

The treatment of women under Canada's Gender Guidelines in judicial reviews of gender-related refugee claims: 2003-2013

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ABSTRACT

Women claiming refugee status in Canada must demonstrate to the Immigration and Refugee Board [IRB] that their claim is valid and plausible. Canada's legislative framework acknowledges that gender-related persecution can qualify as a ground for refugee status under the United Nations Convention Relating to the Status of Refugees [*Refugee Convention*]. Specifically, the IRB's Chairperson's Guideline 4 – Women Refugee Claimants Fearing Gender-Related Persecution [Gender Guidelines] assist IRB decision-makers in deciding gender-related refugee claims by offering options for procedural accommodation and analytical guidance in the evaluation of gender-related claims. The Gender Guidelines aim to ensure decision-makers have “the degree of knowledge, understanding, and sensitivity” needed to make a “fair and correct judgment” of gender-related claims (*Griffith v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1142 (QL)).

The purpose of this research is to critically examine the use of the Gender Guidelines in IRB decisions on gender-related refugee claims and Federal Court judicial reviews of those claims. Looking at 166 Federal Court of Canada judicial reviews of gender-related claims of persecution previously rejected at the IRB level from 2003 to 2013, I used a grounded theory methodological basis and content analysis approach informed by Michel Foucault's insights on power relationships and Judith Butler's insights on performativity to examine discursive deployment of gender in refugee determinations through the treatment of the Gender Guidelines. I examined four legal standards used in these judicial reviews of gender-related claim determination—credibility assessments, plausibility assessments, availability of state protection, and the availability of an internal flight alternative [IFA]. I analyzed the application of these standards and looked at how variables such as country of origin or type of persecution or extrajudicial factors such as Canadian political discourse and rigid understandings of gender identity result in inconsistent application of the Gender Guidelines, thereby violating women refugee claimants' right to procedural fairness. Several recommendations are made for changes at both the IRB and Federal Court level to correct identified barriers and to ensure all claims related to gender-related persecution have a full and fair opportunity to provide evidence and have it considered on its merits.

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LIST OF ABBREVIATIONS

BOC	Basis of Claim Form
BRRA	Balanced Refugee Reform Act
CBSA	Canada Border Services Agency
CIC	Citizenship and Immigration Canada
DFN	Designated Foreign National
DCO	Designated Country of Origin
IFA	Internal Flight Alternative
INA	Immigration and Naturalization Act (USA)
IRB	Immigration and Refugee Board
IRPA	Immigration and Refugee Protection Act (Canada)
PCISA	Protecting Canada's Immigration System Act
PIF	Personal Information Form
RPD	Refugee Protection Division
UNHCR	United Nations High Commission for Refugees

CHAPTER 1: INTRODUCTION

1.0 Introduction

Women claiming refugee status in Canada must demonstrate to the Immigration and Refugee Board [IRB] that their claim is valid and that it fits within the *Immigration and Refugee Protection Act's* [IRPA]¹ definition of a refugee.² Canada's legislative framework acknowledges that persecution on the basis of one's gender³ qualifies a woman for refugee status under the 1951 U.N. *Convention Relating to the Status of Refugees* [the *Refugee Convention*].⁴ Specifically, the IRB *Chairperson's Guideline 4 – Women Refugee Claimants Fearing Gender-Related Persecution*⁵ [the Gender Guidelines] assists IRB decision-makers in deciding gender-related refugee claims by offering options for procedural accommodation and

¹ *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

² *Ibid* at s 96 & s 97.

³ The focus of this thesis is on persecution that is causally linked to a claimant's constructed "gender" rather than on her biological "sex". The UNHCR's Guidelines on Gender-Related Persecution summarize the key differences between these two terms:

Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time.

UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01 (7 May 2002) [UNHCR Gender Guidelines] at para 3.

⁴ *Convention Relating to the Status of Refugees*, adopted July 28, 1951, 19 UST 6259, 189 UNTS 137 (entered into force Apr 22, 1954). The 1967 Protocol extended the Convention's protection beyond those whose persecution occurred before 1951 (UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p 267) [the "Protocol"] [collectively the "*Refugee Convention*"]. In order to be entitled to refugee protection pursuant to the Refugee Convention, a claimant must establish that he or she:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. *Ibid*, Art 1A(2).

The UNHCR is dedicated to carrying out the operational mandate of the *Refugee Convention* through operational processing of claims. However, the *Convention* lacks an international supervisory body to ensure consistent application of the *Convention's* provisions. See Katie O'Byrne, "A need for better supervision of the *Refugee Convention*" (2013) 26:3 J of Refugee St 330 at 332.

⁵ Canada, Immigration and Refugee Board (IRB), *Women Refugee Claimants fearing Gender-based Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act* (Ottawa: Immigration and Refugee Board, 1996) [Gender Guidelines].

analytical guidance in the evaluation of gender-related claims.⁶ These Gender Guidelines were drafted to ensure decision-makers have “the degree of knowledge, understanding, and sensitivity” needed to make a “fair and correct judgment” of gender-related claims.⁷

The purpose of this research is to critically examine how decision-makers use the Gender Guidelines in decisions on gender-related refugee claims and Federal Court judicial reviews of those claims. I investigate whether the structure for gathering and considering evidence for gender-related refugee claims in Canada permits a full consideration of the evidence for all such claims. Furthermore, I explore whether the institutional policies and practices of the IRB yield equitable results for claimants who are seen by decision-makers as deviating from an imagined norm of who a victim of gender-related persecution could be and what she would do.

Looking at 166 Federal Court of Canada judicial reviews of gender-related claims of persecution previously rejected at the IRB level from 2003 to 2013, I use a grounded theory methodological basis and content analysis approach, informed by Michel Foucault’s insights on power relationships and Judith Butler’s insights on performativity, to examine discursive deployment of gender in refugee determinations through the treatment of the Gender Guidelines. Four legal standards used in these judicial reviews are considered—credibility assessments, plausibility assessments, availability of state protection, and availability of an Internal Flight Alternative [IFA]. I analyze the application of these standards and look at how variables such as country of origin or type of persecution or extrajudicial factors such as Canadian political discourse and rigid understandings of gender identity result in inconsistent application of the Gender Guidelines, thereby violating women refugee claimants’ right to

⁶ *Ibid* at C & D.

⁷ *Ibid* at B.

procedural fairness. Finally, I make several recommendations for changes at both the IRB and Federal Court level to correct identified barriers to giving all claims related to gender-related persecution a full and fair opportunity to provide evidence and have it considered on its merits.

1.1 Laws Governing Refugee Status Determinations in Canada

The basic definition of a refugee in all major western countries rests upon the definition provided in Article 1A(2) of the 1951 *Refugee Convention*.⁸ The *Convention*'s 1967 Protocol extended this definition to include refugees whose experience of persecution occurred after 1951.⁹ The *Refugee Convention* requires signatories to adopt a definition of a refugee substantively similar to that found in Article 1A(2).¹⁰ Canadian domestic implementation of the *Refugee Convention* is contained in s.96 of the *IRPA*.¹¹ In Canada, each *Convention*-based claimant must prove all three elements of *IRPA* section 96: a) a well-founded fear of persecution; b) based on one of five *Convention*-based grounds – race, religion, political opinion, nationality, or membership in a particular social group; and; c) outside of country of nationality and unable or unwilling to seek state protection.¹²

The term “persecution” has a specialized definition in the context of refugee determinations although neither the *Refugee Convention* nor the *IRPA* define the term. Some scholars have postulated that the drafters of the *Refugee Convention* intentionally avoided a closed list approach to defining persecution in order to avoid a narrow and quickly outdated

⁸ *Ibid* at Art 1A(2).

⁹ *Protocol*, *supra* note 4.

¹⁰ *Ibid* at Art 1(A)2.

¹¹ *IRPA*, *supra* note 1.

¹² *Ibid* at s 96. Section 96 defines a *Convention* refugee:

96 . A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

definition.¹³ In discussing the *Convention*'s failure to define persecution, James Hathaway suggested in his key text, *The Law of Refugee Status*, that "the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was the risk of injury inconsistent with the willingness and ability of a state to protect its own population."¹⁴ This lack of definitional clarity forces practitioners into a case-by-case assessment approach.¹⁵

The establishment of the existence and nature of persecution is at the core of what constitutes a *Convention* refugee in Canada. When determining whether a certain set of experiences or conditions constitutes persecution, a decision-maker considers "both the nature of the risk and the nature of the state response (if any), since it is the combination of the two that gives rise to the predicament of "being persecuted."¹⁶ In order to prove that the treatment she has experienced rises to the level of persecution, a refugee claimant must demonstrate "sustained or systematic violation of basic human rights demonstrative of a failure of state protection."¹⁷ Persecution thus only exists in a situation where the state is unable or unwilling to defend its citizenry.¹⁸

¹³ Guy Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (New York: Oxford University Press, 2007) at 93-94 & Volker Turk & Frances Nicholson, "Refugee Protection in International Law: An Overall Perspective" in Erika Feller, Volker Turk, & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) at 39.

¹⁴ James Hathaway & Michelle Foster, *Law of Refugee Status (2d)*, (Cambridge: Cambridge University Press, 2014) at 184.

¹⁵ Goodwin-Gill & McAdam, *supra* note 13 at 94.

¹⁶ James Hathaway & Jason Pobjoy, "Queer cases make bad law" (2011) 44 NYU J Int'l L & Pol 315 at 320.

¹⁷ Hathaway & Foster, *supra* note 14 at 104-105.

¹⁸ *Ibid.* The concept of the availability of state protection and internal flight alternatives are key issues in a state's determination of whether refugee status should be made available to an individual. Both of these concepts are detailed in subsequent chapters.

The *Refugee Convention* was drafted in the period immediately following World War II and the Holocaust.¹⁹ Therefore, the drafters' orientation focused on persecution, particularly political persecution²⁰ by state actors in public forums²¹ rather than persecution occurring by non-state actors in other situations.²² However, an individual escaping persecution by a non-state actor can be offered refugee protection if the persecution is due to one or more the *Convention* grounds and the individual's home country is unable or unwilling to prevent the persecutory treatment.²³

Women who experience male violence have long faced a mythological/imaginary divide between the public sphere (where the state exercises its power to protect) and an "apolitical private sphere"²⁴ (seen by the state as a place where it should not intervene).²⁵ Summing up the historical marginalization by states of women's gender-related claims of persecution, Guy Goodwin-Gill writes: "From the perspective of the 1951 *Convention*...the

¹⁹ Guy Goodwin-Gill explains: "In the aftermath of the Second World War, refugees and displaced persons were high on the international agenda." Guy Goodwin-Gill, "Convention Relating to the Status of Refugees & Protocol Relating to the Status of Refugees: Introductory Note" (2008), online: United Nations Audiovisual Library of International Law <legal.un.org/avl/ha/prsr/prsr.html> at 1. However, the initial efforts to resettle refugees into new countries of residence were expensive and reflective of Cold War politics. *Ibid.*

²⁰ Lara Sarbit, "The Reality Behind the Rhetoric: Probing the Discourses Surrounding the Safe Third Country Agreement" (2003) 18 J L & Soc Pol'y 138 at 141. Sarbit asserts that the drafters' emphasis on civil and political values also had a strategic benefit to Western nations in that it, "concealed their own vulnerability in terms of the human rights protection of social and economic rights. Victims of political repression were granted the right to seek asylum; victims of major socio-economic deprivation such as the right to food and health care were not, unless the deprivation resulted directly from political status." *Ibid.*

²¹ Gillian McFadyen characterized the political environment at the time of the *Refugee Convention*:

At the time of its birth, the Refugee Convention was premised upon Western conceptions and social environments. Following the Second World War, and facing the ideological split of the Cold War, the state as the agent of persecution was a fitting criterion for the times. The Convention definition of a refugee reflects the European historical background of totalitarianism whereby refugees, by and large, were the victims of persecution conducted by 'highly organized predatory states'

Gillian McFadyen, "The Contemporary Refugee: Persecution, Semantics and Universality" (2012) eSharp (Special Issue: The 1951 UN Refugee Convention – 60 Years On), online: University of Glasgow <www.gla.ac.uk/media/media_234569_en.pdf at 13>.

²² Goodwin-Gill & McAdam, *supra* note 13 at 81.

²³ *Ibid* at 83.

²⁴ Rachel Slater, "Gender Violence or Violence Against Women? The Treatment of Forced Marriage in the Special Court for Sierra Leone" (2012) 13 Melb J Int'l L 732 at 761.

²⁵ Goodwin-Gill & McAdam, *supra* note 13 at 81.

problem with much of the violence against women is precisely that it is perceived either as domestic or as individual and non-attributable to the State or other political structure.”²⁶ The drafters’ failure to incorporate gender-related persecution has been interpreted by US scholar Maria Cianciarulo as a “deliberate unwillingness to extend the definition of a classic refugee to include gender-based violence,” rather than simply reflective of an androcentric worldview.²⁷ As is described in section 1.2.2 of this chapter, Canada’s Gender Guidelines helped to bridge this gap by explaining to decision-makers how gender-related persecution can be linked to the *Refugee Convention* grounds.

In order to be considered a *Convention* refugee, a claimant must not only have experienced persecution but also have a “well-founded fear” of it. In other words, the claimant must both subjectively fear the persecutor and that fear must be objectively reasonable. The possession of a “well-founded fear” is analyzed on an individual basis and specifically in relation to an actual or a persecutor-perceived affiliation with a certain group of people. The IRB sees this singular, gender-neutral person -- rather than the group or class to which that individual belongs -- as a focal point of its assessment. Each person is thus cleaved away from her cultural, social, and gendered context in the claim determination process. The corollary to the use of the singular “refugee” in the refugee definition is that the harm suffered must also be personally focused. Thus, it is not enough to state that, for example, all women in Somalia are forced to undergo various forms of circumcision in adolescence and therefore should be eligible to make a refugee claim to escape this negative cultural practice. Rather, each woman

²⁶ *Ibid.*

²⁷ Marisa S Cianciarulo, “Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims” (2012) 35 Harv J L & Gender 117 at 139.

refugee claimant from Somalia must allege and provide some evidence to prove that she has a “well-founded fear” that she personally will be subject to this practice.

Next, the reason for the persecution of the claimant must be causally linked to one or more of five enumerated grounds²⁸ that specify that a refugee claimant is a person facing persecution due to “race, religion, nationality, membership in a particular social group or political opinion,”²⁹ as originally set out in the 1951 *Refugee Convention*. The claimant has the difficult task of proving that the persecutor was motivated to persecute her due to one or more of the enumerated grounds.³⁰ Excluded from the *Convention*-based grounds are so-called “economic refugees” and refugees fleeing general instability, such as war, famine, or natural disasters.³¹

In addition to those who meet the *Refugee Convention*-based definition of a refugee, the *IRPA* also offers refugee protection under its supplementary protection provisions. Section 97(1) of the *IRPA*, often called the “complementary protection” provision, allows a person to be found as “a person in need of protection” if her removal from Canada would subject her personally³² to torture or inhumane treatment even if her basis for seeking protection does not fall under one of the enumerated grounds.³³ While those who face a risk of torture or cruel and

²⁸ Strangely, although the *Refugee Convention* grounds are commonly referred to in this manner, they are not and never have been numbered.

²⁹ *IRPA*, *supra* note 1.

³⁰ See *Ward v Canada*, [1993] 2 SCR 689 at 747, wherein the Supreme Court opined “the examination of circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution.”

³¹ Audrey Macklin, “Opening the Door to Women Refugees: A first crack” in Wenona Giles, Helene Moussa & Penny Van Esterik, eds, *Development & Diaspora: Gender and the Refugee Experience* (Dundas, Ont.: Artemis Enterprises, 1996) 118 at 119.

³² In order to have a valid claim under s 97, the claimant must prove that he or she will personally face a risk of death or cruel and unusual treatment or punishment. *IRPA*, *supra* note 1 at s 97(b)(ii). See also *Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at para 41.

³³ Section 97(1) of the *IRPA* allows a person to seek refugee protection if she is at severe risk of torture or inhumane treatment:

A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence,

unusual punishment in their home countries can apply for refugee protection under the *IRPA*'s complementary protection provision, this provision has not been well applied in gender-related claims that are not *Convention*-based.³⁴ While not the focus of this thesis, it is important to note that a person can be found as a person in need of protection under the *IRPA*'s s 97 due to an individualized risk of gender-related harm but that is not causally related to one of the *Convention* grounds.

The ability to be found a refugee under the *IRPA*'s section 96 or as a person in need of protection under *IRPA*'s section 97³⁵ is subject to the exclusions defined in the *Refugee Convention* and domestically enacted in the *IRPA* section 98.³⁶ Two classes of potential claimants are excluded under this provision even if they would otherwise qualify for refugee protection. The first group includes those who fall under the *Refugee Convention*'s Article 1E's³⁷ exclusion for those who are "recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the

would subject them personally (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care." *IRPA*, *supra* note 1 at s 97(1).

³⁴ Jamie Liew, "Taking it Personally: Delimiting Gender-Based Refugee Claims Using the Complementary Protection Provision in Canada" (2014) 26:2 Can J of Women & the L 300.

³⁵ Jane McAdams has argued that, because the complementary protection concept is rooted in the State's *non-refoulement* obligations, it ideally should not be subject to the exclusion clauses. Jane McAdam, *Complementary Protection in International Refugee Law* (New York: Oxford University Press, 2007) at 21.

³⁶ This section succinctly states that "a person referred to in section E or F of Article 1 of the *Refugee Convention* is not a Convention refugee or a person in need of protection." *IRPA*, *supra* note 1 at s 98.

³⁷ The *Convention*'s Article 1E states that the provisions shall not apply to "a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country." *Refugee Convention*, *supra* note 4 at Article 1E.

possession of the nationality of that country,”³⁸ even if they are not citizens.³⁹ The *IRPA* extends Article 1E’s provisions by excluding individuals who already have refugee status in another country and who “can be sent or returned to that country” from refugee protection.⁴⁰

In accordance with Article 1F of the *Refugee Convention*, the second group of individuals who are excluded from refugee protection includes those who have “(a) committed a crime against peace, a war crime, or a crime against humanity...; (b) committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; or (c) has been guilty of acts contrary to the purposes and principles of the United Nations.”⁴¹ The United Nations High Commissioner for Refugees [UNHCR]⁴² has urged signatory states to narrowly interpret the Article 1F exclusion because of the serious limitation it places on refugee protection.⁴³ Individuals whose actions fall under the Article 1F categories of exclusion have limited defences (such as self-defence or duress)⁴⁴ available to rebut the presumption of exclusion.

³⁸ *Ibid.*

³⁹ However, Canadian jurisprudence on Article 1E has emphasized that, in order for this exclusion to apply, the individual must be able to access “all of the rights of a national” (*Canada (Minister of Citizenship and Immigration) v Choovak*, 2002 FCT 573 at para 34) including “the right to return, the right to reside for an unlimited period of time, the right to study, the right to work, and access to basic social services” (*Hassanzadeh v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1494 at para 19, quoting Lorne Waldman, *The Definition of Convention Refugee* (Markham: Butterworths, 2001) at s 8.481).

⁴⁰ *IRPA*, *supra* note 1 at s 101(1)(d).

⁴¹ *Refugee Convention*, *supra* note 4 at Article 1F. The interpretation of Article 1F’s subsets has evolved over the years in response to other areas of law, such as Article 1F(a)’s reference to international criminal law (Ned Djordjevic, “Exclusion under Article 1F(b) of the Refugee Convention: The Uncertain Concept of Internationally Serious Common Crimes” (2014) 12:5 J Int Criminal Justice 1057 at 1061), and to changing political climates, particularly security concerns about terrorists and international criminals. Asha Kausal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23:1 Int’l J of Ref L 54 at 55.

⁴² The UNHCR has supervisory capacity over the signatory states to the *Refugee Convention* (*supra* note 4). However, it has no enforcement mandate established in its enabling statute, thereby limiting its supervisory capacity to statements on states’ adherence to the *Convention* and guidance documents. See UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para 8(a).

⁴³ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Reissued), HCR/1P/4/ENG/REV.3 (Geneva, 2011) [*UNHCR Handbook*] at 165.

⁴⁴ *Ibid* at 119-120.

1.2 Gender-related persecution and the role of the Gender Guidelines

1.2.1 Canada's Immigration and Refugee Board and the role of Chairperson's Guidelines

The IRB is an administrative tribunal under the authority of the Minister of Citizenship and Immigration but operating at arm's length from Citizenship and Immigration Canada and the Canada Border Services Agency.⁴⁵ The IRB is divided into four divisions: the Immigration Division, the Immigration Appeal Division, the Refugee Protection Division [RPD] and, as of the 2012 regulatory changes, the Refugee Appeal Division [RAD].⁴⁶ The Immigration Division handles the acceptance and rejection of visa applications (for example, temporary work visas or family class applications). The Immigration Appeal Division hears appeals with respect to negative visa applications, admissibility decisions, residency obligation determinations, and removal orders.⁴⁷ The Chairperson "has supervision over and direction of the work and staff of the Board,"⁴⁸ including a broad mandate to take "any action that may be necessary to ensure that the members of the Board carry out their duties efficiently and without undue delay."⁴⁹

The RPD⁵⁰ is granted broad powers under the *IRPA* to determine refugee applications within Canada. As part of the 2010 changes to the *IRPA*, members of the RPD are now public servants, rather than Ministerial appointees.⁵¹ Under Section 170(a) of the *IRPA*, the RPD "may inquire into any matter that it considers relevant to establishing whether a claim is well-

⁴⁵ Immigration and Refugee Board of Canada, "About the Board," online: Immigration and Refugee Board of Canada <www.irb-cisr.gc.ca/Eng/BoaCom/Pages/index.aspx>.

⁴⁶ *IRPA*, *supra* note 1 at s 151.

⁴⁷ *Ibid* at s 62 & 63.

⁴⁸ *Ibid* at s 159(1)(a).

⁴⁹ *Ibid* at s 159(1)(g).

⁵⁰ *IRPA* specifies that the RPD shall consist of the "Deputy Chairperson, Assistant Deputy Chairpersons and other members, including coordinating members, necessary to carry out its functions." *Ibid* at s 169.1(1).

⁵¹ *Ibid* at s 169.1(2).

founded.”⁵² Section 170 also contains a basic outline of RPD procedural expectations leading up to the refugee determination hearing⁵³ wherein decision-makers:

- (c) must notify the person who is the subject of the proceeding and the Minister of the hearing;
- (d) must provide the Minister, on request, with the documents and information referred to in s 110(4);⁵⁴
- (d.1) may question the witnesses, including the person who is the subject of the proceeding; (and)
- (e) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations.⁵⁵

These statutory provisions provide a baseline for the refugee determination process but guidance documents issued from the Chairperson also inform hearing proceedings.

The RAD was created to provide a means of substantive appeal for determinations on the merits at a time when the number of RPD decision-makers in each case was reduced from two to one.⁵⁶ Although the RAD was provided for in the original text of the 2002 *IRPA*, this division was unfunded until the implementation of the 2012 regulatory changes. Except in cases where the RAD has determined that a hearing is warranted,⁵⁷ a RAD appeal involves a

⁵² *Ibid* at s 170(a).

⁵³ *Ibid* at s 170(b). The IRB may waive the need for a hearing in cases where the decision-maker is able to make a positive determination based on documentation alone, as long as the Minister’s representative is not planning to intervene in the case. *Ibid* at s 170(f).

⁵⁴ *Ibid* at s 100(4) requires a claimant under this section to comply with the timelines specified for submission of documents:

- (4) A person who makes a claim for refugee protection inside Canada at a port of entry and whose claim is referred to the Refugee Protection Division must provide the Division, within the time limits provided for in the regulations, with the documents and information — including in respect of the basis for the claim — required by the rules of the Board, in accordance with those rules.

⁵⁵ *Ibid* at s 170(a).

⁵⁶ Stacey A Saufert, “Closing the Door to Refugees: The denial of due process for refugee claimants in Canada” (2007) 70 Sask L Rev 27 at 28.

⁵⁷ Pursuant to *IRPA* s 110(6):

The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

- (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;
- (b) that is central to the decision with respect to the refugee protection claim; and
- (c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

Ibid at s 110(6).

If a hearing is held, the RAD is required to give both the claimant and the Ministerial representative the opportunity to present evidence, call and question witnesses and make submissions. *Ibid* at 171(a.1).

paper-based review of the case determination.⁵⁸ Decision-makers of the RAD have many similar responsibilities and lack of evidentiary constraints enjoyed by RPD decision-makers:

171. In the case of a proceeding of the Refugee Appeal Division,
(a) the Division must give notice of any hearing to the Minister and to the person who is the subject of the appeal...the Division is not bound by any legal or technical rules of evidence;
the Division may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;
the Minister may, at any time before the Division makes a decision, after giving notice to the Division and to the person who is the subject of the appeal, intervene in the appeal;
the Minister may, at any time before the Division makes a decision, submit documentary evidence and make written submissions in support of the Minister's appeal or intervention in the appeal;
(b) the Division may take notice of any facts that may be judicially noticed and of any other generally recognized facts and any information or opinion that is within its specialized knowledge; and
(c) a decision of a panel of three members of the Refugee Appeal Division has, for the Refugee Protection Division and for a panel of one member of the Refugee Appeal Division, the same precedential value as a decision of an appeal court has for a trial court.⁵⁹

However, these provisions only entered into force with the recent legislative changes. Without a functioning appeal division for refugee claims, the only recourse available for failed refugee claimants has been the narrow judicial review option at the Federal Court.

In recognition of the complexity of many determinations, the *IRPA* expressly permits the Chairperson of the IRB to “issue guidelines in writing to member of the Board and to identify decisions of the Board as jurisprudential guidelines, after consulting with the Deputy Chairpersons, to assist members in carrying out their duties.”⁶⁰ Guidelines primarily have an operational purpose as guiding principles for the adjudication of claims.⁶¹ The Chairperson

⁵⁸ *Refugee Appeal Division Rules*, SOR/2012-257 at s 7.

⁵⁹ *IRPA*, *supra* note 1 at s 171.

⁶⁰ *Ibid* at s 159(1)(h).

⁶¹ Immigration and Refugee Board of Canada, “Chairperson’s Guidelines,” online: Immigration and Refugee Board of Canada <www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/guidir/Pages/index.aspx>.

has promulgated eight guidelines over the course of the last 20 years concerning claim evaluation and procedures relevant to named classes of claimants (those on civilian non-combatants,⁶² child refugee claimants,⁶³ persons with particular vulnerabilities,⁶⁴ and women refugee claimants fearing gender-related persecution) and on certain procedural issues (those on use of detention,⁶⁵ scheduling of proceedings,⁶⁶ preparation and conduct of an RPD hearing)⁶⁷.

1.2.2 Canada's Gender Guidelines

Canada's Gender Guidelines were the first domestic gender guidelines to be developed after the promulgation of the 1991 UNHCR's Guidelines on the Protection of Refugee Women.⁶⁸ First published in 1993 and revised in 1996, Canada's Gender Guidelines were the result of an extensive consultation process by the IRB with external stakeholders.⁶⁹ The Gender Guidelines marked a clear doctrinal step forward in recognizing the existence of and particular circumstances of gender-related refugee claims compared to other types of refugee claims.⁷⁰

⁶² Immigration and Refugee Board of Canada, "Guideline 1 – Civilian Non-combatants Fearing Persecution in Civil War Situations" (Ottawa: Immigration and Refugee Board, 1996).

⁶³ Immigration and Refugee Board of Canada, "Guideline 3 – Child Refugee Claimants: Procedural and Evidentiary Issues" (Ottawa: Immigration and Refugee Board, 1996) [Child Refugee Guideline].

⁶⁴ Immigration and Refugee Board of Canada, "Guideline 8 – Concerning Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada" (Ottawa: Immigration and Refugee Board, 2006, as amended in 2012) [Vulnerable Persons Guideline].

⁶⁵ Immigration and Refugee Board of Canada, "Guideline 2 – Detention: Guidelines Issued by the Chairperson Pursuant to paragraph 159(1)(h) of the Immigration and Refugee Protection Act" (Ottawa: Immigration and Refugee Board, 2013).

⁶⁶ Immigration and Refugee Board of Canada, "Guideline 6 - Scheduling and Changing the Date or Time of a Proceeding" (Ottawa: Immigration and Refugee Board, 2010, as amended 2012).

⁶⁷ Immigration and Refugee Board of Canada, "Guideline 7 – Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division" (Ottawa: Immigration and Refugee Board, 2003, as amended 2012) [Refugee Hearing Guideline].

⁶⁸ *UNHCR Gender Guidelines*, *supra* note 3.

⁶⁹ Valerie Oosterveld, "The Canadian Guidelines on Gender-Related Persecution: An Evaluation" (1996) 8(4) *Int'l J Refugee L* 569 at 571. *See also*, Nicole Laviolette, "Gender-related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19(2) *Int'l J Refugee L* 169 at 174-175.

⁷⁰ The Federal Court in Griffith (1999) characterized the Gender Guidelines as "...a positive, enlightened, and necessary effort by the Immigration and Refugee Board to ensure knowledgeable and sensitive consideration of the evidence of women claiming refugee status because of violence within a relationship." *Griffith v Canada (Minister of Citizenship and Immigration)* [1999] FCJ No 1142 (QL) at para 3.

The Canadian Gender Guidelines originate from an international recognition that the *Refugee Convention* has been “interpreted (by states) through a framework of male experience” leading to a failure to “recognize and respond appropriately to the experiences of women.”⁷¹ Despite their positioning as domestic interpretive tools instead of binding law, Canada’s Gender Guidelines were hugely influential upon international refugee law and policy.⁷²

The Gender Guidelines are designed to aid decision-makers in the identification and evaluation of claims of gender-related persecution within the context of the *Refugee Convention*’s enumerated grounds for refugee protection pursuant to Section 96 of the *IRPA*.⁷³ The Gender Guidelines note that “(w)oman refugee claimants face special problems in demonstrating that their claims are credible and trustworthy.”⁷⁴ They caution the decision-maker to act with sensitivity towards the claimant, especially those whose claims involve sexual violence, and encourage the decision-maker to recognize that “the circumstances which give rise to women’s fear of persecution are often unique to women”.⁷⁵

The Gender Guidelines are the primary instrument available to IRB decision-makers to guide procedural accommodation and analytical guidance of gender-related claims in Canada. Once the persecution is identified as gender-related, the decision-maker is obliged to consider the appropriateness of special evidence-gathering measures and analyses under the Gender Guidelines unless there is a reason to deviate from their advice. Decision-makers are expected to take relevant Chairperson’s Guidelines into consideration, even though these Guidelines do not have a statutory or regulatory provision entrenching their application, in

⁷¹ Rodger Haines, “Gender-related Persecution” in Erika Feller, Volker Turk, & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 319 at 327.

⁷² Laviolette, *supra* note 69 at 170, 178.

⁷³ *IRPA*, *supra* note 1 at s 96.

⁷⁴ Gender Guidelines, *supra* note 5 at D.

⁷⁵ *Ibid* at B.

order “to avoid a finding that a reviewable error has been made in judging the applicant’s statements and conduct.”⁷⁶ Decision-makers are not, however, required to specifically cite them in their decisions.⁷⁷

Section A. Determining the Nature and the Grounds of the Persecution

The Gender Guidelines are organized in four sections, the first two of which situate gender-related claims in the context of the refugee definition. Section A, Determining the Nature and the Grounds of the Persecution, details how gender-related harms can qualify as persecution under the *Refugee Convention*,⁷⁸ including a non-exclusive list of claims that could be gender-related in connection with one or more of the *Convention*-based grounds.⁷⁹ These include claims in which women are:

1. persecuted on the same Convention grounds, and in similar circumstances, as men (in which case, the substantive analysis does not vary as a function of the person’s gender, although the nature of the harm feared and procedural issues at the hearing may vary as a function of the claimant’s gender;
2. persecuted based on their kinship with a family member who is persecuted on Convention-enumerated grounds;
3. subject to severe gender-related persecution or gender-related acts of violence; or
4. persecuted for failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin.⁸⁰

In recognition of the challenges decision-makers may face in establishing “the linkage between gender, the feared persecution and one or more of the definition grounds,”⁸¹ the

⁷⁶ *Griffith*, *supra* note 70 at para 27 (Decision-makers must disclose a “degree of knowledge, understanding, and sensitivity required to avoid a finding that a reviewable error has been made in judging the applicant’s statements and conduct”).

⁷⁷ See *Allinagogo v Canada (Citizenship and Immigration)*, 2010 FC 545 at para 14 and *SIN v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1662 at Analysis, para 2.

⁷⁸ Gender Guidelines, *supra* note 5 at A.

⁷⁹ The Gender Guidelines advise, “Although gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of Convention refugee may properly be interpreted as providing protection for women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds.” *Ibid* at A(I).

⁸⁰ *Ibid*.

⁸¹ *Ibid* at “Update”.

Gender Guidelines give illustrations of how gender-related persecution might intersect with the race, religion, nationality, political opinion, and particular social group grounds.⁸²

Section B. Assessing the Feared Harm

After establishing the link between gender and one or more of the *Convention*-related grounds in the claim, the next issue is whether the experiences of the claimant rise to the level of persecution. Section B, Assessing the Feared Harm, directs decision-makers to focus on “whether the violence -- experienced or feared -- is a serious violation of a fundamental human right for a *Refugee Convention* ground and (whether it) result(s) from a failure of state protection.”⁸³ Decision-makers are cautioned against dismissing a claim just because the sexual or domestic violence alleged is prevalent in the claimant’s country of origin.⁸⁴ Finally, Section B advises decision-makers that norms and laws in the claimant’s country of origin that affect women should be assessed against human rights instruments.⁸⁵ However, a refugee claim cannot be based solely on a policy or law that appears to contradict human rights norms without also offering evidence of the likelihood of harm to the claimant herself.⁸⁶

⁸² *Ibid* at A II.

⁸³ *Ibid* at B.

⁸⁴ *Ibid*. Section C also cautions decision-makers against drawing negative conclusions “simply because the claimant comes from a country where women face generalized oppression and violence and the claimant’s fear of persecution is not identifiable to her on the basis of an individualized set of facts” *Ibid* at C.

⁸⁵ The Gender Guidelines reference the following human rights instruments as among the possible sources for establishing the international standards for the protection needs of women:

Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Political Rights of Women, Convention on the Nationality of Married Women, Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Declaration on the Elimination of Violence Against Women. Ibid.

⁸⁶ The Gender Guidelines explain that a claimant must provide evidence that the law or policy is “inherently persecutory,” “used as a means for persecution on one of the enumerated grounds,” “administered through persecutory means,” or that “the penalty for non-compliance with the policy or law is disproportionately severe.” *Ibid*.

Section C. Evidentiary Matters

Section C, Evidentiary Measures, focuses on how decision-makers should evaluate evidence related to the conditions in the claimant's country of origin, especially with regard to the availability of state protection and IFAs. However, the descriptions and advice contained in Section C are also relevant to over-arching credibility evaluations about the claimant's contextual circumstances in her country of origin.

Section C of the Gender Guidelines explains that the decision-maker's evaluation of the availability to state protection and IFAs may be different in gender-related cases than in non-gender-related cases.⁸⁷ This section emphasizes the importance of decision-makers using a contextualized approach to the evidence, based on the "claimant's particular circumstances in relation to both the general human rights record of her country of origin and the experiences of other similarly situated women."⁸⁸ The core of the state protection analysis in gender-related cases, the Guidelines emphasize, centers on whether the state is unable or unwilling to provide the claimant with adequate protection from gender-related violence.

In evaluating whether or not the claimant should have reasonably done more to seek the state's protection, the Guidelines urge IRB decision-makers to consider "among other relevant factors, the social, cultural, religious, and economic context in which the claimant finds herself..." In a related vein, decision-makers are encouraged when evaluating the availability of IFAs to assess the reasonable ability of the claimant "to travel safely to the IFA and stay there without facing undue hardship." They are also to keep in mind the religious,

⁸⁷ *Ibid* at C.

⁸⁸ *Ibid*.

economic, and cultural factors that could influence the reasonableness of the IFA for that claimant.⁸⁹

Section D. Special Problems at Determination Hearings

Whereas Section C focuses primarily on the evaluation of the claimant's evidence, Section D, Special Problems at Determination Hearings, describes circumstances that could hinder the ability of a woman with a gender-related claim to effectively provide evidence or that could affect how credible her claim appears.⁹⁰

Using three illustrative descriptions, Section D describes cross-cultural and trauma-related barriers that may arise during a determination hearing while the claimant is giving testimony about her claim. The first two examples describe gender-related divisions between men and women in some cultures. These divisions may mean that women do not have knowledge of their male relatives' experience⁹¹ that, for example, could be relevant if a woman's claim is based on her family relationship with a politically active brother. In another culture-related example, Section D informs decision-makers of the fact that "women from societies 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."⁹² Section D notes the special challenges that can arise in cases where a claimant exhibits symptoms of Rape Trauma Syndrome or Battered Woman Syndrome. Decision-makers are warned that such cases "may require extremely sensitive handling" because the claimant may be reluctant to testify.⁹³ It

⁸⁹ *Ibid.*

⁹⁰ *Ibid* at D.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

advises decision-makers to consider whether a claimant could provide testimony “by affidavit or by videotape, or in front of members and refugee claims officers specifically trained in dealing with violence against women.”⁹⁴ Finally, IRB decision-makers are advised to familiarize themselves with the UNHCR Executive Committee Guidelines on the Protection of Refugee Women.⁹⁵

The purpose of Section D is not to provide an alternative means of assessing credibility in gender-related cases but instead to emphasize the need for a context-dependent understanding of the frame of reference or logic from which the claimant may have been operating at the time the persecution occurred and also at the time of the hearing. The IRB decision-maker can look to this Section to explain behaviours that may otherwise cast doubt on the claimant’s credibility, such as vagueness, hesitancy, inconsistency, contradictory responses or cases where the claimant had an inappropriate demeanour during the hearing.⁹⁶ This directive to consider the contextual circumstances informing a claimant’s testimony is crucial for IRB decision-makers who witness the claimant testify and thus are in the best position to assess credibility.⁹⁷

The Vulnerable Persons Guideline and its relationship to gender-related claims

The IRB’s *Chairperson Guideline 8 -- Procedures With Respect to Vulnerable Persons Appearing Before the IRB*⁹⁸ [Vulnerable Persons Guideline] was developed to ensure procedural accommodations would be put in place for claimants facing unusually serious barriers to presenting evidence.⁹⁹

⁹⁴ *Ibid* at D(3).

⁹⁵ Gender Guidelines, *supra* note 5 at D.

⁹⁶ See *Ezi-Ashi v Canada (Secretary of State)*, [1994] FCJ No 401 at para 4.

⁹⁷ *Ibid*. See also *Chowdhury v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 570 at para 8.

⁹⁸ Vulnerable Persons Guideline, *supra* note 64.

⁹⁹ The Vulnerable Persons Guideline defines “vulnerable persons” as “individuals whose ability to present their cases before the IRB is severely impaired” (*ibid* at “2. Definition of vulnerable persons”) and whose

The definition of “vulnerable people” in this guideline includes some claimants with gender-related claims but does not specify how “vulnerable” should be interpreted in conjunction with the Gender Guidelines. The Vulnerable Persons Guideline broadly applies to those who are “mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, women who have suffered gender-related persecution, and individuals who have been victims of persecution based on sexual orientation and gender identity.”¹⁰⁰ It advises decision-makers to seek independent credible evidence whenever possible to support testimony on the claimant’s vulnerability.¹⁰¹

The Vulnerable Persons Guideline offers stronger and more specific procedural accommodation provisions than the vague accommodation provisions of the Gender Guidelines. However, the Vulnerable Persons Guideline has no provisions to advise decision-makers on the substantive evaluation of vulnerable persons’ claims. Making clear the overlap between these two guidelines, the Vulnerable Persons Guideline lists “women who have experienced gender persecution (domestic violence case, forced marriage, etc.)” as one of the categories of claimants who may also be considered particularly vulnerable, as that term is understood in the Vulnerable Persons Guideline.¹⁰² The Vulnerable Persons Guideline requires specific evidence on the claimant’s vulnerability in order to determine whether it applies, whereas the Gender Guidelines are intended to be generally applied in accordance with the description of persecution. Like the Vulnerable Persons Guideline, the Gender Guidelines offer decision-makers advice on procedural accommodations in cases where a

circumstances “go beyond those that are common to most persons appearing before the IRB. It is intended to apply to individuals who face particular difficulty and who require special consideration in the procedural handling of their cases. It applies to the more severe cases of vulnerability” (*ibid* at 2.3).

¹⁰⁰ *Ibid* at 2.1.

¹⁰¹ *Ibid* at 2.4.

¹⁰² *Ibid* at s 2.3.

claimant has mental health issues linked with their experience of persecution (such as Battered Woman Syndrome) that impact on a claimant's ability to testify.¹⁰³ The Gender Guidelines acknowledge that some claimants with gender-related claims may suffer mental health issues connected to their experiences of persecution. The Gender Guidelines' Section D alerts decision-makers that some claimants might be suffering from the psychological effects of battering:

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. Similarly, women who have been subjected to domestic violence may exhibit a pattern of symptoms referred to as Battered Women Syndrome and may also be reluctant to testify.¹⁰⁴

This section then advises decision-makers to consider whether procedural accommodations, such as testimony by videotape or affidavit, would facilitate testimony for claimants suffering from these mental health issues¹⁰⁵ but does not speak to the impact of mental health on evidence evaluation.

Unfortunately, there is a lack of clarity on how the Vulnerable Person's Guideline applies to the evaluation of gender-related claims in which the claimant's mental health is put at issue and how the provisions of this guideline meshes with those of the Gender Guidelines. The Gender Guidelines, having been drafted before the drafting of Vulnerable Persons Guidelines, do not mention this guideline nor how the Gender Guidelines might function with other applicable guidelines. No other guidance from the Chairperson exists to advise decision-makers on how to proceed in cases where more than one Chairperson's guideline is relevant to the evaluation of evidence or to appropriate accommodation at the hearing. This lack of

¹⁰³ Gender Guidelines, *supra* note 5 at D.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

clarity on applicability is problematic when the guidelines themselves take different approaches to the same issue.

1.2.3 What constitutes a gender-related claim?

While gender is not explicitly included in the *Refugee Convention*'s refugee definition, gender-related claims have gained international and national recognition as valid bases for claims under the *Convention* grounds. In 2002, the United Nations General Assembly and the UNHCR adopted the view that "an awareness of possible gender dimensions" is necessary for accurate claims determination in relevant cases.¹⁰⁶

Gender-related persecution is persecution based on one of the *Refugee Convention*-based grounds but which contains a causal nexus between a claimant's gender and the persecution experienced by that claimant. Not all woman claimants have gender-related claims¹⁰⁷ but rather only those "who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds".¹⁰⁸ Gender-related refugee claims include not only persecution based on one's biological sex,¹⁰⁹ but also the persecution of "persons who refuse to conform to social criteria specific to men and women."¹¹⁰ Moreover, as Nicole Laviolette further reminds us, "gender-based persecution is not based on the biological sex of the victims but rather on the underlying power relations."¹¹¹

As noted in the Gender Guidelines, gender-related persecution can encompass a wide variety of experiences and circumstances in which a claimant's gender or perceived gender is causally linked to the persecution. Within this study, the most common category of claims was

¹⁰⁶ UNHCR Gender Guidelines, *supra* note 3 at 2.

¹⁰⁷ Gender Guidelines, *supra* note 5 at A.

¹⁰⁸ *Ibid.*

¹⁰⁹ Laviolette, *supra* note 72 at 182.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid* at 170.

based on domestic violence. Gender-related persecution also includes being subjected to forms of sexual violence, including rape, that constitute violations of a woman's human right to physical integrity and protection against cruel, inhuman, or degrading treatment,¹¹² or being targeted for having transgressed the social roles assigned to one's gender in a given society.¹¹³ Certain types of alleged harm are almost universally perpetrated against women, including rape, forced marriage, mandatory dress codes, forced abortion or sterilization, and so-called "honour" crimes.

Women who seek refugee protection in Canada on the basis of gender-related persecution often do so on the basis of membership in a particular social group.¹¹⁴ The particular social group category is the broadest of the *Convention* refugee protection grounds although the UNHCR cautions states against treating it like a catch-all category for anyone suffering persecution.¹¹⁵ In Canada in 1993, the landmark Supreme Court decision of *Canada (AG) v Ward*,¹¹⁶ a case that did not involve a gender-related claim, laid the groundwork for gender-related claims by linking the particular social group definition to legal norms of anti-

¹¹² Deborah Anker, "Refugee Status and Violence against Women in the Domestic Sphere: The Non-State Actor Question" (2001) 15:3 *Georgetown Imm L J* 391 at 392.

¹¹³ US-based practitioner Nancy Kelly has described gender-related claims as falling into one of two distinct categories: "gender-related persecution", wherein the persecution is inflicted for a reason causally linked to the claimant's gender and "gender-specific persecution", wherein the persecution is by its nature tied to a claimant's gender (for example, in persecution in the form of female genital mutilation (FGM)), and "gender-related persecution." Nancy Kelly, "Gender-Related Persecution: Assessing the Asylum Claims of Women" (1993) 26 *Cornell Int'l LJ* 625.

¹¹⁴ Gender Guidelines, *supra* note 5 at A. *See also*, Immigration and Refugee Board of Canada, "Chapter 4 – Ground of Persecution," online: Immigration and Refugee Board of Canada <www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef04.aspx#n45>. *See generally*, *Ward*, *supra* note 30 which held that 'women' could be considered as members of a 'particular social group' for the purposes of the refugee definition.

¹¹⁵ UNHCR, "Guidelines on International Protection No. 2: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (7 May 2002) HCR/GIP/02/01 at 2.

¹¹⁶ *Ward*, *supra* note 30.

discrimination.¹¹⁷ *Ward* outlined three possible types of groups that could constitute a particular social group:

- (1) groups defined by an innate, unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.¹¹⁸

Since this decision and the subsequent publication of the Gender Guidelines, refugee law scholars have debated whether a stand-alone category on gender-related persecution is the only effective path to fair consideration of these types of claims or if a broader interpretation of the particular social group grounds would accomplish the same goal.¹¹⁹

1.2.4 Use of the Gender Guidelines

Although the drafters of the *IRPA* contemplated the need for guidelines, the Gender Guidelines are non-binding administrative tools.¹²⁰ Nevertheless, once the IRB identifies the claim as gender-related, the IRB decision-maker (also known as “the adjudicator” or “the Board member”) is expected to consider the Gender Guidelines “unless there are compelling or exceptional reasons for adopting a different analysis.”¹²¹

Although the Gender Guidelines are directed to IRB decision-makers, they also have relevance for Federal Court judicial reviews of gender-related claims. Reviewing judges can

¹¹⁷ *Ibid* at 733.

¹¹⁸ *Ibid* at 739.

¹¹⁹ See Audrey Macklin, “Refugee Women and the Imperative of Categories” (1995) 17 Hum Rts Q 213 at 217 in which she argues for an approach of “reinterpretation of the existing categories” rather than “augmentation” of the Convention grounds; Melanie Randall, “Accountability for Violence against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution” (2002) 25 Harv Women’s LJ 281 at 289.

¹²⁰ *Khon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 143 at para 18. See also, Laviolette, *supra* note 72 at 177.

¹²¹ Immigration and Refugee Board of Canada, “Procedures for the Guideline-Making Process – s 65(3) and (4) of the *Immigration Act*” as quoted in Government of Canada, “Gender-Related Refugee Claims”, BP-370E (March, 1994), online: Government of Canada Publications <publications.gc.ca/Collection-R/LoPBdP/BP/bp370-e.htm>. *Khon*, *supra* note 120 at para 19 (quoting *Fouchong v Canada (Secretary of State)*, [1994] FCJ No 1727 at paras 10 & 11).

draw on the Guidelines to examine whether the IRB decision-maker's claim evaluation was within the range of conclusions reasonably open to him or her. Albeit through the lens of a highly deferential standard of review, the Federal Court judge examines whether the IRB decision-maker's evaluation of evidence is in line with the legal standards as well as fundamental principles of fairness and due process.

For example, the reviewing Federal Court in the *DRI* case emphasized the importance of taking the Gender Guidelines into consideration in order to ensure “a fair and just hearing is provided on a gender-based protection claim hearing.”¹²² The Federal Court judge can therefore set aside a determination if the IRB decision-maker ignores or “pays lip service” to the Gender Guidelines but fails to substantively apply them.¹²³

Many judicial reviews challenging whether the Gender Guidelines were substantively applied in the analysis of a gender-related claim focus on whether a decision maker was “sensitive”¹²⁴ in evaluating gender-related claims. Unfortunately, the Guidelines do not give decision-makers specific techniques or strategies to ensure a sensitive evaluation of the claim. As will be discussed and illustrated through the case studies in Chapter 5, neither IRB decision-makers nor reviewing Federal Court judges demonstrate consistent understandings of how sensitivity should practically manifest in the evaluation of a gender-related claim.

1.2.5 How do gender-related claims of persecution fit into the Refugee Convention?

As mentioned previously, gender-related persecution is most commonly classified under the umbrella of the particular social group *Refugee Convention* grounds. However, the fact that most gender-related claims are classified under the particular social group category can lead

¹²² *DRI v Canada (Minister of Citizenship and Immigration)*, 2006 FC 99 at para 3.

¹²³ See, e.g., *CFO v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1432 at para 57.

¹²⁴ *AQU v Canada (Minister of Citizenship and Immigration)*, 2004 FC 677 at para 16.

to challenges because of the inherent incoherency of the category.¹²⁵ This awkwardness comes about because the claimant must tie the reason for the persecution she has experienced to a group identity that encompasses more than the individual but which is still narrow enough to be tailored to the claimant's individual circumstances. Women escaping persecution on gender-related grounds may paradoxically find that their experiences are either too narrow or too broad to fit within the five existing *Convention*-based categories for refugee protection of race, religion, nationality, political opinion, or membership in a particular social group.¹²⁶ Jamie Liew characterizes the predicament women claimants with gender-related claims face in trying to tie their experiences to the particular social group grounds as a catch-22 wherein the claimant struggles to fit her experiences into a particular social group that is broad enough to describe her situation but not so vague as to be meaningless.¹²⁷

Women claimants with gender-related claims must therefore often artificially create a social group to which the claimant belongs.¹²⁸ Bethany Lobo has written that the major barrier towards full recognition of gender-related asylum claims is the need to narrowly define a specific gendered harm through the particular social group category.¹²⁹ The task of defining a particular social group is easier in cases where the type of gender-related persecution is only directed towards one distinct and defined group of claimants, such as women facing genital

¹²⁵ See Andrea Binder, "Gender and the 'Membership in a Particular Social Group' Category of the 1951 Refugee Convention" (2001) 10 Colum J Gender & L 167 at 168.

¹²⁶ Jenny-Brooke Condon, "Asylum Law's Gender Paradox" (2002-2003) 33 Seton Hall L Rev 207 at 208.

