Teitelbaum J.

231 *Lin v Canada (Minister of Citizenship and Immigration)*, 2007 FC 21 at para 39, 154 ACWS (3d) 933, O'Keefe J; *Jiang v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1292 at para 9, 68 Imm LR (3d) 127, Dawson J.

232 "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 FC 157 at para 55, 405 FTR 21, Russell J). See also *Jiang v Canada (Minister of Citizenship and Immigration)*, 2014 FC 180 at paras 16–17 (available on QL), Manson J; *Halili*, above n 225 at paras 4–5; *VRBL*, above n 130 at para 21; *Ceco v Canada (Minister of Citizenship and Immigration)*, 2006 FC 48 at para 15, 145 ACWS (3d) 494, Tremblay-Lamer J; *Iqbal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1219 at para 8, 152 ACWS (3d) 308, Campbell J.

233 *Jiang*, above n 232 at para 16.

234 *Iqbal*, above n 232 at para 8. See also *Haque v Canada (Minister of Citizenship and Immigration)* (2000), 192 FTR 112 at para 14, 8 Imm LR (3d) 248.

logic":[235] where, having rejected the claimant's documents because of her lack of credibility, the member then finds that the claimant is not credible because she submitted false documents[236] or because she no longer has any documents to support her claim.[237]

Lastly, the Court worries that even if the Board accepts that a claimant's documents are genuine and not prohibitively self-serving, the member may nonetheless hold them to too high a standard. The Court 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."[238] 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."[239] 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."[240] Similarly, the Court advises that its warnings about circular reasoning, above, apply 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.[241]

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

[235] *Vazquez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 9 at para 25, 96 Imm LR (3d) 224, Pinard J.

[236] *Chen v Canada (Minister of Citizenship and Immigration)*, 2013 FC 311 at paras 19–21 (available on QL), Rennie J.

[237] *Vazquez* (2011), above n 235 at para 25.

[238] *Ali v Canada (Minister of Citizenship and Immigration)*, 2012 FC 259 at para 15, 10 Imm LR (4th) 103, Rennie J.

[239] *Theik v Canada (Minister of Citizenship and Immigration)*, 2004 FC 353 at para 11, 129 ACWS (3d) 779, Harrington J.

[240] *Mahmud v Canada (Minister of Citizenship and Immigration)* (1999), 167 FTR 309 at paras 11–12, 88 ACWS (3d) 648 (TD), Campbell J; *Bagri v Canada (Minister of Citizenship and Immigration)* (1999), 168 FTR 283 at para 11, 88 ACWS (3d) 2016 (TD), Campbell J. See also *Arslan*, above n 74 at para 88; *PUA*, above n 80 at paras 31–32; *Molano v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1253 at para 73, 5 Imm LR (4th) 228, Russell J; *Durrani*, above n 214 at para 7; *Akter*, above n 27 at paras 23–25.

[241] See e.g. *Okoli*, above n 42 at para 32. "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" (*ibid* [emphasis in original]).

had been the result of some other cause."[242] The Board must consider the claimant's evidence in evaluating his credibility and not the other way around; the member cannot expect a document "to provide information beyond its defined purpose";[243] 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.[244]

In short, in a great many of its judgments, the Court demonstrates a strong concern that refugee claimants are particularly susceptible to being wrongly disbelieved. As the Court notes, this not only puts them at risk, but is also 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,"[245] and this is no small matter. "Credibility is the most important thing any of us has," and a truthful claimant simply "deserves better."[246]

OVERLOOKING OBJECTIVE DANGER

Where a member has solid reasons for concluding that the claimant's story is not credible, the Court, like many other commentators, worries that this may blind her to the possibility that the claimant may nonetheless be at risk of persecution.[247] Even if the claimant has fabricated his entire account of the experiences that caused him to flee his country, the Court makes clear that if the member accepts that he is who he says he is – a gay man,[248] for example, or a member of a minority opposition

[242] *Alfonso*, above n 18 at para 20. See also e.g. *Charles*, above n 54 at para 10; *Thurairajah v Canada (Minister of Employment and Immigration)*, 46 ACWS (3d) 710 at paras 8, 15 (available on QL), Tremblay-Lamer; *Okoli*, above n 42 at para 32; *CLJ*, above n 29 at paras 6–7.