¹²⁷ Liew, *supra* note 34 at 320.

¹²⁸ Scholar Natalie Rodriguez has suggested that amending domestic refugee law to include examples of gender-related claims, especially domestic violence claims, as valid types of stand-alone Particular Social Group categories (without any additional descriptors) may help create a common starting point for adjudicators and claimants in defining gender-related claims. Natalie Rodriguez, "Give us your Weary but not Your Battered: The Department of Homeland Security, Politics, and Asylum for Victims of Domestic Violence" (2011) 18:1 Southwestern J of Int'l L 317 at 338.

¹²⁹ Bethany Lobo, "Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom" (2012) 26 Geo Immigr LJ 361.

mutilation¹³⁰ or women subject to sexual abuse¹³¹ in a particular country or among a certain ethnic or religious group. It can be more challenging to develop a short moniker for a particular social group that encompasses a large percentage of the female population in the claimant's country of origin.

The Gender Guidelines advise decision makers that a particular social group representing a large percentage of a country's female population should not be fatal to a claim: "A gender-related claim cannot be rejected simply because the claimant comes from a country where women face generalized oppression and violence and the claimant's fear of persecution is not identifiable to her on the basis of an individualized set of facts."¹³² Thus, if a claimant's experiences amount to persecution, then the size of the group to which she belongs should not be a determining factor in her claim.¹³³ However, as Nitzan Sternberg describes, decision-makers and judges are hesitant to interpret this category expansively for fear of overuse:

The debate about asylum law and the definition of PSG is partly informed by policy. Commentators advocating for a more inclusive definition of PSG assert that asylum law should comport with the humanitarian purpose of international refugee law. On the other side of the debate, commentators in favour of restricting the definition of PSG make arguments based on the risk of tipping the balance struck by multilateral treaties, the risk of making the other enumerated categories redundant, and the dangers of using PSG as a "safety net".¹³⁴

A number of scholars have pointed out that the creation of broad descriptions of gender-related

¹³⁰ *AOW v Canada (Citizenship and Immigration)*, 2011 FC 827 at para 34. Gregory Kelson has argued that, of the types of gender-related persecution, only FGM-related persecution appropriately fits under the "particular social group" category. Gregory A Kelson, "Female Circumcision in the Modern Age: Should Female Circumcision Now be Considered Grounds for Asylum in the United States" (1998) 4 Buff Hum Rts L Rev 185 at 206.

¹³¹ *EMV v Canada (Citizenship and Immigration)*, 2011 FC 1364 at para 3.

¹³² Gender Guidelines, *supra* note 5 at C.

¹³³ Anjana Bahl wrote, "If the treatment a women is subjected to amounts to persecution, it is irrelevant whether she alone is persecuted, or persecuted with others. In fact, it is argued that the social group category, like the other enumerated categories, is simply a tool or a way of acknowledging and identifying the persecution." Anjana Bahl, "Home is where the Brute Is: Asylum Law and Gender-based Claims of Persecution" (1997-1998) 4 Cardozo Women's LJ 33 at 67.

¹³⁴ Nitzan Sternberg, "Do I need to Pin a Target on My Back" (2011) 39:1 Fordham Urban LJ 245 at 249.

claims under the umbrella of particular social group has not led to a “floodgates” of new refugee claims because decision-makers determine claims on a case-by-case basis.¹³⁵

Reinterpretation v Augmentation

Feminist legal scholars have debated for years whether the current enumerated grounds for refugee status can be interpreted to adequately encompass gender-related claims or whether the *Refugee Convention* need to be augmented to include a new stand-alone category for gender. Although many advocates agree that gender should ideally be an enumerated ground of its own, most do not want to open the *Refugee Convention* for debate for fear that it may be used as a pretext by western countries to significantly restrict refugee flows.¹³⁶ Audrey Macklin characterized the debate on whether or not a revision to the *Refugee Convention* is needed to incorporate gender-related claims as one between “augmentation verses reinterpretation of existing categories.”¹³⁷

One group of scholars believes that the existing enumerated categories can be reinterpreted to recognize gender-related claims as forms of refugee claims. Scholars in this camp maintain that effective and substantive inclusion of gender-related refugee claims is a matter of developing the interpretation of existing *Convention*-based grounds to include gender-related persecution.¹³⁸ Deborah Anker, for example, has argued that gender has always

¹³⁵ Marian Kennady, “Gender-related Persecution and the Adjudication of Claims: Is a Sixth Category Needed” (1998-2000) 12 Fla J Int’l L 317 at 339 – 340; Condon, *supra* note 126 at 252; Rodriguez, *supra* note 128 at 340-345; Marisa Cianciarulo & Claudia David, “Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women” (2009) 59:2 American U L Rev 337 at 380-381; and Sternberg, *supra* note 134 at 250.

¹³⁶ For example, signatory countries may suggest revisions that reduce the scope of their protection obligations to asylum seekers. See Jacqueline Greatbatch, “The Gender Difference: Feminist Critiques of Refugee Discourse” (1989) 1 Int’l J Refugee L 518 at 518-519.

¹³⁷ Macklin, *supra* note 119 at 216.

¹³⁸ See Deborah Anker, “Refugee Law, Gender, and the Human Rights Paradigm” (2002) 15 Harvard Hum Rts J 133 at 139 wherein Anker argues the problem with integrating gender-related claims is not in structure of the legal categories but in “the incomplete and gendered interpretation of refugee law.” See Heaven Crawley, *Refugees and Gender: Law and Process* (Bristol, U.K.: Jordan Publishing Limited, 2001) at 9.

been a part of refugee law but has historically been underdeveloped as grounds for refugee claims.¹³⁹ Bethany Lobo asserts that the particular social group would only offer effective protection for gender-related claims if a particular social group of “women” without any additional group description were allowed as a valid basis for a refugee claim. If women were permitted to argue that persecution occurred as a result of being in the particular social group of “women,” they would be able to provide evidence on multiple types of gender-related harms and how they are inter-related to one another rather than narrowing the claim to what is relevant to the artificially created particular social group category.¹⁴⁰

Those taking the approach that the existing refugee categories can accommodate gender-related claims point to the establishment of domestic gender guidelines as an important method for guaranteeing that gender-related claims are considered equally to claims on other bases (such as claims on related to political persecution). Andrea Sanche and Joanna Erdman argue that the development of domestic guidelines to aid interpretation of gender issues has furthered the development of gender as part of *Convention*-based grounds for refugee protection.¹⁴¹ However, they also caution that interpretive guidelines should not encourage decision-makers to look at gender in isolation from other aspects of a claimant’s identity: “Interpretive guidelines must be cognizant of the intersection between nationalism, sexuality, gender, and race. A woman’s gender should not eclipse any other aspect of her identity.”¹⁴²

In opposition to those arguing that the existing categories are broad enough to include gender-related persecution, other scholars assert that only a stand-alone gender category

¹³⁹ Anker asserted, “Refugee law has matured and evolved over the past decade. Gender has reflected and been part of – perhaps a key impetus or ingredient of – that maturation, but gender has not transformed refugee law; gender has always been there, albeit latent and underdeveloped.” Anker, *supra* note 112 at 393.

¹⁴⁰ Lobo, *supra* note 129 at 404.

¹⁴¹ Joanne Erdman & Andrea Sanche, “Talking about Women: The Iterative and Dialogic Process for Creating Guidelines for Gender-Based Refugee Claims” (2004) 3:1 J of L & Equality 69 at 73.

¹⁴² *Ibid* at 83.

within domestic refugee laws will guarantee the consistent and meaningful evaluation of gender-related claims.¹⁴³ Among the arguments made by these scholars is that situating gender into the particular social group category is fundamentally flawed because this approach relies on the decision-maker's discretionary power to decide whether the group has social significance.¹⁴⁴ Heather Potter, for example, emphasizes that the Gender Guidelines, although a positive step forward, will never have the permanence and binding formality of legislative revision to include an additional enumerated ground for gender in the refugee definition.¹⁴⁵ Gregory Kelson insists that this legal revision must first focus on revisions to the *Refugee Convention* or creating a new protocol on gender-related claims.¹⁴⁶

Other scholars, such as Columbia University scholar and staff attorney Sarah Hinger, question whether a gender-related claim can be effectively classified in the particular social group category. She problematizes whether understandings of gender truly fit into the quasi-immutability aspect of the "particular social group" grounds.¹⁴⁷ She notes that those who are applying for refugee status in the United States based on gender or sexual orientation must demonstrate that their gender is a characteristic so fundamental to them they cannot or should

¹⁴³ Lucy Akinyi Orinda, "Securing Gender-Based Persecution Claims" (2010-2011) 17 Wm & Mary J Women & L 665 at 686-687 (arguing that the US INA should include specific provisions for sexual violence-related claims in addition to the existing provisions for claims based on forced abortion or sterilization); Amanda Kneif, "Gender Bias in Asylum Law: Recognizing Persecution Against Women and Girls" (2006-2007) 92 Women Law J 19 at 24; Condon, *supra* note 126 at 253-254; Bret Thiele, "Persecution on Account of Gender: A Need for Refugee Law Reform" (2000) 11 Hastings Women's LJ 221; Kelson, *supra* note 130 at 200; Kennady, *supra* note 135 at 339-340; Linda Cipriani, "Gender and Persecution: Protecting Women under International Refugee Law" (1993) 7 Geo Immigr LJ 511 at 513.

¹⁴⁴ Condon, *supra* note 126 at 248.

¹⁴⁵ Heather Potter, "Gender-Based Persecution: A Challenge to the Canadian Refugee Determination System" (1994) 3 Dalhousie J Legal Stud 81 at 104. *See also* Kirstin Kandt, "United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison" (1995) 9:1 Georgetown Immigration LJ 137 at 138 (Writing for a US legal audience, Kandt said that Canada's development of the Gender Guidelines should be applauded but the United States needs to go further and amend the refugee definition to include gender).

¹⁴⁶ Kelson, *supra* note 130 at 207-208.

¹⁴⁷ Sarah Hinger, "Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims" (2010) 19 Colum J Gender & L 367.

not be required to change it.¹⁴⁸ She writes that this process of proof may unintentionally cause harm to the claimant herself and those who subsequently make claims on similar grounds:

Thus, the surest way for applicants and advocates to demonstrate that the asylum standard is met is to put forward a familiar and universalized picture of the persecuted woman, lesbian, or gay man, minimizing variability or complicating factors in the individual case. These firm but under-theorized depictions of gender and sexual orientation create and reinforce limited conceptions of identity and culture that make it more difficult to raise new asylum claims within these established categories.¹⁴⁹

Hinger critiques “the implicit search for fixed or fundamental characteristics to identify a particular social group”, arguing that this search “creates a limited narrative of how identity is shaped and operates within culture.”¹⁵⁰ Hinger concludes that a new method of “axis-oriented” claim analysis is needed in cases of gender or sexual orientation-based persecution cases in order to move away from fixed and simplistic understandings of gender. In an “axis-oriented” claim analysis method, a decision-maker would look at a gender-related claim through the lens of another demographic facet informing the social construction of the claimant’s gender, such as age or ethnic background.

In a different approach, Nancy Kelly, a clinical professor of immigration law at Harvard University, advocates for a bifurcation of gender-based persecution claims.¹⁵¹ Her article, written and published prior to the US gender guidelines, recommends that gender claims be separated into two categories. The first category would include persecution directly tied to gender transgression.¹⁵² The second category would include persecution due to a basis rooted to the applicant’s biological sex.¹⁵³

¹⁴⁸ *Ibid* citing the case of *In re Toboso-Alfonso* (20 I & N Dec 819 (BIA 1990), a US exclusion case of a gay Cuban man.

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid* at 368.

¹⁵¹ Kelly, *supra* note 113.

¹⁵² *Ibid* at 643.

¹⁵³ *Ibid* at 642-3.

1.3 Problems with the Gender Guidelines

Despite the Gender Guidelines' broadly worded description of possible gender-related claims, decision-makers often give little attention to the intersectional nature of women's oppression.¹⁵⁴ Some scholars, such as Deborah Anker¹⁵⁵ and Nicole Laviolette,¹⁵⁶ have questioned the efficacy of the Gender Guidelines¹⁵⁷ as a means of guaranteeing procedural fairness and equitable evaluation for all gender-related claims because of decision-makers' narrow or erroneous interpretation of gender.

Unfortunately, this narrow understanding of gender leads to a failure to fairly and fully consider evidence in gender-related claims.¹⁵⁸ A recent study in Australia found a lack of systematic and consistent application of Australia's gender guidelines, even years after the guidelines had been implemented.¹⁵⁹ The researchers also suggested that the fact that gender guidelines were in place has led some people in positions of influence on refugee claim determinations to conclude that "gender has now been taken care of" despite clear evidence these types of claims are not being given fair consideration by decision-makers.¹⁶⁰ Scholars

¹⁵⁴ Political theorist Wendy Brown problematizes discussions of "rights" as "irresolute signifiers, varying not only across time and culture, but across other vectors of power whose crossing indeed they are sometimes deployed to effect – class, race, ethnicity, gender, sexuality, age, wealth, education" Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, New Jersey: Princeton University Press, 1995) at 97.

¹⁵⁵ Anker argues that the women's exclusion from refugee protection has been largely due to "the incomplete and gendered interpretation of refugee law." Anker, *supra* note 138 at 139.

¹⁵⁶ Laviolette argues the overly narrow understanding of gender-related persecution is rooted in a prevailing legal analysis that ties it to biological sex rather than to systems of power relations between the genders. Laviolette, *supra* note 72 at 170-171.

¹⁵⁷ Gender Guidelines, *supra* note 5. The Gender Guidelines were updated November 13, 1996 by the IRB. They are available on the website of the Immigration and Refugee Board of Canada at: <www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/GuideDir4.aspx>.

¹⁵⁸ In their review of Canadian and Australian legislation, Catherine Dauvergne and Jenni Millbank found evidentiary practices had a vital role in the appropriate evaluation of evidence. Catherine Dauvergne & Jenni Millbank, "Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers" (2003) 31 Fed L Rev 299 at 299.

¹⁵⁹ Melinda McPherson; Leah Horowitz, Dean Lusher, Sarah Di Giglio, & Lucy Greenacre, "Marginal Women, Marginal Rights: Impediments to Gender-Based Persecution Claims by Asylum-seeking Women in Australia" (2011) 24 J of Refugee Studies 323.

¹⁶⁰ *Ibid* at 325.

studying the United Kingdom (UK)'s asylum system have also identified issues of inconsistent treatment by decision-makers of gender-related claims. The UK asylum advocacy group, Asylum Aid, undertook a study in 2011 to look at how the first level decisions of UK Border Agency (UKBA) officials (termed "case owners") analyzed the cases of women refugee claimants seeking asylum.¹⁶¹ From their examination of decisions between 2007 and 2011, the Asylum Aid researchers concluded that:

Women's asylum claims regularly present issues that are different from those presented by men, and can be highly complex and challenging. The findings in this report have deepened our concern that the UKBA is badly failing to meet this challenge, and that women seeking asylum are frequently let down by an extremely poor standard of decision-making.¹⁶²

The researchers found that a disproportionate number of gender-based classes where negative credibility assessment was crucial to the judgment were overturned on appeal.¹⁶³ They also found that UK decision-makers did not appropriately consider gender-based persecution cases as a form of particular social group persecution.¹⁶⁴ Moreover, the UK decision-makers in the study sample had a poor understanding of the nature of gender-based persecution and did not use available resources, such as government-produced country reports, to help augment their understanding of the issue.¹⁶⁵

Some Canadian scholars also suggest that gender-related aspects of claims may be misunderstood by some decision-makers or discounted in comparison to other *Convention*-based grounds. Audrey Macklin, a former IRB Member, has noted a lack of consensus

¹⁶¹ Asylum Aid, "Unsustainable: the quality of initial decision-making in women's asylum claims" (January, 2011) ["Asylum Aid Report"]. The report methodology consisted of interviews and a random sample of 147 case files. *Ibid* at 6.

¹⁶² *Ibid* at 5.

¹⁶³ *Ibid* at 4.

¹⁶⁴ *Ibid* at 6.

¹⁶⁵ *Ibid*.

amongst decision-makers on the boundary between what is and is not a claim based on gender-related persecution.¹⁶⁶

1.4 Current Relevance: New Canadian Legislation and its impact on Gender-related Claims

1.4.1 New Legislative and Regulatory Changes and Securitization Discourse

The legal system for determining refugee claims in Canada is at a critical juncture. The past five years have seen dynamic changes to Canadian refugee law, particularly for those who apply from within Canada or at the border. Amendments to the *IRPA* in 2010¹⁶⁷ and 2012,¹⁶⁸ both of which took effect December 20, 2012, have changed and accelerated the claim determination process for those who apply for refugee status in Canada.

The *Balanced Refugee Reform Act*¹⁶⁹ [*BRRA*] and the *Protecting Canada's Immigration System Act* [*PCISA*],¹⁷⁰ introduced and passed in 2010 and 2012 respectively, emerge from a political milieu in which the government repeatedly puts out statements on the danger of “bogus refugee claimants”¹⁷¹ who, according to former Canadian Minister of Citizenship, Immigration, and Multiculturalism Jason Kenney, “abuse our generosity or take advantage of our country.”¹⁷²

¹⁶⁶ Audrey Macklin, “A Comparative Analysis of the Canadian, US and Australian Directives on Gender Persecution and Refugee Status” in Doreen Indra, ed, *Engendering Forced Migration* (Providence: Berghahn Books, 1999) at 279.

¹⁶⁷ *An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act* *Balanced Refugee Reform Act*, SC 2010, c 8 [*BRRA*].

¹⁶⁸ *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act* (short title: *Protecting Canada's Immigration System Act*, SC 2012, c 17 [*PCISA*].

¹⁶⁹ *BRRA*, *supra* note 167.

¹⁷⁰ *PCISA* *supra* note 168.

¹⁷¹ Government of Canada, “Making Canada's Asylum System Faster and Fairer: New Asylum System Comes into Force December 15, 2012” (30 Nov 2012) (Media Release), online: Citizenship and Immigration Canada <www.cic.gc.ca/english/department/media/releases/2012/2012-11-30.asp>.

¹⁷² Citizenship and Immigration Canada, “Speaking notes for the Honourable Jason Kenney, P.C., M.P., Minister of Citizenship, Immigration and Multiculturalism: At a news conference following the tabling of Bill C-31, *Protecting Canada's Immigration System Act*” (16 February 2012), online at: Citizenship and Immigration Canada <www.cic.gc.ca/english/department/media/speeches/2012/2012-02-16.asp>. The changes, in the view of the government, “offer faster protection for real refugees, while at the same time discouraging those who are not refugees but seek to abuse our generosity, from doing so in our asylum system.” Government

This fear-mongering political discourse now informs the landscape for refugee claim determination within Canada. Political rhetoric surrounding the legislative changes has been instrumental in shifting public perceptions towards suspicion of the legitimacy of refugee claims in the last five years. People who arrive at Canada's shores seeking asylum from persecution,¹⁷³ are characterized as "irregular migrants" rather than as "refugee claimants."¹⁷⁴

The new legislative and regulatory changes to the *IRPA* include marked accelerations to the claim determination timeframes (the time in between when a claim is filed and when a refugee claimant must have gathered all evidence and attend a determination hearing) and additional requirements and restrictions for some claimants based on their countries of origin or their modes of arrival. The government asserts that, "(u)nder the *Balanced Refugee Reform Act* and the *Protecting Canada's Immigration System Act*, all eligible asylum claimants will still get a fair oral hearing before the independent Immigration and Refugee Board of Canada."¹⁷⁵ However, many refugee advocates have expressed doubts as to whether the new restrictions to refugee determinations will permit the adequate consideration of all relevant evidence.¹⁷⁶ They are concerned that the changes will have an unequal impact on the

of Canada, Ministry for Immigration, Culture, and Citizenship, "Speaking notes for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration, and Multiculturalism: At a news conference to announce the initial list of Designated Countries of Origin, whose citizens will have their asylum claims expedited for processing because they do not normally produce refugees" (14 Dec 2012).

¹⁷³ While the main focus of the Canadian government's negative rhetoric has been on refugee claimants who apply for status on arrival or from within Canada, there is evidence to suggest it also has an impact on government-sponsored and privately sponsored refugee claimants. Government and privately sponsored refugees apply for status outside of Canada. Citizenship and Immigration Canada has steadily increased the yearly numbers permitted for these groups in an effort to encourage their resettlement in Canada. Citizenship and Immigration Canada, "Expanding Canada's Refugee Refugee Resettlement Programs" (News Release) (29 March, 2010), online: Citizenship and Immigration Canada <www.cic.gc.ca/english/department/media/releases/2010/2010-03-29>.

¹⁷⁴ Public Safety Canada, "Government of Canada statement on arrests of alleged organizers of the MV Sun Sea" (15 May 2012), online: Public Safety Canada <www.publicsafety.gc.ca/media/nr/2012/nr20120515-1-eng.aspx>.

¹⁷⁵ Citizenship and Immigration Canada, "Protecting Canada's Immigration System" (News Release), online: Citizenship and Immigration Canada <www.cic.gc.ca/english/refugees/reform.asp>.

¹⁷⁶ *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 [*Singh*].

availability of a fair hearing to all refugee claimants. Don Galloway recently analyzed the impact of the 2010 and 2012 changes, concluding that they signified an ideologically informed reconceptualization of the legal concept of a refugee in Canada¹⁷⁷ wherein the claimant is no longer treated as the best source of relevant evidence.¹⁷⁸

1.4.2 Classification of Claimants

The 2010 and 2012 changes to the legislation brought with them new ways of classifying and treating some refugee claimants based on their modes of arrival in Canada (“Designated Foreign National” [DFN]) or on their country of origin (“Designated Country of Origin” [DCO]). As part of the *PCISA* changes to the *IRPA*, the Minister of Public Safety has the ability to designate a defined set of “irregular arrivals” as DFNs.¹⁷⁹ The passage of *PCISA* also allows the Canadian government to designate countries that either have a high number of rejected or withdrawn/abandoned claims¹⁸⁰ or those “do not normally produce refugees, but do respect human rights and offer state protection”¹⁸¹ as DCOs. The government’s stated

¹⁷⁷ Donald Galloway, “Rights and the re-identified refugee: an analysis of recent shifts in Canadian law” in Susan Kneebone, Dallal Stevens, & Loretta Baldassar, eds, *Refugee Protection and the Role of Law: Conflicting Identities* (New York: Routledge, 2014) at 36.

¹⁷⁸ *Ibid* at 38.

¹⁷⁹ The *IRPA*, *supra* note 1 at s 20.1(1) provides:

The Minister may, by order, having regard to the public interest, designate as an irregular arrival the arrival in Canada of a group of persons if he or she

(a) is of the opinion that examinations of the persons in the group, particularly for the purpose of establishing identity or determining inadmissibility — and any investigations concerning persons in the group — cannot be conducted in a timely manner; or

(b) has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) for profit, or for the benefit of, and at the direction of or in association with a criminal organization or terrorist group.

¹⁸⁰ *Ibid* at s 109.1(2)(a)(i).

¹⁸¹ CIC, “Designated countries of origin” (17 August, 2015) online: Government of Canada <www.cic.gc.ca/english/refugees/reform-safe.asp>. As of August 28 2015, the following countries are currently on the DCO list: Andorra, Australia, Austria, Belgium, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel (excludes Gaza and the West Bank), Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, San Marino, Slovak Republic, Slovenia, South Korea, Spain, Sweden, Switzerland, United Kingdom, and the United States of America. *Ibid*. See also *IRPA*, *supra* note 1 at s 109.1(2)(a)(ii).

purpose for the creation of this designation is “to deter abuse of the refugee system by people who come from countries generally considered safe.”¹⁸²

Claimants who come from DCOs or have been designated as DFNs face expedited determination process wherein claimants have much shorter time periods for gathering evidence than non-designated claimants and, in the case of DFNs, new mandatory detention provisions.¹⁸³ Galloway critiques the designation of claimants as DFNs or DCOs is a form of refugee profiling and argues that “the profiled claimants will be carrying a prefabricated identity into the hearing room, and will be required to live with this imposed image even if found to be refugees.”¹⁸⁴

1.4.3 Limited access to the new Refugee Appeal Division

The *BRRRA*¹⁸⁵ now provides for the implementation of the RAD, thus representing a shift in the procedural fairness protections available to failed refugee claimants. When the *BRRRA* was passed, the Minister for Citizenship and Immigration at the time Jason Kenney avowed that the newly funded RAD would offer failed claimants a “fact-based appeal” of their claims.¹⁸⁶ However, not all failed claimants are eligible for an appeal through the RAD. The *PCISA* amended the *IRPA* to exclude some claimants from access to this appeal mechanism. The amendments bar appeal rights to claimants with certain characteristics or experiences: a) DFNs;¹⁸⁷ b) those who have withdrawn or abandoned a claim;¹⁸⁸ c) those whose claim was

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Galloway, *supra* note 177 at 37.

¹⁸⁵ *BRRRA*, *supra* note 167.

¹⁸⁶ Citizenship and Immigration Canada, “Balanced Refugee Reform Passes Final Hurdle in the Senate, Launches Summer Tour to Promote Refugee Resettlement” (29 June 2010) (news release) online: Citizenship and Immigration Canada <www.cic.gc.ca/english/departement/media/releases/2010/2010-06-29a.asp>.

¹⁸⁷ *IRPA*, *supra* note 1 at s 101(2)(a).

¹⁸⁸ *Ibid* at s 101(2)(b).

found to be manifestly unfounded or without credible basis;¹⁸⁹ d) those whose claims fall under an exception to the Safe Third Country Agreement;¹⁹⁰ e) nationals of DCOs;¹⁹¹ and, f) those whose decision was based on cessation (an improvement in country circumstances) or vacation (dismissal of the claim based on abandonment or a finding of manifest unreasonableness) of the claim.¹⁹²

1.4.4 Impact on Gender-related Claims

While none focus on women claimants fearing gender-related persecution, I believe these changes will have a disproportionately negative impact on women with gender-related claims to have a full and fair hearing on the merits of their claims for refugee protection. I am particularly concerned with three aspects of these changes: changes to DCO classification, tighter timelines, and restrictions on the hearing and access to the RAD.

DCO classification

First, women with gender-related claims may be overrepresented within the group of claimants from DCO countries because the criterion for DCO designation does not consider whether the country realistically provides state protection for gender-related claims, many of which occur in the private sphere. The first condition permitting the Minister to designate a DCO provided for in *IRPA* s 109.1(2)(a)(i) regarding the number of failed, abandoned, or withdrawn claims from a certain country does not account for variance in the success rate of different claim grounds. A country may be designated as a DCO if it has a very low success rate with a large number claims based on political opinion, for example, even though it may also have a very high success rate of a small number of gender-related claims based on particular social group.

¹⁸⁹ *Ibid* at s 101(2)(c).

¹⁹⁰ *Ibid* at s 101(2)(d)(i).

¹⁹¹ *Ibid* at s 101(2)(d.1).

¹⁹² *Ibid* at s 101(2)(e) & (f).

Furthermore, the criterion used to designate a DCO on the grounds that it is generally considered safe¹⁹³ do not address whether the country has a good record of offering effective protection against gender-based violence. While one of the criteria requires the Minister to make a subjective opinion on whether the country demonstrates that “basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedoms are infringed,” this undefined term may allow the government to gloss over whether protections for women are in place in cases where other benchmarks for democratic rights (for example, voting rights) are met.

The designation of DCO countries as presumptively “safe” ignores the possibility that state protection may not be evenly available for all populations. The Gender Guidelines recognized the possible gaps existing in some countries between women’s rights and overall country conditions: “Where a woman's fear relates to personal-status laws or where her human rights are being violated by private citizens, an otherwise positive change in country conditions may have no impact, or even a negative impact, on a woman's fear of gender-related persecution.”¹⁹⁴ The criterion for designation as a DCO, though, does not require the Minister to consider the functional impact of improved country conditions on the lives of women living there.

¹⁹³ Under the *IRPA*, *supra* note 1 at s 109.1(2)(b), the Minister may designate a DCO where:
the number of claims for refugee protection made in Canada by nationals of the country in question in respect of which the Refugee Protection Division has made a final determination is less than the number provided for by order of the Minister, if the Minister is of the opinion that in the country in question
(i) there is an independent judicial system,
(ii) basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedoms are infringed, and
(iii) civil society organizations exist.

¹⁹⁴ Gender Guidelines, *supra* note 5 at C.

Tighter Timelines

Second, the new legislative changes bring procedural differences, particularly tighter timelines for the submission of evidence and for the scheduling of a hearing, which can be more problematic for those with gender-related claims, many of which rely on forms of evidence that are more difficult to obtain. The Chairperson recognized this difficulty in the Gender Guidelines. The Guidelines explain that a woman with a claim based on sexual violence at the hands of a non-state agent of persecution “may have difficulty in substantiating her claim with any ‘statistical data’ on the incidence of sexual violence in her country.”¹⁹⁵ The 2010 and 2012 legislative changes, especially the shortening of timelines for submission of evidence, exacerbate these pre-existing disadvantages and therefore have an impact on the ability of a claimant whose claim relates to gender persecution to receive a full and fair oral hearing on the individual merits of his or her claim.¹⁹⁶

Third, women with gender-related claims may be disproportionately among the classes of claimants who are excluded from appealing negative claim determinations to the RAD. As described in an earlier section, the legislative changes bring to reality the RAD but exclude certain classes of claimants from accessing this mechanism. Among these classes are claimants from DCOs and DFNs. As a consequence of the exclusions of these categories of claimants from eligibility for the RAD, a core feature of the *IRPA*’s procedural fairness structure is removed. While it is too early to measure whether these exclusions will have a disparate impact on women claimants with gender-related claims, there are strong indications that women will be profoundly affected. For example, of the 166 women claimants in my case

¹⁹⁵ *Ibid* at “Framework for Analysis.”

¹⁹⁶ The constituent elements of the right to due process for refugee claimants in Canada will be discussed in more detail in Chapter Two.

study, approximately 30% come from countries that have since been designated as “safe” under the DCO category.¹⁹⁷ None of these claimants would have access to an appeal under the current RAD eligibility criteria even though many of the cases demonstrated serious misunderstandings about gender-related claims.

1.5 Contribution of this work in the current international and domestic political and legal context

The issue of how to properly handle refugee claims to ensure equal access to fair claim determination is a worldwide problem. The changes to Canada’s refugee law are part of an international trend in migration restriction that has knock-on effects for the collection and consideration of refugee testimonial evidence. Furthermore, Canada is increasingly coordinating its refugee determination systems with other countries, through the United States – Canada Safe Third Country Agreement, for example.¹⁹⁸ This Agreement provides for the return to the United States of potential refugee claimants arriving in Canada through land ports of entry from the United States,¹⁹⁹ effectively preventing the claimant from having his or her claim determined in Canada. According to refugee law scholars, removal of a refugee claimant to the United States without evaluating her claim denies her ability to choose where to seek

¹⁹⁷ As of July, 2015, the Canadian government has included 42 countries in this list: Andorra, Australia, Austria, Belgium, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel (except for Gaza and the West Bank), Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, San Marino, Slovak Republic, Slovenia, South Korea, Spain, Sweden, Switzerland, United Kingdom, and the United States. Canada, Department of Citizenship and Immigration, *Order designating countries of origin* (Ottawa, 15 December 2012).

¹⁹⁸ Canada and The United States of America, *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* (29 December, 2004) [the Safe Third Country Agreement].

¹⁹⁹ Citizenship and Immigration Canada, “PPI Processing claims for refugee protection in Canada” (CIC Operations Manual) (Ottawa: 17 February, 2012) at s 15.

protection²⁰⁰ and, in the case of gender-related claims relating to domestic violence, results in a higher likelihood of refusal.²⁰¹

The changes to the Canadian in-country refugee determination system have developed in a context of legislative responses to migration in the United States, European countries and Australia aimed at reducing involuntary migration to their borders. Canada's changes are both responding to and exerting pressure on their international counterparts. The United States, Canada, and Australia have generally trended towards a policy approach of deterrence that keeps out potential refugee claimants through visa requirements, rigorous border control mechanisms, and interdiction of potential migrants prior to arrival.²⁰² This new approach mirrors changes in the United Kingdom's immigration regulation that has effectively restricted the ability of people to apply for asylum through visa restrictions, carrier sanctions, fast-tracking, and aggressive detention policies for some asylum categories.²⁰³ The United Kingdom passed in December 2012 a more vigorous analytical framework for evaluating the

²⁰⁰ James C Hathaway & Alexander Neve, "Fundamental Justice and the Deflection of Refugees from Canada" (1996) 24 Osgoode Hall LJ 214 at 216.

²⁰¹ Sonia Akibo-Betts, "The Canada-U.S. Safe Third Country Agreement: Why the U.S. is Not a Safe Haven for Refugee Women Asserting Gender-Based Asylum Claims" (2005) 19 Windsor Rev Legal & Soc Issues 105 at 106. The validity of the Safe Third Country Agreement, *supra* note 198, was the subject of a court challenge by the Canadian Council for Refugees and other refugee advocacy groups. The Federal Court (*Canadian Council for Refugees v Canada*, 2007 FC 1262) first ruled in favour of the advocacy groups, who argued that the regulations implementing the agreement to be *ultra vires* and in violation of the *Charter*'s sections 7 and 15, on the grounds that the United States "is not a safe country that complies with the non-*refoulement* requirements of article 33 of the *Refugee Convention* and article 3 of the *Convention Against Torture*." *Canada v Canadian Council for Refugees*, 2008 FCA 40 at para 11 (this judgment stayed the implementation of the lower court's order). The Federal Court of Appeal reversed the Federal Court's decision, endorsing the government's view that the impugned regulations are not *ultra vires* because the government is in a position to continually review the United States' designation and that the *Charter*-based challenge was in the abstract. *Canadian Council for Refugees v Canada*, 2008 FCA 229. The Supreme Court denied the refugee advocacy groups' leave to appeal the decision.

²⁰² Rebecca Hamlin, "International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia" (2012) 37:4 Law & Soc Inquiry 933 at 937.

²⁰³ Sile Reynolds & Helen Muggeridge, *Refugee Council: Remote Controls: how UK border controls are endangering the lives of refugees* (December 2008), online: Refugee Council <www.refugeecouncil.org.uk/assets/0001/7043/Remote_Controls.pdf>.

criminality of potential asylum seekers, meant to exclude a larger class of claimants.²⁰⁴ Many member states of the European Union have adopted substantially similar regulation of asylum requests and controls at the border as part the Schengen Agreement²⁰⁵ and other agreements amongst members of the European Union.

This work thus contributes to the academic knowledge on judicial oversight of refugee decisions at a dynamic time in Canadian refugee law. While other scholars have raised concerns about the realistic ability of traumatized claimants to receive fair assessments of their claims,²⁰⁶ not much focus has been given to the particular impact these recent changes may have on evaluation of gender-related claims.

The analysis presented in this research also contributes to the literature on gender and migrants and scholarly debates on judicial oversight that have only been addressed in limited studies in Canada. The insights and themes emerging from this study lend force to the arguments of feminist legal scholars who call for deepening the understanding of gender's role in refugee claim determinations. Broadening the perspective of gender is also important to feminist theory in order to explain how discrimination and stereotyping can occur despite advances in the recognition of gender-related claims. An enriched understanding of "gender" also might offer points of resistance to antiquated and harmful images of refugees, especially women refugees, as "victims".²⁰⁷

²⁰⁴ UK Home Office Border Services Agency, "Changes to the Immigration Rules to come into effect December 13, 2012" (13 December 2012), online: Government of the United Kingdom <www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/december/17-rules>.

²⁰⁵ The Schengen Agreement, which ensures freedom of movement within member states, created a common set of rules for people crossing into the zone from an external border. These rules include regulation of asylum requests. See European Union Home Affairs, "Schengen Area" (19 December, 2011) online: European Union Home Affairs <ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen>.

²⁰⁶ See Janet Cleveland, "The Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada: A Critical Overview" (2008) 25:2 *Refuge* 119 & Jessica Choudhary, "Memory and its implications for asylum decisions" (2010) 6 *J Health & Biomedical L* 37.

²⁰⁷ For further discussion of the construction of women refugee claimants as victims, see Chapter Six.

1.6 Structure of the Dissertation

Chapter Two: Legal Frameworks of Administrative Law and Evidence Consideration

This chapter provides an overview of the administrative legal frameworks informing the consideration of evidence about gender-related refugee claims in Canada and the circumstances under which the Federal Court of Canada is permitted to review those decisions. The first part builds on the introductory chapter's discussion of legislation, regulation, and case law related to Canadian refugee determinations as a form of administrative law. The second part picks up Chapter One's discussion of the legal process for refugee determination by describing in further detail the settings and actors involved in refugee determinations. The third and fourth parts of the chapter discuss the standards employed in judicial reviews of administrative determinations and looks more closely at the issues of credibility, plausibility, the availability of state protection, and IFAs. The final two parts of this chapter discuss issues surrounding use of judicial notice, relevancy, and non-judicial factors informing decision-making.

Chapter Three: Theoretical Informants on Gender Performativity

This chapter has two purposes. First, it situates this research project within the wider academic scholarship on the treatment of gender-related refugee claims and women refugee claimants. This chapter provides the groundwork for a further discussion of the use of gender performativity as a theoretical lens to examine the review of gender-related claims by the Federal Court.

Second, this chapter discusses the theoretical underpinnings of feminist performance theory and explores the ways in which representations of women claimants with gender-related claims have been constructed and reconstructed over time and through particular legal

geographies by both gender-related claimants themselves and those who decide their claims. In the context of the hearing as a mechanism for claim determination, this chapter discusses the interaction between the decision-maker's understanding of the claimant's gender and his or her understanding of the claim. It argues that this interaction is a fluid, interactive dialogue that influences and is influenced by legal constructions of evidence gathering.

Chapter Four: Methodology

This chapter sets out the analytical framework used to examine Federal Court judicial reviews of gender-related refugee determinations. It both describes the qualitative research methods used and details the boundaries of the data set. This chapter also explains the process of selecting the research method, including the unsuccessful attempt to conduct interviews with women refugees.

Chapter Five: Data Analysis Chapter

The main focus of this chapter is the data analysis of Federal Court judicial reviews of gender-related refugee claims from 2003-2013. The chapter starts by describing observed patterns in the judge's discussion of aspects of the claimant's identity unrelated to persecution (such as education, class, and religion) and corresponding discussions of credibility and/or IFA. Then, illustrative examples are used to show how the decision-maker's understanding of the claimant's non-persecution-related identity influences the decision-maker's consideration of persecution evidence. For example, if the decision-maker perceives the claimant as resourceful or educated, the claim tends to be denied on the basis of the existence of an IFA or due to doubts by the decision-maker regarding the claimant's credibility.

In this chapter and in the remainder of the thesis, the names of the claimants with gender-related claims have been anonymized by replacing them with a three-letter code. The

remainder of the case title and the citation remain in their original form. The reason for altering the names in this manner is to reduce the likelihood that a particular last name would be associated with a thesis on gender-related violence and thus cause discomfort or embarrassment for the claimant or her family in the future.

Chapter Six: The Domestic Violence Victim: Constructing the Gendered Other

Building on the previous chapter's case analyses, this chapter takes a closer look at the most frequent type of gender-related persecution represented within the case studies, domestic violence-related persecution. This chapter describes a disturbing tendency among decision-makers to rely on stereotypic constructions of domestic violence survivors as "victims" and shows that the Federal Court views these determinations as reasonable. In particular, it looks at how decision-makers decided and judges reviewed evidence on re-availment to abuse, delay in flight, the claimant's wealth or sophistication, the claimant's mental health, and the claimant's cultural and political context. It argues that the analysis employed in these cases demonstrates that women who experience domestic violence continue to be constructed as "gendered others".

Chapter Seven: Conclusion and Recommendations

The final chapter of this thesis synthesizes the subject matter of the previous chapters and offers conclusions on whether the use of the Gender Guidelines in IRB determinations and Federal Court judicial reviews adequately ensures equal access to justice for women with gender-related claims. Next, it discusses what these conclusions might indicate for the evaluation of gender-related claims in the current legal context in the wake of the 2010 and 2012 changes to Canadian immigration and refugee law. Finally, it outlines a proposal for legal reform centering on legal mechanisms that would facilitate the substantive and consistent

use of the Gender Guidelines in gender-related claim evaluations. The suggestions for change include expanding the understanding of what constitutes relevant evidence of gender-related persecution and allowing for more opportunities for testimony.

CHAPTER TWO: LEGAL FRAMEWORKS INFORMING REFUGEE DETERMINATIONS: GATHERING AND PRESENTING EVIDENCE

*In law context is everything.*²⁰⁸
- Lord Steyn

*At root, discretion is about power and judgment.*²⁰⁹
- Anna Pratt & Lorne Sossin

2.0 Introduction

The introductory chapter explained the basic legal framework governing evaluations of refugee claims in Canada and gave an overview of how recent changes to Canadian refugee law have altered that framework. It also described the legislative and regulatory framework governing legal standards for gender-related refugee claims. This chapter takes a step back from the specifics of the refugee determination system to broadly examine evidence consideration in administrative tribunals and the judicial review of administrative action. It also provides additional insights regarding factors outside of the narrow legal standards that can influence success or failure in administrative tribunals.

This chapter is divided into the following parts. Section 2.2 discusses the Canadian refugee determination as a form of administrative legal proceeding and its key differences from non-administrative legal fora in terms of evidence and procedures. Keeping in mind Judith Butler’s metaphor of theatre and performance, this part explores the actors and the administrative arenas used to gather and evaluate claimant evidence. Section 2.3 takes a closer look at the evolving standard of review employed in Federal Court judicial reviews of refugee determinations. It also discusses recent jurisprudential developments regarding the crucial issue of judicial deference to administrative determinations. Section 2.4 delves into a discussion of the administrative decision-maker’s assessment of the plausibility and credibility

²⁰⁸ Lord Steyn, *Regina v Secretary of State For The Home Department, Ex Parte Daly* [2001] UKHL 26 at para 26.

²⁰⁹ Anna Pratt & Lorne Sossin, “A Brief Introduction to the Puzzle of Discretion” (2009) 24:3 CJLS 301 at 301.

of a claimant's testimony and how these evaluations intersect with determinations of the availability of state protection and IFAs. Section 2.5 presents the recent work of several academics on judicial calculations of relevancy. Finally, Section 2.6 examines how extrajudicial factors, such as a claimant's counsel, might impact whether a claim succeeds.

2.1 Process and Procedures in the Administrative Law system

Although the RPD, a component of the IRB, is an administrative tribunal carrying out the powers given it through the *IRPA*, its hearings function like a court's. Unlike a court, however, it has extensive powers to call evidence and to alter procedures according to the specific case circumstances. The IRB, which is composed of the RPD, the RAD, the Immigration Division, and the Immigration Appeal Division,²¹⁰ is afforded broad powers²¹¹ and a high level of deference in the review of its decisions. The *IRPA* s. 162(1) grants to each of its divisions "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction"²¹² coupled with the broad mandate under the *IRPA* s. 162(2) to proceed "as informally and quickly as the circumstances and considerations of fairness and natural justice permit."²¹³ Failed claimants are offered only a limited ability to apply to the Federal Court²¹⁴ for judicial review of a decision and restricted rights of appeal to the RAD.

The landmark 1985 Supreme Court case of *Singh v. Canada (Minister of Employment and Immigration)*²¹⁵ established that refugee determination decisions generally require an in-person hearing. The case was a constitutional challenge to the lack of an in-person hearing for

²¹⁰ Under *IRPA* s 151, "(t)he Immigration and Refugee Board consists of the Refugee Protection Division, the Refugee Appeal Division, the Immigration Division and the Immigration Appeal Division." *IRPA*, *supra* note 1 at s 151.

²¹¹ *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 27.

²¹² *Ibid* at s 162(1).

²¹³ *Ibid* at s 162(2).

²¹⁴ *Ibid* at s 72.

²¹⁵ *Singh*, *supra* note 176.

refugee determinations under the pre-*IRPA*.²¹⁶ The Court found that paper-based refugee determinations did not give decision-makers the meaningful opportunity to evaluate the credibility of a claim on its merits,²¹⁷ with three members of the Court basing their opinion on the right to security of person and the right to fundamental justice under Section 7 of the *Canadian Charter of Rights and Freedoms*²¹⁸ and three members basing their opinion on the right to a fair hearing under Section 2(e) of the *Canadian Bill of Rights*.²¹⁹ Therefore, each refugee claimant should be entitled to “at least one full oral hearing before adjudication on the merits” in order to ensure the requirement for procedural fairness is met.²²⁰

Section 170 of the *IRPA* furnishes IRB decision-makers with a broad license to consider any and all “credible and trustworthy”²²¹ evidence, including facts or opinions within the decision-maker’s specialized knowledge,²²² without the restraints of the rules of evidence.²²³ As a result of *Singh*,²²⁴ the Act requires (with a narrow exception for some positive

²¹⁶ The appellants *Singh et al.* were subject to sections 45-48 and 70-71 of the *Immigration Act, 1976*, c 52, s 1, wherein their cases were determined by written submissions alone without any in-person hearing. *Singh, supra* note 176 at 214.

²¹⁷ *Ibid* at 213-214 wherein Justice Wilson wrote, “I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person...” Notably, the concurring opinion of Justice Beetz was anchored in the *Canadian Bill of Rights*, SC 1960, c 44, and did not mention the *Charter*.

²¹⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Canadian Charter*] at s 7.

²¹⁹ Section 2(e) prohibits any law of Canada to be construed or applied so as to “deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.” *Canadian Bill of Rights, supra* note 217.

²²⁰ *Singh, supra* note 176 at 231.

²²¹ *IRPA, supra* note 1 at s 170(h).

²²² *Ibid* at s 170.

²²³ *IRPA* s 165 grants its decision makers the powers generally afforded a commissioner: “The Refugee Protection Division, the Refugee Appeal Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and may do any other thing they consider necessary to provide a full and proper hearing.” *Ibid* at s 165.

²²⁴ *Singh, supra* note 176.

determinations)²²⁵ claimants to be given an in-person hearing.²²⁶ The purpose of the hearing is to ensure both the Minister and the claimant have a “reasonable opportunity to present evidence, question witnesses and make representations.”²²⁷

The refugee determination hearing is the main forum at which IRB decision-makers rule on a claimant’s credibility; the plausibility of her claim; and whether state protection and IFAs were reasonably available to her. At the hearing, the claimant “must produce all documents and information as required by the rules of the Board”²²⁸ to support his or her refugee claim. The Supreme Court in the *Prasad v Canada* case reaffirmed the right of the IRB to govern how its hearings operate and who may participate:

As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion.²²⁹

A refugee claimant whose claim for refugee protection has been rejected has a limited ability to ask the Federal Court to review the IRB’s determination. In general, claimants initiate most applications for judicial review but the Ministry may also request leave for judicial review of a refugee determination.²³⁰ The decision to grant a leave for judicial review is discretionary and the Federal Court only grants a small percentage of leave applications.²³¹ Once the

²²⁵ *IRPA*, *supra* note 1 at s 170(f).

²²⁶ *Ibid* at s 170(b).

²²⁷ *Ibid* at s 170(e).

²²⁸ *Ibid* at s 100(4).

²²⁹ *Prasad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at 568-569.

²³⁰ Citizenship and Immigration Canada, *ENF 9: Judicial Review* (Ottawa, June 30, 2006) at 5.1. Applications for judicial review must be served on the other party and filed with the Registry of the Federal Court within 15 days after a decision is delivered to the claimant or the Minister. *IRPA*, *supra* note 1 at s 72(2)(b).

²³¹ Sean Rehaag, “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment” (2011) 49 Osgoode Hall LJ 71. Rehaag’s review of Federal Court applications for review of refugee determinations in 2009 found that just 13.9% of leaves were granted a hearing (*Ibid* at 76). It is also worth noting that immigration matters (including refugee determination judicial reviews) comprise the majority of the Federal Court docket, making up 74% of the active caseload in 2012-2013 (6,835 out of 9,200 cases). Courts Administrative Service, Federal Court of Canada, *Supporting the Delivery of Justice for All Canadians*:

reviewing Federal Court judge has rendered a decision, no appeal is available unless the judge has certified a question of general importance.²³²

The *Federal Courts Act*²³³ offers declaratory and other forms of relief²³⁴ from administrative decisions on narrow grounds. The *Act* permits relief from the administrative tribunal only if the tribunal:

- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
- (e) acted, or failed to act, by reason of fraud or perjured evidence; or
- (f) acted in any other way that was contrary to law.²³⁵

As discussed below, the judiciary has effectively narrowed the scope of federal review by adopting a general attitude of deference towards the tribunal.

2.2. Procedure and Evidence-gathering in Canadian Refugee Determinations

2.2.1 Institutional Actors in Evidence-gathering

For those refugees who apply for status at Canada's borders, their first point of contact is the Canada Border Services Agency [CBSA] agent with whom they speak at the airport at the end of the long immigration queue, after what is often a long flight.²³⁶ Thus, the immigrant must engage in a legally significant dialogue with a governmental official when not necessarily in

2012-2013 Annual Report, online: Courts Administrative Service, <cas-ncr-nter03.cas-satj.gc.ca/CAS/pdf/13-078-SATJ-Rapport-annuel-ANG-WEB.pdf>.

²³² *IRPA*, supra note 1 at s 72(2)(e) & s 74(d).

²³³ *Federal Courts Act*, RSC 1985, c F-7 at s 18.1(4).

²³⁴ *Ibid* at s 18.1(3) permits the Federal court to order a tribunal to do an act "it has unlawfully failed or refused to do" or "declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding..."

²³⁵ *Ibid* at s 18.1(4).

²³⁶ *Immigration and Refugee Protection Act Regulations*, SOR/2002-227 [*IRPA Regulations*] at s 27(1).

the best state of readiness. Long delays, poor sleep, and stressful travel conditions can be detrimental in cases where the Port of Entry dialogue triggers the start of an application for refugee status.

The CBSA officer then engages in an examination of the person and their immigration status, sometimes asking very detailed questions about the person's history, family, immigration history, and, in the case of refugee claimants, why he or she is seeking refugee protection in Canada. A person asking for refugee protection will usually be taken out of the primary inspection line and brought into a CBSA interview room at the airport for "secondary examination" by a CBSA officer. These eligibility interviews can take between two to four hours and involve copying identity documents and fingerprinting the claimant.²³⁷ The CBSA officer relies on the statements and documents presented to him or her at the port of entry to assess the claimant's eligibility for refugee protection.²³⁸

The claimant's responses at a port of entry can be used to impugn later written or oral testimony although lawyers are usually not present when the refugee claimant is questioned²³⁹ nor is there a right to legal counsel during port of entry inspection.²⁴⁰ In a memorandum on credibility, the IRB Legal Services establishes unequivocally the admissibility of Port of Entry notes in later determination proceedings. They state:

Port of entry notes or documents prepared by Canadian immigration officials are

²³⁷ Lynn Gaudet & Camilia Jones (Consulting Editors), *Immigration Practitioner's Handbook 2008* (Toronto: Thomson Carswell, 2008) at 111.

²³⁸ Lynn Fournier-Ruggles & Peter McKeracher, *Canadian Immigration and Refugee Law for Legal Professionals* (Toronto: Emond Montgomery Publications, 2009) at 232.

²³⁹ There is no constitutionally guaranteed right to have counsel present while a claimant is being questioned by a CBSA or CIC official. An immigrant being questioned at a port of entry interview is not considered formally detained and thus the *Canadian Charter's* 10(b) right "to retain and instruct counsel without delay and to be informed of that right" does not apply unless a person is detained by the CBSA. See *Dehghani v Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053.

²⁴⁰ *Ibid.* See also, Citizenship and Immigration Canada, "ENF-4 Port of Entry Examinations" (CIC Operational Manual) at 26, online: Citizenship and Immigration Canada <www.cic.gc.ca/english/resources/manuals/enf/enf04-eng.pdf>.

admissible at an RPD hearing, without any further participation by the Minister at the hearing. They are admissible even though they may be unsigned and undated, and even though their author is not called or is not available to testify. Port of Entry notes are admissible even though there is no evidence that the form in question has been established by ministerial order, and even though the notes are in a non-official language.²⁴¹

As a practical application, consider the perspective of a person fleeing persecution in West Africa being questioned by a CBSA officer after arriving at Toronto Pearson Airport from a two-day flight journey from Senegal. When asked why she is coming to Canada, a claimant may respond “to seek a better life” or “to visit my sister” rather than stating her fear of persecution. When the person then claims refugee status and has a hearing (which could sometimes occur years after the initial arrival prior to the post-December, 2014 regulatory environment), the claimant will be questioned as to why she did not tell the officer she was coming to Canada to seek refuge from persecution.

The claimant has the burden of showing her refugee claim is eligible for referral to the tribunal.²⁴² This initial “eligibility interview” with a CBSA officer generally occurs either at a port of entry or with a CIC officer (if the claim is made from within Canada).²⁴³ In this interview, the officer can refuse to refer a claim to the IRB if he or she has sufficient evidence to establish that the person is ineligible to apply for refugee status.²⁴⁴ Although it is generally

²⁴¹ Legal Services, Immigration and Refugee Board, “Assessment of Credibility in Claims for Refugee Protection” (31 January 2004) at 27, online: Immigration and Refugee Board of Canada <http://www.irb.gc.ca/Eng/brdcom/references/legjur/rpdspr/cred/Documents/credib_e.pdf>.

²⁴² *IRPA*, *supra* note 1 at s 100(1.1).

²⁴³ *Ibid* at s 110(1).

²⁴⁴ For example, a person may be ineligible to apply for refugee protection in Canada if he or she already has refugee protection in Canada or in another country that the claimant to which the claimant can be returned. *Ibid* at s 101(1)(a) & (d). A person may also be found ineligible to apply for refugee protection because:

- A prior claim for refugee protection by the claimant has been rejected (*Ibid* at 101(1)(b)) withdrawn or abandoned (*Ibid* at 101(1)(c))
- Transited through another country designated by the regulations as a safe country and failed to apply for refugee protection there (e.g. a “Safe Third Country”) (*Ibid* at 101(1)(e))
- The claimant was found inadmissible on the grounds of security, violating human or international rights, serious criminality, or organized criminality (*Ibid* at 101(1)(f)).

understood that the majority of claims can overcome the initial threshold, the 2012 regulatory changes expanded the reasons for ineligibility,²⁴⁵ making it increasingly likely that an officer may decline to refer a claim to the IRB for determination.

Refugees may also apply for status from within Canada's borders.²⁴⁶ These applicants commonly enter Canada by means of a visa on another basis, such as a visitor visa or a work visa. Those individuals apply for refugee status directly to CIC at a Canada Immigration Centre within the country.²⁴⁷ The CIC officer then performs the "referral" gate-keeping function that is performed by a CBSA officer at a port of entry. Within this subset of claimants, some apply later because circumstances in their country have changed in their absence,²⁴⁸ although a person subject to a removal order is not permitted to make a *sur place* claim.²⁴⁹ The officer may also put the claimant into detention pending removal or evaluation of a claim, if he or she believes there are sufficient grounds to do so. The grounds for detention of refugees are met if: the claimant is unable to establish his or her identity; there is a risk that the person may fail to appear if released; or if there is sufficient evidence to suggest serious criminality.²⁵⁰

²⁴⁵ Under *PCISA*, the grounds for ineligibility on the basis of serious criminality were expanded to include a wider scope of crimes. *PCISA*, *supra* note 168 at s 35, modifying *IRPA*, *supra* note 1 at s 101(2)(a) and (b).

²⁴⁶ This project does not examine Canada's laws and policies on overseas refugee resettlement. Traditionally seen as complementary to Canada's in-country refugee determination process, it is increasingly being politically positioned as being at odds with in-country, "spontaneous" refugee claims because of government rhetoric asserting that the latter group have failed to wait their turn in an imaginary claim evaluation queue. See Shauna Labman, "Queue the Rhetoric: Refugees, Resettlement, and Reform" (2011) 62 UNBLJ 55.

²⁴⁷ Citizenship and Immigration Canada, *Claimant's Guide* (2013) online: Citizenship and Immigration Canada <www.irb.gc.ca/Eng/RefClaDem/Pages/ClaDemGuide.aspx>.

²⁴⁸ Section 99(1) states "a claim for refugee protection may be made in or outside of Canada." *IRPA*, *supra* note 1 at s 99(1). Refugees applying for status due to changed circumstance are traditionally termed refugees *sur place* and are specifically permitted under the Refugee Convention. See Fournier-Ruggles & McKeracher, *supra* note 238 at 233.

²⁴⁹ *IRPA*, *supra* note 1 at s 99(3).

²⁵⁰ Section 55 of *IRPA* (*supra* note 1) specifies that an immigrant may be detained if an officer has reasonable grounds to believe any of the following factors to be true of the immigrant: "(a) is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of the Act; (b) is a danger to the public; or is a foreign national whose identity has not been established." *Ibid.* These grounds for detention are further explored in the *IRPA Regs*, *supra* note 236 at s 245 (flight risk), s 246 ("danger to the public" or criminality) and under s 247 (no proof of identity). The concept of "danger to the public" is described in *IRPA*, *supra* note 1

Although not the subject of this thesis, some refugees have their claims determined from outside Canada through the Refugee Resettlement Program as a government-sponsored or private-sponsored refugees. These applicants to the Refugee Resettlement Program, also called “government-assisted refugees,” are drawn from populations already vetted by the UNHCR or through private sponsorships.²⁵¹ Under the *IRPA* s. 99(2) and *IRPA Regs.* s.144 and s. 145, people in the “Convention Refugee Abroad” class may be issued a permanent resident visa based on a determination by an officer outside of Canada on their refugee status.²⁵² Applications for refugee status completed outside of Canada are facilitated through international organizations, such as the UNHCR or through a private sponsorship application by individuals or organizations.

Refugee claimants asking for refugee protection at a port of entry or from within Canada are required to fill out detailed information about the claim. Before the December 2014 regulatory changes, claimants filled out the Personal Information Form²⁵³ [PIF]. Since the implementation of the regulatory changes, claimants fill out the Basis of Claim Form²⁵⁴

at s 101(2) as the following:

...a foreign national is inadmissible on grounds of serious criminality for (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed; (b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. *Ibid.*

²⁵¹ As part of the reforms from the old *Immigration Act*, the *IRPA* made it a requirement for overseas applicants to the Refugee Resettlement Program to come through a UNHCR referral. Citizenship and Immigration Canada, “The refugee system: Resettlement from outside Canada,” online: Citizenship and Immigration Canada <www.cic.gc.ca/english/refugees/outside/index.asp>.

²⁵² *IRPA*, *supra* note 1 & *IRPA Regulations*, *supra* note 236 at s 144 and s 145.

²⁵³ Refugee Protection Division, Immigration and Refugee Board of Canada, “Personal Information Form,” online: Immigration and Refugee Board of Canada <www.irb-cisr.gc.ca/eng/tribunal/form/Documents/form189_e.pdf> [PIF].

²⁵⁴ Refugee Protection Division, Immigration and Refugee Board of Canada, “Basis of Claim Form,” online: Immigration and Refugee Board of Canada <www.irb-cisr.gc.ca/eng/tribunal/form/Documents/RpdSpr0201_e.pdf> [BOC].

[BOC]. For those arriving at a port of entry, the PIF must be filled out and submitted in triplicate within 28 days of arrival or 15 days of arrival in the case of the new BOC form). As this research is focused on the period before the implementation of the new system, the PIF will be discussed from this point forward, with brief mentions of the differences between the forms as appropriate. The importance of the PIF in the determination of the claim cannot be overstated. Although it was possible to amend a PIF after it was submitted or even to bring up new facts at the hearing, the IRB worked on the assumption that all key elements to the claim are contained in the PIF. Thus, in the Federal Court case of *Besseghi*, the level of detail that should be included was explained:

It is not incorrect to say that answers given in a PIF should be brief but it is incorrect to say that the answers should not be complete with all of the relevant facts. It is not enough for an applicant to say that what he said in oral testimony was an elaboration. All relevant and important facts should be included in one's PIF. The oral evidence should go on to explain the information contained in the PIF.²⁵⁵

The decision-maker may assume a negative inference as to the claimant's credibility if he or she fails to include or incorrectly states a fact in the PIF viewed by the decision-maker as key to the claim.²⁵⁶

The PIF and the BOC are forms that require the claimant to detail numerous aspects of her life. Included in these forms are biographical questions on:

- the claimant's ethnic, religious, and linguistic background²⁵⁷

²⁵⁵ *Basseghi v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1867 as quoted in *Maqdassy v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 238 at para. 14. For example, in the *SJO v Canada (Minister of Citizenship and Immigration)* case, 2006 FC 405, the Federal Court set aside the IRB decision-maker's over-reliance on omissions in the claimant's PIF describing her domestic violence-related claim that the claimant later raised at the hearing.

²⁵⁶ See Legal Services, Refugee Protection Division, "Assessment of Credibility in Claims for Refugee Protection" (January 31, 2004) at 27, online: Immigration and Refugee Board of Canada <www.irb.gc.ca/Eng/brdcom/references/legjur/rpdspr/cred/Documents/credib_e.pdf>.

²⁵⁷ The PIF and the BOC ask for: "Nationality, ethnicity or tribe" and "Religion and denomination." The PIF has extensive questioning about a claimant's language skills ("First Language", "Language and dialect you now speak most fluently", "Other languages or dialects you speak") while the BOC simply asks, "List all languages and dialects you speak." PIF, *supra* note 253 & BOC, *supra* note 254.

- a list of countries of residence and immigration status in each²⁵⁸
- a list of the names, citizenships, countries of residence, and dates of birth of the claimant's relatives, including her spouse, children, parents and guardians, siblings and half-siblings,²⁵⁹ noting anyone who has claimed refugee protection in any country or from the UNHCR²⁶⁰ and
- the claimant's employment history.²⁶¹

Once the claimant has filled out these personal biographical details, the next section of the form asks her to detail the basis for her claim for refugee protection. In the PIF, the claimant is given a blank paper and asked to characterize her claim within one of the *Convention* grounds. In contrast, the BOC asks the claimant directed questions about the claim. These include:

- claimant's experience of harm or threats²⁶²
- how the claimant sought state protection²⁶³
- whether and why the mistreatment would continue²⁶⁴

²⁵⁸ The PIF asks claimants to "list each country in which you have lived since birth and indicate your status there" (PIF, *supra* note 253) while the BOC asks, "List each country of which you are or have been a citizen." BOC, *supra* note 254.

²⁵⁹ The PIF and the BOC ask the claimant to: "List your relatives, living or dead, in the order below. Use and additional sheet if required: i. Present spouse(s), including common-law or same-sex partner(s); ii. Children, including children born outside of marriage and adopted children; iii. Father, mother and any guardian if you are under 18 years of age; iv. Brothers and sisters, including half brothers and half sisters." Include "Given name(s), Family name(s), Relationship, Date of Birth (if unknown provide approximate age), Citizenship(s), Place and country of residence (if person is deceased, provide date of death)." PIF, *supra* note 253 & BOC, *supra* note 254.

²⁶⁰ The PIF and the BOC require the claimant to: "list all relatives, including relatives listed in question 4, who have claimed refugee protection in Canada, at the Canadian office abroad, from the Office of the United Nations High Commissioner for Refugees (UNHCR) or in any other country." PIF, *supra* note 253 & BOC, *supra* note 254.

²⁶¹ The PIF and the BOC ask claimants to, "list all employment, including full-time, part-time, temporary and self-employment, beginning with the most recent." PIF, *supra* note 253 & BOC, *supra* note 254.

²⁶² The BOC asks, "have you or your family ever been harmed, mistreated, or threatened by any person or group? If "YES" explain in detail: what happened to cause you and your family. When the harm or mistreatment or threats occurred; Who do you think caused the harm or mistreatment or threats; What do you think was the reason for the harm or mistreatment; Whether persons in situations similar to yours experienced such harm, mistreatment, or threats (Indicate dates, names and places, wherever possible.)" *Ibid.*

²⁶³ The BOC asks, "Did you ask any authorities such as the police, or any other organization, in your country to protect or assist you? If "NO" explain in detail why not. If "YES" explain in detail: Whom you approached for help; What steps you took; and What happened as a result. Indicate dates, names and places, wherever possible." *Ibid.*

²⁶⁴ The BOC asks, "if you returned to your country, do you believe you would be harmed, mistreated or threatened by any person or group? If "YES" explain in detail: What would happen to you? Who would harm, mistreat or threaten you? What do you think is the reason you would be harmed, mistreated or threatened? Indicate dates, names, and places, wherever possible." *Ibid.*

- whether there are other safe IFAs within the claimant's country of origin.²⁶⁵

Finally, the claimant is asked about when and why she left her country of origin,²⁶⁶ whether she sought protection from any other country before coming to Canada,²⁶⁷ and to list "any other details that you think are important for your claim for refugee protection."²⁶⁸

While the overall brevity of the BOC could be seen as an advantage over the old PIF form, the short timeline in which it must be completed make it less likely that it will be filled out fully and accurately. Inaccuracies in the BOC can have serious ramifications for the success of the claim because inaccuracies, inconsistencies, or omissions between written and oral testimony can impugn the claimant's credibility. For example, the guided questions of the BOC might be seen as an improvement over the old PIF, but the reduced timeline for submitting the BOC (within 15 days of claiming at a port of entry) means that a claimant is more likely to omit information in a rush to submit the form by the deadline. The likelihood of errors, inconsistencies, or omissions increases if the claimant is not literate in French or English and cannot secure a translator within the short timeframe. The likelihood of errors, inconsistencies, or omissions also can increase dramatically if the claimant has a gender-related claim and has difficulty relating the circumstances of the persecution due to trauma, memory problems, or culturally informed feelings of guilt or shame about what she must detail in the form.

²⁶⁵ The BOC asks, "'Did you move to another part of your country to seek safety? If "NO" explain in detail why not: If "YES" explain in detail: Why you left the place that you moved to; and Why you could not live there, or some other place in another part of your country, today.'" *Ibid.*

²⁶⁶ When did you leave your country? Provide dates" *Ibid.* Why did you leave at that time and not sooner, or at a later time?" *Ibid.*

²⁶⁷ Did you move to another country (other than Canada) to seek protection? If "YES" explain in detail: Name of country; When you moved to that country; How long you stayed there; Whether you claimed refugee protection in that country and, if not, why not?" *Ibid.*

²⁶⁸ *Ibid* at 2(h).

The Hearing

Decision-makers are generally active participants in the hearing, including determining the order of questioning and the structure of the proceedings. Refugee determination hearings are considered to be non-adversarial in nature unless the Minister is involved in the case such as when there is a possibility of an exclusion disqualifying a person from applying for refugee status.²⁶⁹ The decision-maker in a refugee hearing has an “inquisitorial role” in which he or she actively participates in eliciting evidence in an effort to bring forth all relevant facts in a “search for truth.”²⁷⁰ The decision-maker can ask the claimant questions about her claim.²⁷¹ He or she must then consider the evidence after it is gathered and weigh the arguments of counsel.

Under the pre-December, 2014 rules, the refugee claimant had to wait for a hearing date to be set after submitting a PIF. Wait times between submission of a PIF and the hearing date were notoriously long. By the government’s own estimate, the average wait time in 2012 was 18 months.²⁷² Under the post-December, 2014 system, certain classes of claimants can have claims processed in as little as 30- 45 days,²⁷³ although many practitioners have criticized this extremely short timeline as compromising the ability of the claimant to gather evidence

²⁶⁹ Legal Services, Immigration and Refugee Board, “Memorandum: Weighing Evidence” (December 31, 2003) at s 3.1.1 [Memorandum: Weighing Evidence]. Note the inquisitorial standard in the Refugee Protection Division differs from the Immigration and Immigration Appeal divisions, both of which are adversarial proceedings with a shifting burden of proof. *Ibid.*

²⁷⁰ Audrey Macklin, “Truth and Consequences: Credibility Determinations in the Refugee Context” (1998 Conference Proceedings of the International Association of Refugee Law Judges) at 134.

²⁷¹ See “Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division,” *supra* note 67.

²⁷² Citizenship and Immigration Canada, “Backgrounder – Overview of Canada’s Refugee Programs” (January 8, 2013), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/departement/media/backgrounders/2012/2012-11-30a.asp>>.

²⁷³ *Ibid.*

in support of her claim.²⁷⁴

2.3 The Evolving Standard of Deference to Administrative Decisions

Refugee law scholars Delphine Nakache and François Crépeau characterize the refugee determination hearing as a “critical space” of debate, interaction, and decision-making whose “vitality is conditioned by a consensus (that can certainly evolve with time) of the various actors on its format, on its framework and on the way it operates.”²⁷⁵ As will be discussed in greater depth in later chapters, the refugee determination system is a form of administrative proceedings that places great value on the unique perspective of the first-level decision-maker. The Federal Court sets a high bar of deference towards the first level decision-making at the refugee determination hearing because the judiciary considers IRB decision-makers as in the best position to fairly evaluate the credibility of the claimant in relation to the evidence presented by him or her.

The IRB operates relatively free of constitutional checks-and-balances, unlike decision-makers in criminal cases, despite the fact that individual liberty is at stake in both contexts. Criminal law proceedings are structured with layers of procedural checks; a high burden of proof; and a careful division of powers.²⁷⁶ The principles of the *Canadian Charter of Rights and Freedoms*²⁷⁷ apply to refugee law situations but the Supreme Court has found

²⁷⁴ Peter Showler, “New Refugee Bill Will Not Give Refugees a Fair Chance to Tell Their Stories” (18 April, 2012), online: Share News <sharenews.com/new-refugee-bill-will-not-give-refugees-a-fair-chance-to-tell-their-stories/>.

²⁷⁵ François Crépeau & Delphine Nakache, “Critical Spaces in the Canadian Refugee Determination System” (2008) 20 Int’l J Refugee L 50 at 51.

²⁷⁶ Jennifer Bond, “Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law, and ‘Guilty’ Asylum Seekers” (2012) 24:1 Int’l J of Ref L 37 at 48. See also, Crépeau & Nakache, *supra* note 275 at 97.

²⁷⁷ Section 7 of the *Canadian Charter of Rights and Freedoms* provides, “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” *Canadian Charter*, *supra* note 218 at s 7. This section of the *Charter*, along with Section 9 (protection against arbitrary detention) and Section 12 (protection against cruel or unusual treatment or punishment) is one of the key checks on the State’s application criminal law in Canada. See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 503 (regarding the lack of a *mens rea* element in a penal sanction on driving

that, as an administrative forum, it does not demand the same level of procedural protection as criminal law.²⁷⁸ The comparison with criminal law evidence procedures is not intended to suggest that a criminal law analytical framework would be better for refugee law than the administrative law framework currently in place. The criminal law's focus on guilt or innocence can be problematic in refugee law contexts, such as exclusion proceedings, which do not have the sentencing function that gives criminal law judges a second opportunity to consider relevant factors before rendering the case outcome but can have grave consequences if the claimant is removed as a consequence of the proceedings.²⁷⁹

The IRB decision-maker controls the proceedings of a hearing and decides which issues merit discussion and the order of questions to the claimant. The decision-maker's use of evidence is informed by his or her determination on the claimant's credibility; the plausibility of her statements; and how much weight to assign the rendered evidence. The IRB decision-maker thus plays a crucial role in framing the discourse and metaphoric space in which the claimant's gender is negotiated.

Pushpanathan

The standard of review the courts should employ when examining an administrative decision has long troubled the courts. The 1998 decision of the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*²⁸⁰ further developed the "pragmatic and functional approach"²⁸¹ used by the judiciary to decide which standard of

with a suspended license and where the court characterized the "judiciary as guardian of the justice system"). See also *R v Swain*, [1991] 1 SCR 933.

²⁷⁸ *Singh*, *supra* note 176 at para 49. The case further explains the distinction between immigration and refugee law fora in paragraphs 49-52.

²⁷⁹ Bond, *supra* note 276 at 48.

²⁸⁰ *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982.

²⁸¹ The name for this approach stemmed from the 1988 case of *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048 at 1088, which urged reviewing judges to weigh several factors to indicate what level of deference should be shown an administrative determination.

review to use. Justice Bastarache, speaking for the majority, outlined four factors informing the analysis of which standard of review would be appropriate for an administrative decision:²⁸²

1. The presence of a privative clause²⁸³ in the enabling statute;²⁸⁴
2. The subject matter expertise of the tribunal relative to that of the reviewing court;²⁸⁵
3. The purpose of the tribunal as articulated in the enabling statute;²⁸⁶
4. The nature of the question to be answered in the case, whether of law or fact.²⁸⁷

Applying these factors to the case at bar, the Court found that the facts of the case dealing with exclusion merited the “correctness” standard (wherein the conclusion must have been the right one) rather than a deferential standard (wherein the Court would defer to the tribunal decision-maker’s subject matter expertise). Using a “correctness” review, the court asks whether the conclusion was one that the reviewing judge herself would have reached.²⁸⁸ In other words, the reviewing court does not show deference to the decision-maker’s reasoning but rather conducts its own analysis, deciding whether it comports with the original determination and substituting its own decision if it does not.²⁸⁹

More recently in 2009, the Supreme Court in *Canada (Ministry of Citizenship and Immigration) v Khosa*²⁹⁰ applied the low-deference standard of correctness to questions of law and a high-deference standard of “reasonableness” to mixed questions of law and fact.²⁹¹ Put

²⁸² *Ibid* at para 29.

²⁸³ A privative clause is a statutory provision that aims to limit judicial intervention by stating that interpretation of the statute should be decided exclusively by the applicable tribunal.

²⁸⁴ *Ibid* at para 30.

²⁸⁵ *Ibid* at para 32-33.

²⁸⁶ *Ibid* at para 36.

²⁸⁷ *Ibid* at para 37.

²⁸⁸ As the Supreme Court explained in *Dunsmuir*, a “correctness” standard is appropriate in cases touching on a question of general law that is both of central importance to the legal system as a whole and outside of the statutes closely connected to the adjudicator’s area of expertise (*Dunsmuir*, *supra* note 211 at para 54). In these cases, an administrative tribunal’s determination is subjected to a close examination as to whether the determination was “correct” rather than whether it was “reasonable”.

²⁸⁹ *Ibid* at para 50.

²⁹⁰ [2009] 1 SCR 339.

²⁹¹ *Ibid* at para 59.

another way, the Federal Court will generally uphold the substantive determinations of an administrative tribunal (a reasonableness approach) but will examine with greater scrutiny in cases where the tribunal incorrectly stated the law itself.²⁹² Thus, the issue of whether the IRB applied the right test to assess state protection would be reviewed on a correctness standard but the issue of whether the IRB did an adequate job of applying the correct test to the claimant's facts would be reviewed by the Federal Court on a standard of reasonableness.²⁹³

Under the standard adopted under *Pushpanathan*, the reviewing Federal Court uses a four-factor analysis to decide on the appropriate standard of review. Unfortunately, the four-factor analysis established in *Pushpanathan* proved to be cumbersome in the face of the complex cases put before the Federal Court. The result was inconsistent jurisprudence and ongoing confusion over the best standards for review.²⁹⁴

Dunsmuir steers towards increased deference

The 2008 Supreme Court of Canada case of *Dunsmuir v New Brunswick*²⁹⁵ aimed to simplify the standard of review framework²⁹⁶ for a tribunal's decision.²⁹⁷ The case collapsed *Pushpanathan*'s spectrum of reasonableness informed by case-specific factors into one single "reasonableness" standard of review. This single standard replaced the correctness standard²⁹⁸ and signified a rejection of using a variable scale of reasonableness to determine the

²⁹² Paul Daly, "Canada's Bipolar Administrative Law: Time for Fusion" (2014) 40 Queen's LJ 213 at 214. Daly asserts as false the distinction made between substance and procedure in Federal Court decisions in the applicable standard review of administrative decisions and argues for a universal deferential standard. *Ibid* at 216.

²⁹³ *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 22. See also *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 420 at para 199.

²⁹⁴ Alice Woolley & Shaun Fluker, "What has Dunsmuir Taught?" (2009-2010) 47 Alta L Rev 1017 at 1019-1020.

²⁹⁵ *Dunsmuir*, *supra* note 211.

²⁹⁶ Gerald Heckman, "Substantive Review in Appellate Courts since Dunsmuir" (2009) 47:4 Osgoode Hall LJ 751 at 752.

²⁹⁷ Woolley & Fluker, *supra* note 294 at 1021.

²⁹⁸ *Dunsmuir*, *supra* note 211 at para 34.

appropriate standard of review.²⁹⁹ The decision noted that administrative assessments of facts and law may lead to a number of acceptable and rational conclusions.³⁰⁰ The test of reasonableness, the justices found, required an assessment of the “justification, transparency, and intelligibility within the decision-making process”³⁰¹ to determine whether the decision-maker’s findings fell “within the reasonable range of possible, acceptable outcomes which are defensible in respect of the facts and law.”³⁰² Justices Bastarache and LeBel, speaking for the majority of the Court, made the conscious decision to move the standard away from “patent unreasonableness” –and towards either a standard of correctness or of reasonableness, depending on the facts.³⁰³

The majority also held that a reasonableness standard is presumed to apply when the decision-maker is applying the tribunal’s home statute or a closely related one to the facts³⁰⁴ or in cases where the home statute contains a privative clause.³⁰⁵ *Dunsmuir* emphasized the need for a reviewing judge to first figure out the correct standard of review before examining “the who, what, why and wherefore of the litigant’s complaint on the merits.”³⁰⁶

²⁹⁹ Indeed, Justice Binnie rejected the notion that there could be a range of reasonableness standards in the post-*Dunsmuir* decision of *Khosa* (*supra* note 290 at para 17).

³⁰⁰ *Dunsmuir*, *supra* note 211 at para 47.

³⁰¹ *Ibid* at para 47.

³⁰² *Ibid*. In their decision, the Supreme Court of Canada emphasized the importance of judicial review but also the need for courts to not overly interfere with administrative decisions: “As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation... Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.” *Ibid* at para 27.

³⁰³ *Ibid* at para 45.

³⁰⁴ *Ibid* at para 54.

³⁰⁵ *Ibid* at para 52. The existence of a privative clause in a statute is a strong indication that the legislative drafters intended for reviewing courts to defer to the expertise of the adjudicator when reviewing tribunal decisions, the Supreme Court explained. *Ibid* at para 18. However, the Court was also careful to point out that even the existence of a strong privative clause cannot “remove the judiciary’s power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government.” *Ibid* at para 31.

³⁰⁶ *Ibid* at para 154.

Further entrenching this deferential approach, the Court in this case specified that the majority of administrative law decisions involving issues of fact attract a reasonableness standard of review. In recognition of the legislature's role to create the law,³⁰⁷ the courts defer to a tribunal in cases where the first level decision was legal, reasonable, and fair.³⁰⁸ One of the few exceptions to the Court's deferential approach is a case involving a constitutional issue, such as a *Charter* challenge. If a constitutional question is put at issue, then the correctness standard applies, although sometimes it is not immediately clear to the court whether a constitutional question is at issue in the case.³⁰⁹

Binnie J.'s concurring opinion in *Dunsmuir* attempted to address the conflict between the adoption of clear categories to replace the situation-specific, factor-driven approach of *Pushpanathan*, noting somewhat paradoxically that multiple levels of deference exist within the reasonableness standard.³¹⁰ Echoing this view the following year in his 2009 *Khosa* decision, Binnie J. noted "reasonableness is a single standard taking its colour from the context."³¹¹

Writing for the majority of the Supreme Court of Canada, Justice Binnie in the *Khosa* case advocated for a deferential "reasonableness" approach even in cases where the enabling legislation did not include a privative clause because he felt that the legislature must have assumed that the courts would afford a level of deference because to do otherwise would

³⁰⁷ *Crevier v Quebec (Attorney General)*, [1981] 2 SCR 220 at 234-235. Daly, *supra* note 292 at 339 summarized this case as standing for the premise that "the Constitution requires judicial review must be available to keep decision makers within limits prescribed by legislatures." In *Dunsmuir*, *supra* note 211 at para 27, the court opined, "judicial review is intimately connected with the preservation of the rule of law."

³⁰⁸ *Canada (Attorney General) v TeleZone Inc* [2010] 3 SCR 585 at para 24.

³⁰⁹ Legal scholar Robert Leckey's 2004 article, "Territoriality in Canadian Administrative Law," critiques the Federal Court's tendency to part ways with the customary case-by-case "pragmatic and functional approach" of determining the appropriate standard of review when it encounters a constitutional question. Robert Leckey, "Territoriality in Canadian Administrative Law" (2004) 54:3 UTLJ 327 at 362.

³¹⁰ *Ibid* at para 139.

³¹¹ *Khosa*, *supra* note 290 at para 59.

render a tribunal pointless.³¹² Binnie J. based this view on *Dunsmuir*'s assertion that because of the possibility of multiple yet valid statutory interpretations, "courts ought not to interfere where the tribunal's decision is rationally supported."³¹³

Since Dunsmuir

Legal scholars have been divided on whether *Dunsmuir* marked a step forward or a step backward in judicial review of administrative decisions. Several have heralded the practical focus of its non-interventionist stance to judicial review as a sensible approach.³¹⁴ Legal scholar Diana Ginn praised *Dunsmuir*'s focus on legislative intent as the means to resolve previous uncertainty in the jurisprudence about the appropriate standard of review of administrative decisions.³¹⁵

However, other scholars have remarked that the *Dunsmuir* decision leaves unanswered questions on how reviewing Federal Court judges determine the proper standard of review and whether the *Pushpanathan* factors still play a role in selecting the appropriate standard.³¹⁶ One of the fiercest critics of the *Dunsmuir* decision has been Paul Daly, who has written several articles arguing that it fails to offer any clarity on how reviewing judges should select the appropriate standard of review.³¹⁷ He asserts that the *Dunsmuir* decision marginalizes the nuanced approach of the *Pushpanathan* factors in determining the right level of deference.³¹⁸ He also claims that *Dunsmuir*'s simplified, categorical approach does not work in reality

³¹² *Ibid* at para 55.

³¹³ *Dunsmuir*, *supra* note 211 at para 41.

³¹⁴ Heckman, *supra* note 296 at 784-785 & Diana Ginn, "New Words for Old Problems: The *Dunsmuir* Era" (2010) 37:3 *Advocates' Q* 317 at 320.

³¹⁵ *Ibid* at 330.

³¹⁶ See Ron Goltz, "Patent Unreasonableness is Dead – And we have killed it – a critique of the Supreme Court of Canada's Decision in *Dunsmuir*" (2008) 46 *Alta L Rev* 253.

³¹⁷ Paul Daly, "The Unfortunate Triumph of Form Over Substance in Canadian Administrative Law" (2012-2103) 50 *Osgoode Hall LJ* 317 at 216-218 & Paul Daly, "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 *McGill LJ* 483.

³¹⁸ *Ibid* at 487.

because the categories it creates can conflict with one another, creating uncertainty about the appropriate standard.³¹⁹

Supporting this conclusion, Alice Woolley and Shaun Fluker observed in their empirical study of Alberta Court of Appeals decisions that *Dunsmuir*'s lack of clarity on *stare decisis* has led to inconsistent application in Alberta Court of Appeals decisions.³²⁰ Daly has also pointed out the flaws of the Court's deferential approach towards administrative decisions by focusing on a tribunal's home statute, pointing out that a correctness standard may be appropriate in cases where the home statute is overly general or in those involving a question of law.³²¹

Newfoundland Nurses entrenches the deferential approach

The 2011 Supreme Court of Canada decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*³²² further entrenched *Dunsmuir*'s call for a deferential approach for judicial reviews of most administrative decisions. The Court advised reviewing judges that, in cases where they find the administrative decision-maker's reasons unclear or lacking, they should "first seek to supplement them before it seeks to subvert them."³²³ To do so, reviewing judges should look at the tribunal record³²⁴ and pay "respectful attention to the reasons offered or which could be offered in support of a decision."³²⁵ The case indicates that insufficiency of reasons in an administrative decision is no longer grounds

³¹⁹ *Ibid* at 488.

³²⁰ Woolley & Fluker, *supra* note 294 at 1025 and 1028. On page 1028, the authors assert *Dunsmuir* erroneously mixed "precedent within the standard of review analysis" (*Ibid* at 1028).

³²¹ Daly, *supra* note 317 at 342-343.

³²² *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* [2011] 3 SCR 708.

³²³ *Ibid* at a para 12.

³²⁴ *Ibid* at para 15.

³²⁵ *Ibid* at para 11.

to have a decision reviewed³²⁶ as long as there is sufficient information in the determination to allow a reviewing judge to understand why the tribunal made its decision and then decide whether the tribunal's decision was within a range of acceptable outcomes.³²⁷

Despite its clear emphasis on deference, *Newfoundland Nurses* does not signal that judicial reviews always mean a rubber stamp approval of administrative determinations. While *Newfoundland Nurses* permits "reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn," it does not authorize reviewing judges to speculate as to what the tribunal might have been thinking when there is no evidence to logically support this conclusion.³²⁸ The Federal Court noted recently in *Komolafe v Canada*, a 2013 judicial review of the denial of a skilled worker application,³²⁹ that the failure of administrative decision-makers to provide reasons when they are required (presumably in cases where the decision-maker's intent cannot be guessed by context) would warrant a decision being set aside.³³⁰ Nevertheless, *Newfoundland Nurses* represents a fundamental turn towards discretion in administrative tribunal decision-making.

The judiciary's strong turn to deference in judicial reviews of administrative decisions unfortunately comes at a time when refugee law is moving in a new and more restrictive direction. The recent regulatory changes may have a serious impact on decision-makers' credibility assessments (for example, in the case of errors or omissions in the new BOC form). With increasing deference, the Federal Court is less likely than at any other point in Canadian history to supervise the tribunal's implementation of these changes and to ensure basic

³²⁶ *Ibid* at para 14.

³²⁷ *Ibid* at para 16. See also *Millik v Canada (Citizenship and Immigration Canada)*, 2015 FC 82 at para 19.

³²⁸ *Ibid* at para 11.

³²⁹ *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 1.

³³⁰ *Newfoundland Nurses*, *supra* note 322 at para 22.

procedural fairness for claimants. There will therefore be fewer opportunities for women with gender-related claims to seek judicial review of decision-makers' substantive adherence to the advice of the Gender Guidelines.

2.4. Legal Standards for Credibility, Plausibility and Internal Flight alternatives

2.4.1 Credibility

Credibility—the assessment of whether or not a claimant is telling the truth-- is a crucial aspect of the refugee claim determination process. It is a subjective assessment of verbal and non-verbal cues that surround a claimant's spoken words to determine if the claimant's testimony and previous oral and written statements are “coherent and plausible, not contradicting generally known facts, and [] therefore, on balance, capable of being believed.”³³¹ Factors such as “demeanor, frankness, readiness to answer, coherence, and consistency”³³² can all influence institutional evaluations of credibility.

As Michael Kagan writes, “Defining credibility in terms of being *believable* rather than being *believed* makes clear that an adjudicator should in some cases accept the credibility of applicants he or she may personally mistrust, since another reasonable person may find the applicant believable.”³³³ This notion of a believable rather than believed claimant espoused by UNHCR and scholars like Michael Kagan stands in contrast to Canadian case law placing emphasis on the individual decision-maker's credibility assessment rather than turning credibility assessments into a question of whether a reasonable person might believe the claimant.

³³¹ UNHCR, *Note on Burden and Standard of Proof In Refugee Claims* (16 Dec 1998) at 3.

³³² *Tong v Canada (Secretary of State)*, [1994] FCJ No 479 at para 3 as quoted in *Li v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1242 at para 17.

³³³ Michael Kagan, “Is Truth in the Eye of the Beholder - Objective Credibility Assessment in Refugee Status Determination” (2002-2003) 17 *Geo Immigr LJ* 367 at 381.

Canadian jurisprudence has placed credibility determinations as a matter that is within the “heartland of discretion of triers of fact.”³³⁴ The decision-maker’s evaluations of credibility are therefore highly influential on the outcome of a claim in part because these evaluations are given great deference by a reviewing court.³³⁵ However, a decision-maker’s credibility determination can be formed through his or her observations of factual inconsistencies or contradictions in the claimant’s testimony, the failure to respond to a question or her perceived evasiveness and/or her apparent confusion in answering questions.³³⁶ Even in cases where the reviewing court clearly does not agree with the decision-maker’s credibility assessment, the decision will stand unless the assessment was “made in a perverse and capricious manner, without due regard for the evidence.”³³⁷

As refugee law heavily emphasizes testimonial evidence due to the lack of documentary evidence, a claimant’s credibility is a crucial assessment in the evaluation of many claims,³³⁸ often leading to the acceptance or rejection of the claim.³³⁹ Particularly in a claim where the persecutor is a non-state actor, as is the case in many gender-related claims, the claimant’s testimony is often the majority of the case evidence.³⁴⁰

Despite credibility’s determinative role in many cases,³⁴¹ there are few hard and fast

³³⁴ *LLR v Canada (Citizenship and Immigration)*, 2008 FC 1214 at para 19. See also *RLU v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 7.

³³⁵ *Rahaman v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1800 at para 38.

³³⁶ *Ibid.*

³³⁷ *Tosha v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1741 at para 24.

³³⁸ Kagan, *supra* note 333 at 368, stating, “Despite advancement in broadening the interpretation of the refugee definition (for instance, by recognizing gender-related persecution claims), correct application of the Refugee Convention still depends on reliable credibility judgments.”

³³⁹ Hathaway & Foster, *supra* note 14 at 83.

³⁴⁰ In cases where a claimant’s testimony forms the heart of the case evidence, the decision-maker’s credibility determination becomes analogous to the suppression of evidence in criminal cases. Kagan, *supra* note 333 at 371.

³⁴¹ Australian legal scholar Guy Coffey illustrates the centrality and complexity of assessments of credibility in refugee determinations, writing: “Credibility evidence is both conceptually elusive and adjudicatively influential... The assessment of credibility is acknowledged as a necessary and unavoidable accompaniment to

rules decision-makers can use in determining whether a claimant is credible, unlike the wealth of jurisprudence describing the *Convention*-based grounds. Unfortunately, there are considerable differences in how individual decision-makers assess a claimant's credibility. In their 2002 study, Cr peau and Nakache concluded that there was no common understanding amongst decision-makers about how claimant credibility should be evaluated.³⁴² They found that each decision-maker approached the basic establishment of facts differently wherein the decision-makers' preconceived notions about the claimants informed how they evaluated inconsistencies and discrepancies in claimant testimony.³⁴³ Based on an extensive set of interviews with institutional actors, Cr peau and Nakache concluded that some decision-makers do not make sound credibility assessments in that they failed to "appropriately identify and assess the relevant evidence."³⁴⁴

The assessment of evidence in credibility assessments is complicated by the fact that the objective and subjective elements of the assessment are enmeshed with one another. As former IRB decision-maker Audrey Macklin comments: "It is frequently difficult to articulate in rational terms why one does, or does not, believe another. Decision-makers may put a lot of faith in their 'gut feelings' about credibility, but recognize that gut feeling does not amount to a legally defensible basis for a decision."³⁴⁵ From an institutional perspective, achieving consistent and predictable credibility assessments among similarly situated claimants involves a difficult balancing act between taking reasonable measures to ensure consistency and

the weighing of a witness's evidence." Guy Coffey, "The Credibility of Credibility Evidence at the Refugee Review Tribunal" (2003) 15 Int'l J of Refugee L 377 at 377.

³⁴² Cr peau & Nakache, *supra* note 275 at 99. The authors did not elaborate on the specifics of the different ways decision-makers approached credibility but said that their interviews with decision-maker showed "no common understanding of the objectives underlying the assessment of the refugee claimant's credibility." *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ *Ibid* at 112.

³⁴⁵ Macklin, *supra* note 31 at 134.

allowing decision-makers the flexibility to make judgments based on their own observations and assessments.³⁴⁶

Although one of the functions of the Gender Guidelines is to inform the decision-maker's assessment of credibility,³⁴⁷ a judicial review of a credibility assessment nonetheless attracts a reasonableness standard of review because it involves an application of law to facts. The Federal Court supported this principle when it held in *Hernandez*, "Where the Guidelines are used as part of the assessment of credibility, they become subsumed in the standard of review of reasonableness as applied to credibility findings."³⁴⁸

2.4.2 Plausibility

Determinations on the plausibility of a claimant's account of her experience of persecution are conceptually distinct from credibility assessments but these two judgments are often lumped in together in decision-maker's findings. For example, the IRB decision-maker in the 2006 *RMY* case "did not believe it was credible or plausible that the authorities would not have helped Ms. RMY if she had gone to them" for help to escape her abusive spouse.³⁴⁹ Neither the decision-maker nor the reviewing Federal Court judge clearly distinguished whether the claimant's evidence relating to the availability of state protection was an untrue accounting of events (and therefore not credible) or an impossible set of facts (and therefore implausible). Instead of inquiring into whether it was reasonable for the decision-maker to conclude no one in RMY's position could have had the experience she described, the reviewing Federal Court

³⁴⁶ See Katie Eyer, "Administrative Adjudication and the Rule of Law" (2008) 60 Admin L Rev 647 at 662 in which Eyer explains that a legal system permitting unfettered discretion would make ensuring consistency and predictability almost impossible.

³⁴⁷ *VMU v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 274 at para 6.

³⁴⁸ *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 106 at para 11.

³⁴⁹ *RMY v Canada (Minister of Citizenship and Immigration)*, 2006 FC 871 at para 9.

judge concentrated his examination on whether the decision-maker's credibility conclusions were reasonable.

Unlike credibility findings based on assessments of the claimant's actual experiences, a decision-maker's implausibility finding questions whether the factual circumstances of the claimant's story could not have logically occurred to any similarly situated person. In an oft-quoted passage from *Immigration Law and Practice*, Lorne Waldman explains:

§ 8.22 Plausibility findings should only be made in the clearest of cases - where the facts as presented are either so far outside the realm of what could reasonably be expected that the trier of fact can reasonably find that it could not possibly have happened, or where the documentary evidence before the tribunal demonstrates that the events could not have happened in the manner asserted by the claimant. Plausibility findings should therefore be "nourished" by reference to the documentary evidence. Moreover, a tribunal rendering a decision based on lack of plausibility must proceed cautiously, especially when one considers that refugee claimants come from diverse cultures, so that actions which might appear implausible if judged by Canadian standards might be plausible when considered within the context of the claimant's background.³⁵⁰

Despite the apparently objective nature of plausibility assessments, they contain "subjective assessments which are largely dependent on the individual Board member's perceptions of what constitutes rational behaviour."³⁵¹

The level of deference the Federal Court affords a tribunal's negative plausibility finding is considerably lower than the deference given a negative credibility determination. While the RPD has jurisdiction to determine the plausibility of testimony,³⁵² the reviewing court has the right to intervene when the tribunal has drawn unreasonable inferences³⁵³ on the

³⁵⁰ Waldman, *supra* note 39 at s 8.22.

³⁵¹ *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937 at para 15.

³⁵² *Divsalar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 653 at para 22. In the case of *Aguebor v Canada (Minister of Employment and Immigration)*, 160 NR 315 at para 4, the Federal Court of Appeals rhetorically asked: "There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences?"

³⁵³ *Ibid.*

plausibility of the claimant's narrative or in cases where the plausibility conclusions are based on speculation³⁵⁴ and are not supported by evidence.³⁵⁵ The Federal Court in *Cao v Canada (Minister of Citizenship and Immigration)* pointed out that, "(w)ith respect to a finding of implausibility, the Court is often just as capable as the Board at deciding whether a particular scenario or series of events described by the claimant might reasonably have occurred."³⁵⁶ However, several Federal Court cases have gone a step further to suggest that IRB decision-makers should only make negative plausibility findings "in the clearest of cases"³⁵⁷ and that the decision-maker should plainly set out the rationale and the facts on which the negative plausibility conclusion is based.³⁵⁸

2.4.3 Internal Flight Alternative

A decision-maker's decision on whether an IFA is available to the claimant forms part of the analysis of whether the claimant is "unable to avail himself of the protection" of his or her country rather than an independent test of refugee status.³⁵⁹ IFA determinations are a crucial part of refugee determinations³⁶⁰ and, according to the UNHCR, are increasingly important to decision-makers.³⁶¹ In the influential Federal Court cases of *Rasaratnam*³⁶² and

³⁵⁴ *Beltran v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1475 at para 8.

³⁵⁵ *Yada v Canada (Minister of Employment and Immigration)*, [1998] FCJ No 37 (QL) at para 25 ("the court may intervene on judicial review and set aside the finding where the reasons that are stated are not supported by the evidence before the panel, and the court is in no worse position than the hearing panel to consider inferences and conclusions based on criteria external to the evidence such as rationality, or common sense.")

³⁵⁶ 2007 FC 819 at para 7.

³⁵⁷ *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 776 at para 7.

³⁵⁸ *Santos*, *supra* note 352 at para 15 ("The appropriateness of a particular finding can therefore only be assessed if the Board's decision clearly identifies all of the facts which form the basis for their conclusions. The Board will therefore err when it fails to refer to relevant evidence which could potentially refute their conclusions of implausibility").

³⁵⁹ UNHCR, "Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (23 July 2003) HCR/GIP/03/04 [UNHCR IFA Guidelines] at para 2 & 3.

³⁶⁰ *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 at 710.

³⁶¹ UNHCR IFA Guidelines, *supra* note 359 at para 1.

³⁶² *Rasaratnam*, *supra* note 360.

*Thirunavukkarasu*³⁶³ (decided in 1992 and 1994 respectively), the court established that a claimant with an otherwise valid claim must convince a decision-maker “on a balance of probabilities” that there is no other part of the country where the claimant could escape a serious possibility of persecution.³⁶⁴ The IFA cannot be any alternative location within a claimant’s country of origin but rather must be a location that is reasonable under the circumstances for a claimant to live safely taking into consideration financial, logistical, or other barriers.³⁶⁵

The Gender Guidelines remark on special considerations that decision-makers should address when determining a claimant’s reasonably available IFAs: “decision-makers should consider the ability of women, because of their gender, to travel safely to the IFA and to stay there without facing undue hardship.”³⁶⁶ In order to reasonably evaluate the claimant’s ability to travel to and stay in an IFA, the decision-maker must take into consideration the claimant’s cultural and socio-economic contexts (as well as factors like age and disability) and their intersections with the claimant’s gender.

2.4.4 Availability of State Protection

Each country is presumed to have the ability to protect its own citizens from persecution unless there is evidence to suggest otherwise. In order to succeed in a claim for refugee protection, the claimant must give testimony that her country of origin is either unable or unwilling to protect her against harm.

The Gender Guidelines direct decision-makers to evaluate whether state protection is reasonably available to a gender-related claimant. They advise:

³⁶³ *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* [1994] 1 FC 589.

³⁶⁴ *Rasaratnam*, *supra* note 360 at 710.

³⁶⁵ *Thirunavukkarasu* *supra* note 363.

³⁶⁶ Gender Guidelines, *supra* note 5 at C.

- “A gender-related claim cannot be rejected simply because the claimant comes from a country where women face generalized oppression and violence;
- “Decision-makers should consider evidence indicating a failure of state protection if the state or its agents in the claimant’s country of origin are unwilling or unable to provide adequate protection from gender-related persecution;
- “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.
- “In determining whether the state is willing or able to provide protection to a woman fearing gender-related persecution, decision-makers should consider the fact that the forms of evidence which the claimant might normally provide as “clear and convincing proof” of state inability to protect, will not always be either available or useful in cases of gender-related persecution.”
- “A change in country circumstances, generally viewed as a positive change, may have no impact, or even a negative impact, on a woman’s fear of gender-related persecution.”³⁶⁷

The decision-maker’s state protection analysis must therefore consider the claimant’s factual circumstances.

2.5. Relevancy, Judicial Notice and Hearsay

2.5.1 Defining Relevancy

Once the decision-maker has received all the evidence at issue in a refugee determination, he or she must then winnow out the evidence he or she considers irrelevant to the legal issue. What is left, the relevant evidence, is then used by the decision-maker to establish or refute the legally determined “key” facts to a case. Evidence can include facts the claimant has directly experienced, such as observations or events. Evidence can also be circumstantial, which requires the decision-maker to draw an inference or conclusion about whether a claimant has suffered persecution from one or several indirect facts.³⁶⁸ In attempting to

³⁶⁷ Gender Guidelines, *supra* note 5 at C.

³⁶⁸ JW Deese (Hon), “Relevancy of Evidence in Administrative Law Proceedings” (1987) 7 J Nat’l Ass’n Admin L Judges 38 at 39.

accomplish the difficult task of assessing credibility, the decision-maker may directly or indirectly draw on a host of sources, including:

- a) documents available to him or her on the claimant and/or the country of origin; the testimony of other witnesses;
- b) the decision-maker's past experience;
- c) his or her general knowledge about the area of inquiry;
- d) and/or conscious or subconscious assumptions or "gut feelings" about the claimant.

Philosophy professor Paola Garbolino characterizes "relevant" evidence as those markers that share causal connections significantly different than chance.³⁶⁹ What one considers relevant to a given event varies greatly with both the context of the occurrence and the outlook of the person viewing or recounting it. There are several consequences for the claim if the claimant fails to provide evidence considered relevant and material to the facts to be proven. If the claimant's evidence does not mesh with the evidence the decision-maker considers relevant, the decision-maker is likely to either give it little probative value or exclude it altogether as "irrelevant".³⁷⁰ Even if he or she allows it as evidence, it may be given little weight compared to independent evidence on country conditions, for example, that the decision-maker may use to impugn the claimant's credibility. As one former decision-maker explained: "Relevance is the key category.... This is pertinent to that, so you define issues and based upon issues, you ask questions that are relevant to those issues."³⁷¹

Credibility and Relevance

Relevancy determinations involve the interaction between the facts of the case as presented by the claimant and a careful assessment of whether the claimant's presentation of these facts rings true, that is whether the account is "plausible, credible, and frank".³⁷² The tribunal's

³⁶⁹ Paolo Garbolino, "Explaining Relevance" (2001) 22 Cardozo L Rev 1503 at 1512.