[243] *Njodzenyuy v Canada (Minister of Citizenship and Immigration)*, 2014 FC 709 at para 30 (available on QL) Manson J.

[244] *Gunes v Canada (Minister of Citizenship and Immigration)*, 2008 FC 664 at paras 19, 31–33, 168 ACWS (3d) 602, Frenette DJ ("It is difficult to understand how a tribunal could ignore the logical and obvious cause of torture such as cuts and [a] 'cigarette burn'" at para 33). See also *Kingsley v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 194 at paras 7–8, 121 ACWS (3d) 128, Campbell J. For a discussion of similar principles under EU law, see Reneman, above n 70 at 248.

[245] *Vodics*, above n 74 at para 11; *Herrera*, above n 104 at para 18; *Roozbahani*, above n 168 at para 26; *Rojas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 710 at para 4, 204 ACWS (3d) 135, Campbell J.

[246] *Amiragova v Canada (Minister of Citizenship and Immigration)*, 2008 FC 64 at para 17, 70 Imm LR (3d) 136, Noël J.

[247] See e.g., Hathaway & Foster, above n 60 at 159–61; Gorlick, above n 84 at 360–61, 364; Kagan, above n 15 at 370–71. As Dauvergne explains, under the Convention, "lying does not exclude anyone from refugee status" (Dauvergne, above n 135 at 62). See also Reneman, above n 70 at 218, for a discussion of this principle under EU law. "[W]hen 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" (*ibid*).

[248] *Burgos-Rojas v Canada (Minister of Citizenship and Immigration)* (1999), 162 FTR 157 at paras 12–14, 85 ACWS (3d) 884 (TD), Rouleau J.

party,[249] or a young Tamil from the north of Sri Lanka at the height of the country's civil war[250] – this identity alone may be enough to give him a well-founded fear of returning home.[251] If the claimant cannot be believed even on the question of his identity, the Court finds that his claim can still succeed if his identity can be established by independent evidence.[252]

DENYING CLAIMS ON PROCEDURAL GROUNDS

Lastly, the Court 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."[253] With this in mind, the Court here stresses that "procedure [should] be the servant of justice and not its mistress."[254]

[249] *Touma v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1279 at paras 11–12, 126 ACWS (3d) 846, Heneghan J.

[250] *Sivalingam v Canada (Minister of Citizenship and Immigration)*, 2006 FC 773 at para 5, 55 Imm LR (3d) 52, Mactavish J; *Balasubramaniam v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1137 at paras 9–11, 125 ACWS (3d) 1051, Snider J; *Satkunarajah v Canada (Minister of Citizenship and Immigration)*, 2004 FC 37 at paras 6–7, 40 Imm LR (3d) 230, Kelen J; *Kamalanathan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 553 at para 25, 15 Imm LR (3d) 55, O'Keefe J; *Mylvaganam v Canada (Minister of Citizenship and Immigration)* (2000), 98 ACWS (3d) 1089 at para 10 (available on QL) (FCTD), Gibson J; *Kathirkamu*, above n 65 at paras 44–47; *Suppan v Canada (Minister of Citizenship and Immigration)*, 2007 FC 204 at paras 10–12, 155 ACWS (3d) 650, Mactavish J (in obiter).

[251] 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 in *Baranyi v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 664 at para 14, 16 Imm LR (3d) 142, O'Keefe J; a woman wanting to have a second child in contravention of China's one-child policy in *Tan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1280 at paras 40–42, 39 Imm LR (3d) 59, O'Keefe J; a claimant who would be returning home as a failed asylum-seeker in, e.g., *Touma*, above n 249 at paras 10–12; *Suntharalingam v Canada (Minister of Citizenship and Immigration)*, 2014 FC 987 at paras 49–51, 466 FTR 20, Brown J; *Nadarasa v Canada (Minister of Citizenship and Immigration)*, 2012 FC 752 at paras 20–28 (available on QL), Phelan J.