³⁷⁰ Deese, *supra* note 368 at 40.

³⁷¹ Crépeau & Nakache, *supra* note 275 at 74.

³⁷² Hathaway & Foster, *supra* note 14 at 84.

credibility assessment is not just based on the decision-maker's own background and experiences but also on documents and people who can help provide context to the claim. In assessing a claimant's credibility, decision-makers can and often do access a number of resources to assist decision-making, including documentary support, such as country and case-specific materials from the Research Directorate.³⁷³ Decision-makers may also draw on other experts present at the hearing such as an interpreter, a Minister's representative, and counsel.³⁷⁴

All of these sources of information inform the decision-maker's analysis of what seems logical or sensible in the claimant's account of persecution.³⁷⁵ In addition, although decision-makers strive to be as neutral as possible, the decision-maker's pre-existing assumptions can influence his or her ability to understand the context of the claimant. These might include the decision-maker's past experiences, gender, age, race, or socio-economic status.³⁷⁶

The IRB decision-maker's assessments of the claimant's credibility and available IFAs are closely linked with the decision-maker's understandings about the circumstances of the claimant, including the claimant's age, experience, or socio-economic background. A 2010 study evaluating Canadian IRB determinations of refugee claims based on gender identity or sexual orientation (including gay men, lesbians, bisexuals, and transgender people) by Jessica Young found that the analysis used for availability of an IFA systematically disadvantaged these claimants because decision-makers considered IFAs that required sexual minorities to

³⁷³ France Houle, "The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience" (1994) 6 Int'l J Refugee L 6 at 8.

³⁷⁴ Selwyn A Pieters, "Assessment of credibility in the context of a Refugee Protection Division Hearing is not an exact science – it is the art that makes or breaks a Refugee Claim," (2004) 31 Imm L Rev (3d) 276 at 277.

³⁷⁵ *Faryna v Chorny*, [1952] 2 DLR 354 (BC Ct of App) The court held that the judge may not make a credibility simply on the basis of who makes a good witness but rather based on all "elements and probabilities" ("Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility").

³⁷⁶ See the Data Chapter for discussion of this issue.

act “discreetly” regarding their sexual orientations to be reasonable options.³⁷⁷ In her 2002 review of sexual orientation cases, Jenni Millbank also found that Australian decision-makers considered IFAs that required the claimant to act discreetly to be reasonable but, unlike Young’s 2010 study, did not observe this expectation in the Canadian decisions she reviewed.³⁷⁸

The decision-maker’s views on the claimant’s particular social and cultural circumstances also impact how he or she analyzes a certain action as sensible, or a turn of events as possible or impossible. For example, in a gender-based claim involving domestic violence, a decision-maker may deny a claim because the claimant had knowledge of legal avenues that existed to seek state protection; had the ability to access those avenues; and did not do so.

The credibility of the claimant herself and the credibility of the evidence she gives are closely linked. In the *Abdulkhaliq Ali Sheikh v Canada (MEI)*, the Federal Court explained:

The concept of “credible evidence” is not, of course, the same as that of the credibility of the applicant, but it is obvious that where the only evidence before a tribunal linking the applicant to his claim is that of the applicant himself ... a tribunal’s perception that he is not a credible witness effectively amounts to a finding that there is no credible evidence on which the second-level tribunal could allow his claim.... even without disbelieving every word an applicant has uttered, a first-level panel may reasonably find him so lacking in credibility that it concludes there is no credible evidence relevant to his claim on which a second-level panel could uphold that claim. In other words, a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony.³⁷⁹

Thus, while conceptually distinct, a decision-maker’s assessment of claimant credibility

³⁷⁷ Jessica Young, “Alternate Refuge Concept: A Source of Systematic Disadvantage to Sexual Minority Refugee Claimants” (2010) 60 UNBLJ 294 at 327.

³⁷⁸ Jenni Millbank, “Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia” (2002) 26 Melb U L Rev 144 at 171.

³⁷⁹ *Abdulkhaliq Ali Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238 at 244 (as quoted in *Rahaman v Canada (MCI)*, Docket: IMM-1112-99 at para 55).

directly informs and influences her/his assessment of the testamentary evidence and vice versa.

2.5.2 Judicial Notice of Specialized Knowledge

Decision-makers are permitted to “take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge.”³⁸⁰ Under the Refugee Protection Division Rules, the RPD is permitted to take into account this specialized knowledge as long as the claimant (and the Minister’s representative, if present) is notified of it and given the opportunity to respond with submissions and evidence on the reliability of the specialized knowledge to the case.³⁸¹ This knowledge can include personal or professional experiences that the decision-maker has had with claimants from a particular country; news reports related to the basis for the claim; and/or personal experiences.

In gender-related claim evaluation, the use of judicial notice encompasses the use of specialized knowledge about gender-related persecution. While decision-makers are not obligated to cite the Gender Guidelines an informational resource, the Federal Court has repeatedly stated that it is “incumbent on the Board to exhibit a special knowledge of gender persecution and to apply the knowledge in an understanding and sensitive manner.”³⁸² Decision-makers can demonstrate their substantive adherence to the Guidelines by taking judicial notice during the hearing of his or her understanding of a particular type of gender-related harm and the social or cultural context in which the harm occurred.³⁸³

³⁸⁰ *IRPA*, *supra* note 1 at s 170(i).

³⁸¹ *Refugee Protection Division Rules*, SOR/2012-256.

³⁸² *AQU*, *supra* note 124 at para 16. *See also*, *SBK v Canada (Minister of Citizenship and Immigration)*, 2005 FC 56 at para 14; *PRO v Canada (Citizenship and Immigration)*, 2007 FC 796 at para 9 & *Danelia v Canada (Citizenship and Immigration)*, 2014 FC 707 at para 31 (both *PRO* and *Danelia* quote *SBK*, *supra* note 382 at para 14).

³⁸³ As the reviewing judge in the *SBK* case pointed out, “substance prevails over form when considering whether the principles in the guidelines were properly applied.” *SBK*, *supra* note 382 at para 15.

2.5.3 The Lack of a Hearsay Rule

As mentioned previously, in the administrative context of refugee determinations, decision-makers are not bound by typical rules of evidence and are empowered by statute to “receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances.”³⁸⁴ These inquisitorial proceedings can be relatively informal,³⁸⁵ taking into account factors related to fairness and natural justice,³⁸⁶ in order to provide a full hearing on the issues.³⁸⁷

The usual legal customary rules about what constitutes relevant evidence do not apply in refugee law contexts. In most litigated contexts, the types of evidence a claimant can bring forward to prove a particular fact are limited to the claimant’s personal knowledge (the common law “hearsay rule”³⁸⁸). *The Canada Evidence Act*³⁸⁹ supplements common law understandings of admissible evidence through codification and augmentation of these norms. Although refugee law, like criminal law (which limits admissible evidence), deals in basic freedoms, *The Immigration and Refugee Protection Act*³⁹⁰ does not limit the type of evidence considered admissible at a hearing. The ability to present any evidence, even that which would be considered hearsay in court, is intended to allow a refugee claimant to give as much testimony as possible in support of her claim. In addition, Section 165 of *IRPA* grants members

³⁸⁴ *IRPA*, *supra* note 1 at s 170(g) & (h).

³⁸⁵ *Kumar v Canada (MCI)*, 2009 FC 643, at para 28 & *Thamotharem v Canada (MCI)*, 2007 FCA 198; [2008] 1 FCR 385 at para. 35 (noting “the content of the duty of fairness varies with context”).

³⁸⁶ *IRPA*, *supra* note 1 at s 162(2).

³⁸⁷ *Ibid* at s 165.

³⁸⁸ Justice McLachlin summarized the common law hearsay rule as standing for the principle “that out-of-court statements could not be admitted for the truth of their contents unless they fit into one of the established exceptions to the rule.” *R v F(WJ)*, [1999] 3 SCR 569 at 580.

³⁸⁹ *Canada Evidence Act*, RSC, 1985, c. C-5.

³⁹⁰ *IRPA*, *supra* note 1.

of the Refugee Protection Division “the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and may do any other thing they consider necessary to provide a full and proper hearing.”³⁹¹ The *Act* also gives commissioners the power to summon witnesses; require them to give oral or written evidence on oath; and produce any documents the commissioner deems necessary to a full investigation.³⁹² Section 170 of *IRPA* describes the basic rules of refugee proceedings:

The Refugee Protection Division, in any proceeding before it,
(a) may inquire into any matter that it considers relevant to establishing whether a claim is well-founded;
(b) must hold a hearing...
(g) is not bound by any legal or technical rules of evidence;
(h) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances; and
(i) may take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge.³⁹³

Unbound by the customary evidentiary structures present in formal courts, refugee determinations are permitted to consider any fact or piece of evidence although claimants tend to introduce the majority of evidence through their written and oral testimony.³⁹⁴ A claimant cannot object to a particular piece of evidence’s admissibility to the proceedings as she might be able to in a typical court setting. A decision-maker may admit but give little weight to a certain piece of evidence or refuse to admit it altogether.³⁹⁵

³⁹¹ *Ibid* at s 165.

³⁹² *Inquiries Act*, RSC, 1985, c. I-11 at s 4.

³⁹³ *IRPA*, *supra* note 1 at s 170.

³⁹⁴ Melanie A Conroy, “Real Bias: How REAL ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants” (2009) 24:1 Berkeley J Gender L & Just 1 at 11.

³⁹⁵ Legal Service, “Memorandum: Weighing Evidence,” *supra* note 269 at s 3.2.1.

2.6 Non-judicial Factors in Administrative Decision-making

2.6.1 Impact of Memory Problems on Credibility Assessment

Omissions and inconsistencies between different instances of testimony (for example, at the port-of-entry versus at the hearing) can be used to discredit the claimant's credibility as a witness.³⁹⁶ While a claimant's ability to recall can be affected by context and the passage of time, her credibility can hang in the balance if her testimony is inconsistent.

There is often variability in the memory function of individuals in an everyday context.³⁹⁷ A person's memory recall is never an exact duplication of events. Legal scholar Juliet Cohen writes:

For long-term memory, visual, verbal, and auditory information is thought to be coded by meaning, and then linked to related information and associations. Consequently, what is recorded is not an accurate copy of the data but an interpretation. What we remember is influenced by what we already know. Details tend to be lost over time and become generalized, sometimes merging with similar memories.³⁹⁸

Drawing on numerous psychological studies, scholar Jessica Choudhary explains:

Memory is malleable and complex; it is not a fixed entity. For example, intellectual capacity and emotional capacity can have an impact on a person's ability to retrieve events from memory, both at the time the event occurs and at the time of the retelling. In terms of long-term memory, "visual, verbal and auditory information is thought to be coded by meaning, and then linked to related information and associations." As a result, "what is recorded is not an accurate copy of the data but an interpretation. What we remember is influenced by what we already know."³⁹⁹

A claimant's mental state, including post-traumatic stress disorder, depression, sleep deprivation, and physical trauma, can have a further impact on the person's ability to recall.⁴⁰⁰

³⁹⁶ *STA v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571 at para 30.

³⁹⁷ Juliet Cohen, "Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers" (2001) 13 Int'l J Refugee L 293.

³⁹⁸ *Ibid* at 295.

³⁹⁹ Choudhary, *supra* note 206 at 41.

⁴⁰⁰ Cohen, *supra* note 397 at 294; Aoife Drudy, "Credibility Assessments and Victims of Female Genital Mutilation: A Re-evaluation of the Refugee Determination Process" (2006) 14:1 Irish Student LJ 84 at 92; & Choudhary, *supra* note 206 at 40. Choudhary notes "memory loss, memory subjectivity, change of events due

Psychological issues, particularly post-traumatic stress disorder in domestic violence cases, were frequently at issue in the gender-related claims in my study.⁴⁰¹ Inconsistency, vagueness, omissions, or delay in a claimant's testimony may also be affected by factors such as physical and mental health, age, lack of education, social status, cultural traditions, and feelings of shame.⁴⁰² Difficulties can also arise when the setting of recall (the hearing) diverges radically from the initial setting of memory coding of a certain experience.

2.6.2. *The Influence of Counsel*

In addition to decision-makers, the claimant's own advisors, such as community workers, friends, or lawyers, play important roles in how gender-related claims are articulated.⁴⁰³ Scholars have also demonstrated in the United States and Canada that a claimant's ability to be represented by legal counsel dramatically increases the likelihood of a successful claim. In the United States, Ramji-Nogales et al. found at the immigration court level that legal representation increased the likelihood of success by 30%⁴⁰⁴ and that refugee claimants represented by legal counsel were three times more likely to receive positive decisions than unrepresented claimants.⁴⁰⁵

In Canada, Osgoode Hall legal scholar Sean Rehaag found through an empirical study of Canadian refugee determinations that representation was crucial to claimant success.⁴⁰⁶

to confusion, repression or dissociation, psychiatric disease, and cultural norms" all can influence decisions and should be taken into consideration. *Ibid.*

⁴⁰¹ See e.g. *NKU v Canada (Citizenship and Immigration)*, 2009 FC 687, *ACA v Canada (Citizenship and Immigration)*, 2010 FC 1313, *EDE v Canada (Citizenship and Immigration)*, 2010 FC 559, *DKA v Canada (Citizenship and Immigration)*, 2012 FC 1078, *PKA v Canada (Citizenship and Immigration)*, 2012 FC 1379, *EPJ v Canada (Citizenship and Immigration)*, 2013 FC 376.

⁴⁰² United Kingdom Home Office, "Asylum Policy Instruction: Assessing Credibility and Refugee Status" (6 January 2015) at 14.

⁴⁰³ Robert F Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (Montreal: John Benjamins Publishing Company, 1994) at 5.

⁴⁰⁴ Jaya Ramji-Nogales, Andrew I Schoenholtz, & Philip G Schrag, "Refugee Roulette: Disparities in Asylum Adjudication" (2007-2008) 60 *Stan L Rev* 295 at 384.

⁴⁰⁵ *Ibid* at 376.

⁴⁰⁶ Rehaag, *supra* note 231.

Rehaag's study found that unrepresented claimants were almost four times more likely to withdraw or have the IRB declare their claims abandoned than lawyer-represented claimants.⁴⁰⁷ He also noted that claimants represented by non-lawyer legal consultants were more likely to succeed than their unrepresented counterparts but less likely to succeed than claimants who had lawyers.⁴⁰⁸

2.7 Chapter Conclusion

The trend towards a categorical rather than a situationally specific approach to standard of review is appealing in its simplicity, particularly at a time when administrative laws affecting refugees are becoming more complex.⁴⁰⁹ This simplicity, though, comes at a cost. The move away in *Dunsmuir* from *Pushpanathan*'s fluid set of factors, cumbersome though they are, has meant less focus on the specific circumstances of a case and a general paintbrush of deference being applied to all but the most egregious of cases where the court finds there is a breach of natural justice or a constitutional issue at issue.

The lack of attention to the claimant's socio-economic or cultural circumstances, for example, is particularly troublesome for gender-based claims of persecution due to the heightened importance of these issues in persecution cases involving the private sphere. The Gender Guidelines advise decision-makers to consider and evaluate evidence differently in gender-based claims than in others, particularly with regard to the credibility and plausibility of a claim. Unfortunately, using a standard of deference means that this gender-sensitive lens is not carried forward to the Federal Court level of judicial review. The reviewing court's

⁴⁰⁷ *Ibid* at 87.

⁴⁰⁸ *Ibid*.

⁴⁰⁹ For example, the new legislative changes brought with it new timelines related to designated foreign nationals and designated countries of origin claimants and new limits on applications for humanitarian and compassionate relief.

failure to recognize that the range of acceptable outcomes might look different in a gender-based claim than a non-gender-based one means that relevant evidence may be ignored.

3.1 The Importance of Context on Credibility

The Gender Guidelines are often held up as an illustration that the Canadian refugee determination system has measures to ensure that claimants are able to offer evidence in an environment that is sensitive to them.⁴¹⁰ However, the Gender Guidelines may be contributing to an overly simplistic understanding of gender as it relates to persecution. Canadian refugee law scholar Nicole Laviolette argued the understanding of gender-related persecution in the Guidelines does not adequately encompass all types of gender-related persecution⁴¹¹ because they do not provide a comprehensive understanding of the ways in which people can face persecution for the transgression of gendered social hierarchies.⁴¹²

Each case brings with it a unique mix of factors that influence the claimant's experience of persecution, including other axes of oppression and/or other aspects of identity outside of the identified grounds. Joanne Erdman and Andrea Sanche argue that guidelines on gender-related claims must account for these multiple facets to effectively inform refugee decisions.⁴¹³ They explain, "Interpretive guidelines in refugee law must be cognizant of the intersection among and between nationalism, sexuality, gender, and race. A woman's gender should not eclipse any other aspect of her identity."⁴¹⁴ The failure of some decision-makers to appreciate the possible intersections between the claim and other facets of the claimant's life

⁴¹⁰ Deepti Asthana, "Gender Politics: Refugee Definition and the Safe Third Country Agreement" (2011) *Geo J of Gender & the L* 1 at 7; Erdman & Sanche, *supra* note 141 at 77; Andrea E. Bopp-Stark, "Post traumatic Stress Disorder in Refugee Women: How to Address PTSD in Women Who Apply for Political Asylum Under Grounds of Gender Specific Persecution" (1996-1997) 11 *Geo Immigr LJ* 167 At 173-174; and Kelly, *supra* note 113 at 660-661.

⁴¹¹ Laviolette, *supra* note 72 at 170.

⁴¹² *Ibid* at 204.

⁴¹³ Erdman & Sanche, *supra* note 141 at 83.

⁴¹⁴ *Ibid*.

may lead to them to draw negative credibility or plausibility conclusions or to ignore relevant evidence.

Furthermore, the evaluation of gender claims must recognize that a person's gender is a social and cultural construct that is contextually dependent and that can change over time. The UNHCR's "Guidelines on International Protection: Gender-Related Persecution" acknowledge the social, cultural, and temporal factors influencing how gender is articulated in an individual case.⁴¹⁵ Critical race theorist Sherene Razack argues that requiring a claimant to give evidence on a gender-based claim outside of the context of other aspects of identity, such as race and culture, reinforces colonial understandings of racialized women. She writes, "Gender persecution, as it is deployed in refugee discourse, can function as a deeply racialized concept in that it requires that Third World women speak of their realities of sexual violence outside of, and at the expense of, their realities as colonized people."⁴¹⁶ Razack's argues that women refugee claimants must strike a Faustian bargain wherein they must silence aspects of their identity in trade for refugee protection.⁴¹⁷

The Gender Guidelines discuss, to a limited extent, the issue of multiple axes of oppression and the multifaceted nature of claimant identities. They include mention of the importance of considering the "social, cultural, religious, and economic context in which the claimant finds herself" in the analysis on the availability of state protection.⁴¹⁸ As will be illustrated in the case study of Federal Court judicial reviews of gender-related claim

⁴¹⁵ UNHCR Gender Guidelines, *supra* note 3 at 2. The Guidelines notes the importance of distinguishing between "gender" and "sex" and to recognize that "Gender is not static or innate but acquires socially and culturally-constructed meaning over time." *Ibid.*

⁴¹⁶ Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 88.

⁴¹⁷ *Ibid.*

⁴¹⁸ Gender Guidelines, *supra* note 5 at C (2).

determinations, these references to a woman's context are cast in the Gender Guidelines as barriers that may hinder a woman's ability to testify rather than as assets that inform the context and circumstances of the story of persecution. For example, the Guidelines' Section D begins by advising decision-makers, "(w)omen refugee claimants face special problems in demonstrating that their claims are credible and trustworthy. Some of the difficulties may arise because of cross-cultural misunderstandings."⁴¹⁹ The downplaying or suppression of the claimant's intersectional identity and especially her choices in the face of oppression can problematically feed into victim discourses and cause the decision-maker to treat any testimony that does not further a limited stereotype of a victim as an inconsistency impugning her credibility.

The concept of victimhood is an undeniable but extremely problematic companion of the concept of persecution. For gender-related claims,⁴²⁰ victimization of women at the hands of male perpetrators is a central theme. US-based lawyer Sarah Hinger notes that claimants and legal practitioners tend to "put forward a familiar and universalized picture of the persecuted women...minimizing variability or complicating factors in the individual case" in order to ensure the claim's success.⁴²¹ Evidence that doesn't bolster a victimhood script can tarnish claimant credibility. For example, evidence of strategic decision-making, such as a woman's decision to select the best timing for her flight from persecution, may undermine her claim although such a decision may be perfectly logical given the particular circumstances. While evidence of strategic decision-making might also be a factor in non-gender-related

⁴¹⁹ *Gender Guidelines*, *supra* note 5 at D.

⁴²⁰ It is also important to recognize in this discussion that not all gender-related persecution is directed towards women. Men can also experience gender-persecution but the Gender Guidelines may not be fairly applied towards them. Nicole Laviolette, a Canadian refugee law scholar, has written persuasively that decisions on the gender-related claims of male claimants have not properly taken the Gender-related Guidelines into consideration when determining their claims. Laviolette, *supra* note 72.

⁴²¹ Hinger, *supra* note 147 at 367.

claims, the psychological and cultural circumstances of escaping an abusive spouse should inform how a decision-maker looks at evidence suggesting an abused woman delayed flight.

Furthermore, counsel or other community advisors may encourage the claimant to frame herself as a victim of circumstance to ensure the claim succeeds.⁴²² Legal advocates for claimants may strategically highlight the claimant's experience of victimization in order to create a coherent narrative of persecution⁴²³ but use of this narrative problematically sidelines the important role of a claimant's resilient agency in the story of her persecution.⁴²⁴ Furthermore, as will be described in more detail later in this thesis, testimonial evidence by the claimant indicating choice, strategy, education, or sophistication tends to be interpreted as taking away from the credibility of her testimony about persecution.

The characterization of a gender-related claim of persecution often includes problematic discourse on the gendered victimization of the claimant. For example, a claim based on religious persecution might be membership in the particular social group of "Sunni Muslims in Ethiopia." In contrast, a gender-based claim may be "El Salvadorian women who are victims of domestic violence" or "Haitian women who have experienced violence, kidnapping, and rape."

The Gender Guidelines' focus on the "particular vulnerabilities" of gender-related claimants and the unusual struggles they may face in presentation of their claims can be a useful tool for those who are indeed facing these struggles, but it also can indicate a homogeneity of vulnerability that fails to reflect the true diversity of women's experiences and

⁴²² Barsky, *supra* note 403 at 5.

⁴²³ Hinger, *supra* note 147 at 384.

⁴²⁴ The influence of the competing narratives of victimhood and resilience in the context of psychosocial work with refugees was described in Maryanne Loughry, "The Representation of Refugee Women in Our Research and Practice" in Maroussia Hajdukowski-Ahmed, Nazilla Khanlou & Helene Moussa, eds, *Not Born A Refugee Woman: contesting identities, rethinking practices* (Oxford, New York: Berghahn Books, 2008).

their reactions to them. Thus, centering gender-related claims using victimization discourse can have the disturbing consequence of making testimony related to women claimant's exercising agency in the face of persecution, other aspects of her identity, or her testimony on other intersecting types of discrimination seem not credible.⁴²⁵ For example, the IRB decision-maker may view women who do not take the first opportunity to flee after an incident of persecution as failing to exhibit a substantive fear of persecution.⁴²⁶ As will also be discussed later, the IRB decision-makers in several cases found the claimants were not credible in part because their education levels should have led to different behaviour.

This research relies on the notion of gender performativity to help illuminate the gaps in understanding between the claimant and the decision-maker regarding her experience of persecution as it relates to her gender. As noted above, both the decision-maker and the woman refugee claimant (as well as her legal advocate) are active participants in "performing" the claimant's gender identity in a manner that meshes with the subjective expectations of the decision-maker.⁴²⁷ The decision-maker's performance of gender in one claim can also impact the decision-maker's judgment of a claimant's gender performance in subsequent claims he or she adjudicates of a similar type.⁴²⁸ The process of shaping and winnowing a multifaceted person and a complex story of persecution and migration into the narrow constraints of a

⁴²⁵ The limits on discourses within ideologically-driven bureaucratic spaces has been explored in other contexts by authors like Himani Bannerji who, in her discussion of Canadian discourses on multi-culturalism states, "diversity discourse portrays society as a horizontal space, in which there is no theoretical or analytical room for social relations of power and ruling, of socio-economic contradictions that construct and regulate Canadian political economy and its ideological culture." Himani Bannerji, *Dark Side of the Nation: Essays on Multiculturalism, Nationalism, and Gender* (Toronto: Canadian Scholar's Press, 2000) at 50.

⁴²⁶ *Khan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 839.

⁴²⁷ Mary Coombs, "Telling the Victim's Story" (1993) 2 Texas J of Women & the L 277 at 278.

⁴²⁸ For an excellent discussion of this phenomenon in United States asylum claims, see Hinger, *supra* note 147 at 383-384.

refugee claim determination leaves much at the margins. This project interrogates what may be lost in such a process and how it may affect the evaluation of a gender-related claim.

The discursive performance and negotiation of gender between the claimant and the decision-maker informs the process of evidence analysis and, more importantly, credibility determination. The decision-maker's determinations about the credibility and plausibility of evidence are intertwined with his or her assessment of the claimant's performance of gender roles. The success or failure of a claim can rest on how well a claimant's gender performance matches the decision-maker's expectations for her roles, behaviours, and speech, both in her recounting of persecution and in her comportment within the hearing space.

In the field of criminal law, feminist legal scholars note that legal advocates for sexual assault survivors tend to shape the story to the facts considered relevant by the decision-maker.⁴²⁹ Mary Coombs writes in the context of women's testimonies on sexual assault:

The woman who brings a legal claim of sexual violation, whether of rape or sexual harassment, wants to prevail. She and those acting on her behalf want the story to be believed. That natural and appropriate desire to win one's case, however, inevitably colors the way the case is presented and heard...the story is likely to be crafted, within the limits of the facts, to resonate rather than to clash with the fact finder's cultural script.⁴³⁰

This winnowing of the survivor's experience to fit the judge's expectations of relevant testimony may mean that some aspects of the survivor's experience are left out, but doing so may further the goal of a successful prosecution of the offence. Building on the idea of a performative space, the concept of intersectionality offers a view of performance as a dynamic process whereby divergent streams of oppression (including those based on the *Convention* grounds of race, particular social group, political opinion, religion, and national origin) interact

⁴²⁹ See Georgina Feldberg, "Defining the Facts of Rape: The Uses of Medical Evidence in Sexual Assault Trials" (1997) 9 Can J Women & L. 89 at 112; and Mary Coombs, *supra* note 428.

⁴³⁰ *Ibid* at 278.

and are negotiated simultaneously to resist institutional structures of inequality.⁴³¹ Feminist legal writers such as Heaven Crawley⁴³² and Angela Harris⁴³³ have persuasively argued that women's experiences are intersectional and simultaneously based on race, class, age, or sexual orientation and that all of these combine to shape their encounters with legal systems.

For example, the decision-maker in a sexual orientation-based claim of an Iranian woman found her story of persecution to be implausible in part due to her assertion that she had her own apartment in Tehran and was allowed to travel freely despite being a single woman.⁴³⁴ In this case, the woman claimant's testimony about her life as a single woman in Iran undermined the credibility of her story, even though this testimony was not necessarily related to her claim of persecution based on sexual orientation. In this example, colliding views of the claimant's gender in the hearing led to a negative credibility assessment. The Federal Court's judicial review found the IRB's assessment to have been made in a "perverse and capricious manner" and sent the case back to a reconstituted Board for another hearing.⁴³⁵

3.2 Theoretical Informants on Gender Performativity

The theoretical origins of this study are firmly rooted in a post-structural standpoint theory and the feminist idea that women, particularly marginalized women, should have a voice and agency in the legal processes concerning them. While progress has been made in "adding gender to law", the law does not go far enough to prioritize women's identities and standpoints

⁴³¹ Leah Bassel, "Intersectional Politics at the Boundaries of the Nation State" (2010) 10:2 *Ethnicities* 155 at 158.

⁴³² Crawley, *supra* note 138 at 6-9.

⁴³³ Angela Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 *Stan L Rev* 581. See also Angela Harris, "Bad Subjects: The Practice of Theory and the Constitution of Identity in Legal Culture" (2003) 9 *Cardozo Women's LJ* 515 (in which Harris argues that even in an age of laws on equality, we continue to conform to the demands of white supremacy by denying certain people as political and economic subjects).

⁴³⁴ *SP v Canada (MCI)*, 2004 FC 282.

⁴³⁵ *Ibid* at para 19. In his reversal of the decision, The Honorable Mr. Justice Mosley specifically took the Board member to task for his unreasonable, stereotype-fueled assessment of gender roles in Iran. *Ibid* at para 19-20.

as indispensable facets of refugee determinations. Furthermore, institutional understandings of gender do not consider its temporal⁴³⁶ and context-dependent⁴³⁷ elements. Although the implementation by the IRB of the Gender Guidelines⁴³⁸ may help to mitigate some of the more overt stereotypes about women claimants, they do not offer much content detailing the diversity of women's experiences and backgrounds and how these may impact their claims.

3.2.1 Foucault on Power Relations and Language

My methodology draws upon Foucauldian understandings that discourse is an expression of power. A Foucauldian understanding of law adds depth to understanding law's "symbiotic relationship to other forms of disciplinary power relations."⁴³⁹ Foucault significantly advanced the idea that discourse is not a singular message about a population but rather is better understood as a confluence of power and knowledge where a "series of discontinuous segments whose tactical function is neither uniform nor stable."⁴⁴⁰ Despite Foucault's "problematic indifference to sexual difference,"⁴⁴¹ his understanding of the interactive relationship between discourse and power holds important lessons for this research. I also draw

⁴³⁶ As Margaret Somers wrote, "The Narrative Constitution of Identity: A Relational and Network Approach": One way to avoid the hazards of rigidifying aspects of identity into a misleading categorical entity is to incorporate into the core conception of identity the categorically destabilizing dimensions of time, space, and relationality (*italics deleted*)

Margaret Somers, "The Narrative Constitution of Identity: A Relational and Network Approach" (1994) 23 *Theory & Society* 605 at 606.

⁴³⁷ See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990) & Razack, *supra* note 417.

⁴³⁸ Gender Guidelines, *supra* note 5.

⁴³⁹ Annie Bunting, "Feminism, Foucault, and Law as Power/Knowledge" (1992) 30 *Alberta L Rev* 829 at 837.

⁴⁴⁰ Michel Foucault (1972) *The History of Sexuality, Vol 1: An Introduction* (London: Penguin, 1990) at 100. Foucault, in his typical elliptical fashion, further explained, "It is in discourse that power and knowledge are joined together. And for this very reason, we must conceive discourse as a series of discontinuous segments whose tactics function is neither uniform nor stable. To be more precise, we must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated one, but as a multiplicity of discursive elements that can come into play in various strategies. ... We must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling block, a point of resistance and a starting point for an opposed strategy." *Ibid.*

⁴⁴¹ Butler, *supra* note 437 at xii.

upon Foucault's approach to power as a dynamic and negotiated relationship rather than a strict hierarchy.

Applying this theory to gender-related refugee determinations and reviews of those decisions, discourses on refugee status cannot and should not be considered in isolation from discourses on culture, gender, and socio-economic status, for example. These discursive aspects inform each other. This study thus relies on a Foucauldian view of discourse as a culturally constructed representation of reality that both constructs knowledge and powerfully polices the perimeters of what is and what is not discussed in a refugee determination. Using a methodology informed by Foucault's approach to language provides a deep understanding of contested representations of truth inherent to a refugee determination. It also informs discussions of what identities and actions are rendered desirable or even possible and what is silenced or pathologized. In the case of gender-related refugee claim determinations, a Foucauldian perspective also highlights that the norms of what constitutes a "good" or "authentic" gender-related refugee are inscribed upon the refugee claimant by IRB decision-makers who police these norms and punish those who do not conform through negative evaluation of the claim.

3.2.2 Judith Butler on Intersectional and Contextual Understandings of Gender

Judith Butler's theory of gender performativity builds on Foucault's approach towards discourse as representative of the multifaceted and dynamic negotiation of power relationships.⁴⁴² Starting with her influential text, *Gender Trouble*,⁴⁴³ and then further developed in later texts, like *Excitable Speech*,⁴⁴⁴ Butler explores how language constructs the

⁴⁴² Elena Loizidou, "Butler and Life: Law, sovereignty, power" in Terrell Carver & Samuel A Chambers, eds, *Judith Butler's Precarious Politics: Critical Encounters* (London & New York: Routledge, 2008) at 149.

⁴⁴³ Butler, *supra* note 438.

⁴⁴⁴ Judith Butler, *Excitable speech: a Politics of the Performative* (New York, London: Routledge, 1997).

categorization of gender.⁴⁴⁵ Butler's approach to the performative and context-specific nature of gender deepened my understanding of the significance of discourse about the category of "woman" constructed in the adjudicative proceeding of a refugee claim determination. In "Under Western Eyes," Chandra Mohanty reminds us of the problematic positioning of "woman" as a stable, ahistorical, and universal categorization of people.⁴⁴⁶ Like Butler, Mohanty emphasizes the need to recognize the specific circumstances informing the positioning of a group of women as social subjects and agents operating in particular cultural, socio-economic, religious, and political frameworks.⁴⁴⁷

3.3 Performativity of Intersectional Identities in hearings

The process of determining membership in a particular social group by necessity involves an exploration of the claimant's relationship to the persecutor as well as an analysis of the importance or immutability of her gender identity. If a gap exists between the claimant's own sense of her gender identity and the persecutor's perception of her gender, the claimant may have difficulty articulating why she is being persecuted. Furthermore, even if there was no gap at the time of the persecution, one may have developed by the time the claimant testifies at the hearing. Furthermore, the space of a determination hearing may not be conducive (due to shortened time or reverse order questioning, for example) to the claimant's expression of the

⁴⁴⁵ In the introduction of *Gender Trouble*, Butler asks a series of rhetorical questions about language's central role in the construction of categories:

How does language itself produce the fiction construction of "sex" that supports these various regimes of power? Within a language of presumptive heterosexuality, what sorts of continuities are assumed to exist among sex, gender, and desire? Are these terms discrete? What kinds of cultural practices produce subversive discontinuity and dissonance among sex, gender, and desire and call into question their alleged relations?

Butler, *supra* note 437 at xxx.

⁴⁴⁶ Chandra T Mohanty, "Cartographies of Struggle: Third World Women and the Politics of Feminism" in Ann Russo, and Lourdes Torres, eds, *Third World Women and the Politics of Feminism* (Bloomington, IN: Indiana University Press, 1991) at 51.

⁴⁴⁷ *Ibid* at 30.

contextual, multiple, and temporal nature of her identity while simultaneously arguing that the persecution is grounded on a static characteristic.

The balance between multiple and singular gender identities of the claimant is further strained in cases where the burden of proof requires the claimant to give evidence on expression or performance of a singular gender identity, such as when the claimant must characterize the particular social group of which she is a member. The United States and Australia have formally adopted an approach towards refugee claim analysis that critics say effectively requires claimants to visibly display the attributes stereotypically associated with the identity causally connected to the persecution. As discussed above, recent scholarly analysis of this trend as it applies to gender has focused on claims based on sexual orientation. Sexual orientation claims, depending on the facts, share analytical attributes of gender-related claims and sometimes are themselves also gender-related claims.

The decision-maker's analysis of the claimant's demeanor and other non-verbal cues to make a determination on the claimant's credibility is closely linked to the decision-maker's understanding of the claimant's cultural norms.⁴⁴⁸ In addition to difficulties related to the cultural specificity of non-verbal cues,⁴⁴⁹ reliance on such factors also makes cases more difficult for Federal Court judges to review to ensure consistent and reliable decision-making practices.

As discussed above, the claimant must present herself in her written and oral testimony in a manner that, to some extent, harmonizes with the decision-maker's imagined identity of the claimant in order to avoid seeming not credible. As legal scholars Laurie Berg and Jenni Millbank succinctly summarize, "The refugee is most likely to be seen when she or he looks

⁴⁴⁸ Kagan, *supra* note 333 at 378.

⁴⁴⁹ *Ibid* at 379.

like ‘us’ or, when that is not possible, looks like what is being looked for” (emphasis removed).⁴⁵⁰ For example, a UK pilot study of asylum claims involving rape found that the factors already shown to impinge the claimant’s credibility in a criminal setting, such as inconsistency, lack of emotion, and reporting delay, are amplified in the asylum setting.⁴⁵¹ The study’s authors, Helen Baillot, Sharon Cowan, and Vanessa Munro, explain additional barriers:

As well as the difficulty of facing and reporting the incidence of rape, asylum-seeking women may experience other problems including: difficulties in translation and interpretation; family pressure; shame and expectations regarding ‘appropriate’ behaviour; a lack of culturally sensitive resources or support networks; a lack of recognition of culturally specific means and methods of storytelling’ and inappropriate application of a Western (and, in many cases, ex-colonial) lens to non-Western incidences of war, political and sexual violence, and other forms of persecution.⁴⁵²

While many of these factors are mentioned in the Canadian Gender Guidelines, their consideration is left to the discretion of the decision-maker.

This possibility of failure based on identity dissonance in the testimony has led some legal advisors to preemptively shape a claimant’s narrative to a “familiar and universalized picture” of the claim and the claimant expected by the decision-maker.⁴⁵³ Despite the potential personal benefit to the claimant, minimization of a complicated and variable identity can have the effect of reinforcing decision-makers’ limited conceptions of the identity at issue.⁴⁵⁴ For example, in the context of sexual orientation claims, the repetition of a certain stereotypic identity characteristics creates a situation where the testimony of gay and lesbian claimants is

⁴⁵⁰ Laurie Berg & Jenni Millbank, “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants” (2009) 22:2 J of Refugee Stud 195 at 197.

⁴⁵¹ Helen Baillot, Sharon Cowan, & Vanessa E. Munro, “Seen but Not Heard? Parallels and Dissonances in the Treatment of Rape Narratives across the Asylum and Criminal Justice Contexts” (2009) 36 J L & Soc’y 195 at 204.

⁴⁵² *Ibid.*

⁴⁵³ Hinger, *supra* note 147 at 367.

⁴⁵⁴ *Ibid.*

viewed by the decision-maker through a western lens of expected queer identity.⁴⁵⁵ This problem can also arise in the analysis of forced marriage cases, for example, where a decision-maker may expect a meek, victimized female claimant to provide testimony about her experience of overt physical force or abduction when, in reality, her free will, experience of coercion, and the cultural norms around agreement and consent are much more complex.⁴⁵⁶

From the claimant's perspective, embodying the expected identity presentation can be a personally difficult and psychologically costly process. Both the expected identity and the claimant's self-image also act in dialogue with other intersectional aspects of the claimant's identity. The tension existing between gender images institutionally attributed to the claimant and the claimant's self-image can cause a presentational schism between the refugee's self-image and the dominant discourse about her as a refugee fleeing persecution.⁴⁵⁷ In her research on refugee resettlement, Halleh Ghorashi found that Iranian refugee women who had been politically active in Iran prior to arrival in the Netherlands as refugees still self-identified as activists despite a public that perceived them as helpless victims of circumstances.⁴⁵⁸ The discursive presentation of gender-related claimants as victims by decision-makers and legal advocates for the claimant may cause the claimant to experience a chronic state of marginalization and liminality,⁴⁵⁹ compromising her full participation in society.

⁴⁵⁵ *Ibid* at 368.

⁴⁵⁶ Jenni Millbank & Catherine Dauvergne, "Forced Marriage and the Exoticization of Gendered Harms in United States Asylum Law" (2010) 19:4 Colum J Gender & L 898 at 898-899.

⁴⁵⁷ For a discussion of this phenomenon in the context to refugee settlement in Netherlands, *see* Halleh Ghorashi, "Agents of Change or Passive Victims: The Impact of Welfare States (the Case of the Netherlands) on Refugees" (2005) 18:2 J of Refugee Studies 181 at 183.

⁴⁵⁸ *Ibid* at 185.

⁴⁵⁹ The refugee as a person trapped in a liminal state of exile and non-belonging is a major theme of migration cinema. This genre offers insight into the refugee's metaphoric destabilization of dominant Western paradigms. In her analysis of the film *Lamerica*, Katerina Leung writes, "By taking refuge in a new country, a refugee seeks emplacement in a pre-established social, economic, and political infrastructure. Not a blank slate, the refugee is also pre-formed by the infrastructure of its place of origin. Thus its presence and resultant hyphenated identity exists to disrupt the homogeneity of the host nation." Katerina Leung, "Foreign Fear in

3.4 *Public Production of the Gendered Subject*

The state has a direct hand in forming and classifying its subjects within the process of gender identity performance and formation, what Butler would call a process of rendering gender “intelligible.”⁴⁶⁰ The public setting of the hearing can influence the types of gender discourses possible because it influences and shapes the discourse. Although the hearing is not usually open to those who are not participating in it, its physical situation in a federal building carried out by government actors (a decision-maker, a court reporter, and, in some cases, a translator or government lawyer) mark it as a public forum.

The Gender Guidelines recognize and attempt to ameliorate the potential negative influence of this public setting⁴⁶¹ by permitting procedural accommodations.⁴⁶² Butler finds public space as hostile space in which to perform female-gendered subjectivity, stating that “if there is a body in the public sphere, it is masculine and unsupported, presumptively free to create, but not itself created. And the body in the private sphere is female, ageing, foreign, or childish, and pre-political.”⁴⁶³ Butler also characterizes public spaces as predisposed towards the male-gendered subject rather than the female-gendered subject.⁴⁶⁴ As Arndt and Butler indicate, the construction of the gendered subject in the public forum of the claim

Lamerica: Exile, Liminality, and Hybridity in the Refugee as Monster” (2011) 2 Kino: Western Undergrad J Film St 1 at 5.

⁴⁶⁰ Butler, *supra* note 437 at 16.

⁴⁶¹ Hannah Arendt would call such public determinations a “space of appearance” where political visibility encounters subject matters often rendered invisible. She writes in *The Human Condition* that, “the space of appearance comes into being wherever men are together in the manner of speech and action...” Hannah Arendt, *The Human Condition* (2d ed.) (Chicago: University of Chicago Press, 1998) at 199.

⁴⁶² For example, a decision-maker may allow a change to the order of questioning so that the claimant can be questioned first by her own counsel rather than by the decision-maker.

⁴⁶³ Judith Butler, “Bodies in Alliance and the Politics of the Street” (speech at the European Institute for Progressive Cultural Politics) (September 2011), online: European Institute for Progressive Cultural Policies <eipcp.net/transversal/1011/butler/en>.

⁴⁶⁴ *Ibid.*

determination hearing is a discursive undertaking that must navigate hegemonic understandings of gender role expectations.

Furthermore, the concept of identity performativity allows the consideration of the possible influence of the time and space of the hearing as well as the claimant's identity as it relates to other actors (both at the time of persecution and at the time of claim determination).⁴⁶⁵ In practical terms, the Butler's understanding of identity performance is a means of understanding how decision-makers evaluate a claimant's testimony in the hearing environment (including, for example, the presence of a male decision-maker), and gaps in time between the persecution and the hearing. Until recently, an average refugee claimant could expect to wait between one and three years for a refugee determination hearing. Changes have accelerated these timelines, with hearings now occurring sometimes within two months of a claim being made. Even with shortened wait times, the time between an incident of persecution and the time of recounting can be significant and have an impact on recall, especially when combined with anxiety or other medical issues.⁴⁶⁶ In addition, the time commonly allocated for the entire hearing averages just three hours,⁴⁶⁷ which disadvantages claimants who need extra time to testify about particularly traumatic or factually complex events.

Specific medical conditions, such as PTSD, depression, sleep deprivation, and physical trauma, can also impact the capacity of a person to recall her experience of events at the time.⁴⁶⁸ For example, the reviewing Federal Court judge in the *SJO* case set aside a negative

⁴⁶⁵ Margaret Somers writes in her article, "The Narrative Constitution of Identity: A Relational and Network Approach" (*supra* note 437): "One way to avoid the hazards of rigidifying aspects of identity into a misleading categorical entity is to incorporate into the core conception of identity the categorically destabilizing dimensions of time, space, and relationality" (italics deleted). *Ibid* at 606.

⁴⁶⁶ For example, in the 2015 *E.F.* judicial review, the claimant challenged the IRB's finding of inconsistency by explaining that she had difficulty focusing during the hearing due to anxiety and pregnancy-related pain. *EF v Canada (Citizenship and Immigration)*, 2015 FC 842 at para 19.

⁴⁶⁷ See Showler, *supra* note 274.

⁴⁶⁸ See Cleveland, *supra* note 206; Bopp Stark, *supra* note 410.

determination because she found that the decision-maker had erroneously drawn a negative credibility conclusion from the claimant's poor recall when, in fact, her memory problems were due to PTSD.⁴⁶⁹ Other experiential factors, such as deep-seated habits of silence and evasiveness towards those in authority⁴⁷⁰ can also play a factor in the discursive climate of the hearing. Unfortunately, these factors may inform the claimant's demeanour and subtly influence the decision-maker's perception of the conveyed information. Refugee law scholar Guy Coffey notes that, "the applicant's manner and non-verbal behaviour may influence the Tribunal member's assessment of the truthfulness of the applicant's claims."⁴⁷¹

While anxiety and difficulties with memory recall are common to many refugee claimants who have experienced trauma, the Gender Guidelines recognize that these conditions may inform how some women claimants testify about gender-related persecution if, for example, they exhibit symptoms of Battered Woman Syndrome or Rape Trauma Syndrome.⁴⁷² Other Chairperson's Guidelines, including the Vulnerable Persons Guideline⁴⁷³ and the Chairperson's Guidelines Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division,⁴⁷⁴ offer additional guidance to decision-makers on how traumatic experiences or pre-existing mental difficulties may impact how a claimant thinks about and articulates her experiences.

⁴⁶⁹ *SJO*, *supra* note 255 at para 16-17 ("There are many indications in the hearing transcript of the Applicant's difficulty in sorting out the timeline of events between 1999 and 2003, prior to coming to Canada. Generally, memory gaps may be a reason to draw an adverse credibility inference, but when the claimant is a victim of severe domestic abuse, the Board must be alive to the possibility that these gaps are psychological in nature... Instead of exhibiting awareness of the Applicant's possible difficulties in recalling her past, the Board appears hypercritical of differences between the Applicant's testimony and PIF.").

⁴⁷⁰ Writing about social science research methodological challenges, Lisa Dodson and Leah Schmalzbauer describe the tendency among poor and marginalized women to habitually stay quiet, use "agreeable talk" and "selective telling" when dealing with authority figures. Lisa Dodson & Leah Schmalzbauer, "Poor Mothers and Habits of Hiding: Participatory Methods in Poverty Research" (2005) 67 *J of Marriage & Family* 949 at 951.

⁴⁷¹ Coffey, *supra* note 341 at 386.

⁴⁷² Gender Guidelines, *supra* note 5 at D.

⁴⁷³ Vulnerable Persons Guideline, *supra* note 64.

⁴⁷⁴ Refugee Hearing Guideline, *supra* note 67.

3.5 Agency and Control in Testimony on Gender-related Persecution

Feminist scholars have problematized the feasibility of assessing, from a remote and marginalized position, the unique mix of identity and circumstances that inform one's exercise of agency in a given circumstance. Lois McNay sheds light on the relationship between one's sense of identity and narrative coherence:

The idea of narrative shares the post-structural emphasis on the constructed nature of identity; there is nothing inevitable or fixed about the types of narrative coherence that may emerge from the flux of events. Yet, at the same time, the centrality of narrative to a sense of self suggests that there are powerful constraints or limits to the ways in which identity may be changed...Individuals act in certain ways because it would violate their sense of being to do otherwise.⁴⁷⁵

In this passage, McNay underscores the extent to which narratives (including those on gender roles) and one's sense of identity inform and influence one's capacity to explain the reasons why something occurred.

However, one's narrative is not necessarily only circumscribed by one's sense of identity. The claimant can also shape and then strategically deploy an identity narrative when needed. Based on her work with women refugees from South Sudan, Audrey Macklin reports that women regularly exercise choice in their strategic deployment of gender-related discourses. She finds the refugees themselves often strategize in their interaction with their Western interlocutors in order to gain a positive outcome. She writes:

(T)he women speaking to us engaged in the deliberate and tactical deployment of women as a universal category with the full awareness of the depth and breadth of the power gulf between us. The discursive act of redrawing a circle of inclusion containing both us and them momentarily distracted the mission from the vivid lines that so glaringly divided us, destabilizing the other categories of nationality, race, and class that conjoined us with Talisman Energy. In so doing, I suggest that the speakers were

⁴⁷⁵ Lois McNay, *Gender and Agency: Reconfiguring the Subject in Feminist and Social Theory* (Malden, MA: Blackwell Publishers, 2000) at 80.

reclaiming the colonial spaces of detachment with relationship, pity with accountability, and confrontation with engagement.⁴⁷⁶

While it is important to recognize and account for the role of a claimant's agency in the claims determination process, the significant power differential between the claimant and the decision-maker nevertheless significantly shapes the structure of a hearing and how evidence is brought forth in the hearing setting.

The idea of identity shaping and sometimes constraining a person's narrative articulation of their experiences has useful applications in the context of refugee claim determinations. In order to prove her claim, the claimant must argue that there is a connection between the acts of persecution she has experienced and one or more of the *Convention* grounds. In some cases, this means the claimant must put herself in the shoes of her persecutor in order to articulate why the persecution occurred. For example, the claimants in several cases dealing with the risk of sexual assault in Haiti had difficulty in explaining to the IRB how they, as Haitian women who had traveled abroad and were perceived as wealthy, faced higher likelihood of being sexually assaulted than the risk of "general criminality" faced by the entire population of Haiti.⁴⁷⁷ These Haitian claimants had to argue that their status as wealthy women was an important factor in the eyes of persecutor, whether or not they would have identified themselves this way. Thus, the success of the claim hinged upon the claimants' discursive performances of identities they did not necessarily feel was accurate in their own self-conceptions of their own gender identities.

⁴⁷⁶ Audrey Macklin, "Our Sisters from Stable Countries: War, Globalization, and Accountability" (2003) 10:2 *Int'l Studies in Gender, State & Society* 256 at 276.

⁴⁷⁷ See *EBA v Canada (Citizenship and Immigration)*, 2008 FC 982; *RCY v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1077; *RPL v Canada (Citizenship and Immigration)*, 2010 FC 998; *EDE*, *supra* note 401; *DJO v Canada (Minister of Citizenship and Immigration)*, 2011 FC 39; & *RBR v Canada (Citizenship and Immigration)*, 2012 FC 1101.

A claimant's testimony about her exercise of agency over her circumstances and choices in the face of persecution intersects with notions of gender performativity because the contextualized gender identity informs and delineates the boundaries of the types of actions it would be reasonable to expect the claimant to have undertaken prior to seeking refugee protection. The IRB and reviewing Federal Court's assessment of the claimant's testimony on issues like IFA and state protection inform and are informed by their credibility and plausibility evaluations. The discursive construction of gender identity by the claimant and the decision-maker illuminates the underlying logic driving a decision-maker's or Federal Court judge's sense of what constitutes reasonable behaviour or his or her assessment of the credibility and plausibility of the claimant's testimony. One of the purposes of the Gender Guidelines is to inform and shape the decision-maker's understanding of what is reasonable. However, as the data set cases illustrate, their disparate and inconsistent application in determinations points to the limits of the Gender Guideline's efficacy as a tool in gender-related claim determination.

3.6 *Sexual Orientation-based Refugee Claims*

Persecution on the basis of sexual orientation often but not always overlaps with gender-related persecution. While claimants can be persecuted on their sexual orientation alone, sexual orientation claims often have gender-related aspects based on the claimant's persecutor-perceived transgression of expected gender roles (i.e. an expectation for every women to marry a man). The analysis of sexual orientation-based claims of persecution holds useful lessons for gender-related claims.

Legal scholar Mary Eaton notes a tendency in law to “make global assumptions about the homogeneity and essentiality of (the) identity” of homosexuals.⁴⁷⁸ Legal scholars examining the treatment of sexual orientation-based refugee claims appear to echo Eaton’s view. Nicole Laviolette highlighted difficulties associated with the fixed and essentialized view of sexual orientation-based claims adopted in Canada’s refugee claim determinations. Laviolette argued that classifying sexual orientation as an immutable characteristic, rather than an identity that is also connected to a shared experience of persecution, has had the effect of creating an overly narrow ground for sexual orientation-based persecution.⁴⁷⁹ A more appropriate analytical focus for those fleeing persecution based on sexual orientation, she advocated, is on the shared lived experience of marginalization and ill treatment.⁴⁸⁰ Such a classification of particular social group could, she argued, include both “characteristics of an individual’s identity” and “external factors such as society’s perception of the existence of a social group.”⁴⁸¹ Laviolette’s insights about the difficulty in how sexual orientation claims are classified also suggest that decision-makers’ views of claimants’ gender may also be overly simplistic and inaccurate.

Legal scholars in Canada, Australia, and the United States researching sexual orientation refugee claims (some of which have gender-related claim elements) have highlighted the issue of identity performance in claim analysis. Robert Lidstone conducted interviews with gay and lesbian asylum seekers in Toronto and Vancouver in 2005-2006.⁴⁸²

⁴⁷⁸ Mary Eaton, “At the Intersection of Gender and Sexual Orientation” in Nancy E. Dowd & Michelle Jacobs, eds, *Feminist Legal Theory: An Anti-essentialist Reader* (New York: New York University Press, 2003) at 50.

⁴⁷⁹ Nicole Laviolette, “The Immutable Refugees: Sexual Orientation in Canada (A.G.) v. Ward” (1997) 55:1 U Toronto Fac L Rev 1 at 22-23.

⁴⁸⁰ *Ibid* at 35 & 39.

⁴⁸¹ *Ibid* at 13.

⁴⁸² Robert S Lidstone, *Refugee Queerings: Sexuality, Identity, and Place in Canadian Refugee Determination* (Toronto: York University Master of Arts Thesis, 2003).

He analyzed the case results as well as the questioning that occurred at their refugee determination hearings. Lidstone found a general anxiety by the decision-maker over the need to verify the authenticity of the claimant's sexual orientation. Unfortunately, the questions asked in an effort to "authenticate"⁴⁸³ the claim involved a production of sexual identity mirroring that of the persecuting country.⁴⁸⁴ Lidstone's interviewees reported that they felt they had to consciously demonstrate their sexual identity during their hearings in some cases. In his analysis of the questions asked of claimants, Lidstone found some decision-makers had very simplistic or stereotypic understandings of claimants' sexual identities.⁴⁸⁵ For example, interviewees reported the more effeminate a claimant appeared in their hearings, the more likely it was that their claims would be viewed as credible.⁴⁸⁶

Similarly, Fadi Hanna,⁴⁸⁷ in an essay discussing the impact of the 2004 US decision of *In re Soto Vega*,⁴⁸⁸ contends that gay male claimants in the US have similar difficulties in that they are compelled to be demonstratively "gay" in order to have their claims accepted.⁴⁸⁹ In reviewing decisions of asylum claims similar to *In re Soto Vega*, Hanna observes through these cases that gay male asylum claimants who are able to "reverse cover" by performing

⁴⁸³ This impulse amongst some decision-makers to "authenticate" the claim through third party testimony has been manifest in other jurisdictions in requirements that claimants demonstrate the identity or status at issue in the persecution is "visible" to others. This approach means the claimant must prove her fear is well-founded by proving that her particular social group characteristic was reasonably likely to be known by those seeking to persecute her. The concept of "visibility" has become increasingly an issue in the United States in accordance with provisions of the REAL ID act and is also a central part of the analysis in Australia. Whereas Canada, the United States, New Zealand, and the United Kingdom have historically adopted the "protected characteristic" approach endorsed by the UNHCR, Australia has instead primarily relied on a "social perception" approach towards the analysis of evidence in particular social group-based claims. Fatima Marouf, "The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group' and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender" (2008-2009) 27 Yale L & Pol'y Rev 47 at 48-49.

⁴⁸⁴ Lidstone, *supra* note 482 at 63.

⁴⁸⁵ *Ibid* at 69-70.

⁴⁸⁶ *Ibid* at 68, 70-71 & 80.

⁴⁸⁷ Fadi Hanna, "Punishing Masculinity in Gay Asylum Claims" (2004-2005) 114 Yale LJ 913.

⁴⁸⁸ No. A-95880786 (B.I.A. Jan. 27, 2004), as cited in Hanna, *supra* note 488.

⁴⁸⁹ *Ibid*.

certain stereotypic actions and appearances associated with homosexuality are more successful than similarly situated claimants who do not.⁴⁹⁰

Finally, Australian refugee law scholar Jenni Millbank's comparative study of over 300 Australian and Canadian refugee decisions covers sexual orientation-based claims from the year 1994 until 2000.⁴⁹¹ Millbank finds that many Canadian decisions during this period were predicated on implicit assumptions that the proper place for homosexuality is the private realm.⁴⁹² Millbank shows how tribunal judgments focused on determining whether someone was really "out." If the tribunal found they were "closeted," it would then conclude continuation of that closeted status a viable option.⁴⁹³ Illustrating some of the composite parts comprising sexual orientation identity, Millbank writes:

In reality, one is never completely closeted or completely out, as if these are static, universal and opposing states. Rather, the degree to which a lesbian expresses her sexual identity encompasses a continual process of choice on her part. Moreover, the extent to which she is seen as a lesbian will depend upon the degree of surveillance to which she is subject, and upon the interpretive processes of those who are viewing her...An unconscious gesture, an inquisitive neighbour, a 20-year cohabitation with "a friend" or a change of heart render the state of closeted-ness always a potentially permeable one.⁴⁹⁴

Millbank echoes the motifs of a person navigating performance through her choices and those choices being observed and interpreted by another. This relationship between the observed and the observer occurs between the persecutor and the claimant and then in different form later between claimant and decision-maker. While sexual orientation-based persecution claims

⁴⁹⁰ *Ibid* at 915 & 919.

⁴⁹¹ Jenni Millbank, "Gender, Visibility, and Public Space in Refugee Claims on the Basis of Sexual Orientation" (2002-2003) 1 Seattle J Soc Just 725 at fn 11.

⁴⁹² *Ibid* at 733.

⁴⁹³ *Ibid* at 734.

⁴⁹⁴ *Ibid*.

are not identical to gender-related persecution claims, Millbank's insights on sexual orientation claims are applicable to the gender-related claims of women claimants.

Sexual orientation cases involving gender role transgression are particularly instructive when examined through the lens of gender performativity. In cases where men or women are being asked to act discreetly or to avoid certain behaviours in order to stay safe, the tribunal is essentially shaping the claimant's performance of his or her gender identity.

While this shaping of performance is more evident in cases where decision-makers are urging gay or lesbian claimants to be discrete, decision-makers in gender-related cases can also play a role in actively shaping the claimant's gender performance when they question the truth of a claimant's story because her actions to escape persecution do not comport with the decision-maker's expectations for her gender role. The 2006 *DRI* case⁴⁹⁵ is a heart-wrenching example of this practice. The claimant testified that, in order to escape her abusive spouse, she had to flee St. Lucia without her young son. The decision-maker repeatedly and aggressively questioned the claimant as to why a mother would "abandon" her child.⁴⁹⁶ The reviewing Federal Court judge found the decision-maker's questioning of the claimant constituted a denial of natural justice and set aside the determination.⁴⁹⁷

In the chapter on gender performativity, I argue that claim determination is a performative practice whose primary purpose is the reification of gender norms.⁴⁹⁸ A

⁴⁹⁵ *DRI*, *supra* note 122.

⁴⁹⁶ *Ibid* at paras 9–11.

⁴⁹⁷ *Ibid* at para 19 & 20.

⁴⁹⁸ See Elena Loizidou, "Butler and Life: Law, Sovereignty, Power" in Terrell Carver & Samuel A Chambers, eds, *Judith Butler's Precarious Politics: Critical Encounters* (London and New York: Routledge, 2008) at 154.

performative understanding of identity, with its context-specific focus, also brings out the multi-faceted nature of identity as well as the intersectional nature of oppression.⁴⁹⁹

The role of a contextual understanding of a claimant's gender identity is particularly important in cases where documentary evidence is not available and thus the majority of evidence comes from the claimant herself. Refugee determinations involve a complex interplay of subjective and objective factors, all of which can influence and be influenced by the consideration of the Gender Guidelines. To address this issue, Laviolette advocated for a broadening of the Guidelines to incorporate a social constructionist conception of gender, wherein gender is acknowledged as a context-dependent social phenomenon that changes over time and that is separate from biological factors.⁵⁰⁰

3.7 Discourses of Securitization of Refugee Claims assessment and the Gender-related claim

Recent changes to Canadian law and policy towards refugees have reflected a public policy shift away from an empathetic view of desperate people fleeing war to a publicly expressed anxiety about economic migrants, opportunistic criminals, and terrorists arriving en masse on Canada's shores.⁵⁰¹ This reshaping of the social construction of refugees in Canadian discourse has also marked a shift away from an image of a passive and grateful refugee towards an image of the conniving, duplicitous refugee claimant who exercises agency over her

⁴⁹⁹ Chandra Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" in Anne McClintock, Aamiri Mufti & Ella Shohat, eds, *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (Minneapolis: University of Minnesota Press, 1997) at 258.

⁵⁰⁰ *Ibid* at 170.

⁵⁰¹ Sarbit, *supra* note 20 at 139.

circumstances. The *BRRRA*⁵⁰² in 2010 and the above Bill C-31⁵⁰³ were passed on a wave of securitization rhetoric warning of “bogus refugees” bent on exploiting Canada’s generosity.

Canadian immigration scholars Asha Kaushal and Catherine Dauvergne note with concern that, “In Canada and around the Western world, claims for refugee status have become synonymous with concerns about abuse of the refugee determination system and the entry of terrorists and international criminals.”⁵⁰⁴ They argue that the law, in fact, furthers a construction of refugees as terrorists by classifying political organizations that use violence with the terrorist label,⁵⁰⁵ and thereby excluding them from refugee protection.⁵⁰⁶ This broad classification coupled with the government’s ability to designate whole groups of migrants as deserving of heightened suspicion, has the effect of casting a shadow on all refugee claims and legitimizing the broad discretion granted to decision-makers.⁵⁰⁷

However, the security/criminality discourse of the problem coexists with counter-discourses⁵⁰⁸ constructing the refugee, particularly the female refugee victim of foreign “bad” cultural practices, as emblematic of Canada’s commitment to a progressive, multicultural ideal. Several overlapping yet dissonant narratives co-exist in the Canadian discourse about

⁵⁰² *BRRRA*, *supra* note 167.

⁵⁰³ *An Act to Amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, 41st Parliament, 1st Session [Bill C-31].

⁵⁰⁴ Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Exclusions” (2011) 23 Int’l J of Ref L 54.

⁵⁰⁵ *Ibid* at 73.

⁵⁰⁶ Section 101(1) of the *IRPA* (*supra* note 1) requires that:

A claim is ineligible to be referred to the Refugee Protection Division if... (f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality...

Those who are determined to have links with organizations classified as ‘terrorist’ may fall into the class of those ineligible for refugee determination, although they may be able to apply for protection pursuant to other provisions under the *Act*.

⁵⁰⁷ Catherine Dauvergne, “Evaluating Canada’s New Immigration and Refugee Protection Act in its Global Context” (2003-2004) 41 *Alta L Rev* 725 at 743.

⁵⁰⁸ Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: University of British Columbia Press, 2005) at 219.

who gender-related refugees are and the validity of their presence in Canada. These narratives portray refugees as:

- Cultural “others”/ Threatening religious norms
- Helpless, racialized, foreign females
- Criminals/ “Queue Jumpers”
- Security & Potential Terrorism Threats
- Emblematic of Canada’s Multi-culturalism & Tolerance

An increasing focus on securitization and criminality discourses echoes older scripts on exotic, foreign “others”, as theorized by Edward Said in 1978.⁵⁰⁹ Said coined the term Orientalism to refer to the West’s construction of its self-definition in mirrored opposition to the Orient. He stated, “The Orient has helped to define Europe (or the West) as its contrasting image, idea, personality, experience.”⁵¹⁰ The current rise in securitization and criminality discourses around refugee claimants seems to be in line with Said’s insights because foreigners are being constructed as acting in ways that Canadians would never act, either as criminal opportunists or terrorists.

⁵⁰⁹ Edward Said, *Orientalism* (New York: Vintage Books, 1979).

⁵¹⁰ *Ibid* at 1-2.

CHAPTER FOUR: METHODOLOGY

4.1 Framing the Methodological Approach

I entered into this research inquiry with the desire to develop a research method that would highlight women refugees' experiences with the legal determinations of gender-related claims. This research project examines how the Gender Guidelines were understood and applied in Federal Court judicial reviews of the gender-related refugee claim determinations of women claimants from 2003 to 2013. I use a grounded theory methodological basis and content analysis approach informed by Michel Foucault's insights on power relationships and Judith Butler's insights on performativity in order to examine discursive deployment of gender in refugee determinations through the treatment of the Gender Guidelines.

This study is an empirical investigation of four legal standards used in Federal Court judicial reviews of Canadian gender-related claim determinations from 2003 to 2013: 1) credibility assessments, 2) plausibility assessments, 3) availability of state protection, and 4) availability of an Internal Flight Alternatives [IFA]. The study analyzed the application of these standards and looked at how variables such as country of origin or type of persecution, and extrajudicial factors, such as Canadian political discourse and rigid understandings of gender identity, result in inconsistent application of the Gender Guidelines, thereby violating women refugee claimants' right to procedural fairness.

My research question was based on Federal Court decisions and publicized IRB determinations on gender-related claims. To answer this question, I employed a grounded theory conceptual framework and content analysis tools to examine Federal Court judicial reviews of gender-related refugee claims in order to gain insight into how gender was understood within the setting of refugee determination hearings; how gender discourse in the

hearing recognizes certain types of gender identity and marginalizes others; and what the consequences are for the claimant's access to procedural fairness in the determination of her claim.

Through this analysis, I determined that the Gender Guidelines are not consistently analyzed by the IRB. Further, because of this inconsistent use of the Guidelines, unfair denials of gender-related claims are left intact in Federal Court judicial reviews of these determinations.

4.2 Research Questions and Roadmap

The primary research question I tackle in my case analysis of Canadian Federal Court judicial review decisions is, *“How are the Canadian Gender Guidelines used by Federal Court judges in their evaluations of IRB determinations on credibility, plausibility, state protection, and IFA findings in gender-related claims and how does gender performativity and its link to credibility influence these evaluations?”* To answer the research question, this study uses a content analysis methodology to code every judicial review that came before the Federal Court of Canada from 2003 to 2013 wherein the claim was gender-related as identified by certain key words and a subsequent review. I selected the December 2013 cut-off date because it represents the end of the period in which Federal Court judicial reviews were likely to have been based on the pre-December 2012 changes to Canadian refugee law.

The purpose of this chapter is to discuss the theories informing my research approach and how I arrived at my chosen research methodology. The first section of this chapter gives an overview of the qualitative methodology that will be used to answer my primary research question. My methodological approach is explained, along with the reasons for this choice and a brief discussion of the other methodological options considered. The following sections

examine the theoretical framework underpinning the approach used, focusing on post-structural and feminist contributions to that approach, as well as the study's limitations.

4.3 Selection of Methodology

4.3.1 Research Standpoint

The project was premised on the feminist principle of valorizing the voices and perspectives of refugee women who participated in the determination of their claims through their testimony. Coming from a feminist standpoint, I view power relationships as informing every interaction and these power relationships are particularly stark in legal proceedings involving refugee women. Feminist legal scholars, including Regina Graycar and Molly Karlin, have written extensively about the marginalization of women's experiences in the development⁵¹¹ and interpretation⁵¹² of the law. Graycar notes that the failure to incorporate the experiences of women into legal standards is particularly egregious in cases involving violence against women.

The schism between legal standards and the realities of women's experiences comported with my own observations from working with women refugee claimants and other marginalized women over the past decade as a legal advocate, support worker, and volunteer. In my experience, women refugee claimants are a diverse population of individuals with many different reasons for claiming refugee protection. They are generally a population of resilient, adaptable women whose strength and innovation has brought them to Canada's shores. However, this view of refugee women is quite different from the victim-oriented presentation

⁵¹¹ Regina Graycar, "Telling Tales: Legal Stories about Violence Against Women" (1996) 8:2 Cardozo Stud L & Literature 297 at 299-300.

⁵¹² Molly Karlin, "Damned if She Does, Damned if She Doesn't: De-Legitimization of Women's Agency in *Commonwealth v. Woodward*" (2008) 18:1 Columbia J of Gender & L 125.

of women refugees put forth in the Gender Guidelines and in many decisions on gender-related claims of persecution.⁵¹³

For this reason, I was interested in a legal research project that focused on women claimants' crucial roles in knowledge production in the claim determination process. The claimant's role in creating meaning in the adjudicatory process drew me initially to a narrative research methodology. I selected this methodology because its research outcomes directly emerge from the experiences and perspectives of the research participants.

My previous professional experiences working with marginalized women, including refugee women, also informed my initial selection of a narrative-based methodological approach. Two experiences in particular—having represented domestic violence survivors and having worked to set up a charity to benefit refugee women claimants—led me to believe a narrative approach would be the best way to create research originating in the experiences of those impacted by refugee determinations. When working with these women, I often marveled at the resilience and strength of women who were framed as victims by the legal systems they were compelled to navigate to achieve safety. The institutional approach towards these women, whether in divorce courts or in immigration proceedings, consistently denied women the ability to speak of their experiences in their own words, unbridled from the narrowly defined areas of legal interest. As a lawyer, I always found the narrow focus on the particular legal requirements problematic because it often caused the women concerned to feel frustrated or silenced by the very systems designed to solve their legal problems. As a consequence, they would sometimes not raise facts that may have been relevant to their cases.

⁵¹³ The Gender Guidelines, with their focus on only the suffering of refugee women, may be interpreted by some as reflecting a “meta-narrative of femininity.” Although not directly discussed in relation to refugee claims, this concept was described in McNay, *supra* note 475 at 99.

Later when researching this issue of gender-related refugee claim determinations, I discovered that a focus on the narratives of refugee women could provide important counter-narratives to overly simplistic institutional narratives built around refugee women's experiences of victimhood at the expense of other contextual factors bearing on their experiences of persecution. An interview methodology had been successfully used in other social science empirical studies to demonstrate the negative impact of marginalizing institutional structures on the ability of refugees to integrate in the country of refuge.⁵¹⁴ Regina Graycar has likewise argued for the effective role of narratives in legal analyses of cases turning on women's experiences.⁵¹⁵ Furthermore, narrative methodology allows the interview subject's agency to have a central role in producing and shaping meaning within the research, enabling the highlighting of any gaps between a claimant's narrative and the standards used to judge her case.⁵¹⁶ Projects using narrative methodology often focus on gathering information about the lived experience of the interviewee⁵¹⁷ and encouraging researchers to reflect upon and articulate the potential influence of their own views, assumptions, and biases on research results.⁵¹⁸

⁵¹⁴ See Marie Lacroix, "Canadian Refugee Policy and the Social Construction of the Refugee Claimant Subjectivity: Understanding Refugeeeness" (2004) 17 J Refugee Stud 147 & Ghorashi, *supra* note 458.

⁵¹⁵ She writes, "(T)he use of literature or storytelling might assist judges in their individual decision making by providing "counter-narratives" to dominant narratives that ignore the position of outsiders or by increasing judges' empathic understanding of cases outside their personal experience." Graycar, *supra* note 512 at 309.

⁵¹⁶ One aspect of the identity-testimony nexus that I find most intriguing is exploring what may be at stake to the claimant when she is compelled to give testimony about persecution related to a gender identity she may or may not feel aligned with at the time of the hearing. As McNay writes in her excellent text, *Gender and Agency*, "the centrality of narrative to a sense of self suggests that there are powerful constraints or limits to the ways in which identity may be changed ... Individuals act in certain ways because it would violate their sense of being to do otherwise." McNay, *supra* note 475 at 80.

⁵¹⁷ Ainslie Yardley, "Living Stories: The Role of the Researcher in the Narration of Life" (2006) 9:3 Forum: Qualitative Social Research at 1.1.2 at para 18. *See also*, Michael W Smith, "Comments on Coulter and Smith: The Issue of Authorial Surplus in Narrative Research" (2009) 38:8 Educational Researcher 603 at 606 in which he urges narrative researchers to be aware of their influence of their own framing of interviewee narratives and how this narrows the stories told.

⁵¹⁸ Yardley, *supra* note 517 at 1.1.3 at para 24. Feminist scholars, such as Sandra Harding argues for a situation where, "the research appears to us not as an invisible, anonymous voice of authority, but as a real, historical individual with concrete, specific desires and interests." Sandra Harding, "Is there a Feminist Method?" in

4.3.2 Other Academic Studies Influencing this Methodology

I looked at other empirical studies that researched refugee claims to develop an appropriate methodology to study gender-related refugee claim analysis. Each of the studies described below researched an aspect of refugee claim adjudication through an empirical study. All provided useful methodological examples and influenced how my research was initially structured.

The first of the empirical studies I looked at was conducted by Cécile Rousseau, François Crépeau, Patricia Foxen and France Houle in Canada in 2002 and focused on the influence of legal, psychological, and cultural factors in the Canadian IRB refugee claim determinations.⁵¹⁹ The scholars in that study used a combined qualitative and quantitative methodology to closely examine 40 IRB cases deemed problematic by stakeholders in the refugee determination process. The quantitative elements from their study included an analysis of success rates of the cases. The qualitative elements of inquiry focused on the legal sources for the decision-makers' conclusions on claimant credibility. They found IRB decision-makers improperly used legal, psychological, and cultural dimensions in their credibility assessments in the majority of these selected cases. I found the study's use of a combination of qualitative and quantitative elements added credibility to the authors' findings, something I wanted in my own research.

The second of the empirical studies that influenced my research methodology was the 2003 study on sexual orientation-based refugee claims by Catherine Dauvergne and Jenni

Sandra Harding, ed, *Feminism and Methodology: Social science issues* (Bloomington: Indiana University Press, 1987) at 9. Harding argues, "the class, race, culture, and gender assumptions, beliefs, and behaviors of the researcher her/himself must be placed within the frame of the picture that she/he attempts to paint..." *Ibid.*

⁵¹⁹ Cécile Rousseau, François Crépeau, Patricia Foxen, & France Houle, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board" (2002) 15 J Refugee Stud 43.

Millbank mentioned in Section 3.6. This study compared the Australian Refugee Review Tribunal's evaluation of the claims of lesbian and gay asylum seekers to similar determinations in Canada.⁵²⁰ Dauvergne and Millbank reviewed 204 Australian Refugee Review Tribunal decisions and 127 Canadian IRB determinations over a six-year period from 1994 to 2000. They examined the cases quantitatively for factors such as success rate and percentage of claimants who were represented by counsel.⁵²¹ They also included qualitative analysis of the Australian and Canadian approaches towards evidence evaluation⁵²² and of the availability of state protection in claimants' countries of origin.⁵²³ They found that decision-makers in both settings measured the claimant's story against independent evidence (most often general documents on country conditions) to inform their credibility determinations.⁵²⁴

In 2012, Catherine Dauvergne engaged in a qualitative study of Canadian IRB determinations to look into its use of international law.⁵²⁵ Dauvergne's study relied on a limited sample of publicly available IRB determinations from 2002 to 2010⁵²⁶ on the Canlii (Canadian Legal Information Institute) case database.⁵²⁷ After excluding decisions focusing only on the *Refugee Convention*'s definition of a refugee, Dauvergne coded the remaining IRB determinations into four levels of engagement with international law, from brief mention in a footnote (the lowest level), to extensive discussion and consideration of international legal

⁵²⁰ Dauvergne & Millbank, *supra* note 158. In their review of Canadian and Australian legislation, Catherine Dauvergne and Jenni Millbank found evidentiary practices had a vital role in the appropriate evaluation of evidence. *Ibid* at 299.

⁵²¹ *Ibid* at 302.

⁵²² *Ibid* at 312-325.

⁵²³ *Ibid* at 332-338. Using a subset of the same data, Jenni Millbank published a study in 2003 that qualitatively analyzed Canadian and Australian decision-makers' discussion of public and private space in their analyses of incidents of persecution. Jenni Millbank, "Gender, Sex, and Visibility in Refugee Claims on the Basis of Sexual Orientation" (2003-2004) 18 *Geo Immigr LJ* 71.

⁵²⁴ Dauvergne & Millbank, *supra* note 158 at 309-312.

⁵²⁵ Catherine Dauvergne, "International Human Rights in Canadian Immigration: The Case of the Immigration and Refugee Board of Canada" (2012) 19 *Ind J Global Legal Stud* 305.

⁵²⁶ *Ibid* at 313.

⁵²⁷ *Ibid* at 315.

standards as applied to the facts of the case (the highest level).⁵²⁸ Using this methodological approach, Dauvergne concluded that very few IRB determinations reference international human rights norms.⁵²⁹ I found Dauvergne's systematic, content-based approach to be instructive in the development of my own methodology because she used the length of international law discussions in the cases as indicative of how much consideration the decision-maker gave these norms in the claim determination.

Finally, Sean Rehaag used quantitative and qualitative techniques in several studies to highlight the influence of external factors on a claimant's rate of success. In a 2011 article, Rehaag examined the role of the claimants' legal counsel in 70,000 refugee determinations from 2004 to 2009.⁵³⁰ To get around the lack of public access to closed refugee determination proceedings, Professor Rehaag submitted access to information requests to gain access to data on IRB's own database.⁵³¹ Access to this comprehensive database allowed Rehaag to control for variables such as yearly average grant rates for countries of origin when looking at the influence of claimant legal representation on determination outcomes.⁵³² Rehaag's access to the IRB's own case database enabled him to design a study of first level decision-making that controlled for variables like country-based decision trends. The Rehaag study helped shape my own research because it underscored the need to have full access to first level decisions to focus a study on this level of refugee claim decision-making. Because of my inability to access all IRB decisions on gender-related claims, I chose the publicly available database of all

⁵²⁸ *Ibid.*

⁵²⁹ *Ibid* at 321.

⁵³⁰ Rehaag, *supra* note 231.

⁵³¹ *Ibid* at 83.

⁵³² *Ibid* at 85.

Federal Court judicial reviews while recognizing that gender-related cases in this subset would tend to be cases with stronger legal arguments to support a review of the determination.

4.4 Developing a Methodology

4.4.1 Narrative Methodology Considered

As described in the previous section on research standpoint, the methodology I selected emerged from my professional experience and has evolved over time. The methodological approach I initially selected was a narrative inquiry method that would allow me to interview women refugees with recently decided gender-related claims about their experiences of offering evidence during determination of their claims. The purpose of the interviews was to shed light on the process of evidence giving and gathering by prioritizing the insights of refugee claimants⁵³³ on the validity of evidence-gathering methods. Interviews with claimants seemed appropriate for a study focusing on the deployment or non-deployment of certain discourses related to gender identity.

4.4.2 Pragmatics of the Process

After consulting with caseworkers who work with refugee women, I designed my study around a series of guided interview questions whose goal was to find out refugee women's views and perspectives about the efficacy of evidence collection in their cases. The interview questions particularly focused on the women's impressions of testifying about their claims at the hearing and whether there were any factors that helped or hindered their ability to testify. After receiving approval from the University of Ottawa's Office of Research Ethics and Integrity for the interviews, I began distributing a call for participants using my existing network of

⁵³³ Mari Matsuda urges lawyers to employ "multiple consciousness" in their approach to a legal problem in order to make "a deliberate choice to see the world from the standpoint of the oppressed." Mari Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11 Women's Rights L Rep 1 at 9. See also Harris, *supra* note 433 at 611.

people who work with refugee women and conducting information sessions to inform potential participants of the study.

Unfortunately, this methodology proved to be unsuccessful because not enough women refugee claimants volunteered to participate in the study. While I was able to conduct a handful of interviews with women refugee claimants, they produced only a limited amount of relevant data. I was told by caseworkers that the lack of response was likely due to a fear that the material from their interviews would somehow be sent back to the IRB. After further efforts to search for participants using other strategies did not yield additional participants, I decided that I could not use an interview-based narrative study to research my topic.

4.4.3 Research Design: Hybrid Case Analysis using a Grounded Theory Approach and Content Analysis Tools

After my lack of success with a dataset based on the narratives of claimants, I turned my focus to how decision-makers use their understandings of women's experiences of gender-related persecution to make decisions about their claims.⁵³⁴

A grounded theory-informed content analysis emerged as the best way to glean data on these subjects from Canadian Federal Court judicial reviews of gender-related claims because, like the narrative methodology I initially selected, this hybrid methodological approach focuses on the materiality of what is being said in a particular, context-specific venue. Its findings are rooted in who speaks, the context of what is spoken, and the significance of those words to understandings of discourse. Furthermore, the content analysis approach

⁵³⁴ My views on the discursive deployment of gender in refugee determinations had been informed by post-structural legal scholarship on Foucauldian understandings of power relationships and insights from feminist scholars on the context and temporally-specific performance of gender identity. See Alan Hunt & Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994); Hugh Baxter, "Bringing Foucault into the Law and Law into Foucault" (1995-1996) 48 *Stan L Rev* 449; Annie Bunting, "Feminism, Foucault, and Law as Power/Knowledge" (1992) 30 *Alta L Rev* 829; Maxine Eichner, "On Postmodern Feminist Legal Theory" (2001) 36:1 *Harv CR CL* 1; Somers, *supra* note 436 at 606.

avoids some aspects of researcher bias by allowing the data to naturally emerge from the text itself. For example, I draw conclusions based on statistics around rates of success cross-referenced with claim type and word count (total case word count versus word count of Gender Guidelines discussion) to learn about the weight given to the Gender Guidelines by the decision-makers.

4.5 The Mechanics of a Grounded Theoretical Framework and Content Analysis Tools

4.5.1 Grounded Theoretical Framework

I use the grounded theoretical approach combined with content analysis techniques as a means to tackle the question of how the Gender Guidelines are deployed in gender-related refugee claims. A grounded theory approach, as described by its creators, Anselm Strauss and Juliet Corbin, is “a qualitative research method that uses a systematic set of procedures to develop an inductively derived grounded theory about a phenomenon.”⁵³⁵ The driving logic behind this approach is that a researcher’s theoretical conclusions must be firmly derived or “grounded” in the data itself. This methodological approach is particularly useful for an inquiry into Federal Court judicial reviews because it focuses on the role of the terminology in understandings of the claimant’s gender identity in the context of her claim for refugee protection.

The basic approach advocated by Strauss and Corbin involves the researcher seeking explanations for patterns and trends observed through the process of data collection. Those nascent explanations for the observed patterns are then regularly tested for validity against subsequent data in a call-and-response fashion.⁵³⁶ Grounded theory uses coding, which is

⁵³⁵ Anselm Strauss & Juliet Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (London: Sage Publications, 1990) at 24.

⁵³⁶ Strauss and Corbin note that theory is induced directly from the data as it is “discovered, developed, and provisionally verified.” *Ibid* at 23.

defined by Strauss and Corbin as “The operations by which data are broken down, conceptualized, and put back together in new ways” in order to build theory.⁵³⁷ In this study, a grounded theory approach involved coding for a) positive versus negative decisions; b) inclusion and judicial use of certain key sections of the Gender Guidelines; and c) inclusion and judicial use of non-claim-related aspects of claimant identity.

The basic grounded theory technique is the chronological coding of indicators⁵³⁸ as they are encountered in a text until a point of “theoretical saturation”⁵³⁹ is reached (open coding); the identification of themes, patterns, and trends from observations; and the revisiting of that same text in order to test the validity of that preliminary conclusion through a narrowed coding lens (closed coding).⁵⁴⁰

A grounded theory approach facilitates the examination of gender identity discourse separately from the analysis of whether the claim succeeded or failed. This is useful because a successful outcome, for example, may obscure faulty analysis of a claim in an “ends justify the means” dismissal of a particular presentation of gendered identity. The grounded theory approach also emphasizes the significance of the particular phrasing of identity “facts” about the claimant at their confluence with the application of the law before the point where a final decision has been reached.

4.5.2 Content Analysis Tools and Methods

My study uses a grounded theoretical approach for its overarching architecture but borrows from qualitative content analysis tools to carry out the work of the study. A true grounded

⁵³⁷ *Ibid* at 57.

⁵³⁸ Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (2004) (2nd ed.) (Thousand Oaks, CA: Sage Publications, 2004) at 133.

⁵³⁹ *Ibid.*

⁵⁴⁰ *Ibid.*

theory study would rely exclusively on the data to produce the theory. Instead, this study uses the grounded theory architecture with content analysis tools in order to fully capture data relating to credibility, plausibility, IFA, and state protection analysis at they intersect with gender identity formation in determinations. The instruments of grounded theory permit these initial inquiries to respond to the emerging themes regarding gender identity in the cases.

In order to empirically analyze judicial review decisions of gender-related refugee claims and how gender identity discourse was used within them, this study primarily uses content analysis techniques. Content analysis techniques mesh well with other qualitative empirical research methods already employed in legal scholarship to study case trends in that they “make conclusions and predictions based upon a structured analysis” of a defined data set.⁵⁴¹ Klaus Krippendorff, an expert on qualitative methodologies, characterizes content analysis as a process whereby the examination of data sources (such as “printed matter, images, sounds, or texts”) allows the researcher “to understand what they mean to people, what they enable or prevent, and what the information conveyed to them does”⁵⁴² in an unobtrusive manner.⁵⁴³ Shulamit Reinharz, in *Feminist Methods of Social Research*, notes that content analysis offers good methodological tools for feminist research.⁵⁴⁴

Legal scholars David Wright and Mark Hall advocate in their influential article, “Systematic Content Analysis of Judicial Opinions,” for the use of content analysis as a practical means of approaching qualitative study of judicial opinions.⁵⁴⁵ They championed the

⁵⁴¹ Tyler S Gibb, “A Smack on the Chin or a Nibble? Content Analysis of the Impact of the *Oakwood* Trilogy” (2010) 14 Mich St U J Med & L 93 at 105.

⁵⁴² Krippendorff, *supra* note 538 at xviii.

⁵⁴³ *Ibid* at xiii.

⁵⁴⁴ Reinharz defines content analysis as a method of studying, “a set of objects (i.e. cultural artifacts) or events systematically by counting them or interpreting the themes contained in them.” Shulamit Reinharz, *Feminist Methods in Social Research* (Oxford: Oxford University Press, 1992) at 146.

⁵⁴⁵ Mark A Hall & Ronald F Wright, “Systematic Content Analysis of Judicial Opinions” (2008) 96 Cal L Rev 63.

increased use of empirical studies, including content analysis, in social science research on judicial decisions⁵⁴⁶ as they permit the researcher to consider a larger number of cases and paint a more accurate picture of patterns of conduct than the more common approach of drawing themes from related appellate decisions.⁵⁴⁷ They summarized the method as a systematic gathering of judicial decisions in an area of focus, a systematic reading of those opinions, and “recording consistent features on each and drawing inferences about their uses and meaning.”⁵⁴⁸

Content analysis techniques are also advantageous because they offer legal scholars doing qualitative research a relatively transparent methodology that permits replicability⁵⁴⁹ of the study result more easily than, for example, the narrative methodology originally contemplated for this research. This method permits a close examination of what is being said about a woman claimant’s gender identity within the particular symbolic context of the refugee determination hearing.⁵⁵⁰

4.5.3 Summary of Content Analysis Tools and Procedures

a. Open Coding:

Anselm and Strauss described open coding simply as “the naming and categorizing of phenomena through close examination of data.”⁵⁵¹ Open coding consists of reading the text line by line and noting in the margins the frequency of identified terms. As the indicative terms are identified, they are classed into concept groupings focused on how these indicators work

⁵⁴⁶ *Ibid* at 64.

⁵⁴⁷ *Ibid* at 65.

⁵⁴⁸ *Ibid* at 64.

⁵⁴⁹ *Ibid* at 18.

⁵⁵⁰ For a good discussion of symbolic interaction analysis, see Harold D Lasswell, “The Technique of Symbol Analysis (Content Analysis)” in Roberto Franzosi, ed, *Content Analysis: Volume 1* (Los Angeles: Sage Publications, 2008) at 98.

⁵⁵¹ Strauss & Corbin, *supra* note 536 at 62.

operationally to identify a person or event. As it is used here, a concept is a category of “language signs (words, idioms, phrases, etc.) that together represents a variable in the investigator’s theory.”⁵⁵² When no further concepts can be added, the text is said to have reached a point of theoretical saturation and the open coding step is complete.

In this study, I started by reading through from start to finish all of the Federal Court judicial review decisions I had initially identified in my searches. As I read, I identified and noted a handful of patterns emerging in the cases. For example, a decision that began with a lengthy treatise on the deferential standard of review rarely ended well for the claimant challenging the IRB’s determination. I then used my notes on emergent patterns of certain terms, case references, and decision logic that I observed in the cases as an initial coding document I could use to look at the case content in greater depth.

b. Axial Coding:

After an initial coding of the data set, the next step in my methodology was to revisit the original text through the lens of the categories and indicator terms in order to test whether the patterns I initially identified still proved true as I looked at the cases more closely. This closer look at the cases further narrowed my analytical focus to relevant content,⁵⁵³ including whether and how certain terms inter-relate across conceptual boundaries and how the case results changed as a result of this interrelationship. After completing this step, I read through each case twice more while putting key terms, summaries, and excerpts of the text into a case chart for later reference.

⁵⁵² Philip J Stone, Dexter C Dunphy, Marshall S Smith, Daniel M Ogilvie *et al*, “The Construction of Categories for Content Analysis Dictionaries” in Roberto Franzosi, ed, *Content Analysis: Volume 2* (Los Angeles: Sage Publications, 2008) at 127.

⁵⁵³ Alexander L George, “Quantitative and Qualitative Approaches to Content Analysis” in Roberto Franzosi, ed, *Content Analysis: Volume 1* (Los Angeles: Sage Publications, 2008) at 228.

c. *Selective Coding:*

In a content analysis methodology, selective coding is a final opportunity to test and refine findings of the previous step of axial coding. The process involved in this final step of the analysis is a repetition of the previous chronological coding exercise with a narrowed focus on the frequency of indicators significant to identified categories.

(iv) *Developing theory from the emergent patterns and themes*

After the completion of the coding process, I configured the patterns and categorical themes identified through this process into a cohesive set of research findings. The findings include any correlations evident between a pattern and a certain case outcome and/or mention of the Gender Guidelines in the case.

4.6 Selection of the Data Set

Because of the limited sample size of cases available under the new system, this study is limited to cases occurring during the 11 years prior to the December 15, 2012, legislative changes. I decided to exclude cases that used the IRB legislation enacted on December 15, 2012, although the study includes some cases from 2013 using the pre-December 15, 2012, rules.

These findings nevertheless raise important questions for the determination of gender-related claims under the new system because they give a snapshot of the adequacy of gender-related claim evaluation immediately before the implementation of significant regulatory changes to the timing of claims and the treatment of some classes of claimants.

Case Study Selection

Step-by-Step Chronology of Analysis Techniques

(i) *Gathering Data:* The legal database used for the study was the Canadian Legal Information Institute's database ("Canlii") of Canadian Federal Court decisions of refugee determination

judicial reviews with decision dates falling within the identified period and that contain certain terminology. The search terms were designed to yield Federal Court judicial reviews of gender-related claims in which credibility, plausibility, availability of state protection, or the existence of an internal flight alternative were central to the IRB decision-maker's negative determination. It included search terms such as "gender-related", "credibility", "IFA", "testimony", and "woman". Once compiled, I entered basic information about the cases into a spreadsheet prior to the start of coding, including case name, country of origin, year, and result at the judicial review level. In the initial review of these cases, cases that did not fit the study focus, such as those involving reviews of Pre-removal Risk Assessments, were taken out of the data set.

(ii) Recording basic case data: I used Excel to create a chart to chronicle the following key case facts:

- (a) date of decision
- (b) country of origin
- (c) type of gender-related claim
- (d) basis of first level rejection (availability of state protection, IFA, or plausibility, and credibility issues)
- (e) case outcome at the Federal Court judicial review level

(iii) Manual Case Coding: I reviewed and initially coded the cases for mention and treatment of the identified key terms (open coding). Once reviewed, I again reviewed them to test and build upon the identified concepts emerging from the first review (axial coding). Finally, I revisited all the cases to both confirm that all of the terms were properly coded and also to further analyze where the coded terms occurred in the decision text (selective coding).

(iv) Developing theory from the emergent patterns and themes: Based on the findings drawn from the qualitative analysis, I then developed a series of hypotheses for my analysis in subsequent chapters.

Case Selection

The study includes 166 Federal Court judicial reviews of gender-related claims for refugee protection previously rejected by the IRB's Refugee Protection Division over a ten-year period from January 2003 until December 2013. All of the cases for refugee protection involved a female claimant who asked for refugee protection from Canada after arrival in the country. My study excludes those who arrived in Canada as private or government sponsored refugees as the Gender Guidelines do not apply to these determinations. Each of the cases retained involved a gender-related persecution claim and credibility was an issue in each of the cases.

Overall, 73 cases (44%) were successful on judicial review and were therefore, referred to a different IRB decision-maker for de novo consideration of the claim ("successful" claims). In the overall sample, the Federal Court upheld the previous IRB decision rejecting the claim in the remaining 93 cases (56%) ("failed" claims).

The number of cases was roughly even across the years with the exception of the last two years included in the study. There were an average of 16 cases per year except for 2011 and 2012, which had 23 and 26 cases decided in each of those respective years. The long time period also meant the study included judicial opinions reflecting evolving administrative and judicial interpretation of legal standards for gender-related claims from the implementation of the Gender Guidelines until the implementation of the 2010 and 2012 regulatory changes.

The main method used to collect data for this study was searches of the CanLII database. This database was selected because it offers an easy means to search for the year range and keywords, limited to decisions of the Federal Court. I selected Federal Court judicial reviews as a means to look at decision-making at the Federal Court level and at the IRB level. Examining IRB gender-related claim determinations through the lens of Federal Court judicial

reviews offers insights into a determination process that are otherwise difficult to access because refugee determination hearings are not generally open to the public and only a number of selected decisions are publicly available.⁵⁵⁴ The Federal Court judge adds his or her own perspective on the reasonableness of the IRB determination by either endorsing or refuting the IRB decision-maker's logic and analytical method.

The cases were collected by searching for cases containing the keywords described below from a set of Federal Court decisions from the last 10 years. The five searches used the following terms:

1. "judicial review", "gender-related", and "not credible";⁵⁵⁵
2. "gender-related" and "evidentiary matters";⁵⁵⁶
3. "gender-related" and "special problems";⁵⁵⁷
4. "refugee", "woman", "not credible", and "judicial review";⁵⁵⁸
5. "gender guidelines".⁵⁵⁹

The logic behind running multiple searches on the database was to cast a wide net of possibly relevant cases while still excluding those that are clearly outside of the area of focus, such as those where credibility was not at issue.

I used the search phrase "not credible" in the first and fourth searches because I wanted to examine cases where the IRB decision-maker did not believe the claimant's testimony. This approach had the drawback of excluding some cases where the claimant was found credible

⁵⁵⁴ A selection of IRB decisions is available on the Canadian Legal Information Institute's webpage (www.canlii.org) with identifying information of the claimants removed prior to publication. Some of these determinations are also available on the UNHCR's RefWorld website (www.refworld.org) as case illustrations. In addition a handful of cases are available on the IRB's own website as jurisprudential guides. These guides serve as intended as policy documents to support consistency in decision-making. See *IRB Jurisprudential Guides*, online: Immigration and Refugee Board of Canada <www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/jurisprud/Pages/index.aspx>.

⁵⁵⁵ This search term set resulted in 114 cases.

⁵⁵⁶ This search term set resulted in 8 cases.

⁵⁵⁷ This search term set resulted in 22 cases.

⁵⁵⁸ This search term set resulted in 300 cases.

⁵⁵⁹ This search term set resulted in 300 cases.

but nevertheless denied refugee status because of the availability of state protection or an IFA and cases where the claimant was found credible but the decision did not contain the keyword. However, many of the cases primarily dealing with the state protection or IFA were included with the search criteria I selected because the decision-maker used the language of credibility or plausibility to reject the claimant's testimony on these subjects.

After the initial searches, which yielded over 400 cases,⁵⁶⁰ I read each case to ensure that it shared basic characteristics with the others in the study. I limited the sample to those cases matching the following criteria: a) decided within Canada; b) involving a female claimant; and c) dealing with a gender-related persecution claim determination as identified by the IRB, counsel, or the Federal Court. I also excluded cases that did not involve judicial reviews of claim determinations, such as those involving judicial reviews of pre-removal risk assessments (PRRA). I chose in-country claims and excluded claim determinations made abroad⁵⁶¹ because the Gender Guidelines do not apply to claims determined overseas. I limited the sample of cases to female claimants because gender-related claims by male claimants frequently involve a more complex set of facts and a heavily context-specific discussion of the gender-related elements of the case. While this would have been a rich data set to explore,

⁵⁶⁰ After removing the duplications, there were 406 unique judicial reviews. Separate searches were run for relevant Federal Court of Appeals and Supreme Court cases.

⁵⁶¹ Some *Convention*-based refugee claims are decided by Canadian government officials outside of Canada. This class of refugees, who meet the Convention refugee definition and who are living outside of their countries of origin, form the "Convention refugee abroad class." See *IRPA Regulations*, *supra* note 236 at s 144 & s 145. Individuals living outside of Canada and who are at risk of persecution may also qualify to seek refuge in Canada through the "Humanitarian-protected Person Abroad" class (*ibid* at s 146(1) &(2)) or the "Member of country of Asylum" class. *Ibid* at s 147. These individuals may be referred by the UNHCR or by a private sponsorship group (for example, a church group) to become part of the Convention Refugees Abroad class. See Citizenship and Immigration Canada, *IP3: In Canada Processing of Convention Refugees Abroad and Members of the Humanitarian Protected Persons Abroad Classes*, online: Citizenship and Immigration Canada <www.cic.gc.ca/english/resources/manuals/ip/ip03-part1-eng.pdf>. Some judicial reviews of Convention Refugee Abroad class refugee claims appeared with my search results, such as *ML v Canada (Citizenship and Immigration)*, 2009 FC 63, a case involving a Pakistani woman who applied for permanent residency under the Convention Refugee Abroad class on the basis of gender-related persecution.

cases involving male claimants with gender-related claims do not focus on the perception of women claimant's gender roles because the gender dynamics of this population are different.⁵⁶² Finally, I limited the study to claims identified during the IRB hearing and/or Federal Court judicial review as gender-related claims, although the final keyword search was intended to capture cases that were likely gender-related but did not use the term "gender" in the Federal Court decision. Through this winnowing process, the number of cases within the study was reduced from 406 to 166 cases. The process narrowed the focus of the study to those cases that could illustrate how the Gender Guidelines were employed in four inter-related areas of gender-related claim analysis: credibility, plausibility, state protection, and availability of an IFA.

The search criteria encompassed not only Federal Court judicial reviews but also reviews by the Federal Court of Appeals and the Supreme Court. All cases within the study originated from Federal Court judicial reviews of IRB claim determinations. I also excluded two cases that went to Federal Court judicial review twice: *Smith v Canada (Ministry of Citizenship and Immigration)* and *Cadenas Munoz v Canada (Ministry of Citizenship and Immigration)*.⁵⁶³ Having a study composed of decisions at the same level of review means that I was able to compare similarly situated cases for how they analyzed key elements.

⁵⁶² Professor Nicole Laviolette argued persuasively that the Gender Guidelines have not been effectively applied to the cases of male claimants with gender-related claims because of an institutional failure to understand gender roles as relationships of power and a false equating of gender with biological sex. Laviolette, *supra* note 69.

⁵⁶³ *Smith v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1194 and 2012 FC 1283. *Cadenas Munoz v Canada (Citizenship and Immigration)*, 2005 FC 89 and 2006 FC 1273. These cases were excluded because their unique administrative and jurisprudential histories made them dissimilar from cases that followed the typical trajectory of a claim determination followed by Federal Court judicial reviews. These cases would offer valuable insights about decision-makers' understandings of claimant gender identity. However, their circular trajectories from the IRB; up to the Federal Court; and then back down to the IRB and up again make it difficult to isolate the case facts from the cumulative effect of each case's history.

4.7 Study Limitations

(i) Use of Content Analysis Tools

While content analysis has a number of advantages, it, like other methodologies, offers only one frame to view an issue. As Wright and Hall warn in their article that the use of content analysis for judicial decisions is limited: “Quantitative description can tell us the *what* of case law; other methods may be better suited to understanding the *why* and *wherefore*.”⁵⁶⁴ To ameliorate this problem and bolster findings, they recommend “triangulating” findings by using different methodologies on the same data set.⁵⁶⁵ This study’s hybrid approach of grounded theory-informed content analysis with some quantitative data analysis (my analysis of case characteristics such as country of origin and type of persecution and success rate) avoids the drawbacks of following just one methodology.