[252] In *SS*, the member disbelieved the claimant's testimony that she was a young Tamil woman from the north of Sri Lanka. The Court overturned the decision, finding that the member wrongly disregarded a document that appeared to confirm this identity. *SS v Canada (Minister of Citizenship and Immigration)* (1999), 167 FTR 130 at paras 4–6, 88 ACWS (3d) 650 (TD), Tremblay-Lamer J.

[253] *Trejo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1207 at para 23, 75 Imm LR (3d) 209, Mandamin J. See also *Biro v Canada (Minister of Citizenship and Immigration)*, 2006 FC 712 at para 18, 293 FTR 297, Rouleau DJ.

[254] *Djilal v Canada (Minister of Citizenship and Immigration)*, 2014 FC 812 at para 36, 462 FTR 102, Locke J; *Andreoli*, above n 114 at para 16, citing *Hamel v Brunelle* (1975), [1977] 1 SCR 147 at 156, 8 NR 481, Pigeon J; *Emani v Canada (Minister of Citizenship and Immigration)*, 2009 FC 520 at para 21, 81 Imm LR (3d) 136, Teitelbaum DJ. For a related discussion, see Reneman's argument 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" (Reneman, above n 70 at 225).

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."[255] Similarly, if a claimant files his initial paperwork 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 to declare his claim abandoned.[256] This decision "has dramatic, potentially even fatal implications,"[257] and so the member must be alert to reasons why the claimant may have been "vulnerable and disoriented,"[258] and must ask herself whether he "truly intended to abandon his claim,"[259] bearing in mind that "the right to be heard is at the heart of our sense of justice and fairness."[260]

In the same vein, the Court 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."[261] 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"[262] and failed to "choose counsel willing and able to proceed on the date scheduled."[263] The Court characterizes as inherently unjust the member's decision to give the

[255] As stipulated in Rules 36 and 43 of the *Refugee Protection Division Rules* SOR/2012–256. See e.g. *Mbirimujo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 553 at paras 19, 22, 433 FTR 145, Noël J; *Cox v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1220 at para 26, 420 FTR 68, Near J; *SEB v Canada (Minister of Citizenship and Immigration)*, 2005 FC 791 at paras 23–25, 157 ACWS (3d) 605, O'Keefe J; *Mannan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 144 at paras 41–56, 33 Imm LR (4th) 182, Shore J.

[256] *Peredo*, above n 114 at para 33; *Andreoli*, above n 114 at para 17. See also *Januzi*, above n 10 at paras 6–8 (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).

[257] *Gutierrez*, above n 8 at para 16. See also e.g. *Javed*, above n 7 at para 20.

[258] *Gutierrez*, above n 8 at para 16. See also *Andreoli*, above n 114 at para 17; *Peredo*, above n 114 at para 33.

[259] *Singh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 939 at para 14, 298 FTR 55, Rouleau DJ; *Revich v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1064 at para 15, 14 Imm LR (3d) 129, Blais J. See also *Peredo*, above n 114 at para 29.

[260] *Matondo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 416 at para 18, 44 Imm LR (3d) 225, Harrington J; *Gutierrez*, above n 8 at para 18. See also e.g. *Uysal v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1310 at paras 11–13, 39 Imm LR (3d) 69, von Finkenstein J.

[261] See e.g. *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1275 at paras 50–54, 93 Imm LR (3d) 279, Russell J; *Vazquez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 385 at paras 19–20, 407 FTR 167, Bédard J; *Trejo*, above n 253 at para 23. See also *Cleopartier v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1527 at para 11, 43 Imm LR (3d) 177, Campbell J; *Biro*, above n 253 at para 18.

[262] *Perez*, above n 261 at para 50.