(ii) Use of Federal Court Judicial Reviews as a Data Set

My use of a data set drawn from Federal Court decisions has some drawbacks. It does not include a review of the court submissions or of the transcripts of hearings that took place before the Federal Court. However, it offers a unique window into decision-making at the tribunal level as well as into the position of the reviewing Federal Court judge. An alternative data set could have consisted of IRB hearing transcripts. This data set would have offered a more direct view of the factors considered by decision-makers in their analysis of gender-related claims. As previously mentioned, some legal scholars have successfully accessed these sources through access to information requests and other secondary means.⁵⁶⁶ However, these materials are very difficult to retrieve without an information request unless the case has been

⁵⁶⁴ Wright & Hall, *supra* note 545 at 83.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ Rehaag, *supra* note 231.

submitted for judicial review, as refugee determinations are generally closed to the public.⁵⁶⁷

In addition, those proceedings that are open to the public and published are few and thus unlikely to be representative of all cases.⁵⁶⁸ Therefore, I had no reliable access to these cases.

Even if the first level decisions were open to the public, it is possible that the type of information this study seeks—information on how gender-related claim evidence is analyzed for credibility and the availability of state protection and the intersection with a claimant’s gender identity—would not necessarily appear in the decisions themselves. Board members are not required to detail in their decisions how or why they arrived at a particular conclusion and do not always do so, especially if the outcome is positive for the claimant.

In contrast, Canadian Federal Court decisions are much more likely to include substantive explanations for the consideration of evidence as well as a review and summary of previous decisions on the case. However, the Federal Court accepts only a small percentage of applications for judicial review of refugee claim determinations.⁵⁶⁹

Federal court judicial reviews of refugee determinations give a bird’s eye view of this process both in terms of summarizing the tribunal’s process of evidentiary analysis and of characterizing the claimants. While the decisions of the Federal Court itself tend to be highly deferential, their decisions thereby linguistically mirror and often extensively quote the

⁵⁶⁷ The *IRPA* (*supra* note 1) at *s 166(c)* requires that “proceedings before the Refugee Protection Division and the Refugee Appeal Division must be held in the absence of the public” unless the Division decides to permit the public access to proceedings pursuant to *s 166(d)*.

⁵⁶⁸ Sean Rehaag notes in his article on his own empirical study of IRB Refugee Protection Division decisions that only about 0.1% of IRB decisions are selected for publication on the IRB case database, Reflex. Rehaag, *supra* note 231 at 82–83.

⁵⁶⁹ The average grant rates for application for leave to the Federal Court for refugee determinations from 2004–2013 (the ten year during which statistics on grant rates were available) was 16.9%. Federal Court of Canada, “About the Court – Statistics,” online: Federal Court of Canada <cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics>. Sean Rehaag found in his study of judicial review application for refugee claim determinations between 2005 and 2010 that the overall rate of leave to be just 14.44%. Sean Rehaag, “Judicial Review of Refugee Determinations: The Luck of the Draw?” (2012) 38:1 Queen’s LJ 1 at 23.

preceding decision. Reliance on Federal Court decisions is undeniably more remote from the hearing, but it is still a reliable option for data analysis.

(iii) Case Sample Selection and Quantity

Limited case selection: The selection of cases for this study is limited in scope due to restricted time and restricted availability of source materials. As noted above, only a small percentage of cases requesting judicial review from the Federal Court are granted and this narrows the data field. It is also possible that my own biases towards claimants may have informed the terms I used to select cases.⁵⁷⁰ However, by using several different sets of search terms, I aimed to gain as large and as broad a sample size as possible so that the cases I included would be emblematic of Federal Court cases in the study period.

Limited gender focus within claims with multiple bases: Gender-related claims are often just one aspect of a claim of well-founded fear of persecution. Board members and reviewing Federal Court judges place differing amounts of emphasis on the relationship between the gender-related claim and other grounds (with some decisions only containing a few words of or no explanation while others devote several paragraphs to the subject). Because of the diversity of the gender-related claim types, each with a unique combination of intersectional claims of persecution, it is difficult to draw general conclusions about gender-related claims as a generic category.

Limited Search Terms and Language: I designed the study to cast a broad net to gather all relevant cases. Nevertheless, the study would not have found gender-related cases that did not use the terms I selected. Similarly, the data set could only draw from what can be gleaned from

⁵⁷⁰ Tyler Gibb, a legal scholar employing content analysis, asserts, “By necessity, content analysis requires the researcher to choose and analyze a finite set of texts” and that this process “inherently introduces a measure of potential author bias.” Gibb, *supra* note 541 at 106.

the face of the opinions themselves. I can only speculate on what evidence just never made it “to the table”. In other words, there may have been evidence relevant to the gender-related aspect of the claim that either was never presented as evidence by the claimant or was part of the initial determination but was not discussed in the judicial review due to the fact that the claimant chose to focus her application for judicial review on a decision-making error in another aspect of the claim. Furthermore, the Canlii search terms were English terms and the search results thus tended to favour Federal Court decisions penned or translated in English.

Differences in hearing and review location: The study didn’t control for possible differentials among the political climate, legal culture, and human and reference documents (such as general information on countries of origin) available in different IRB tribunal locations nor any possible influence of differences among the backgrounds and experiences of decision-makers. It is not the goal of this research to comprehensively examine adjudicative motivations. Rather, the goal of the study is to look for usage patterns and general trends in the way language is employed by reviewing Federal Court judges and its relationship with certain results.

The sample size selected can thus be considered sufficient to lead to valid and reliable conclusions because, despite the constraints described above, it draws from an eleven-year period of development of decision-making on gender-related claims after the passage of the Gender Guidelines.

(iv) Difficult to Replicate

As this study borrows from more than one methodological tradition, another scholar may have difficulty in exactly mimicking the methodological approach (the “reliability” of the study).

Nevertheless, content analysis techniques are reliable because they offer straightforward means for subsequent researchers to arrive at the same findings.

(v) Bias

Creation of reliable methodology can be compromised by the subjective view through which data are observed. In this case, I attempted to gain insights on the determination of refugee claims through the partial and biased lens of Federal Court judges who review IRB refugee determinations. Having no direct access to the refugee determination hearing transcripts (except for any excerpts that may be in the Federal Court decision), I had to rely on the judge's impressions of the case and the hearing. My vantage was also narrowed by the claimant's counsel's presentation of the claim at the hearing. All these factors gave me a biased viewpoint. However, the legal standards under examination (credibility, state protection, and IFA) anchor the study and ensure the findings' accuracy.

Because of the limitations described above, I have been careful not to make claims about the attitudes or viewpoints of all decision-makers or judges.⁵⁷¹ I have only made observations of trends, correlations and patterns that appear in the aggregated data.

4.8 Chapter Conclusion

The purpose of this chapter has been to contextualize and explain the methodology to be used in this qualitative study. Further research on the analysis of gender-related claims at the IRB level is needed to produce a full picture of how gender-related claims are being decided at the tribunal level and to build a comprehensive baseline of the external influences on decision-

⁵⁷¹ See Harry T Edwards & Linda Elliott, "Beware of Numbers (and Unsupported Claims of Judicial Bias)" (2002) 80 Wash U L Q 723 at 724-725.

making at the first-decision level. This study is intended to provide a base data set that could be further explored in subsequent research.

The next chapter details how the methodology outlined in this chapter was put into action. It documents the application of this methodology to judicial review decisions and provides a basis for further investigation into the significance of the patterns and trends observed. As the following chapters will show, this study's results provide a clearer understanding of the Federal Court's treatment of gender-related claims in the period leading up to the implementation of the 2012 changes to Canadian refugee law. This research presents a comprehensive overview of the treatment of gender-related cases before the Federal Court during this crucial period in the law's development. It provides a unique portrait of the Federal Court's understandings of gender-related claims and how they apply the legal standards of credibility, plausibility, state protection, and the availability of internal flight alternatives to gender-related claims.

5.0 Introduction

Canada's IRB decision-makers are required to consider the Gender Guidelines⁵⁷² when making determinations on gender-related claims. They also inform the Federal Court's judicial review of the reasonableness of these determinations. The Gender Guidelines urge IRB decision-makers to consider how the sensitive nature of gender-related claims impacts a claimant's statements or demeanour while testifying about her claim. The Gender Guidelines do not necessarily have to be mentioned in a particular case as long as the IRB decision-maker acted within the "spirit" of the Gender Guidelines by engaging in "active listening".⁵⁷³ For this reason, it is not possible to know the extent to which the Gender Guidelines inform the determination of gender-related claims but we can examine their use in the Federal Court judicial reviews of negative claim determinations.

This chapter outlines the findings of a qualitative study with the goal of better understanding how gender intersects with claim analysis and the consideration of the Gender Guidelines in IRB determinations and judicial reviews of those determinations over the last decade. The focus of the data analysis is to answer the following research questions: "*How are the Canadian Gender Guidelines used by Federal Court judges in their evaluations of IRB determinations on credibility, plausibility, state protection, and IFA findings in gender-related claims and how does gender performativity and its link to credibility influence these evaluations?*" These questions engage a qualitative analysis of 166 Federal Court of Canada judicial reviews of gender-related claims of persecution previously rejected at the IRB level from 2003 to 2013.

⁵⁷² Gender Guidelines, *supra* note 5.

⁵⁷³ *OCM v Canada (MCI)*, 2006 FC 1273 at para 33 & *AIQ v Canada (MCI)*, 2012 FC 1338 at para 41.

The Federal Court's understanding of reasonable outcomes⁵⁷⁴ in gender-related claims is discursively linked to the Gender Guidelines' emphasis on the need for "knowledge, understanding, and sensitivity" in dealing with these claims.⁵⁷⁵ This focus on "sensitivity" is a touchstone evoked by the Federal Court in analyzing whether the IRB decision-maker substantively considered the Gender Guidelines, even if they were not mentioned in the decision.⁵⁷⁶ Federal Court judges have interpreted "sensitivity" as the need for "the Board to exhibit a special knowledge of gender persecution and to apply the knowledge in an understanding and sensitive manner."⁵⁷⁷

However, this study demonstrates that the Federal Court's analysis of what constitutes substantive consideration of the Gender Guidelines is inconsistent amongst different judges.

5.1 Characteristics of Gender-related Cases in the Study

The sampled cases include a broad spectrum of gender-related persecution types. The Gender Guidelines outline gender-related forms of persecution in refugee claims⁵⁷⁸ that only happen to women or happen with much greater frequency to women, including sexual assault, infanticide, genital mutilation, bride-burning, forced marriage, domestic violence, forced abortion, and compulsory sterilization.⁵⁷⁹

My categorization of gender-related claims within the study followed the terminology used by the Federal Court cases as much as possible. This strategy meant that the terminology did not always mesh with that listed in the Gender Guidelines and resulted in a longer and

⁵⁷⁴ The application of the reasonableness standard in judicial reviews of administrative decisions is explained in further detail in Chapter 2: Legal Frameworks.

⁵⁷⁵ *Griffith*, *supra* note 70 at para 27.

⁵⁷⁶ IRB decision-makers are not required to state they considered the Gender Guidelines in their decisions even though they are required to consider them in appropriate cases. *SBK*, *supra* note 382 at para 14 and *MVZ v Canada (Citizenship and Immigration)*, 2007 FC 263 at para 11.

⁵⁷⁷ *AQU*, *supra* note 124 at para 16.

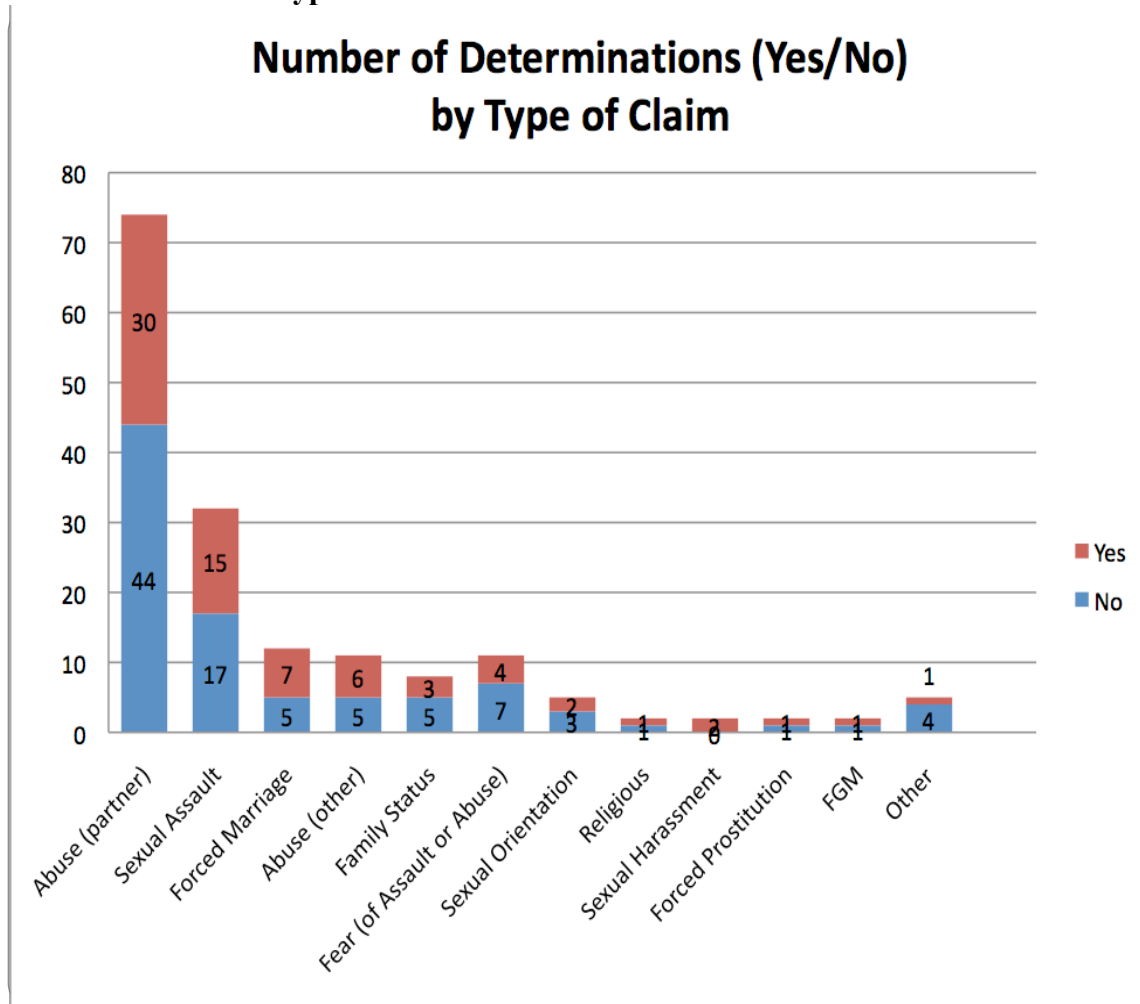
⁵⁷⁸ Gender Guidelines, *supra* note 5 at A.

⁵⁷⁹ *Ibid* at B.

more detailed list of gender-related claims than that offered by the Gender Guidelines. As a case in point, the Gender Guidelines mention “domestic violence” but this term could encompass both intimate partner violence and violence by non-partners. Therefore, I distinguished these two situations in the study by creating a category for “abuse by partner” and “abuse by someone other than a partner.” The most common types of gender-related persecution claims within the study were those based on “abuse by partner” domestic violence (74 cases), followed up by sexual assault (32 cases), forced marriage (12 cases) and abuse by someone other than a partner (11 cases). Other types of gender-related persecution appearing in the sample of cases included: fear of sexual assault or physical violence, persecution based on a woman’s relationship to a family member, and family status as single woman or a widow, for example.⁵⁸⁰ While no single category of gender-related claim had a particularly high success rate, the most common category of claims, abuse by partner, had a lower than average success rate of 40%.

⁵⁸⁰ Gender-related persecution on the basis of family status refers to persecution based on a claimant’s association with one of her family members. For example, the claimant in the 2008 *SSE* case feared harm due to her mother’s political affiliation in Haiti. *SSE v Canada (Citizenship and Immigration)*, 2009 FC 29 at para 7.

FIGURE 1: Types of Gender-related claims and their relative success rate



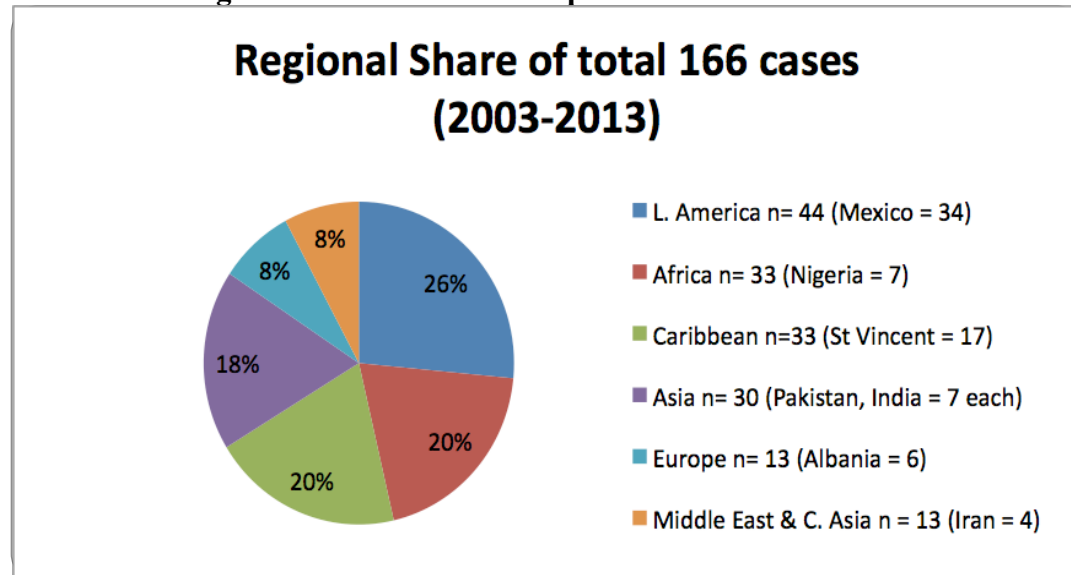
A substantial number of cases (64 cases, constituting 39% of the overall number) contained more than one basis for the refugee claim. This finding was consistent with the Gender Guidelines’ general proposition that gender-related persecution claims may be based on “any one, or a combination of, the enumerated grounds.”⁵⁸¹ These multiple claim cases had a gender-related claim either paired with another form of gender-related persecution (often classified under the *Convention*’s particular social group ground)⁵⁸² or under another

⁵⁸¹ Gender Guidelines, *supra* note 5 at A.

⁵⁸² For example, the 2013 *END* case (*END v Canada (Minister of Citizenship and Immigration)*, 2013 FC 452) involved a woman from Namibia whose claim was based on forced marriage and on the sexual assaults connected to the forced marriage.

Convention grounds, such as persecution on the basis of religion. Among the cases that I analyzed, 36 cases contained two bases (22%), 26 cases contained three bases (16% of total), and two cases (1.2%) contained four bases.

FIGURE 2: Regional distribution of sampled cases



The claimants within the sampled cases originated from 51 countries from every region of the globe. Their countries of origin included many of the top source countries for refugee claims in Canada, according to Citizenship and Immigration Canada statistics for 2013.⁵⁸³ These included Columbia,⁵⁸⁴ Haiti,⁵⁸⁵ Nigeria,⁵⁸⁶ China,⁵⁸⁷ and Pakistan.⁵⁸⁸ Eight countries of origin

⁵⁸³ According to the Government of Canada spreadsheet, the ten most common source countries for refugee applications in 2013 were (ranked in order): China, Pakistan, Columbia, Syria, Nigeria, Afghanistan, Haiti, Democratic Republic of Congo, Democratic Republic of Somalia, and Egypt. Citizenship and Immigration Canada, “Top 10 Source Countries – Refugee Claims at All Offices (in Persons)”, online: Citizenship and Immigration Canada <data.gc.ca/data/en/dataset/d8599fcc-2822-4a3f-b7c8-b92ce44856bb> [“2013 CIC statistics”].

⁵⁸⁴ There were two Columbia cases within the sample set. Columbia was listed as the third most common source country in 2013. *Ibid.*

⁵⁸⁵ This case sample included 10 cases from Haiti, which was number seven on the 2013 CIC statistics. *Ibid.*

⁵⁸⁶ There were five cases in the sample set from Nigeria, the 5th most common source country, according to 2013 CIC Statistics. *Ibid.*

⁵⁸⁷ The case sample included one case from China, the number one source country on the 2013 CIC statistics. *Ibid.*

⁵⁸⁸ This sample set contained five cases from Pakistan, the 2nd most common source country for refugee claims in 2013. *Ibid.*

in the study accounted for 55% of the total number of cases: Mexico, St. Vincent, Haiti, Pakistan, Nigeria, India, Albania, and Sri Lanka.⁵⁸⁹ The most common country of origin for claims in the study was Mexico, with 34 cases constituting 20% of the overall number of cases. The prevalence of cases from Mexico mostly likely has to do with the proximity and migration history between the two countries. Other countries represented within the study included Bangladesh (4 cases), South Korea (3 cases), Burundi (3 cases), Peru (2 cases), and Lebanon (2 cases).

Countries of origin with multiple bases of claim within the study had, with one exception, success rates mirroring the overall average of 44% success at judicial review with one exception. Claimants from Mexico had a lower than average rate of success with only 10 cases (29%) succeeding at Federal Court and 24 failing there. This high failure rate may be linked to the close political relationship between Canada and Mexico, including between the countries' law enforcement agencies, and the large geography of Mexico, which together make an IFA finding more likely. The other countries in the study were close to the overall average success rate except for cases from countries with only one or two cases, which produced either 100% or 0% success rates.

5.2 When Gender-related Cases are not Identified by Decision-makers as Gender-related

Although the study selection criteria were designed to locate gender-related claims in Federal Court judicial reviews of IRB rejections and the Gender Guidelines are a core tool used to understand gender-related claims, 35 cases amongst the 166 cases in the study (21% of the total) did not contain any mention of the Gender Guidelines by its formal title⁵⁹⁰ or any variant

⁵⁸⁹ The most common countries of origin in the sample set were: Mexico (34 cases), St. Vincent (16 cases), Haiti (9 cases), Pakistan (7 cases), Nigeria (7 cases), India (7 cases), Albania (6 cases), and Sri Lanka (6 cases).

⁵⁹⁰ Gender Guidelines, *supra* note 5.

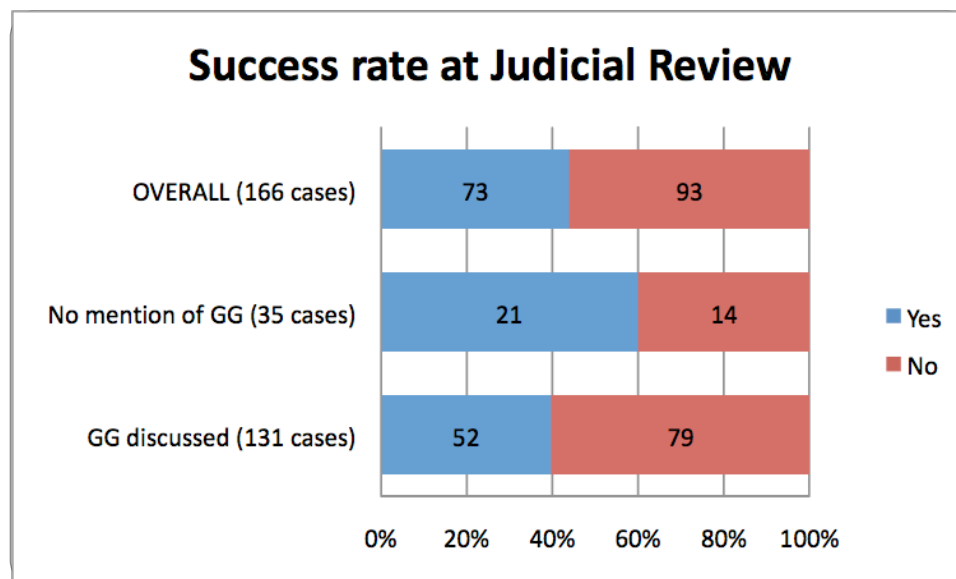
of the title, such as “The Gender Guidelines” or “the Guidelines on gender”. These cases nonetheless were relevant because they satisfied the search criteria through a combination of key words related to the analysis in which I was interested, namely “refugee”, “woman”, “not credible”, and “judicial review”. The “refugee” and “woman” terms included in the search results cases in which the female claimant’s claim was considered secondary to that of another claimant. Although there was no express connection within the cases linking the cause of persecution with the claimant’s gender,⁵⁹¹ these 35 cases shared similar factual circumstances to those in which the Gender Guidelines were discussed, such as sexual assault, abuse by a partner, forced abortion, or sexual harassment. The Federal Court judicial reviews that did not mention the Gender Guidelines also appeared in every geographic region⁵⁹² and represented a variety of types of gender-related claims. A few of these cases used the word “gender” in reference to the claim but the remainder simply made no mention of the gender-related nature of the claim nor of the Gender Guidelines.

Of the 131 cases that did mention the Gender Guidelines, 52 claims were referred back for re-determination by the IRB (successful cases) and 79 claims were dismissed (failed cases), representing a 41% success rate consistent with the overall success rate of 44% for the whole sample. The cases that did not mention the Gender Guidelines counter-intuitively had a higher average success rate of 59% (21 successful cases and 14 failed cases) than gender-related cases mentioning the Gender Guidelines as illustrated in Figure 3.

⁵⁹¹ The term gender here includes both the claimant’s own understanding of her gendered identity and the persecutor’s understanding of the claimant’s gendered identity as it relates to the motivation for persecuting her.

⁵⁹² As mentioned above, the overall percentage of cases in the sample set without reference to the Gender Guidelines was 21% (35 of 166 cases). Europe and Latin America contained the lowest percentage of no-Gender-Guidelines-mention cases in the sample set, with 8% (1 out of 13 cases) and 14% (6 out of 44 cases) respectively omitting mention of the Gender Guidelines. In the Middle East and Central Asia, the percentage of cases was highest in the group of Middle East and Central Asia cases with 46% (6 out of 13 cases) containing no mention of the Gender Guidelines.

FIGURE 3: Success rate at Judicial Review and reference to Gender Guidelines (GG)



The existence of cases in which the Gender Guidelines were not mentioned but which clearly deal with gender-related persecution illustrates the challenges IRB decision-makers face in knowing how to consistently apply the Guidelines to their refugee claim determinations. In the Federal Court case of *SJO*,⁵⁹³ for instance, a judicial review concerning a woman claimant from Trinidad and Tobago who was fleeing domestic violence, the reviewing judge said that the IRB decision-maker failed to act with sensitivity because, “instead of exhibiting awareness of the Applicant’s possible difficulties in recalling her past, the Board appears hypercritical of differences between the Applicant’s testimony and PIF.”⁵⁹⁴ In contrast, the reviewing Federal Court judge in the *TPR* case⁵⁹⁵ found the IRB decision-maker had exhibited the requisite

⁵⁹³ *SJO*, *supra* note 255.

⁵⁹⁴ *Ibid* at para 17.

⁵⁹⁵ *TPR v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1416.

sensitivity to an ethnic Chinese woman in Indonesia suffering from domestic violence because he granted counsel's request for procedural accommodation to facilitate testimony.⁵⁹⁶ It is not clear why gender-related claims not mentioning the Gender Guidelines have a higher rate of success at the Federal Court level. One likely reason for this omission by the Federal Court is that the reviewing judge preferred to focus on the decision-maker's violation of law rather than the IRB's failure to adhere optional guidelines. Another possibility for the lack of Gender Guidelines discussion is that the Federal Court judge considered them but chose not to mention them in the decision because case law provided a stronger underpinning for the decision. Finally, it is possible that the group of study cases without mention of the Gender Guidelines simply were stronger cases in which the court's intervention was clearly merited.

Cases within the study indicated inconsistent understandings amongst different reviewing Federal Court judges of what constituted a gender-related claim despite the provisions in the Gender Guidelines to help decision-makers identify gender-related claims. The Gender Guidelines include a section, entitled "Determining the Nature and Grounds of the Persecution,"⁵⁹⁷ to help IRB decision-makers identify gender-related claims. This section broadly outlines possible ways a woman refugee claimant's gender can intersect with reasons why she has been persecuted, for example, due to family status, severe discrimination, or violence related to gender, and the failure to conform to gender-discriminating religious or cultural practices.⁵⁹⁸ An update to the Gender Guidelines emphasizes the need for decision-makers to determine the linkages between the claimant's gender, the feared persecution, and one or more of the enumerated grounds.⁵⁹⁹ Despite these descriptions, the Gender Guidelines

⁵⁹⁶ *Ibid* at paras 16 & 17.

⁵⁹⁷ Gender Guidelines, *supra* note 5 at A.

⁵⁹⁸ *Ibid*.

⁵⁹⁹ *Ibid* at "Update".

do not give decision-makers much practical guidance on how to identify gender-related claims if the claimant herself does not identify the claim as gender-related. In contrast to other Chairperson's Guidelines, such as the Guideline on Child Refugee Claimants,⁶⁰⁰ the Gender Guidelines contain little concrete advice to decision-makers on how gender-related claims should be considered by IRB decision-makers. This lack of detail may contribute to the failure of decision-makers to accurately identify gender-related claims coming before them and to fully apply the Gender Guidelines' provisions to the analysis of those claims.

Whereas most cases within the study were primarily based on gender-related grounds that had been identified as such by the decision-maker, the decision-makers and reviewing Federal Court judges in a handful of cases rejected the idea that the claim was gender-related despite its factual similarity to examples discussed in the Gender Guidelines. The cases of *MDE*⁶⁰¹ and *RCY*⁶⁰² illustrate how the gender-related elements of the claim do not necessarily mean that the decision-maker takes the Gender Guidelines into consideration, even if the claimant asserts that the claim is gender-related.

In the 2008 *MDE* case,⁶⁰³ the facts of the claim were intertwined with the claimant's family status as a widow yet neither the IRB decision-maker nor the reviewing Federal Court judge mentioned the Gender Guidelines. The case involved a widow living in India who began managing her leased property after the death of her husband.⁶⁰⁴ Shortly after she became a

⁶⁰⁰ Child Refugee Guideline *supra* note 63, contains a wealth of specific advice to decision-makers on how to handle the refugee claims of those under the age of majority. Unlike the Gender Guidelines, which phrases its provisions in soft terms such as "may be necessary", the Child Refugee Guideline phrases its advice in strong terms such as "required", "must", and "all claims." The Child Refugee Guideline also contain a procedural flowchart to help decision-makers to understand the specific timing of when to apply each of the Child Refugee Claimants Guideline's provisions. *Ibid.*

⁶⁰¹ *MDE v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1110.

⁶⁰² *RCY*, *supra* note 477.

⁶⁰³ *MDE*, *supra* note 601.

⁶⁰⁴ *Ibid* at para 2.

widow, her tenant had stopped paying rent and acted hostilely towards her.⁶⁰⁵ Someone then stoned her house and threatened MDE over the phone.⁶⁰⁶ The claimant fled to Canada after the police failed to respond to her complaint about the threats.⁶⁰⁷ The IRB decision-maker rejected the claim on the basis that MDE's description of events was not plausible and thus she lacked credibility. The decision-maker's negative findings, which were supported by the Federal Court, were based on his understanding of the cultural circumstances of elderly widows with sons in India:

The Member found that there were a number of aspects of the evidence that lacked plausibility, including that the Applicant's family in India would offer her no assistance either with the immediate problem concerning Mr. Singh or with her business affairs or in having her come to stay with them in light of the culture of the country to look after mothers; that Mr. Singh would only have targeted the Applicant, an old woman, and not her heirs; and that neither the Applicant nor her family would not seek judicial assistance to retrieve her land when it was so important to her. In my view all of these findings were open to the Member on the record before her.⁶⁰⁸

Notably, with the exception of the state protection argument, each of the reasons was based on the claimant's status as an elderly Indian widow. Later in the same decision, the Federal Court described the IRB's IFA analysis, which also centered on the claimant's status as an elderly Indian widow. Despite these discussions, neither the IRB decision-maker nor the Federal Court judge saw MDE's claim as gender-related. Instead, both the IRB decision-maker and the Federal Court judge viewed the claim as based on a land dispute.⁶⁰⁹ Neither the IRB nor the Federal Court gave consideration to the crucial intersection between this land claim and the claimant's gender. They reached this conclusion despite evidence pointing to the fact

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Ibid.*

⁶⁰⁸ *Ibid* at para 10.

⁶⁰⁹ "The Panel member in dismissing her claim found that there was no nexus between the persecution she claimed to have suffered in India and the Convention grounds as her persecution was based on her unwillingness to give up the land or seek a judicial remedy, rather than on her gender." *Ibid* at para 3.

that the claimant's problems started only after the death of her husband and were exacerbated by her gender-informed circumstances. Furthermore, the IRB decision-maker rejected her claim because he found that the claimant's experiences could not have occurred to an Indian woman under her circumstances. Although the claim circled the issue of gender at every turn, the Gender Guidelines were not referenced once in either decision.

In contrast to the negative decision above, the 2004 judicial review of JWN's refugee protection claim⁶¹⁰ offers an example of a gender-related claim where the judicial review succeeded despite the failure of the IRB and Federal Court to discuss the Gender Guidelines. JWN sought refugee protection based on her fear that her parents and her prospective husband would force her into marriage and to undergo Female Genital Mutilation ["FGM"⁶¹¹].⁶¹² Although the IRB considered documentary evidence on gender-related persecution in general,⁶¹³ it refused the claim because it found "no evidence to suggest that 26-year-old girls are forced into arranged marriages."⁶¹⁴ The reviewing Federal Court judge found he could not address without a transcript whether the IRB decision-maker reached a reasonable conclusion on this or on his other credibility determinations about inconsistencies in the claimant's testimony.⁶¹⁵ It is puzzling that neither the Federal Court nor the IRB looked towards the

⁶¹⁰ *JWN v Canada (Minister of Citizenship and Immigration)*, 2004 FC 432.

⁶¹¹ FGM, also known as female circumcision or female genital cutting, is "the ritual excision of part or all of the external female genitalia, is an ancient cultural practice that occurs around the world today, mainly in parts of Africa." Canadian Women's Health Network, "The FGM Report," online: Canadian Women's Health Network < www.cwhn.ca/sites/default/files/resources/fgm/fgm-en.pdf >.

⁶¹² *JWN*, *supra* note 610 at para 3.

⁶¹³ Paragraph 21 of the Federal Court decision notes that, "The Board stated that it considered all of the documentary evidence with respect to domestic abuse, sexual abuse, rape, FGM and discrimination of women. However, it found that there was no evidence to suggest that 26-year-old girls are forced into arranged marriages." *Ibid* at para 21.

⁶¹⁴ *Ibid*. The claimant submitted at judicial review that the IRB was incorrect in stating she was 26 at the time of persecution; she was 18 and had documentary evidence to prove her age. *Ibid* at para 36.

⁶¹⁵ *Ibid* at para 48.

Gender Guidelines to inform their analyses of this case although the types of persecution it discusses are clearly gender-related.

IRB decision-makers and reviewing Federal Court judges fail to recognize the relevance of gender to other aspects of a gender-related claim. For example, a Haitian claimant in the *MSM* case⁶¹⁶ testified that she experienced persecution by a political association and by her corrupt employer, including a sexual assault.⁶¹⁷ The claimant challenged the denial of her claim based, in part, on the IRB's failure to apply the Gender Guidelines.⁶¹⁸ In its review of the IRB rejection of the claim without reference to the Gender Guidelines, the Federal Court judge did not make a ruling on whether the IRB decision-maker should have considered the Gender Guidelines. Although he noted the failure of the IRB to consider a report to the fire department as problematic,⁶¹⁹ the Federal Court judge found the decision as a whole was reasonable and dismissed the case.⁶²⁰ In contrast, reviewing Federal Court judges in other similar cases have held that the failure to consider the Gender Guidelines in evaluating a sexual assault claim is a reviewable error.⁶²¹

Although the Gender Guidelines include extensive descriptions of possible types of claims that could be considered gender-related, the cases within my study indicate that some decision-makers still hold inconsistent understandings of this basic definitional threshold for a gender-related claim. This was particularly apparent in cases where a claimant's fear of sexual assault was rolled into the decision-maker's analysis of whether the claimant has a

⁶¹⁶ *MSM v Canada (Minister of Citizenship and Immigration)*, 2005 FC 147.

⁶¹⁷ *Ibid* at para 3.

⁶¹⁸ *Ibid* at para 13.

⁶¹⁹ *Ibid* at para 19.

⁶²⁰ *Ibid* at para 21.

⁶²¹ *AEL v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 210; *GUB v Canada (Minister of Citizenship and Immigration)*, 2005 FC 58; & *MHA v Canada (Minister of Citizenship and Immigration)*, 2006 FC 908.

reasonable fear of generalized violence.⁶²² In order to address contradictory and overly narrow understandings of what constitutes a gender-related claim, the Gender Guidelines sections defining gender-related claims should be clarified to ensure that decision-makers consider and fairly assess the gender-related elements of a claim, even in cases where they are embedded in other types of persecution claims.

5.3 Procedural Accommodations at the Hearing

Despite the discretionary nature of the accommodation provisions within the Gender Guidelines, 31% of the cases (51 cases) within the study discussed procedural accommodations to facilitate the claimant's testimony, although the requested accommodation was not granted in all cases.⁶²³ The selected cases also offer compelling insights on how the discursive space of the hearing can be altered by procedural accommodation granted to the claimant pursuant to the Gender Guidelines.⁶²⁴ Just over 25% of the 166 Federal Court judicial reviews in the study addressed whether procedural accommodations were needed in the hearing to facilitate the claimant's testimony although the Gender Guidelines themselves have limited mention of this issue.⁶²⁵ In the section on "Special Problems at Determination Hearings,"⁶²⁶ the Guidelines note that claimants who exhibit symptoms of Rape Trauma

⁶²² See e.g. *RBR v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1101 (wherein a discussion of whether the claimant faced a risk of rape was combined with a discussion of whether she faced a risk of crime).

⁶²³ The two most frequent types of procedural accommodations mentioned within the cases studied were: additional time to respond to questions (including taking breaks during the hearing) and requests for a female IRB decision-maker. The judicial reviews of these cases often noted positively that requests for extra time and breaks were granted. Requests by claimants for female decision-makers were not frequently granted by the IRB.

⁶²⁴ Gender Guidelines, *supra* note 5 at D.

⁶²⁵ Note that several Chairperson's Guidelines besides the Gender Guidelines contain provisions for changes to normal hearing procedure. These include:

- Child Refugee Guideline, *supra* note 63.
- Refugee Hearing Guidelines, Canada, *supra* note 67.
- Vulnerable Persons Guidelines, *supra* note 64.

⁶²⁶ Gender Guidelines, *supra* note 5 at D.

Syndrome “may require extremely sensitive handling.”⁶²⁷ The Guidelines further remind decision-makers that women with domestic violence-related claims may be reluctant to testify about their experiences.⁶²⁸ Immediately after the sentences on sexual assault and domestic violence (thus, implying that it only applies to these types of claims), the Gender Guidelines state:

In some cases it will be appropriate to consider whether claimants should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by videotape, or in front of members and refugee claims officers specifically trained in dealing with violence against women.⁶²⁹

This section then concludes with a recommendation that decision-makers familiarize themselves with the UNHCR’s *Guidelines on the Protection of Refugee Women*, a document that generally discusses processes and procedures that can improve women refugees’ access to services.⁶³⁰

The reviewing Federal Court judge’s assessment regarding procedural accommodation often referred to psychological reports submitted by the claimant combined with one or more of the Chairperson’s Guidelines that contain provisions on procedural accommodation or mention the Vulnerable Persons Guideline,⁶³¹ to justify a procedural change to the hearing

⁶²⁷ I have always found this phrasing of “sensitive handling” (which is echoed in some decisions) to be patronizing towards women refugee claimants. Furthermore, I do not find it to be useful guidance on how decision-makers should substantively alter their behaviour and questioning in order to facilitate claimants’ testimonies in these circumstances.

⁶²⁸ Gender Guidelines, *supra* note 5 at D.

⁶²⁹ *Ibid.*

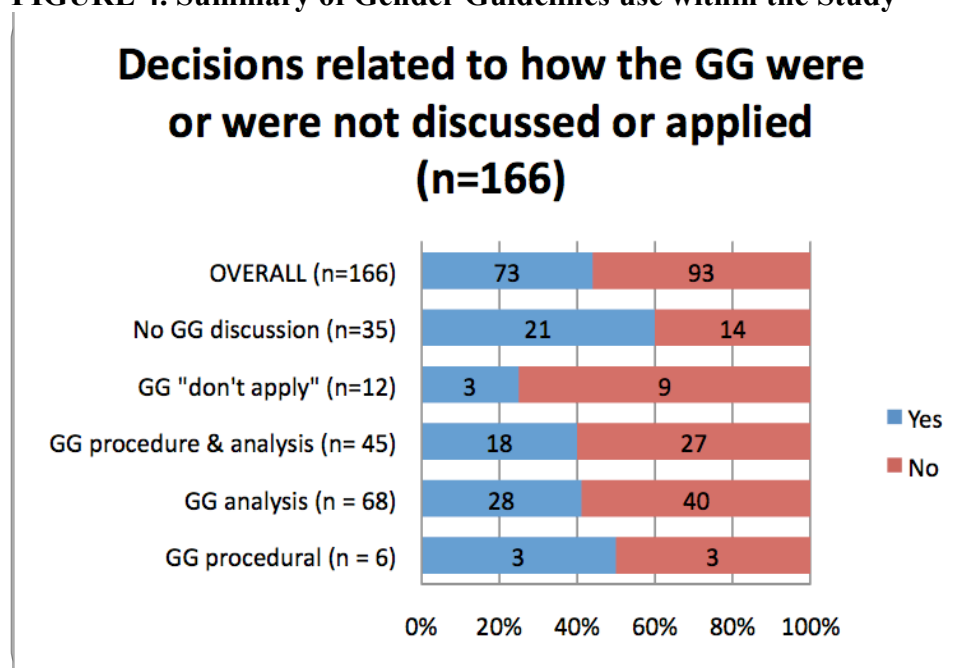
⁶³⁰ United Nations High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women*, online: UNHCR <www.unhcr.org/3d4f915e4.html>.

⁶³¹ The Vulnerable Persons Guidelines (*supra* note 64) offer lengthier discussion of procedural accommodations that could be included in the hearing in order to facilitate the claimant’s testimony. For example, Section 4.2 lists the following as possible accommodation options:

- a. allowing the vulnerable person to provide evidence by videoconference or other means;
- b. allowing a support person to participate in a hearing;
- c. creating a more informal setting for a hearing;
- d. varying the order of questioning;
- e. excluding non-parties from the hearing room;
- f. providing a panel and interpreter of a particular gender;
- g. explaining IRB processes to the vulnerable person; and

This subset of cases shows inconsistent understandings within the Federal Court about when an IRB decision-maker should grant a claimant’s request for procedural accommodation in hearings on gender-related claims.⁶³²

FIGURE 4. Summary of Gender Guidelines use within the Study



5.4 Application of the Gender Guidelines to Credibility and Plausibility Analyses

The Gender Guidelines contain advice on how credibility should be assessed in gender-related cases. The Guidelines’ Section D stresses the need for decision-makers to consider how barriers such as cross-cultural misunderstandings may hinder a woman refugee claimant’s ability to demonstrate how her claim is credible and trustworthy.⁶³³ Although credibility is not

h. allowing any other procedural accommodations that may be reasonable in the circumstances.

Ibid at s 4.2.

⁶³² The 44 percent rate of success and failure within this sub-set was consistent with the average rate within the broader sample.

⁶³³ Gender Guidelines, *supra* note 5 at “Section D. Special Problems at Determination Hearings.”

explicitly mentioned in the section on the process of gender-related claim evaluation entitled “Framework of Analysis,”⁶³⁴ it stands to reason that Section D’s discussion on credibility was intended for decision-makers to use in their initial credibility assessments.

There were 30 cases within the study centering on when the Gender Guidelines should apply when analyzing whether a claimant was credible or whether her description of her experiences was plausible. Amongst these 30 cases, the reviewing Federal Court judges in 16 cases⁶³⁵ found the Gender Guidelines applied to the claim but were irrelevant to the judicial review because the claimant was either not credible or the claim was implausible. In other words, they treated the Gender Guidelines as a document that was only applicable *after* determinations on claimant credibility and claim plausibility were made. For example, in the 2003 *SZE* decision, the Federal Court accepted the decision-maker’s finding that the claimant was enmeshed in a family blood feud in Albania was not plausible and therefore not gender-related.⁶³⁶

The remaining 14 cases⁶³⁷ found the opposite, that the Gender Guidelines were crucial to the review of a claimant’s credibility or the plausibility of her claim, *before* the analysis of

⁶³⁴ *Ibid* at “Framework of Analysis.”

⁶³⁵ *SZE v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636; *SKM v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1190; *AAY v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1411; *RKH v Canada (Minister of Citizenship and Immigration)*, 2006 FC 839; *TPR*, *supra* note 595; *GKS v Canada (Citizenship and Immigration)*, 2007 FC 430; *KMI v Canada (Citizenship and Immigration)*, 2008 FC 224; *SSE*, *supra* note 580; *LKH v Canada (Citizenship and Immigration)*, 2012 FC 659; *GMM v Canada (Citizenship and Immigration)*, 2012 FC 62; *NLR v Canada (Citizenship and Immigration)*, 2012 FC 1184; *DUW v Canada (Citizenship and Immigration)*, 2012 FC 61; *PKA*, *supra* note 401; *EGG v Canada (Citizenship and Immigration)*, 2013 FC 416; & *AYL v Canada (Citizenship and Immigration)*, 2013 FC 765; *MSM*, *supra* note 616; & *RPL*, *supra* note 477 at para 57.

⁶³⁶ *SZE*, *supra* note 635.

⁶³⁷ *AQU*, *supra* note 124, *HSY v Canada (Minister of Citizenship and Immigration)*, 2005 FC 379, *SBK*, *supra* note 382, *JAK v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1205, *MHA*, *supra* note 621, *SJO*, *supra* note 255, *MKA v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1066, *MVZ*, *supra* note 576, *ARO v Canada (Citizenship and Immigration)*, 2010 FC 1080, *KCC v Canada (Citizenship and Immigration)*, 2011 FC 1445, *ANO v Canada (Citizenship and Immigration)*, 2012 FC 805, *EOW v Canada (Citizenship and Immigration)*, 2012 FC 140, *MRE v Canada (Citizenship and Immigration)*, 2013 FC 973, & *NAZ v Canada (Citizenship and Immigration)*, 2013 FC 1156.

the availability of state protection or an IFA. Of these 14 cases, 11 succeeded (79% success rate). Thus, the reviewing Federal Court judge's decision on whether or not the Gender Guidelines should apply to credibility and plausibility assessments correlated strongly with the success or failure of the claim.

Among the 16 cases where credibility or plausibility was assessed without reference to the Gender Guidelines, only one (the *GKS* case)⁶³⁸ succeeded at judicial review (6% success rate). The judge in this case avoided discussion of how the Gender Guidelines applied by basing his decision solely on the decision-maker's unreasonable plausibility analysis.⁶³⁹ The *GKS* case involved a woman who was targeted by Sikh terrorists in the Punjab region of India because her husband had witnessed them kill a police officer. The reviewing judge found the IRB's failing to make a fair implausibility analysis constituted reason to remit the case back to the IRB for reconsideration. He therefore found it unnecessary to address the claimant's concerns regarding the IRB's treatment of the Gender Guidelines because there was already sufficient evidence to set the decision aside.

All remaining claims in the study where credibility and plausibility were assessed separately without reference to the Gender Guidelines failed at judicial review. The 2012 *LKS* case⁶⁴⁰ case illustrates the view that the Gender Guidelines become relevant only after credibility and plausibility are determined positively in the claimant's favour. Mr. Justice O'Reilly found the IRB's "credibility findings were not unreasonable given the evidence before it... (and therefore) it was unnecessary to consider aspects of LKS's claim that depended on the discredited evidence."⁶⁴¹ He responded later in the decision to the claimant's

⁶³⁸ *GKS*, *supra* note 635.

⁶³⁹ *Ibid.*

⁶⁴⁰ *LKH*, *supra* note 635.

⁶⁴¹ *Ibid* at para 3.

assertion that the IRB failed to apply the Gender Guidelines correctly by reiterating that the Guidelines were inapplicable where “there was nothing left to analyze” because the fear alleged by the claimant was not credible.⁶⁴²

In other examples, the reviewing judge asserted that the IRB considered the Gender Guidelines in the decision as a whole (implicitly or explicitly) but that the Guidelines had no bearing on the key issue of credibility.⁶⁴³ For example, in the 2004 *AAV* case, the judge held, “this Court finds that the tribunal’s failure to mention the Gender Guidelines has no bearing on the issue of this case since its key findings relate to the applicant’s lack of subjective fear and of credibility. Moreover, the tribunal is not bound by the Gender Guidelines.”⁶⁴⁴ Similarly, the Federal Court judge in the 2008 *KMI* case found the IRB’s credibility assessment reasonable even though the IRB decision-maker determined the Gender Guidelines were inapplicable because the claim was not credible.⁶⁴⁵

In contrast, other Federal Court reviewing judges emphasized the centrality of the Gender Guidelines in credibility assessments. For example, in the *MHA* case,⁶⁴⁶ involving a woman from Ethiopia who had been sexually assaulted, the Federal Court set aside a determination based on the decision-maker’s unreasonable credibility assessment. The Court found that the decision-maker had unfairly drawn a negative credibility inference from the claimant’s failure to disclose the sexual assault to the Canadian immigration officer at the port

⁶⁴² *Ibid* at para 20 & 21.

⁶⁴³ See *AAV*, *supra* note 635 at para 19 wherein the judge determined the decision-maker implicitly considered the Gender Guidelines. See *SSE*, *supra* note 585 at para 28, wherein the judge stated the Guidelines were explicitly mentioned but they did not apply because the claimant was found not credible. See also *AYL*, *supra* note 635 at para 38 (“Having previously found the Applicants’ overall credibility in doubt, on the basis of the documentary evidence and cumulative findings and negative inferences drawn, and in light of the lack of persuasive evidence to the contrary, the RPD found that the Applicants’ allegation that they would face persecution on the basis of China’s one child policy was not credible”).

⁶⁴⁴ *AAV*, *supra* note 635 at para 19.

⁶⁴⁵ *KMI*, *supra* note 635 at para 9 & 21.

⁶⁴⁶ *MHA*, *supra* note 637.

of entry despite the Gender Guideline's clear guidance that some claimants may have culturally based feelings of shame that would inhibit such disclosures.⁶⁴⁷ The Federal Court judge in the *HSY* case firmly rejected the IRB decision-maker's conclusion that the Gender Guidelines did not apply if the claimant was not credible, although she ultimately dismissed the case.⁶⁴⁸ The judge emphasized the importance of the Gender Guidelines as a tool to assess credibility.⁶⁴⁹ The Federal Court in the *NZO* case⁶⁵⁰ set aside the IRB's determination because of its failure to substantively consider the Gender Guidelines in the assessment of credibility and the availability of state protection,⁶⁵¹ noting the Guidelines "were issued in order to assure a certain coherence in tribunal decisions."⁶⁵²

The Federal Court's failure to consider the Gender Guidelines consistently when determining credibility plainly illustrates the court's deference to administrative decisions and reveals the flaw in not requiring IRB decision-makers to follow the Gender Guidelines. In contrast, among cases where judges discussed the relevance of the Gender Guidelines, credibility assessments tended to also emphasize the need to guarantee procedural fairness to women with gender-related claims. In both lines of cases, the Federal Court was able to point to jurisprudence to support the position on whether the decision-maker's use of (or lack thereof) the Gender Guidelines for credibility assessment was a reasonable determination by the IRB decision-maker.

The Federal Court judges' and IRB decision-makers' contradictory views on the role of the Gender Guidelines in credibility determinations clearly indicate the need for greater

⁶⁴⁷ *Ibid* at para 5.

⁶⁴⁸ *HSY*, *supra* note 637 at para 13 & 14.

⁶⁴⁹ *Ibid* at para 14.

⁶⁵⁰ *Ibid*.

⁶⁵¹ *Ibid* at para 66.

⁶⁵² *NZO v Canada (Citizenship and Immigration)*, 2011 FC 193 at para 4.

clarity on this issue, through revisions to the Gender Guidelines themselves or to the *IRPA*. It is essential that decision-makers and Federal Court judges have consistent understandings of when the provisions of the Gender Guidelines should be applied, especially at the preliminary stage of credibility and plausibility evaluations. As I have indicated above, the Gender Guidelines' provisions related to credibility clearly indicate that the drafters intended the Guidelines to be used in credibility and plausibility assessments. This initial but crucial stage of gender-related claim evaluations also needs to be clearly included in the Guidelines' "Framework of Analysis" section⁶⁵³ in order to emphasize that they need to be used in credibility evaluations.

5.5 Gender Guidelines Word Count and Success Rate

To help evaluate how the Gender Guidelines were incorporated into Federal Court judicial reviews, I tested whether there was a correlation between the success rate at Federal Court judicial review and the length of Gender Guidelines discussion. I did this by grouping the cases by length and then counting up the number of successful and unsuccessful cases in each group. In the overall study, the average case length was 3,456 words⁶⁵⁴ and the average discussion of the Gender Guidelines was 276 words⁶⁵⁵ (8.3% of the document). The Gender Guidelines discussion tended to be slightly longer in successful judicial reviews than in negative decisions. Successful cases had on average 433 words of Gender Guidelines discussion (12% of the case). Negative cases had on average 292 words of Gender Guidelines

⁶⁵³ Gender Guidelines, *supra* note 5 at "Framework of Analysis".

⁶⁵⁴ The shortest case was 243 words in length and the longest case was 9,687 words in length. The median case length was 2,852 words.

⁶⁵⁵ This figure includes cases not citing the Gender Guidelines. These 35 cases reduce the average. If the cases without Gender Guidelines discussion are excluded from the calculation, then the average length of Gender Guidelines discussion is 348 words. Excluding those cases without any Gender Guidelines, the shortest Gender Guidelines discussion was 14 words and the longest was 2,722 words.

discussion (9% of the overall case length).⁶⁵⁶ It is not feasible to suggest a causal link between the proportion of a case dedicated to the Gender Guidelines and outcome. However, the evidence indicates that a claimant is less likely to be successful if the reviewing Federal Court judge considered the Gender Guidelines to have an insignificant impact on the IRB's determination of reasonableness. The unusually high (59%) success rate for non-Gender Guidelines cases was an exception to this trend. The one logical explanation for this phenomenon is that the reviewing Federal Court judge found the non-gender-related arguments in the case to be highly persuasive and so based the decision on those factors without substantively considering the gender-related aspects.⁶⁵⁷

Excluding the non-Gender Guidelines cases, cases with 500 words or less of Gender Guidelines discussion had a 35% or below likelihood of success.⁶⁵⁸ Federal Court judicial reviews with 501 words or higher of Gender Guidelines discussion had a 50% or higher likelihood of success,⁶⁵⁹ as is illustrated in Figure 5 below.

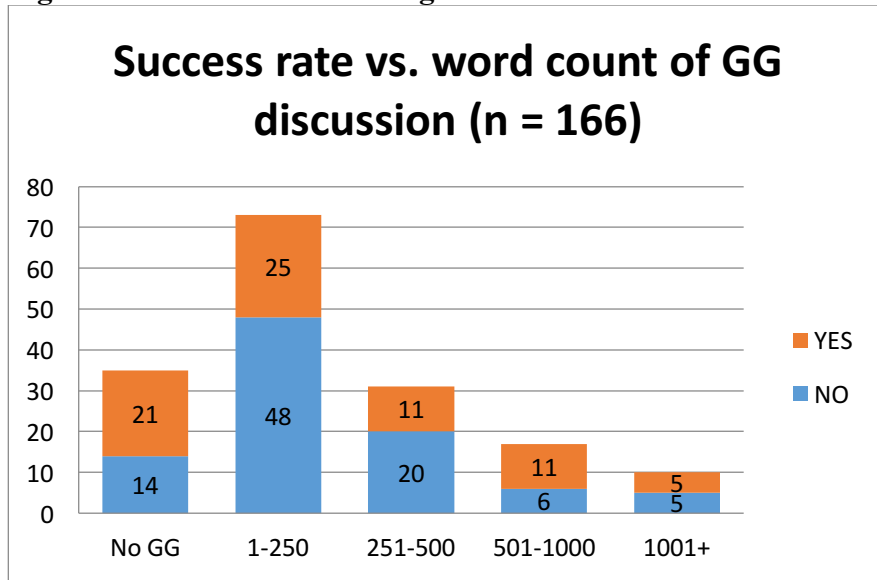
⁶⁵⁶ There was no significant difference in overall case length between positive and negative cases within this subset.

⁶⁵⁷ It is also possible that a decision-maker's or judge's avoidance of gender-related aspects of a woman's claim might be due to a "backlash" view that inequality between men and women is no longer an issue that needs to be institutionally addressed.

⁶⁵⁸ There was a 34% success rate for 1-250 words of Gender Guidelines discussion and a 35% success rate for cases with 251-500 words.

⁶⁵⁹ There was a 65% success rate for 501-1000 words and a 50% success rate for cases with over 1001 words of Gender Guidelines discussion.

Figure 5. Success rates vs. length of Gender Guidelines discussion



In considering the success rate and judicial discussion of the Gender Guidelines, it is important to keep in mind that, while there is a correlation between a lengthier Gender Guidelines discussion and judicial review success, this fact does not mean that there is necessarily a causal relationship between the two factors.

A short discussion of the Gender Guidelines in a long decision does, however, have some predictive power because decisions tend to dedicate the greatest number of words to the central legal issue of the case. It is logical to infer that when a judge only writes a few sentences about the Gender Guidelines, he or she has not used them as a key analytical tool in reviewing the IRB's claim determination. In over half the cases in the data set, the discussion of the Guidelines was less than 250 words. Overall, the median Gender Guidelines discussion in the data set was 128 words while the median case length was 2,852 words. Therefore, the median discussion of the Guidelines represents 4.5% of the median case word count, suggesting that their influence on judges' understanding and analysis of the gender-related claims was limited.

5.6 Use of the Section C (Evidentiary Measures) and Section D (Special Problems in the Hearing)

Within the study cases, those cases discussing two specific sections of the Gender Guidelines, “Section C Evidentiary Measures” and “Section D Special Problems in the Hearing,” tended to have higher success rates than those where these provisions were not referenced. The Gender Guidelines’ Section C and Section D provide decision-makers with specific advice on the substantive evaluation of gender-related claims. Representing 15% of the total sample (25 cases⁶⁶⁰), the cases including these provisions tended to have longer and more in-depth discussions of the Gender Guidelines by the IRB and the reviewing Federal Court. The 25 cases mentioning Section C or Section D had a success rate of 64%,⁶⁶¹ much higher than the remaining 141 cases not mentioning either of these sections, where the success rate was 37%. Failure to specifically discuss Section C or Section D in cases where the Gender Guidelines were mentioned indicates that the reviewing Federal Court judge thought that only the sections of the Guidelines dealing with identification of gender-related claims were relevant to the review. This is troubling because it means the judge did not look at the reasonableness of the decision-maker’s evidence analysis through the lens of the Guidelines’ Section C.

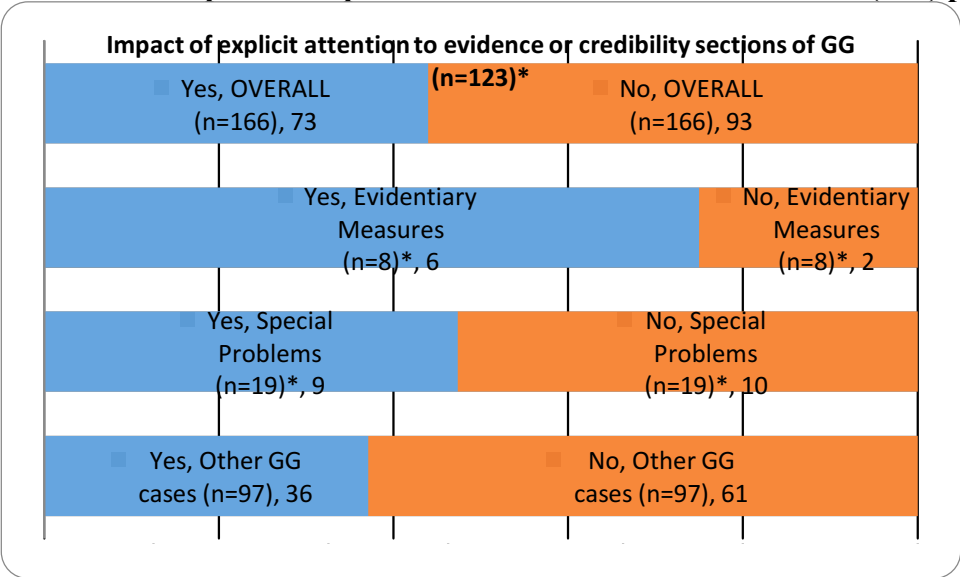
The failure of Federal Court judges to mention Section C and Section D of the Gender Guidelines is troubling because these sections are the two most relevant provisions to the twin

⁶⁶⁰ *SIN v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1662; *HSY*, *supra* note 637; *JGY v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1119; *ADC v Canada (Minister of Citizenship and Immigration)*, 2006 FC 739; *DRI*, *supra* note 122; *RMV*, *supra* note 349; *CVL v Canada (Citizenship and Immigration)*, 2007 FC 256; *IIS v Canada (Citizenship and Immigration)*, 2008 FC 149; *JCG v Canada (Citizenship and Immigration)*, 2008 FC 128; *NKU*, *supra* note 401; *RPL*, *supra* note 477; *MHI v Canada (Citizenship and Immigration)*, 2010 FC 445; *APA v Canada (Citizenship and Immigration)*, 2010 FC 216; *KCC*, *supra* note 637; *SLE v Canada (Citizenship and Immigration)*, 2011 FC 1378; *FER v Canada (Citizenship and Immigration)*, 2011 FC 534; *NZO*, *supra* note 652; *MKA*, *supra* note 637; *PKA*, *supra* note 401; *MLU v Canada (Citizenship and Immigration)*, 2012 FC 763; *EOW*, *supra* note 642; *JND v Canada (Citizenship and Immigration)*, 2013 FC 459; *EGR v Canada (Citizenship and Immigration)*, 2013 FC 486.

⁶⁶¹ Nine cases out of 18 cases mentioning Section C were successful on judicial review (50%). Six out of seven cases mentioning Section D were successful (86%).

issues of state protection and credibility respectively. They speak directly to the intersection between gender-related persecution and the influence of the claimant’s contextual circumstances on the IRB decision-maker’s analysis of evidence.

FIGURE 6. Impact of Explicit Attention to Gender Guidelines’ (GG) provisions



** 1 case (PKA) applied both Special Problems & Evidentiary Measures*

There were seven cases within the study discussing the Gender Guidelines’ Section C. Of these, six cases related to abuse by a partner (domestic violence) and one claim related to abuse by a non-partner (the claimant’s son). Cases mentioning Section C, while not numerous, had a much higher average rate of success than the study’s other domestic violence cases: an 83% success rate⁶⁶² compared to the 26% overall success rate for the 74 abuse by partner cases not mentioning the section. Cases that discussed Section C also tended to have lengthier decisions than the average for the study’s judicial reviews: 4,224 word count rather than the 3,456 words overall average. These longer decisions, which were directly informed by the Gender Guidelines’ Section C, spent more time discussing how the claimant’s personal circumstances

⁶⁶² Five out of six cases were successful.

informed both her experience of persecution and how she sought protection of the state from that persecution.

The Federal Court judges in these judicial reviews emphasized the centrality of a claimant's real life context in analyzing evidence related to credibility issues and the availability of state protection. In the *EGR* case,⁶⁶³ an abuse by partner-based case from the Dominican Republic, Justice Shore noted contextual factors the IRB decision-maker should have considered in its analysis of the evidence on state protection:

The applicant testified that she came from a small town where she lacked both the necessary information and resources to take action against the violent partner who had abused her and prevented her from seeing her children. The RPD should have taken into account the circumstances of the narrative that it held to be credible (including the social milieu to which the applicant belonged, her abusive and turbulent marital relations and her state of psychological health); its failure to do so renders its decision unreasonable.⁶⁶⁴

He also discussed whether or not state protection was realistically available to the claimant, looking holistically at her circumstances and acknowledging past jurisprudence that suggested state protection was available to domestic violence victims in the Dominican Republic.⁶⁶⁵ In a similar vein, the reviewing Federal Court judge in the *NZO* case found the IRB decision-maker's failure to substantively analyze available evidence indicating the claimant suffered from Battered Woman Syndrome rendered the decision-maker's conclusions on credibility unreasonable.⁶⁶⁶

Cases that discussed both Section C and Section D did not necessarily signify the claimant would succeed on judicial review. The 2012 *PKA* case⁶⁶⁷ offered another interesting

⁶⁶³ *EGR*, *supra* note 666.

⁶⁶⁴ *Ibid* at para 29.

⁶⁶⁵ *Ibid* at para 24.

⁶⁶⁶ *NZO*, *supra* note 652 at para 51.

⁶⁶⁷ *PKA*, *supra* note 401.

example for two reasons: first, it mentioned both Section C and Section D; and second, despite consideration of these sections, the Federal Court rejected the claim. The Indian claimant in this case sought refugee protection on the basis of abuse by her partner. After receiving a negative determination of her claim, she brought the case to Federal Court arguing the IRB decision-maker failed to consider her psychological report and her cultural context in the credibility assessment.⁶⁶⁸ In rejecting her claim, the reviewing Federal Court judge found the IRB had considered the claimant's Post-Traumatic Stress Disorder (PTSD)⁶⁶⁹ and her context as a battered woman in India, but arrived at the reasonable conclusion that her inconsistencies and omissions indicated a lack of credibility.⁶⁷⁰

A search of all Federal Court refugee claim judicial reviews yielded 19 cases over the past ten years that mention "Section D" or "Special Problems" in gender-related refugee claims. These cases enjoyed a slightly higher rate of success than the overall average rate within the study (47% success rate⁶⁷¹ versus a 44% overall success rate). Cases mentioning "Section D" or "Special Problems" were of a broad range of types but a significant percentage

⁶⁶⁸ The claimant challenged the Federal Court decision in part because:

...the Board also relied on assumptions based on its own cultural background, rather than on the applicant's background. For example, the applicant notes that: the Board found it implausible that the applicant's mother would tell her to run away or commit suicide if the abuse was true; the Board did not reference materials in the National Documentation Package on widespread honour killings, domestic violence and the shameful effect of publicly acknowledging abuse in India.

Ibid at para 36.

⁶⁶⁹ PTSD is a diagnosis based on a collection of psychological and psychosomatic symptoms linked to experience of trauma. American Psychiatric Association "Posttraumatic Stress Disorder" (Fact Sheet), online: Diagnostic and Statistical Manual of Mental Disorders

<www.dsm5.org/Documents/PTSD%20Fact%20Sheet.pdf>. Psychiatrist Janet Cleveland further explains:

Asylum seekers are highly likely to suffer from PTSD and depression because they typically have been exposed to multiple traumatic events involving interpersonal violence, have suffered multiple losses, and are subject to considerable stress and insecurity linked to exile and the refugee claims process itself. The likelihood of developing PTSD is generally much higher in response to interpersonal violence, especially sexual violence...

Cleveland, *supra* note 206 at 124.

⁶⁷⁰ *Ibid* at para 70.

⁶⁷¹ 9 out of 19 cases.

(44%) were abuse by partner cases (roughly in line with the 46% overall representation of partner abuse cases).

Within the subset of cases discussing Section D, successful cases tended to focus on the IRB decision-maker's simplistic or subjective understanding of the claimant's experience. For example, in the *IIS* case, an Armenian claimant sought refugee protection based on her experience of abduction and forced prostitution in her home country.⁶⁷² The IRB found her story to be implausible and that she was not a credible witness regarding her persecution.⁶⁷³ The reviewing Federal Court judge concluded that the IRB had made numerous reviewable errors in its credibility assessment of the claimant, especially with regard to the plausibility of the claimant's actions during her escape from captivity and attempts to seek state protection. He also noted the importance of evaluating plausibility evidence in context: "an applicant's evidence must be viewed from that applicant's position in her real life context, not from a removed and uninformed position. The conduct that is to be expected in an applicant's circumstances is a matter of evidence that is to be placed on the record."⁶⁷⁴

Cases that cited Section D but dismissed the claim tended to be ones in which the reviewing Federal Court judge concluded that the IRB's findings on the claimant's credibility were valid despite not properly considering the Gender Guidelines. One example is the case of *HSY*.⁶⁷⁵ HSY was a young woman from Mali who came to Canada to study and then claimed refugee protection on the grounds that she would be forced to undergo Female Genital Mutilation and be forced to marry an older cousin in Mali.⁶⁷⁶ The IRB found her claim was

⁶⁷² *IIS*, *supra* note 666 at para 1.

⁶⁷³ *Ibid* at para 3.

⁶⁷⁴ *Ibid* at para 14.

⁶⁷⁵ *HSY v Canada (MCI)*, *supra* note 637.

⁶⁷⁶ *Ibid* at para 1.

not credible in part because the claimant was unable to give the names of her potential husband's two other wives.⁶⁷⁷ The Federal Court concluded that the IRB's negative inference from her lack of knowledge was in error, citing Section D's discussion of possible cultural differences that might explain a woman's lack of knowledge about the social circumstances of a male relative.⁶⁷⁸ Despite this error, the Federal Court found the documentary evidence supported the decision-maker's credibility determination and permitted the determination to stand.⁶⁷⁹

5.7 Use of the Gender Guidelines in Sexual Assault Cases

The 20 sexual assault-based cases within the study highlighted the diversity of Federal Court assessments on what is considered a reasonable IRB finding on the issue of state protection or of credibility in gender-related claims. Five cases from Haiti illustrate this divergence of views. Each of them dealt with the risk of sexual violence in the wake of the 2010 Haiti earthquake and discussed how the risk to the claimant relates to her gender and to the risk faced by the wider population. Despite the factual similarities among the five cases, two succeeded at judicial review and three were dismissed.

In the *EDE* case,⁶⁸⁰ the principal claimant asked for refugee protection on the basis of her fear of persecution either for her past political beliefs and/or "the fact that both she and her daughters would be targets of criminal gangs, kidnappers and potential rapists as a result of the fact that they are women and more particularly those who have lived outside the country for a period of time".⁶⁸¹ The IRB declined her claim in part because of disbelief that the

⁶⁷⁷ *Ibid* at para 12.

⁶⁷⁸ *Ibid* at para 14 & 15.

⁶⁷⁹ *Ibid* at para 11 & 19.

⁶⁸⁰ *EDE*, *supra* note 401.

⁶⁸¹ *Ibid* at para 3.

claimant's situation was anything more than a generalized fear of violence faced by all citizens regardless of gender. Characterizing the IRB's position, the Federal Court wrote:

Notably, the Board highlighted the following information as relevant to its assessment of the objective quality of the applicant's fear: 1) the Prime Minister of Haiti is a woman; and 2) half of Haiti's population of 8 million are women. Directly following these facts, the Board found that the risk the applicant fears is one rooted in a general problem of criminality in that country. And, that fearing the risk of rape is not from gender, but "rather [it is] a risk that is faced by all Haitian citizens as a result of the violence in their country". In conclusion, the Board stated: "[t]he jurisprudence has held that victims of generalized violence or potential victims of generalized violence such as the claimants are not afforded refugee protection."⁶⁸²

In his rejection of the IRB's decision, Justice Pinard criticized the IRB's reliance on the fact that Haiti had a female prime minister and that women constituted half of the population of the country as grounds for impugning the claimant's credibility. The IRB also drew a negative inference from the claimant's difficulty in remembering key political events in Haiti's recent history. Justice Pinard criticized the IRB's failure to adequately consider the claimant's submitted psychological and medical assessments, which described her PTSD diagnosis, instead finding these to be rational explanations for her recall problems.⁶⁸³ In contrast to some of the other Haitian cases described below, the Federal Court in this case found a clear nexus between the social group of which the claimant was a member and the nature of the harm feared. Quoting from the Gender Guidelines⁶⁸⁴ as well as several reports on sexual violence in Haiti, he concluded that the fear of sexual assault is not a generalized fear experienced by all Haitians because, although it is possible for men and boys to be sexually assaulted, women experience the majority of such assaults.⁶⁸⁵

⁶⁸² *Ibid* at para 10.

⁶⁸³ *Ibid* at para 16.

⁶⁸⁴ *Ibid* at para 24.

⁶⁸⁵ *Ibid* at para 38.

The *DJO* case⁶⁸⁶ shares a substantially similar fact pattern to the *EDE* case, a fact noted by Justice Martineau in his judicial review.⁶⁸⁷ *DJO* sought a judicial review of the reasonableness of the IRB's conclusions that her fears of persecution in the form of politically motivated attacks by gangs and/or sexual violence were unfounded. While the IRB accepted the notion of a Haitian woman as member of a particular social group, it rejected the idea that this group faced a specific threat of violence or rape that differentiated them from the male population.⁶⁸⁸ Justice Martineau overturned the decision:

The Board erred or otherwise acted unreasonably in finding that rape is not a gender-related risk in Haiti or that only “some female Haitians under the age of 18 may be at risk of gender-related persecution”. The fact that much of the sexual violence against girls, and women in general, in Haiti occurs in a domestic or family context does not excuse or lift the persecutory nature of gender-related abuses against women in Haiti who are kidnapped by gangs or raped in camps since the earthquake of January 12, 2010... Therefore, the suggestion made by the Board that women are randomly raped in Haiti by criminals is not supported by the evidence; while women are targeted for kidnapping just like men, they are raped because they are women.⁶⁸⁹

In concluding, the Justice emphasized the need for the IRB to keep an open mind and not resort to stereotypic understandings of sexual assault (such as that it is mostly a problem for a young and uneducated populations) in rendering a decision.⁶⁹⁰

Sharing a similar fact situation but reaching the opposite conclusion, the *RCY* case⁶⁹¹ involved a claim brought by 30-year-old woman. *RCY* feared persecution at the hands of Lavalas partisans, who robbed her home and attacked her brother,⁶⁹² on the basis of being “part of the social group of Haitian woman, or as a Haitian woman coming from abroad.”⁶⁹³ The

⁶⁸⁶ *DJO*, *supra* note 477.

⁶⁸⁷ *Ibid* at para 21.

⁶⁸⁸ *Ibid* at para 7.

⁶⁸⁹ *Ibid* at para 33 & 34.

⁶⁹⁰ *Ibid* at para 35.

⁶⁹¹ *RCY*, *supra* note 477.

⁶⁹² *Ibid* at para 4.

⁶⁹³ *Ibid* at para 11.

reviewing judge, Justice Beaudry, noted that the IRB considered the Gender Guidelines but “found that on a balance of probabilities, there was no evidence that the applicant’s subjective fear was based on her gender.”⁶⁹⁴ The Justice concluded that this decision was within the range of reasonable options open to the IRB and therefore accepted the IRB determination.⁶⁹⁵

In another case, the Federal Court again found a claimant’s fear of violence to be indistinguishable from that of the general Haitian population.⁶⁹⁶ IGI, a 63-year-old Haitian woman, feared sexual assault at the hands of robbers who perceived her as being a wealthy, foreign-traveled woman. The IRB found her not credible based on inconsistencies between her testimony and documentary evidence and concluded:

In the circumstances, she had not demonstrated that she was a vulnerable person with no secure place to live with her husband and family if she were to return to Haiti. The Board found that she has friends, two sisters, a brother, and a family with whom she can live safely. If that was not the case, Ms. IGI would not have returned to Haiti in July 2010.⁶⁹⁷

While the claimant’s return to Haiti is relevant to the assessment of her objective and subjective fear, the Federal Court’s findings on the reasonableness of her fear of sexual assault in her circumstances were more problematic. Notably, in this decision, the IRB did not deny the risk of sexual assault amongst women in Haiti but it concluded that the claimant, in her particular circumstances, would not face more than a “mere possibility” of rape due to her family support structures.⁶⁹⁸

In supporting the IRB’s determination as being fundamentally reasonable, Madame Justice Gagné stated that she was not necessarily in agreement with the bases for all of the

⁶⁹⁴ *Ibid* at para 8.

⁶⁹⁵ *Ibid* at para 14.

⁶⁹⁶ *IGI v Canada (Minister of Citizenship and Immigration)*, 2013 FC 771.

⁶⁹⁷ *Ibid* at para 21.

⁶⁹⁸ *Ibid* at para 35.

IRB's negative credibility findings.⁶⁹⁹ However, Justice Gagné found no evidence to suggest that the IRB had failed to consider the Gender Guidelines or behaved insensitively towards the claimant. She emphasized that it was not the role of the Federal Court to substantively revisit the IRB's decision as the IRB had the "benefit of hearing [IGI] in person and was entitled to consider and evaluate her general demeanor while testifying."⁷⁰⁰

The final Haitian sexual assault case in the study (the *RPL* case) also ended in a dismissal by the Federal Court, although the facts of the case were somewhat murkier than the others in the group because the claimant's counsel positioned her claim as dependent upon the claim of her brother.⁷⁰¹ *RPL*, a Haitian woman, claimed she was the victim of harassment, robbery and attempted rape on the basis of her relationship with her politically active brother, who was a co-applicant for refugee protection.⁷⁰² In his decision, Justice Russell found that the claimant implicitly conceded that her claim was not gender-related because she stated to the decision-maker that her claim would only succeed if her brother's claim succeeded.⁷⁰³ He thus concluded that there was no basis for contesting the decision on the grounds that the IRB decision-maker failed to analyze the claim as gender-related.⁷⁰⁴

Other non-Haitian sexual assault cases further illustrate the lack of clarity from some IRB and Federal Court decision-makers on what constitutes due process in a gender-related

⁶⁹⁹ *Ibid* at paras 28 & 30.

⁷⁰⁰ *Ibid* at para 31.

⁷⁰¹ In paragraph 92, the judge weighs in on the counsel's arguments:

...her counsel specifically advised the RPD that the Female Applicant's claim was so connected with the Male Applicant's political claim that it must fail if the Male Applicant's claim failed. On these facts, I do not think that the RPD can now be faulted for not addressing gender-based persecution. *RPL*, *supra* note 477 at para 92.

⁷⁰² *Ibid* at paras 6-9.

⁷⁰³ *Ibid*.

⁷⁰⁴ The judge explains his logic in rejecting the claim as:

The Female Applicant's concession must surely be taken to mean that, as far as she was concerned, there was no evidence to support a gender based claim in her case. Otherwise, why would she link her claim exclusively to her brother's political claim?

Ibid at para 92.

claim. In particular, these cases revealed a lack of consistent approach to ensuring that the claimant has an opportunity to respond to evidence that may impugn credibility, such as apparent omissions, vagueness, inconsistencies, and implausibilities. For example, the IRB decision-maker in the *IMP* case⁷⁰⁵ failed to give the claimant, a young Mexican woman escaping sexual assault and domestic violence from a former partner, the chance to rebut negative credibility inferences based on her testimony. It appeared that the IRB drew its own conclusions on the claimant's credibility although it relied on her failure to name her treating doctor without having asked her for this information.⁷⁰⁶ As such, the reviewing Federal Court judge found that the IRB had committed a reviewable error.

In contrast, the IRB in the 2004 *SKM* case⁷⁰⁷ found the Gender Guidelines not to be applicable because the claimant was not credible based on her "illogical" testimony.⁷⁰⁸ The case involved a young woman from Bangladesh who alleged that she was pursued, kidnapped, and raped. She then escaped from a gang member who wanted to marry her⁷⁰⁹ with the help of her husband and her family.⁷¹⁰ She later said that she was unable to obtain documentary support for her claim (such as her hospital records) because these same people did not want to help her.⁷¹¹ The IRB found this difficult to believe. As with other credibility cases in the study, the IRB saw the Gender Guidelines as inapplicable because the applicant had failed to persuade the IRB of her credibility.⁷¹² The Federal Court did not find the errors to be

⁷⁰⁵ *IMP v Canada (Minister of Citizenship and Immigration)*, 2009 FC 76.

⁷⁰⁶ *Ibid* at para 17.

⁷⁰⁷ *SKM*, *supra* note 635.

⁷⁰⁸ In the most poetic dismissal of the sample set, the Federal Court decision in the *Khan* case opens with the lines, "To a trier of fact, there is a point at which nothing makes sense, no matter whence one came or who, in fact, hears. Credibility, or inherent logic, in and of itself, requires, if not a ring of harmony, then, at least, not a complete cacophony, causing discordance of that inherent logic." *Ibid* at para 1.

⁷⁰⁹ *Ibid* at paras 4-8.

⁷¹⁰ *Ibid* at paras 9 & 10.

⁷¹¹ *Ibid* at para 26.

⁷¹² *Ibid* at para 6.

substantive ones, in spite of the fact that the cultural context may have suggested that her relatives refused to help her out of a sense of shame.

IRB decision-makers and reviewing Federal Court judges in 24 cases in the study demonstrated differing understandings of how medical evidence of psychological conditions, such as PTSD, may impact testimony.⁷¹³ Without necessarily having medical experts on hand to interpret such evidence, decision-makers were left in the awkward position of having to make quasi-medical determinations on how and to what extent such a condition might hinder the claimant's ability to render effective testimony.

Among the cases in the study, medical evidence, particularly evidence related to psychological conditions, was often dismissed as being either biased or not a good explanation for the claimant's testimonial omissions and inconsistencies. For example, in the *NKU* case⁷¹⁴ the IRB decision-maker made negative findings on the claimant's credibility and subsequently gave little weight to the claimant's medical evidence suggesting she had PTSD impacting her ability to remember dates and facts about her case.⁷¹⁵ The IRB decision-maker drew negative conclusions because the claimant appeared "utterly confused," gave "internally inconsistent" statements, and "fail[ed] to bring to her hearing key documents that would have helped corroborate her account."⁷¹⁶ The Federal Court set aside the IRB decision-maker's

⁷¹³ *RLU*, *supra* note 334, *CKI v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1168, *BEF v Canada (Minister of Citizenship and Immigration)*, 2005 FC 255, *LOR v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1365, *RMY*, *supra* note 349, *SJO*, *supra* note 255, *FPE v Canada (Minister of Citizenship and Immigration)*, 2006 FC 425, *BAR v Canada (Citizenship and Immigration)*, 2008 FC 774, *JSO v Canada (Citizenship and Immigration)*, 2009 FC 140, *NKU*, *supra* note 401, *ACA*, *supra* note 401, *MCR v Canada (Citizenship and Immigration)*, 2010 FC 462, *MVL v Canada (Citizenship and Immigration)*, 2011 FC 1349, *AOW*, *supra* note 130, *VRG v Canada (Citizenship and Immigration)*, 2011 FC 343, *TME v Canada (Citizenship and Immigration)*, 2011 FC 927, *MZL v Canada (Citizenship and Immigration)*, 2011 FC 456, *VGH v Canada (Citizenship and Immigration)*, 2012 FC 1097; *MLU*, *supra* note 660, *DKA*, *supra* note 401, *PKA*, *supra* note 401, *SHK v (Citizenship and Immigration)*, 2012 FC 159, & *KCC*, *supra* note 637.

⁷¹⁴ *NKU*, *supra* note 401.

⁷¹⁵ *Ibid* at para 5.

⁷¹⁶ *Ibid*.

determination because it failed to view the quality of the claimant's testimony through the lens of her medical condition.⁷¹⁷ Justice Campbell emphasized that consideration of the Gender Guidelines goes beyond just being "sensitive" in the collection of testimonial evidence.⁷¹⁸ It includes the obligation to "be very cautious in arriving at credibility conclusions where the evidence exhibits the kinds of problems identified in the decision presently under review."⁷¹⁹

In contrast, the Federal Court upheld the IRB's determination in the *CAN* case,⁷²⁰ a case also involving an IRB decision-maker who dismissed the importance of mental health-related medical documents because he viewed the claimant's statements as lacking credibility. As in the *NKU* case, the claimant gave confused and contradictory responses to questions posed to her.⁷²¹ However, unlike in *NKU*'s case, the Federal Court endorsed the IRB's view, finding:

the applicant's distressed mental state was not a reasonable explanation for her provision of detailed false information was reasonable and did not amount to an impermissible "expert psychological finding"; rather, it was the Board's assessment of the evidence before it, which it was entitled to weigh. The Board considered the applicant's explanations, the Guidelines, and the fact that the officer's notes confirmed that the officer and applicant understood each other, and reasonably determined that the applicant's explanation was unsatisfactory.⁷²²

Thus, as with other cases within the study, *CAN*'s claim failed due to inconsistencies and omissions present in every aspect of the claim despite the IRB decision-maker's consideration of the Gender Guidelines. A similar conclusion was reached in the case of *CKI*, a woman from South Korea who sought refugee protection based on persecution in the form of sexual

⁷¹⁷ *Ibid* at para 6.

⁷¹⁸ *Ibid*.

⁷¹⁹ *Ibid*.

⁷²⁰ *CAN v Canada (Minister of Citizenship and Immigration)*, 2011 FC 822. The case involves a Nigerian woman who claims she was forced into marriage to an older man and, when she tried to escape the situation, was subject to sexual assault by her uncle.

⁷²¹ *Ibid* at para 14.

⁷²² *Ibid* at para 30.

assault.⁷²³ The IRB found every element of the claimant's story to be fabricated. The reviewing Federal Court found that the IRB in the *CKI* case considered the Gender Guidelines, particularly with regard to the psychologist's report, which stated that the claimant had chronic PTSD. However, even accepting that report as true, the IRB did not think the claimant was credible and the Federal Court supported this determination.⁷²⁴

5.8 Educated and Wealthy Women as Refugee Claimants

Finally, there appears to be a troubling number of cases where the claimant's education level is used to undermine the credibility of the claimant; the plausibility of her story; and whether she reasonably sought state protection or an IFA. These cases all involve refugee claims by women who were educated, wealthy, and/or professionally successful and, the Federal Court dismissed the judicial review in the majority of the cases.

Within the study, women who were classified as educated or who had held a job prior to persecution were more likely to have their claim denied than those who did not have these characteristics. The discussion of the claimant's education, wealth, and sophistication was raised in credibility and plausibility analyses as well as in the analysis of an IFA.

The Gender Guidelines encourage decision-makers to take into consideration the claimant's contextual circumstances when examining their realistic ability to relocate to a IFA, but the cases reflect a tendency to put greater weight on evidence related to a woman's education level or wealth than they do on her individual psychological or socio-cultural circumstances. A person with more socio-economic resources generally has a higher

⁷²³ *CKI v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1126.

⁷²⁴ *Ibid* at para 4.

likelihood of successful relocation than someone who does not have these resources.⁷²⁵ The Gender Guidelines advise IRB decision-makers to consider whether a possible location for an IFA is realistically an option for the claimant when taking into consideration her particular circumstances, such as age, education, and cultural circumstances.⁷²⁶ For example, the court in the *AQU* case⁷²⁷ talked about the claimant's status as "a young, university educated woman who could find employment" in Mexico if she were forced to move to another region of the country.⁷²⁸ However, even someone of a higher socio-economic status may have difficulty moving to another area of the country if cultural or religious norms preclude her from doing so.

The cases in the study also revealed inconsistent approaches amongst Federal Court judges in the evaluation of IFAs for women who are educated or wealthy. Two similar cases from Namibia illustrate this issue. The claimant in the *NHE* case⁷²⁹ was a 23-year-old woman who was being pressured by her family to marry a cousin. The Federal Court set aside the IRB's negative determination because the IRB decision-maker erroneously failed to consider in its analysis of an IFA her objective fear that cultural norms for traditional families would mean a young, single woman would be socially ostracized if forced to relocate.⁷³⁰ Another Federal Court reviewing judge reached the opposite conclusion in the *NKA* decision.⁷³¹ In that case involving abuse by a non-partner, the Federal Court judge dismissed the claimant's argument that relocation to an IFA would pose undue hardship to her as a young, single woman

⁷²⁵ An example of this principle from the sample set is the 2013 *MIM* case in which the Federal Court found that the claimant could have reasonably relocated to a large city within Botswana given her wealth and education. *MIM v Canada (Citizenship and Immigration)*, 2013 FC 251.

⁷²⁶ Gender Guidelines, *supra* note 5 at C.

⁷²⁷ *AQU*, *supra* note 124.

⁷²⁸ *Ibid* at para 19.

⁷²⁹ *NHE v Canada (Citizenship and Immigration)*, 2013 FC 483.

⁷³⁰ *Ibid* at para 9 & 14.

⁷³¹ *NKA v Canada (Citizenship and Immigration)*, 2013 FC 930.

without the support of her family, despite the claimant's testimony that family support is essential to be able to socially function in Namibia.⁷³²

The cases in the study illustrated the Federal Court's tendency to have higher expectations of "reasonable" behaviour for claimants with high levels of socio-economic resources in the context of credibility and plausibility analyses. While IRB decision-makers can consider personal circumstances in credibility assessments, some cases in the study indicate these factors are being unfairly used to undermine the believability of a claimant's testimony based on stereotypes. In particular, in several cases women claimants with money, family connections, and education were questioned about their credibility because of these socio-economic resources. The *MFD* and *JND* cases are examples where the Federal Court intervened to set aside the IRB determination because of its assumption that only meek and uneducated women would stay in a situation of domestic violence.⁷³³ The court rejected stereotypes about persecutors in the *DJO* case wherein the reviewing judge set aside the IRB's view that the claimant didn't have a reasonable fear of sexual assault on the basis of her imputed political opinion because most rapists were poor, uneducated men without a political agenda.⁷³⁴ The reviewing court correctly found this argument to be outside of the range of reasonable conclusions.

In contrast, the reviewing court judges in several other cases within the study upheld IRB determinations that rejected the claim on credibility grounds related to the claimant's education. In each of these cases, the Federal Court saw as reasonable the decision-maker's belief that the claimant was not telling the truth because a woman of the claimant's socio-

⁷³² *Ibid* at para 31.

⁷³³ *JND*, *supra* note 660 & *MFD v Canada (Citizenship and Immigration)*, 2011 FC 589.

⁷³⁴ *DJO*, *supra* note 477 at para 7.

economic status should not have feared the alleged persecution or should have acted differently. The Federal Court upheld the IRB's skepticism towards an educated claimant's objective fear in the *DUW* case, finding the Burundian claimant lacked credibility because someone of the claimant's high education level and resourcefulness should not have feared forced marriage.⁷³⁵ The claimant's education was also used by the IRB to impugn her credibility in the *SJY* case when it found that someone with 16 years of education would have reasonably been able to find out how to apply for refugee status in Canada more promptly than the claimant did.⁷³⁶

One particularly interesting illustration of the intersection between a claimant's education and her credibility was in the *HSY* case. HSY's claim was rejected by the IRB decision-maker because he did not view it as credible that an educated woman had an objective basis to fear FGM. HSY, who was from an educated family in Mali, sought refugee protection from being forced to marry and to undergo FGM were she to return to her country of origin. The Federal Court dismissed her request for judicial review of the IRB's credibility assessment. The Federal Court summarized the IRB's view of the claimant:

With respect to the Applicant's claim that she would be forced to undergo FGM, the Board found that the Applicant had fabricated the allegation... the Board found that the documentary evidence clearly identified a profile of FGM victims as being very young and from an uneducated background and that the Applicant did not fit this profile....**It reviewed the personal characteristics of the Applicant, specifically noting that she was well-educated and that her father and mother had not forced her to endure this procedure.** Although her father passed away in 1995, leaving her uncle as the effective head of the family, the Applicant lived another 5 years in Mali without incident. Documentary evidence referred to exceptions to the widespread practice for educated women and where families are not supportive of the practices. **In summary on this issue, the Board's conclusion, in light of the documentary evidence and the Applicant's own situation, is not patently unreasonable.** (emphasis added)⁷³⁷

⁷³⁵ *DUW*, *supra* note 635.

⁷³⁶ *SJY v Canada (Citizenship and Immigration)*, 2012 FC 930.

⁷³⁷ *Ibid* at para 5-7.

Despite documentary evidence supporting the claimant's contention that she would likely be subjected to FGM, the court found the IRB's determination to be reasonable. In fact, the documentary evidence of who is generally at risk of FGM was used to cast doubt on the claimant's testimony about the situation. The IRB further asserted that the claimant could not be telling the truth because she did not present herself as the type of Malian woman who would reasonably be subjected to FGM and forced marriage-- someone young and uneducated.

Despite the claimant's testimony explaining that the new head of her family was in favour of FGM and forced marriage, the IRB decision-maker held to the belief that an educated and older woman would not have a well-founded fear of these practices. This conclusion is also concerning from a procedural fairness standpoint because it sidesteps the standard grounds of credibility assessment (such as omissions or inconsistencies in testimony or the claimant's demeanor) and moves towards an characterization of the claimant's identity that is almost impossible to dislodge. Once so characterized, HSY had no meaningful opportunity to contest the IRB's negative finding on credibility.

5.9 Restatement of Findings

1. Some IRBs and judges treat a finding of credibility as a condition precedent to the consideration of the Gender Guidelines despite clear guidance that the Guidelines should be part of credibility analyses.
2. Cases with lengthier discussions of the applicability of the Gender Guidelines (particularly Section C (Evidentiary Measures) and Section D (Special Problems at Determination Hearings) had higher than average success rate, suggesting that the gender-related aspects of these claimants' cases were more completely analyzed when the Gender Guidelines were used as recommended.

3. Certain identity characteristics, such as perceived wealth or education of the claimant, appear to negate the consideration of the Gender Guidelines in the credibility and plausibility analyses of some gender-related claims within the study.
4. There are no consistent understandings of the role of the Gender Guidelines at the IRB level nor in Federal Court's judicial reviews of gender-related claim determinations of credibility, plausibility, state protection and IFA availability.

6.0 Introduction

This chapter examines the language and logic used by decision-makers to tell the story of the victimized refugee claimant who escapes persecution on the basis of domestic violence, what Robert Barsky would term the “productive Other”.⁷³⁸ Barsky argued that the evidence-gathering methods used at the refugee determination hearing construct a stereotypic victim and, furthermore, that the complex and intersectional identity of the claimant is “diminished to the point of near non-existence”.⁷³⁹ Informed by the theoretical lens of gender performativity, this chapter probes how IRB decision-makers and Federal Court judges approach their analyses of evidence in these types of claims expecting the claimant to discursively perform her gender in the manner of a gendered and racialized “victim”. It asserts that when decision-makers have overly narrow views of the realities and diverse situations of women experiencing domestic violence, they fail to adequately analyze all relevant evidence about the claim.

This chapter explores the question of whether refugee claimants are constructed as victims by looking at how the Federal Court judge and the IRB decision-maker discuss and assess the claimant’s personal circumstances as they relate to issues of credibility, plausibility, and the availability of state protection and IFAs in the data set based on domestic violence.

⁷³⁸ Barsky, *supra* note 403 at 1. Barsky uses this term to refer to the discursive environment of the hearing reduces the claimant to an objectified *Other* rather than presenting a full picture of the individual and her relationship to the refugee claim. Barsky writes, “...the Other who emerges from these transcriptions is diminished to the point of near non-existence because both the means of *production* employed by the parties to the hearing, and the method by which this hearing is constructed, act to diminish rather than complete the claimant. ‘Production’ is therefore appropriate inasmuch as it denotes the process of origination, creation, generation and construction (of the Other)...” *Ibid* at 3-4.

⁷³⁹ *Ibid*.

My analytical approach to the words used in these domestic violence-based cases was directly informed by discussion threads emerging from the initial narrative methodology. In an interview of a refugee woman whose claim was domestic violence related, the claimant talked about the emotional difficulty of explaining what had occurred to her in front of what she felt was a hostile hearing environment. In her determination hearing, the decision-maker asked her pointed questions about her ability to go to her office-based job and the fact that she lived in the capital city. The claimant felt that these questions made her feel like she was to blame for her experiences.

Drawing from what this individual reported to develop a initial list of identified terms to examine, I looked at the terms used and the length of discussion of the claimant's behavior in the hearing (especially her emotional state) and how they talked about the claimant's other circumstances (especially statements relating to the claimant's socio-economic status).⁷⁴⁰ I used the themes that emerged to examine the intersections between the decision-maker's beliefs about gender-related claims and institutional approaches to evidence analysis available to the decision-makers in the administrative context of refugee claim determinations. Building on the data set analyzed in earlier chapters, this chapter's case analysis further tests whether the Gender Guidelines are substantively used to inform legal standards on assessments of credibility, plausibility, as well as the availability of IFAs and state protection. Through this data, we see the extent to which misunderstandings about domestic violence (rather than the substantive advice of the Gender Guidelines) inform determinations on the issues of credibility, plausibility, and the availability of state protection and IFAs at the IRB hearing and the reviewing Federal Court levels.

⁷⁴⁰ See Chapter 4 in section 4.5.2 for a further discussion of content analysis tools used in this study.

This chapter concludes that when decision-makers have overly narrow views of the realities and diverse situations of women experiencing domestic violence, they fail to adequately analyze all relevant evidence presented about the claim. Case examples demonstrate that legal standards of assessments of credibility, plausibility, and availability of state protection and IFAs are given form and meaning through decision-makers' assessment of the claimant's contextual gender identity as it relates to her experience of domestic violence. These erroneous assessments have led to inconsistent IRB evaluations and Federal Court reviews of this type of gender-related claim.

The first part of this chapter introduces the domestic violence-related cases within the study. This part is also informed by scholarship on the notion of a gendered other in order to enrich the understanding of gender performativity in domestic violence-based claims. Next, it discusses post-colonial theories on the construction of national identity. This theoretical discussion highlights the problematic constructions of the woman refugee claimant as a racialized other and an idealized victim of domestic violence. Feminist scholarship regarding the law's problematic construction of the domestic violence victim is briefly reviewed.

The second part of this chapter focuses on the 74 domestic violence-related cases in this study. It will highlight the problematic assumptions/approaches that underpin the analyses by IRB decision-makers and reviewing Federal Court judges of credibility, plausibility, and the availability of state protection and IFAs in these cases. These cases fall in two streams: First, cases where the claimant was not seen as credible; and second, cases where the claimant was seen as credible but did not adequately seek state protection or an IFA. While examining these cases, I focus particular attention on cases wherein the claimant requested procedural accommodation in relation to trauma and on those cases that included a discussion of the

claimant's wealth or education as these two factors correlated with certain types of Gender Guidelines discussion and outcomes.

The final section offers some concluding remarks on the analysis undertaken and suggests how the system could be improved.

6.1 Situating Domestic Violence related claims within the data set and explanation of methodology

The largest number of gender-related persecution cases in the data set, 74 in total, dealt with persecution by the refugee claimant's partner or former partner, more commonly known as domestic violence. The most common countries of origin for this type of claim were Mexico, which had 25 cases (8 of which were successful) and St Vincent, which had 6 cases (4 of which were successful). The remaining cases are distributed evenly across five other countries.⁷⁴¹ This category of cases also had a slightly lower than average rate of success at judicial review, as was noted earlier in this chapter, 40.5% success rate rather than the overall average of 44%. As such, it is worthwhile to look more closely at how the Gender Guidelines were employed within these cases.

The domestic violence cases are a useful point of focus to study the issue of how discourse on claimants is deployed in analyses of credibility, plausibility, state protection and IFA because the subject matter is relatively well documented in Canada. Domestic Violence-based claims are arguably the type of gender-related claims with which a typical judge would be most familiar because domestic violence is unfortunately a prevalent issue in Canada.⁷⁴² In

⁷⁴¹ There were cases from South Korea (2), Peru (2), Namibia (2), Nigeria (2), and Albania (2).

⁷⁴² According to the most recent figures from Statistics Canada, there were over 90,300 instances of police-reported violence by an intimate partner in Canada in 2013, with almost 80% of such incidents involving violence against a female partner. Statistics Canada, "Family violence in Canada: A statistical profile, 2013" (15 January, 2015), online: Statistics Canada: <<http://www.statcan.gc.ca/pub/85-002-x/2014001/article/14114-eng.pdf>> at 22.

addition, domestic violence-related claims are the largest subset within the study and are relatively consistent with other types of gender-related claims in terms of success rate, case length, and Gender Guidelines discussion length. Therefore, it is possible to draw reasonable inferences about how gender-related claims overall are analyzed by looking at how they are treated within the domestic violence claim subset.

In this chapter, I am applying the content analysis techniques in a slight different way than in previous chapters in order to make causal inferences on how judges and decision-makers evaluate the experiences and situations of domestic violence survivors. Whereas the previous chapter primarily focused on content analysis' more quantitative aspects of counting of word frequency and case length, this chapter uses the technique's qualitative element of interpreting terms and themes⁷⁴³ to, in the words of Kris Krippendorff, "to understand what [the texts] mean to people, what they enable or prevent."⁷⁴⁴ By using content analysis in this manner, I am able draw conclusions that will have utility for both academics and legal practitioners about how evidence is analyzed in gender-related cases.

Building on the discussions of Gender Guidelines discussion length and decision length in the last chapter, this chapter looks more closely at the words judges use to support or dismiss an IRB determinations on evaluations of credibility, plausibility and the availability of state protection and IFAs. For example, in section 6.4.2 (*Delay in Flight*) of this chapter, I discuss the words reviewing judges use to discuss claimants' economic decision-making prior to fleeing an abusive spouse and how these terms are used by decision-makers and judges to

⁷⁴³ In this case, these themes and works stem from those identified through the grounded theory framework.

⁷⁴⁴ Krippendorff, *supra* note 538 at xviii.

impugn the credibility of the claimant's testimony on subjective fear.