[263] *Bryndza v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1250 at paras 6, 13–14, 13 Imm LR (4th) 292, Campbell J. See also e.g. *Sandy v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1468 at paras 27, 31, 54, 260 FTR 1, O'Keefe J; *Perez*, above n 261 at paras 10–12, 50–54.

claimant a "choice" in such circumstances: "either abandon the claim, or proceed unrepresented."[264]

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."[265] The Court refuses to hold a claimant responsible for his counsel's procedural failings even when the claimant himself was also "negligent" and so is "partly to blame"[266] – even, in fact, when the Court concludes that the claimant has shown "little or no interest in what is happening to his application."[267] Recognizing that claimants may have trouble finding counsel through no fault of their own,[268] and that the lack of counsel may put them at a real disadvantage,[269] 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."[270]

[264] *Cleopartier*, above n 261 at para 3. "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" (*ibid* at para 11 [emphasis added]). In *Cheema*, 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 the premises by security. *Cheema v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1082 at paras 31–33, 468 FTR 18, Noël J.

[265] *Andreoli*, above n 114 at para 22, citing *Doyle v Olby (Ironmongers) Ltd.* [1969] 2 QB 158 at 166, [1969] 2 All ER 119, Denning MR; *Peredo*, above n 114 at para 39, citing *Doyle v Olby*, above. For representative judgments in related refugee and immigration contexts, see *Thamotharampillai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 438 at para 1, 388 FTR 95; *Chukwudebe v Canada (Minister of Citizenship and Immigration)*, 2009 FC 211 at para 13, 79 Imm LR (3d) 298; *Medawatte v Canada (Minister for Public Safety and Emergency Preparedness)*, 2005 FC 1374 at para 10, 52 Imm LR (3d) 109.

[266] *Djilal*, above n 254 at paras 34–35, 42–44; *Khan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 833 at paras 28–30, 47 Imm LR (3d) 278, Mosley J; *Karagoz v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1479 at paras 7–8 (available on QL), Rennie J. See also *Brown v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1305 at para 73, 48 Admin LR (5th) 1, Russell J (in the PRRA context).

[267] *Khan*, above n 266 at para 29, citing *Mussa v Canada (Immigration Refugee Board)* (1994), 49 ACWS (3d) 561 at para 3 (available on QL) (FCTD), Teitelbaum J.

[268] See e.g. *KCC v Canada (Minister of Citizenship and Immigration)*, 2011 FC 852 at para 17, 37 Admin LR (5th) 8, Mosley J; *Vazquez* (2012), above n 261 at para 19; *Galamb v Canada (Minister of Citizenship and Immigration)*, 2014 FC 563 at paras 23, 25–31, 456 FTR 229, de Montigny J.

[269] *Canadian Council for Refugees v Canada*, 2007 FC 1262 at para 230, [2008] 3 FCR 606, Phelan J, rev'd on other grounds 2008 FCA 229, [2009] 3 FCR. The Court here, 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 e.g. *Galamb*, above n 268 at paras 23, 25–31; *Tocjeva v Canada (Minister of Citizenship and Immigration)* (1997), 73 ACWS (3d) 1023 at para 17 (available on QL) (FCTD), Cullen J. For empirical support, see Chapter 8, n 153.

[270] *Soares v Canada (Minister of Citizenship and Immigration)*, 2007 FC 190 at para 22, 308 FTR 280, Shore J (in obiter). For a related discussion, see also *Echegoyen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 152 at para 23–24 (available on QL), Noël J.

CONCLUSION

When the Court imagines refugee claimants as singularly vulnerable participants in an exceptionally uncertain process, it shares Kagan's view of the wrong mistake in refugee law: "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."[271] Seen from this perspective, it makes sense to depart from the law's default preference for erring against the party who brought the matter forward. As set out in the next chapter, it makes sense, as it does in the criminal law, to design the law's fact-finding obstacle course to try to avoid a particularly devastating kind of harm to a particularly vulnerable kind of litigant.

[271] Kagan, above n 15 at 414–15.

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