6.2 Judicial Perceptions of Domestic Violence

Canadian courts have long recognized that decision-makers who hold poor understandings about the nature of domestic violence and behavioural patterns common to those victimized by domestic violence tend to make poor judgments on cases involving these factors.⁷⁴⁵ In 1990, in *R v Lavallee*,⁷⁴⁶ the Supreme Court found that a “mythology about domestic violence” informed many judicial decisions involving domestic violence. Writing for the majority, Justice Wilson noted that these erroneous legal narratives about domestic violence failed to account for the cyclical nature of domestic violence and supported the misguided view that a woman who does not leave an abuser at the first opportunity must either be lying or masochistically enjoying the abuse.

Unfortunately, the misunderstandings described in *Lavallee* about the behaviour of domestic violence victims during and after leaving an abusive situation have persisted in adjudicative and court decisions. Writing on the pervasiveness of this phenomenon and the failure to effectively implement international human rights norms, scholar Siobhán Mullally recently noted:

(G)aps remain between the rhetoric of human rights law and the reality of everyday enforcement and implementation on the ground [and that] these gaps are most keenly felt by refugee women...The ambivalence with which domestic violence claims are treated in asylum adjudication reflects the hesitation to affirm the human rights norms and attendant obligations underpinning such claims...Despite more than a decade of gender guidelines on international protection standards and procedures, 5 refugee women continue to face difficulties in presenting claims of persecution and in

⁷⁴⁵ Melanie Randall, “Domestic Violence and the Construction of “Ideal Victims”: Assaulted Women’s “Image Problems” in Law (2004) 23 St Louis U Pub L Rev 107 at 107 (“A significant amount of public attention and legal intervention in the past few decades has focused on the issue of violence against women and children, and especially on domestic violence...Yet most mainstream social and legal responses to the problem of violence against women, especially violence against women in intimate relationships, remain inextricably bound up with and shaped by incomplete and distorted representations of the nature, causes, and effects of that violence.”)

⁷⁴⁶ *R v Lavallee*, [1990] 1 SCR 852.

demonstrating a failure of State protection when the harm suffered takes place.⁷⁴⁷ Many of the determinations on domestic-violence based claims within the case examples included here disturbingly indicate the continued entrenchment of the myths about domestic violence survivors described by Justice Wilson in *Lavallee* over 20 years ago.

Audrey Macklin has characterized domestic violence as the “paradigmatic manifestation” of gender-related persecution by a non-state actor.⁷⁴⁸ The Gender Guidelines contain extensive suggestions to decision-makers on how to analyze claims of domestic violence involving partner abuse. Despite this advice, the case examples dealing with domestic violence-related claims reflect disparate understandings amongst the judiciary of the nature of domestic violence.

6.3 The Construction of the “Gendered Other” and Gender Performativity

Robert Barsky’s landmark book *Constructing the Productive Other* offers a useful analytical framework to illuminate the process used by decision-makers to fit claimants’ testimony into existing legal thresholds for refugee determination. Barsky describes the process of refugee determinations as an “othering” process, whereby “the means of production employed by the parties in the hearing ... act to diminish rather than complete the claimant.”⁷⁴⁹ He asserts that the legal analytics used to evaluate a legal claim were narrowly framed, having the effect of silencing the majority of the refugee’s experience.⁷⁵⁰ Barsky’s work focuses on the important role of the hearing in governing discourse about refugee claims:

(T)he effectiveness of a particular discursive practice is related to the issue of the sayable, a notion which relates to other culturally-imposed confines that hinder or bind

⁷⁴⁷ Siobhan Mullally “Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative” (2001) 60 Int’l & Comp LQ 459 at 459-460.

⁷⁴⁸ Audrey Macklin, “Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims” (1998) 13 Geo Immigr LJ 25 at 56.

⁷⁴⁹ Barsky, *supra* note 403 at 3-4.

⁷⁵⁰ *Ibid* at 4.

the refugee as constructed Other. The process of making a claim in this sense is one of creating a “productive other,” a satisfactory stand-in for the purposes of the hearing.⁷⁵¹

Barsky views the refugee determination hearing as a discursive space requiring claimants to give testimony about their experiences of persecution that reinforce the idea that the experiences of refugee claimants are completely different from those of Canadians.⁷⁵² I argue in this chapter that the need to conceptually distance the experiences of women refugee claimants from those of Canadian women is damaging to the claimant’s cause. Specifically, it leads to the failure of refugee claims in which the circumstances of women claimants do not sufficiently reflect a state of victimhood, in the eyes of the decision-maker.

Barsky’s concept of discursive production of the “other” is a helpful analytical frame to understand the institutional logic underpinning decision-making in gender-related refugee claims. I build on Barsky’s notion that refugee hearings are spaces where the other is produced by further questioning how decision-makers’ understanding of claimants’ gender influence the reductive, discursive production of a gendered other as an acceptable national subject. I argue that the IRB hearing and Federal Court judicial review are spaces where the woman refugee claimant is discursively molded into an imagined ideal of the victimized, foreign woman.

Building on Edward Said’s notion of the exoticized foreign “other”,⁷⁵³ Anna Szorényi, in her research on Australian refugee law and visual representations of refugees in international media, asserts that “colonist habits of representation ... continue to structure the

⁷⁵¹ *Ibid* at 14.

⁷⁵² *Ibid*.

⁷⁵³ In his introduction to his foundational text, *Orientalism* (*supra* note 510), Edward Said described his understanding of the term: “The Orient is an integral part of the European material civilization and culture... (It is) a mode of discourse with supporting institutions, vocabulary, scholarship, imagery, doctrines, even colonial bureaucracies and colonial styles... Orientalism is a style of thought based on an ontological and epistemological distinction made between “the Orient” and (most of the time) “the Occident.” *Ibid* at 2. Said went on to assert that the purpose of this constructing of the Orient was for “dominating, restructuring, and having authority over the Orient.” *Ibid* at 3.

relationship between the European technological gaze and the mysterious collectivized other who is imagined as the natural object of this gaze.”⁷⁵⁴ She argues that legal preoccupation with authentication of the refugee and her experience is really about the production of a valid national subject worthy of humanitarian concern.⁷⁵⁵

6.3.1 The Silencing of Outsider Narratives by the State

Legal scholars inquiring into the law’s treatment of marginalized populations have noted the power of institutions to discursively silence outsider narratives. In her work on legal representation of marginalized populations, Carol Grose argues that stories resonating with dominant tropes are more valued by legal decision-makers than outsider narratives.⁷⁵⁶ She found that these narratives that reflect what the decision-maker already assumed was true about the member of the marginalized population “bec(a)me a part of the network of stories embodied in the dominant legal discourse.”⁷⁵⁷ Conversely, she found that narratives that did not resonate with the insider’s understanding of the world tend to “recast the outsider’s story into language and context that makes sense to the insider. In doing so, the insider erases the outsider’s story.”⁷⁵⁸ Similarly, Don Galloway commented twenty years ago on immigration law’s tendency to situate the immigration applicant as an outsider who was inherently antithetical to the established state because her mere presence challenged its authority.⁷⁵⁹ Galloway’s description of institutional positioning of the immigrant as stranger/outsider is

⁷⁵⁴ Anna Szorényi, “The Face of Suffering in Afghanistan: Identity, Authenticity and Technology in the Search for the Representative Refugee” (2004) 21 Australian Feminist LJ 1 at 2.

⁷⁵⁵ *Ibid.*

⁷⁵⁶ Carolyn Grose, “A Persistent Critique: Constructing Clients’ Stories” (2006) 12 Clinical L Rev 329 at 331.

⁷⁵⁷ *Ibid.*

⁷⁵⁸ *Ibid.* at 336.

⁷⁵⁹ Donald Galloway, “Strangers and Members: Equality in an Immigration Setting” (1994) 7 Can J L Jurisprudence 149 at 149 (“Immigration Law has as its primary subject the stranger: the outsider who is under no obligation of allegiance to the state, who is not represented in its political processes, and whose needs and interests are, in most situations, accorded less concern than those of people who already participate in the social and political life of a community”).

particularly interesting when considered in the context of claims involving situations of violence that also regularly occur in Canada, such as domestic violence against women.

Professor Richard Ford situates territorial sovereignty in a strategic political and ideological context and problematizes refugee law's tendency to fetishize difference through the creation of synthetic jurisdictional categorization of legal subjects.⁷⁶⁰ He argues that discourse on territorial jurisdiction mutually supports discourse where "citizens assert, emphasize, and even exaggerate their organic connections",⁷⁶¹ repeatedly "performing" their territorial identity to each other. These legal subjects continually legitimize their rightful place within that jurisdiction by positioning themselves in contrast to the foreign outsider. As an instrument of territorialization, refugee law is another venue through which territorial jurisdiction is defined and policed, with the refugee claimant clearly outside of the defined territorial identity of a citizen.⁷⁶²

Many scholars have written on the positioning of the citizen in opposition to the outsider. Sunera Thobani writes that the citizen is still viewed as the national status to which all aspire, "even when disparaged as a gendered, sexed, or classed subject ... (it is) in its nationality, this subject positively commands respect as the locus of state power."⁷⁶³ Hannah Arendt, writing from the particular perspective of the post-World War II context, finds alienation from

⁷⁶⁰ Richard Ford, "Law's Territory (A History of Jurisdiction)" (1999) 97:4 Mich L Rev 843.

⁷⁶¹ *Ibid* at 899.

⁷⁶² Institutional processes transmit dichotomous thinking and ideological approach (Nick Lynn & Susan Lea, "A phantom menace and the new Apartheid": the social construction of asylum-seekers in the United Kingdom" (2003) 14:4 Discourse & Society 425 at 428) towards refugee claimants whereby there are only two classes of claimants: false refugee claimants and genuine refugee claimants (Sarah J Steimel, "Refugees as People: The Portrayal of Refugees in American Human Interest Stories" (2010) 23:2 J of Refugee Studies 219 at 222) rather than focusing on whether or not a particular claimant has sufficient evidence to support a claim for refugee protection.

⁷⁶³ Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (Toronto: University of Toronto Press, 2007) at 4.

citizenship to be the core condition of refugee status.⁷⁶⁴ She argues that people without stable immigration status lack the opportunity to achieve national belonging. Those without the “right to have rights”⁷⁶⁵ are then “forced outside the pale of the law” and compelled to transgress the law in order to survive.⁷⁶⁶ Catherine Dauvergne’s more recent observations of Canadian and Australian immigration systems point to the continued relevance of Arndt’s words. Dauvergne found in her comparison of these two legal determination systems that both constructed the refugee as an archetypal other who is a mirror opposite of Canadian and Australian national identities, respectively.⁷⁶⁷

6.3.2 *Constructing the Gendered Other in Canada*

Research on the Canadian context has found that dominant Canadian political discourses on refugee protection increasingly tend to map onto simplistic narratives of the oppressor and the oppressed. These discourses fail to accurately reflect the dynamic nature of national identity.⁷⁶⁸ Himani Bannerji has argued that the Canadian state constructs “impoverished women of color in particular, as political/social subjects who are essentially dependent and weak” and that the state cast this subjectivity as of the women’s own creation.⁷⁶⁹ Mary Bosworth has similarly observed, in her research on immigration detention facilities for women, that immigration officials categorize and make generalizations about women

⁷⁶⁴ Hannah Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt Brace Jovanovich, 1985) at 276-277.

⁷⁶⁵ *Ibid* at 295-296.

⁷⁶⁶ *Ibid* at 286.

⁷⁶⁷ Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws in Canada and Australia* (Vancouver, BC: UBC Press, 2005) at 82.

⁷⁶⁸ Kim England & Bernadette Stiell, “They think you are as stupid as your English: Constructing foreign domestic workers in Toronto” (1997) 29 *Environment & Planning* 195 at 196.

⁷⁶⁹ Bannerji, *supra* note 425 at 71.

detainees based on their perception of whether they believe the detainee has the potential for citizenship.⁷⁷⁰

The Federal Court's discourse on domestic violence in judicial reviews of those decisions is particularly illustrative of the binary portrayal of female victims. These claims are being decided based on whether the woman refugee claimant models the victim script and whether the claimant's country of origin can adequately "save" her from her persecution. Through this process, the victim is cast as a passive recipient of persecution who is bereft of autonomy.⁷⁷¹ The dichotomy of the villain and the victim richly plays out in gender-related refugee claims of women wherein the victim is always female and both her persecutor and her rescuer are always cast as a male.⁷⁷² Audrey Macklin, a prolific writer about Canadian immigration law, writes that the consequence of this mythologization of the immigrant is the "marginalization (of the) subject (that) becomes tantamount to erasure... from the human rights map (and) Othered into extinction as a subject."⁷⁷³

Illustrating the consequences of failing to adhere to a victim script, there were several cases within the data set of domestic violence related claims where testimony suggesting claimants planned out and made a choice on when and where to flee (and thus were not a passive victim to circumstances) was used against them by decision-makers. For example, in

⁷⁷⁰ Mary Bosworth & Bellina Kellezi, "Citizenship and belonging in a women's immigration detention centre" in Coretta Philips & Colin Webster, eds, *New Directions in Race, Ethnicity, and Crime* (Abingdon: Routledge, 2014) at 15. Bosworth writes: "As the women's accounts in this chapter movingly demonstrative, contemporary practices of detention and deportation that are justified by citizenship and facilitated by long-standing racialised tropes about dangerous and undeserving 'Others', have a highly gendered effect. As such, they remind us that questions of citizenship and nationality – which both define life in the detention centres and legitimate it – are related at fundamental levels to beliefs about what it means to be a woman and to have an opportunity at being a self in the world." *Ibid.*

⁷⁷¹ Jennifer Bond & Laurel Sherret, "Mapping Gender and the Responsibility to Protect: Seeking Intersections, Finding Parallels" (2012) 4:2 *Leiden/Boston, Martinus Nijhoff Publishers* 133 (Accepted Paper Series) at 134.

⁷⁷² *Ibid.*

⁷⁷³ Audrey Macklin, "Our Sisters from Stable Countries: War, Globalization, and Accountability" (2003) 10:2 *Int'l Studies in Gender, State & Society* 256 at 270.

the 2006 *RKH* case, the IRB decision-maker doubted the subjective fear of the claimant because she had delayed her flight from her abusive spouse in Pakistan until her apartment was sold (although the claimant testified that she needed the money from the house sale to pay for the airline flight for herself and her child) and because she had declared upon entry to the United States that she was leaving Pakistan to secure a better life for her children.⁷⁷⁴ The Federal Court found the decision-maker's conclusions to be within the range of reasonable outcomes and dismissed the claim with two brief mentions of the Gender Guidelines.⁷⁷⁵

6.3.3 The problematic construction of female victims of domestic violence in gender-related refugee claims

For many, the decision to leave one's country to escape persecution involves a degree of choice and planning not reflected in the popular imagery of the refugee as one who urgently escapes under cover of darkness. The "stock setting"⁷⁷⁶ of urgent flight creates the archetype upon which the narrative of the refugee experience of persecution is produced through institutions making decisions about their claims for asylum. The depiction of women refugees as passive, dependent, and under an urgent need to escape does not mesh with women's ability to strategically plan in order to gain a secure outcome, nor does it reflect claimants' actual experiences of escape. In her study of the experiences of Eritrean women refugees,⁷⁷⁷ Helene Moussa found that flights from persecution were characterized by careful calculations of risk and secret planning. They included detailed arrangements of the logistics of arranging for and paying for the refugee's flight from the country.⁷⁷⁸ The woman's choice to flee and decisions

⁷⁷⁴ *SKM*, *supra* note 635 at para 17.

⁷⁷⁵ *Ibid* at para 31 & para 43.

⁷⁷⁶ Troy E Elder, "Antagonizing Bogota" (2011) 40:2 U of Miami Inter-American L Rev 301 at 303.

⁷⁷⁷ Helene Moussa, *Storm and Sanctuary: The Journey of Ethiopian and Eritrean Women Refugees* (Dundas, ON: Artemis Enterprises, 1993).

⁷⁷⁸ *Ibid* at 145-146.

about when and how to flee play an important role in how a decision-maker judges her subjective fear. The practice by decision-makers of drawing negative inferences from the claimant's delay in flight from persecution is particularly difficult in the case of domestic violence-related claims because refugee law's expectation of the claimant to leave persecution at the earliest opportunity does not reflect the dynamics of many abusive relationships.⁷⁷⁹

The law's failure to recognize the realities of abused women's lives has been widely criticized by many scholars, who have highlighted the fact most laws conceive of domestic violence as isolated acts of physical violence, not reflective of the realities of abuse characterized by "patterns of domination, coercion, and control."⁷⁸⁰ A recent Canadian study by Constance McIntosh found that decision-makers failed "to meaningfully engage with the complex social, cultural, and economic dynamics that impact on how victims of domestic violence are able to seek state protection."⁷⁸¹ The study asserted that this failure signifies a

⁷⁷⁹ Aviva Orenstein, "No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials" (1998) Hastings LJ 663 at 676 ("...abused and sexually assaulted women may exhibit many of the characteristics commonly associated with liars-they delay in reporting, change their stories, and sound equivocal because of self-blame.")

⁷⁸⁰ Melanie Randall, a scholar writing about institutional understandings of domestic violence laws, has asserted: "Most mainstream social and legal responses to the problem of violence against women, especially violence against women in intimate relationships, remain inextricably bound up with and shaped by incomplete and distorted representations of the nature, causes, and effects of that violence. As a result, some of the ways domestic violence is addressed in the law – even those ways expressly aimed at remedying the defects and inadequacies of traditional legal responses – inadvertently end up reinforcing the problems they seek to rectify." Randall, *supra* note 745 at 107. See also Nancy Ver Steegh, "Differentiating Types of Domestic Violence: Implications for Child Custody" (2004-2005) 65 La L Rev 1379 at 1416. See also Lynn Bayes-Wiener, "Family Broils: and Private Terror: A Gender-Neutral, Psychologically-based Approach to Domestic Violence and Asylum Law" (2010-2011) 79:4 UMKC L Rev 1047 at 1049 in which she argues that asylum law should recognize Johnson's Typologies of domestic violence, particularly "Coercive controlling Violence" and "Situational Couples Violence." Bayes-Wiener postulates that US asylum law's focus on physical violence in domestic violence cases stems from an institutional fear of the "floodgates phenomenon" of too many applicants if an expanded definition were adopted. *Ibid* at 1048.

⁷⁸¹ Constance MacIntosh, "Domestic Violence and Gender-related Persecution: How Refugee Adjudicators Judge Women Seeking Refuge from Spousal Violence – and Why Reform is Needed" (2009) 26 Refuge 147 at 148.

“de-gendering” of the decision-making process under the guise of superficial Gender Guideline consideration.⁷⁸²

Decision-makers’ limited discussion of the Gender Guidelines within the domestic violence cases within the data set and, in many cases, the Federal Court’s acceptance of this limited use support the findings of this McIntosh’s study. The Guidelines advise decision-makers to engage in a close examination of how the circumstances in a claimant’s life might impact her ability to escape persecution.⁷⁸³ They also specifically discuss their application in domestic-violence related claims,⁷⁸⁴ for example, advising decision-makers that survivors of domestic violence may have symptoms associated with Battered Woman Syndrome which might hinder a claimant’s ability to testify.⁷⁸⁵

Despite the relevance of the Guidelines, the decisions involving domestic violence-related claims did not reference or discuss them in details. The average length of Gender Guidelines discussion in the 74 domestic violence cases is only slightly higher than the 8% overall average discussion length in the data set, with an average of 12% for positive domestic violence related decisions and 9% for negative decisions. Still, it is difficult to see how such brief discussion of the Gender Guidelines (342 words on average) when examining the particular circumstances of a woman escaping domestic violence constitutes a meaningful engagement with the document and the analytical gaps it was designed to address.

⁷⁸² *Ibid* at 150.

⁷⁸³ Gender Guidelines, *supra* note 5 at C.

⁷⁸⁴ *Ibid* at B (“The fact that violence, including sexual and domestic violence, against women is universal is irrelevant when determining whether rape, and other gender-specific crimes constitute forms of persecution”).

⁷⁸⁵ *Ibid* at D (“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. Similarly, women who have been subjected to domestic violence may exhibit a pattern of symptoms referred to as Battered Woman Syndrome and may also be reluctant to testify”).

6.4 Domestic Violence case analysis

6.4.1 Re-availment (Return) to Persecution

Cases where claimants return to situations of persecution after initial flight (“re-availment”) show how misunderstandings about the nature of domestic violence can intersect with the decision-maker’s assessment of the claimant’s subjective fear of persecution. In two such cases, the IRB decision-maker acknowledged the importance of considering the Gender Guidelines in the credibility assessment of the claim but still failed to adequately understand the dynamics at play in domestic violence-based, gender-related claims. Although there is a general presumption in law that refugee claimants who return to situations of persecution lack subjective fear,⁷⁸⁶ social science literature on women fleeing domestic violence and the frequent return of abused women to their abusers suggest the expectation that a refugee would flee and never return to persecution should be modified in cases involving domestic violence.⁷⁸⁷

The IRB decision-maker in the 2012 *SJY* case⁷⁸⁸ likely would have reached a different determination had he known that women experiencing domestic violence often return to an abusive situation before leaving it for good. This case, involving a young woman from South Korea who fled an abusive boyfriend, illustrates how decision-makers’ lack of understanding about patterns of flight and return in domestic violence situations can impact refugee claims

⁷⁸⁶ *IRPA*, *supra* note 1 at s 108(1) states:

“A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances: (a) the person has voluntarily reaviled themselves of the protection of their country of nationality....(c) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada...”

⁷⁸⁷ Zelda B Harris, “The Predicament of the Immigrant Victim/Defendant: “VAWA Diversion” and other considerations in support of Battered Women” (2004) 23 St Louis U Pub L Rev 49 at 61; Jessica Marsden, “Domestic Violence Asylum after *Matter of L-R*” (2014) 123 Yale LJ 2512 at 2519.

⁷⁸⁸ *SJY*, *supra* note 736.

on this basis. The IRB decision-maker recognized SJY's case as gender-related and therefore offered the Gender Guidelines-based procedural accommodation of a female decision-maker⁷⁸⁹ but did not appear to draw on the Gender Guidelines in his substantive analysis of the case. The reviewing Federal Court judge held that the IRB's reliance on re-avilment⁷⁹⁰ should not have led to the conclusion that the claimant lacked subjective fear. However, the Federal Court did not find the IRB's erroneous application of re-avilment to be fatal to the validity of the determination and therefore dismissed the case.⁷⁹¹

Similarly, the claimant in the *DSL* case⁷⁹² fled and then returned to her abusive spouse. DSL attempted several times to leave her husband by fleeing to other locations in Mexico and the United States, each time returning because of threats by her husband's friends to harm her if she did not return.⁷⁹³ As in the *SJY* case, the reviewing Federal Court rejected the IRB decision-maker's negative conclusion regarding DSL's subjective fear due to her re-avilment,⁷⁹⁴ citing the fact she continued to experience abuse after her return.⁷⁹⁵ The judge in the *DSL* case relied on the claimant's post-return experience of abuse to illustrate his conclusion that the claimant feared abuse despite her return to the abuser.⁷⁹⁶ However, the Federal Court judge let the IRB determination stand because he decided that the IRB decision-maker had been sensitive to the Gender Guidelines (although they were not mentioned in the

⁷⁸⁹ *Ibid* at para 19.

⁷⁹⁰ "The Board also drew a negative inference on the applicant's subjective fear from her reavilment to South Korea to be with Mr. Kim; a man who gambled, drank, took her money and had frequently abused her for four years." *Ibid* at para 21.

⁷⁹¹ *Ibid* at para 64. "The applicant is correct in criticizing the Board's finding on her reavilment to South Korea. Although the Board stated at the beginning of its reasons that it took the Gender Guidelines into account, its negative inference from the applicant's return to South Korea suggests otherwise." However, other aspects of the Board's decision render this error insufficient for a finding that its decision was unreasonable on this issue." *Ibid* para 65.

⁷⁹² *DSL v Canada (Ministry of Citizenship and Immigration)*, 2012 FC 1444.

⁷⁹³ *Ibid* at para 3.

⁷⁹⁴ *Ibid* at para 9.

⁷⁹⁵ *Ibid* at para 9.

⁷⁹⁶ *Ibid*.

decision),⁷⁹⁷ the claimant had not adequately sought police assistance,⁷⁹⁸ and the errors were not sufficiently grave to warrant setting aside the decision.

6.4.2 *Delay in Flight*

The Federal Court also supported IRB decision-makers' negative conclusions on claimants' credibility in cases where the claimants planned or took intermediate steps prior to fleeing persecution by their abusive spouses. The IRB and Federal Court also found the claimants in the *JCG*, *RKH*, and *VRG* cases lacked subjective fear because they took steps to recover property or money after leaving the abuser's household but prior to fleeing the country. In each of these negative decisions, the reviewing Federal Court judges characterized evidence of the claimants' economic decisions to continue working or to attempt to sell or recover assets prior to flight as being inconsistent with subjective fear.⁷⁹⁹

The Federal Court dismissed a request for judicial review in the *JCG* case⁸⁰⁰ because it supported the IRB's negative credibility conclusion due to the fact that the claimant had filed a civil lawsuit to recover her personal property, including her computer, car, and personal effects, after she fled her abuser.⁸⁰¹ The decision-maker reasoned that a person who was truly "fearful for her life and wants her ex to leave her alone...would take very different actions than a civil suit to recover lost property."⁸⁰² The Federal Court found the decision-maker's credibility finding on this point to be reasonable conclusion based on the available evidence.⁸⁰³ In the *RKH* decision, a 2006 domestic violence case from Pakistan, the Federal Court also

⁷⁹⁷ *Ibid* at para 10.

⁷⁹⁸ *Ibid* at para 12.

⁷⁹⁹ It is also interesting to note that in both *RKH* and *VRG*, the length of discussion of this issue was longer than the Gender Guidelines discussion.

⁸⁰⁰ *JCG*, *supra* note 660.

⁸⁰¹ *Ibid* at para 9.

⁸⁰² *Ibid*.

⁸⁰³ *Ibid* at para 24.

supported the IRB decision-maker's conclusion that the claimant lacked subjective fear because she delayed her escape until she sold her apartment.⁸⁰⁴ The decision-maker in the *VRG* case surmised that the claimant lacked subjective fear because she did not quit her work and move at the first opportunity but rather “ “continued to go about her business in spite of the threats to her life and the lives of her children.”⁸⁰⁵ The decision-maker also found the claimant not credible because she incorrectly stated she had only one son and then, after correcting herself, mixed up the birth dates of her two sons.⁸⁰⁶ The Federal Court upheld the tribunal determination, stating that the claimant's fragile state did not explain the discrepancies regarding important dates in her life.⁸⁰⁷

In contrast, the reviewing Federal Court judge in the 2006 *SJO* case⁸⁰⁸ rejected the IRB's decision-maker's conclusion that the claimant's delay in flight meant that she lacked subjective fear. The IRB decision-maker in this case dismissed the claimant's explanation that she falsified her finances because of her situation of abuse.⁸⁰⁹ The IRB rejected without explanation the claimant's testimony that “she had little money for her own private use, that she had to secretly hoard that money, and that she took a desperate act to essentially falsify her financial position.”⁸¹⁰ Citing the Gender Guidelines and the *Lavallee* case, the Federal Court judge firmly rejected the IRB's implication that it was “inconceivable that the Applicant

⁸⁰⁴ *RKH*, *supra* note 635 at para 17.

⁸⁰⁵ *VRG v Canada (Citizenship and Immigration)*, 2011 FC 343 at para 12 & 13. The reviewing Federal Court dismissed the claimant's request to set aside the IRB determination.

⁸⁰⁶ *Ibid* at para 26 & 27.

⁸⁰⁷ *Ibid* at para 27.

⁸⁰⁸ *SJO*, *supra* note 255.

⁸⁰⁹ *Ibid* at para 28.

⁸¹⁰ *Ibid* at para 27.

would remain in an abusive relationship for any good reason and the fact that she did so must mean she is not telling the truth”⁸¹¹ and sent the case back for redetermination.⁸¹²

While the Federal Court in the *SJO* case was able to correct the decision-maker’s misunderstandings about the dynamics of domestic violence, the claimants in the *JCG*, *RKH*, and *VRG* cases were not so lucky. The cases described above demonstrate that the IRB & Federal Court are not consistently and correctly drawing on the Gender Guidelines to inform their decisions on domestic violence claims. The cases furthermore illustrate that misconceptions about the nature of domestic violence still persist within some IRB determinations and that ill-informed conclusions are being left unchecked by the Federal Court.

6.4.3 Domestic Violence Persecution and the sophisticated and wealthy refugee claimant

This section focuses on a particular subset of domestic violence claimants-- wealthy, well-educated, well-traveled women. In some domestic violence cases where the claimants were wealthy, well-educated and well-traveled, the reviewing judge overturned determinations that reflected stereotypic or unreasonable expectations of the claimant. In other such cases, the Federal Court supported the IRB’s determination that the claimant’s circumstances did not seem to reflect those of a person fleeing persecution.

The reviewing Federal Court judge in the *MIM* case⁸¹³ found reasonable the IRB’s conclusion that an IFA was reasonably available to the claimant. Although she provided testimony on her unsuccessful attempts to report the abuse to the police, the judge found the

⁸¹¹ *Ibid* at para 28.

⁸¹² *Ibid* at para 40.

⁸¹³ *MIM*, *supra* note 725. The Motswana claimant in this case began to experience abuse when she dropped out of university and moved in with her partner in Gaborone upon discovering she was pregnant. After years of abuse, including being stabbed by her abusive spouse, the claimant fled the country with her son after her abusive spouse saw her in a restaurant with another man. *Ibid* at paras 2-8.

claimant did not provide evidence to refute the argument that she could have fled elsewhere in Botswana given her fluency in English, her university education, and the fact that her mother and friends had helped her to flee to Canada.⁸¹⁴ The Federal Court dismissed the application for judicial review. The IRB found that the claimant's "age, education, work experience, language, and support network" meant the proposed IFAs (Francistown or Serowe) posed no serious social or economic barriers to the claimant. The claimant refuted this assertion by saying these networks would not matter if her husband used his police connections to locate her and resume his abuse of her.⁸¹⁵ The IFA decision-maker and reviewing Federal Court judge found her testimony to be unpersuasive.

In the 2012 *PKA* case,⁸¹⁶ the Federal Court also supported a negative IRB determination based on the claimant's familial and economic resources. The claimant testified that her mother and her daughter, who lived in England, would regularly send her money and pay for her trips abroad.⁸¹⁷ The Federal Court supported the IRB's negative plausibility conclusion stating that it was "illogical that the applicant would re-avail herself repeatedly to the abuse when she was in a position to escape" with such family support.⁸¹⁸ Finally, the IRB drew a negative conclusion from the claimant's failure to claim refugee protection during her stay in the United States and her subsequent delay in doing so upon her arrival in Canada even though the claimant testified that she was unaware of the refugee system and that she was illiterate.⁸¹⁹ Although the Federal Court acknowledged the IRB adopted a "strict objective

⁸¹⁴ *Ibid* at para 44.

⁸¹⁵ *Ibid*.

⁸¹⁶ *PKA*, *supra* note 401.

⁸¹⁷ *Ibid* at para 22.

⁸¹⁸ *Ibid* at para 23.

⁸¹⁹ *Ibid* at para 68.

view of what someone in an abusive situation would do,” it found overall that the decision was supported by reasonable findings on this issue.⁸²⁰

In the *PKA* case, the IRB and Federal Court struggled to reconcile their expectations of a domestic violence survivor’s experiences with a more complex reality of a well-resourced but still persecuted refugee claimant. In this case, both the IRB and reviewing Federal Court judges drew negative conclusions about the claimant’s openness about her experiences of abuse and relationships with family abroad. In contrast to cases involving poor women, IRB determinations and Federal Court judicial reviews of wealthy women’s claims involve substantial discussions of whether or not the claimant should have reasonably been able to escape the abuse (and thus by implication elected not to escape) because of her financial status. As the claimant’s counsel submitted on judicial review, the IRB “assumed that if the applicant was capable of finding an airport loading gate, she would also be capable of leaving her abusive husband and claiming refugee status when abroad.”⁸²¹ Despite the IRB’s erroneous assumption on this issue, the Federal Court did not find that error warranted the Court’s intervention.

In some of the case examples, decision-makers used evidence about the claimant’s education level and the claimant’s perceived intelligence and “sophistication” (the term seems to be used for someone used to urban settings) when drawing negative conclusions from a claimant’s delay in seeking refugee protection. The *SJY* case discussed above in the section on delayed flight from persecution also contains insights on how some decision-makers treat the claims of educated women who flee domestic violence. In its dismissal of the claimant’s application for judicial review, the Federal Court noted:

⁸²⁰ *Ibid* at para 63.

⁸²¹ *Ibid* at para 33.

The Board highlighted the fact that the applicant is well-educated with sixteen years of formal education, had fled Korea for the second time to escape her abusive boyfriend, had first-hand knowledge from her first visit that there was no guaranteed approval of applications to extend visitor visas and her failure to seek out information on the Canadian refugee protection system although she had knowledge of its existence since October 2008. The Board therefore drew a negative inference on her subjective fear from her delay in claiming.⁸²²

The IRB and Federal Court in this case thus assumed that the claimant's knowledge that Canada had a refugee system combined with her education level meant that she should have also known this system was a reasonable option to her as a domestic violence survivor.

In contrast, other cases in the data set show the Federal Court stepping in to set aside IRB determinations that relied on stereotypic views of a domestic violence victim. For example, the claimant in the *SBK* case⁸²³ was the wife of an Ethiopian diplomat who was posted to the Netherlands. The IRB rejected her appeal for protection against her abusive husband because it concluded that her testimony on her husband's level of control over her life would not be possible for someone within the Dutch diplomatic community.⁸²⁴ The Federal Court, however, set aside this decision because the decision-maker inappropriately relied on his own specialized knowledge instead of the claimant's testimony and did not present the claimant with the opportunity to respond.⁸²⁵ In another example, *JND*,⁸²⁶ a

⁸²² *SJY*, *supra* note 736 at para 22.

⁸²³ *SBK*, *supra* note 382.

⁸²⁴ The Court in *SBK* explained the IRB's reasoning as:

The norms of diplomatic life, and more particularly of the wife of an Ethiopian diplomat, are "not the sort of information of which judicial notice could be taken in proceedings before a court nor...[of a] general character well known to the Board and to the public" (*Hu v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 788 at para 25 (QL)) and therefore constitute specialized knowledge. And the Board invoked this knowledge in the present case to reject the applicant's oral evidence that she did not go outside her home without the company of her husband or his permission, or attend various activities organized which the Board found to be typical in the diplomatic community. The Board flatly asserted that the applicant was free to go outside as she pleased, again in direct contradiction to her testimony, and relied upon this to cast further doubt on the applicant's credibility." *Ibid* at para 24.

⁸²⁵ *Ibid*.

⁸²⁶ *JND*, *supra* note 660.

Namibian national, fled from her abusive husband, who was a wealthy businessman. The IRB decision-maker rejected her claim because “unlike many claimants who claim refugee status relating to gender based mistreatment the applicant speaks English, graduated from high school and made her own decisions regarding her flight to Canada.”⁸²⁷ The Federal Court found the IRB erred in considering these factors as relevant to assessing the applicant’s credibility and had wrongly concluded that only less educated and meek women may be subject to intimate partner violence.⁸²⁸

The *BEF* case offers a more complex example of the grey areas of credibility and plausibility analysis of the claims of wealthy or sophisticated claimants. The Federal Court judicial review turned on the IRB’s negative credibility assessment of BEF. The IRB’s credibility determination assessed the claimant’s vagueness⁸²⁹ and inconsistency⁸³⁰ in light of the IRB’s view of her intelligence and education. The IRB decision-maker concluded that the only possible explanation for BEF’s vague and confused testimony about persecution-related events, dates, and locations was that she was not telling the truth about her experiences. In The IRB drew negative conclusions about BEF’s credibility because her testimony was vague and inconsistent despite her level of education (completion of high school and one year of post-secondary school), her fluency in English (her first language), and her intelligence.⁸³¹ BEF’s counsel explained in the judicial review application that BEF’s vague and inconsistent testimony stemmed from her lack of sophistication.⁸³² He also argued that the IRB decision-

⁸²⁷ *Ibid* at para 7.

⁸²⁸ *Ibid*.

⁸²⁹ *BEF v Canada (Ministry of Citizenship and Immigration)*, 2005 FC 255. The claimant gave vague answers at the IRB hearing about her previous attempts to escape her abusive spouse. *Ibid* at para 6 and 7.

⁸³⁰ The claimant did not disclose her experience of domestic violence at her port of entry interview. *Ibid* at para 3.

⁸³¹ *Ibid* at para 7.

⁸³² *Ibid*.

maker failed to take the Gender Guidelines into account and that the IRB “erred by assessing her explanation in accordance with Canadian values, rather than based on Nigerian stigmas and prejudices toward victims of domestic abuse as disclosed in the country condition documents.”⁸³³

Although the reviewing Federal Court judge said he was troubled by the IRB’s failure to mention the Gender Guidelines,⁸³⁴ he nonetheless found that the IRB decision-maker was “alert and sensitive to cross-cultural and domestic violence concerns in eliciting and assessing the applicant’s claim.”⁸³⁵ The Federal Court dismissed the application for review, holding that the claimant’s lack of consistent and clear testimony could not be attributed to “any symptom of battered wives syndrome or from her embarrassment in disclosing the details of sexual or physical abuse” but rather were due to the claimant’s failure “to credibly account for significant events in her life with a semblance of veracity” despite her education and intelligence.⁸³⁶

This case is troubling because it suggests that the IRB and Federal Court give less evidentiary weight to testimony about the impact of PTSD and culturally driven shame if the claimant is an educated and intelligent woman. Women refugee claimants who are educated and intelligent seem to be held to a higher standard than their less educated sisters by the IRB and the Federal Court. In many cases they are expected to give consistent and clear, fact-based testimony and to remain unaffected by trauma or feelings of shame.⁸³⁷ The claimant’s

⁸³³ *Ibid* at para 11.

⁸³⁴ *Ibid* at para 19.

⁸³⁵ *Ibid* at para 20.

⁸³⁶ *Ibid*.

⁸³⁷ Baillot, Cowan & Munro, *supra* note 451 at 207 (“Full disclosure may also be hindered if a woman’s sense of shame/discomfort is accentuated by the perception that the interpreter, as a member of the community of origin, will judge her harshly”). Writing in the context of refugee claims on the basis of sexual orientation, Sharalyn Jordan writes that “Documenting and providing testimony about sexual or gender identities formed under conditions of persecution requires claimants to revisit traumatic events steeped in shame.” Sharalyn R

education, language fluency, and intelligence were the focus at both levels of decision-making in this case. While it is reasonable for the Federal Court to treat the IRB decision with deference,⁸³⁸ it is also crucial that decision-makers fairly consider all evidence presented to them. In this case, socio-economic status was given far greater weight by the IRB and the Federal Court than her experience and emotion (i.e. psychological trauma and feelings of shame).

In some cases, a claimant's level of education was the primary determinant as to the reasonableness of an IFA. In the *LRR* case⁸³⁹, the reviewing court agreed with the IRB decision-maker's finding that the claimant was not credible⁸⁴⁰ and could have reasonably relocated to another safe location in Mexico (Monterrey or Veracruz) given her young age and high level of education despite the claimant's testimony that these locations would not be reasonable because she had no relatives there.⁸⁴¹ The reviewing Federal Court judge repeated the IRB determination that the claimant could easily find work in her field in these locations.⁸⁴² The Federal Court found that while restarting her life would be "somewhat of a hardship," it would not be "an undue or unreasonable hardship, and certainly not comparable to the hardship of expatriation in a distant country."⁸⁴³

The difficulty with the judge's decision in this case is that he improperly used the fact of the claimant's flight from persecution against her and failed to analyze whether the cultural circumstances of the claimant would render the suggested locations unreasonable despite the

Jordan, "Un/Convention(al) Refugees: Contextualizing accounts of refugees facing homophobic or transphobic persecution" 26:2 *Refuge* 165 at 178.

⁸³⁸ *Ibid* at para 10.

⁸³⁹ *LRR v Canada (Ministry of Citizenship and Immigration)*, 2008 FC 1214.

⁸⁴⁰ *Ibid* at paras 22-25.

⁸⁴¹ *Ibid* at para 33.

⁸⁴² *Ibid* at para 31.

⁸⁴³ *Ibid* at para 33.

available economic opportunities. It appears that the decision-maker decided that LRR's education gave her an economic mobility that was more indicative of the reasonability of the suggested IFAs than her testimony regarding cultural requirements for a single, young woman to remain with extended family. In contrast, the Gender Guidelines advise that the reasonableness of the move to an IFA should be assessed considering all of the circumstances, including evidence of whether a single woman could reasonably live on her own in her cultural circumstances.⁸⁴⁴

6.4.4 Mental Health Issues and the Domestic Violence Survivor

Another theme emerging from the domestic violence-related case examples was that neither the IRB nor Federal Court adopted consistent approaches towards the integration of evidence on a claimant's mental health, including mental illness (such as depression) and other psychological vulnerabilities (such as symptoms associated with PTSD), into their decisions. Section D of the Gender Guidelines briefly discusses that a claimant's mental health may impact her ability to testify,⁸⁴⁵ but it does not provide guidance on how mental health may interact with other issues such as feelings of shame or the challenge of making a difficult decision. Some IRB decision-makers and Federal Court reviewing judges even take the erroneous view that the Gender Guidelines, including those provisions on mental health in Section D, are not applicable if the claimant is found not credible.⁸⁴⁶

⁸⁴⁴ In the "Evidentiary Matters" section, the Gender Guidelines state, "In determining the reasonableness of an IFA, the decision-makers should take into account factors including religious, economic, and cultural factors, and consider whether and how these factors affect women in the IFA." Gender Guidelines, *supra* note 5 at C.

⁸⁴⁵ This section notes that female claimants "from societies 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 dishonor their family or community" and that women "exhibiting symptoms of Battered Woman Syndrome...may also be reluctant to testify." *Ibid* at D.

⁸⁴⁶ For an interesting discussion on the applicability of the Gender Guidelines in cases where the claimant has asserted she has suffered trauma but has no psychological diagnosis, see *MHI*, *supra* note 660 at para 69.

Mental health issues were raised in the domestic violence cases in two ways: 1. In discussion of whether the claimant had a need for procedural accommodation, such as the appointment of a female decision-maker, and 2. In discussions of whether the claimant's mental health explained inconsistencies, errors, or omissions in her testimony or other credibility-related concerns. These cases also showed inconsistent understandings amongst decision-makers and reviewing judges on how the Gender Guidelines inform cases in which mental health is put at issue and whether other guidelines, especially the Vulnerable Persons Guideline, were relevant evidence to mental health. Within the case examples, the issue of whether and how multiple guidelines should apply, both procedurally and substantively, was particularly apparent in the cases of claimants dealing with mental health issues.

Within the study's domestic violence cases, there were 17 in which the claimant submitted evidence that she suffered from a particular mental health issue,⁸⁴⁷ usually in the form of a report from a therapist, doctor, or psychologist. These reports explain the impact of the claimant's mental health on her ability to effectively testify about her experiences and recall important events or other supporting documents to explain how the claimant's experience of trauma hinders her ability to remember past events.⁸⁴⁸ This recognition of the impact of a claimant's mental health on her ability to testify about her experiences is consistent with psychological research on this topic.⁸⁴⁹

The cases reflected a lack of consistent understanding at the IRB and Federal Court levels on how evidence on a claimant's mental health condition should inform a decision-

⁸⁴⁷ Amongst these 17 cases, 7 were successful at judicial review and 10 were rejected at judicial review for an overall success rate of 41% (a success rate that is consistent with the other domestic violence cases in the data set but lower than the overall success rate).

⁸⁴⁸ *ACA*, *supra* note 401 at para 30.

⁸⁴⁹ Cleveland, *supra* note 206; Choudhary, *supra* note 206; & Bopp Stark, *supra* note 410.

maker's credibility assessment. A significant proportion of the domestic violence cases within the case study deal with whether or not the claimant's persecution-produced mental condition compromised her ability to give effective testimony. Roughly one-quarter of the domestic violence cases in the data set discussed a psychologist's report and its applicability to the gender-related claim,⁸⁵⁰ although there was no correlation between such a discussion and a higher than average success rate.⁸⁵¹

The majority of domestic violence cases in which claimant mental health was an issue focused on whether the claimant's mental health explained the claimant's actions during persecution (most often in relation to whether the claimant had a well-founded fear) and to inform a discussion of whether she could have done more to seek state protection or relocate to a suitable IFA.

In the majority of the cases in which credibility was an issue, decision-makers and reviewing judges often viewed mental health claims simply as an unacceptable excuse for omissions or inconsistencies in testimony and found the claimant not credible.⁸⁵² For example, the IRB decision-maker and the reviewing Federal Court judge rejected psychological reports submitted by the claimant in the *JCG* case as an explanation for conflicts in her explanations about seeking police protection: "The depressed and anxious mental condition of the applicant cannot explain or excuse the inconsistencies, contradictions, and implausibilities upon which the Board relied in finding the applicant not credible."⁸⁵³ The Federal Court interpreted the IRB decision-maker's efforts to give the claimant the opportunity to spontaneously correct her

⁸⁵⁰ 24% or 17 out of 71 domestic violence cases in total.

⁸⁵¹ 41% success rate or 7 out of 17 domestic violence cases in total.

⁸⁵² See, for example, *CKI v Canada (Ministry of Citizenship and Immigration)*, 2005 FC 1168, in which the Court stated, "the Rape Trauma Syndrome does not excuse contradictions or omissions of serious incidents in a claimant's previous statements. It is clear that the Guidelines cannot be treated as corroborating any evidence of gender-based persecution so that the giving of the evidence becomes proof of its truth." *Ibid* at para 4.

⁸⁵³ *JCG*, *supra* note 660 at para 26.

inconsistencies as evidence of the IRB's sensitivity to the Gender Guidelines⁸⁵⁴ whereas being given the opportunity to correct errors, omissions, and inconsistencies is standard practice in all hearings.

There were also several cases in which the claimant's credibility was considered separately from evidence on her mental health. The Federal Court's review of Ms. VRG's refugee claim also found testimony on the claimant's mental health to be irrelevant to the assessment of her credibility.⁸⁵⁵ In this case, involving a Mexican woman's escape from her violent spouse, counsel submitted that the claimant's inconsistent testimony on the number of children she had with her husband and the children's birth dates were due to her nervousness at the hearing.⁸⁵⁶ The Federal Court supported the IRB's negative inference from this mistake, noting:

(t)he Court finds it difficult to see how the member, in her decision, allegedly misapplied the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution...even if the applicant was in a fragile state, this does not explain the discrepancies in her testimony with regard to important dates in her life.⁸⁵⁷

In another illustration, the Court in the *MHI* case found as reasonable the decision-maker's dismissal of the claimant's testimony on her mental health (specifically, her continuing trauma from her experience of domestic violence) because she had not submitted formal evidence of a diagnosis.⁸⁵⁸ Like many of the cases in the data set, the Federal Court's discussion of the effect of the claimant's mental state on the credibility of her testimony and memory was exclusively grounded in the Gender Guidelines rather than the Vulnerable Persons Guideline, the guidelines that ought to be applied to claimants with severe psychological vulnerabilities

⁸⁵⁴ *Ibid* at para 28.

⁸⁵⁵ *VRG v Canada (Ministry of Citizenship and Immigration)*, 2011 FC 343 at para 25-27.

⁸⁵⁶ *Ibid* at para 27.

⁸⁵⁷ *Ibid* at para 27.

⁸⁵⁸ *MHI*, *supra* note 660 at para 63.

(although this term is undefined in the Vulnerable Persons Guideline). In the few cases where the Vulnerable Persons Guidelines were considered, the claimants' requests for procedural accommodation were often granted⁸⁵⁹ and, in cases where they weren't, the case succeeded on judicial review.⁸⁶⁰

In many of the violence-related cases involving mental health evidence it was clear that decision-makers struggled to determine how to apply the details from the psychological reports to the issues of the case and determine their relevance to the substantive evaluation and the need for procedural accommodation. This put the decision-maker in the position of making a quasi-medical determination of how the claimant's particular mental state impacted both her actions at the time of persecution and her testimony about it, without direct recourse to medical experts.

6.4.5 The Influence of Cultural and Political Context on decisions

As noted in Chapter 5, the Gender Guidelines encourage decision-makers to take into consideration the claimant's particular circumstances when weighing evidence on whether the claimant took made sufficient efforts to end or avoid further persecution. Section C advises decision-makers to consider "among other relevant factors, the social, cultural, religious, and economic context in which a claimant finds herself" when making determinations on whether the claimant reasonably sought the protection of the state and whether she had reasonable IFAs available to her.⁸⁶¹

The domestic violence cases in this study demonstrate that there are two opposing approaches amongst IRB decision-makers and Federal Court judges about how and when a

⁸⁵⁹ See *MVL v Canada (MCI)*, 2011 FC 1349

⁸⁶⁰ See *FER*, *supra* note 660 & *JSO*, *supra* note 713.

⁸⁶¹ Gender Guidelines, *supra* note 5 at C.

claimant's contextual circumstances are relevant to the substantive analysis of the claim. The first approach is that a decision-maker must first look at the claimant's context and circumstances, including factors like culture, socio-economic circumstances, age, and education, when determining the reasonableness of a claimant's actions. The opposing approach is that the decision-maker analyses the credibility of claimant's actions first based on the testimony alone, and context and circumstances are considered only thereafter if the claimant is found to be credible. Illustrating the first approach, in the 2006 *ADC* case,⁸⁶² the Federal Court found that the IRB had made a reasonable decision on the credibility of the claimant but set aside the determination because the IRB's conclusions on state protection were unreasonable. The Court found IRB decision-maker's expectation that the claimant should have sought police protection each time her spouse was violent towards her did not take into account that the violence occurred in "a culture in which victims learn not to seek assistance from the police or the prosecution."⁸⁶³

The second approach adopted by some IRB decision-makers and Federal Court reviewing judges is that situating a claimant's testimony in the context of her circumstances is relevant to every part of the substantive analysis of the claim. For example, the *NZO* case⁸⁶⁴ involved a Kazakhstani woman whose abusive partner was an influential local politician. The IRB found that the claimant failed to make serious attempts to seek state protection because she did not call the police each time she was beaten and she returned to the abuser even after being hospitalized with injuries caused by a violent attack by the abuser.⁸⁶⁵ The Federal

⁸⁶² *ADC*, *supra* note 660.

⁸⁶³ *Ibid* at para 30.

⁸⁶⁴ *NZO*, *supra* note 652.

⁸⁶⁵ *Ibid* at para 24.

Court's decision cited case law⁸⁶⁶ on Battered Woman Syndrome to support its finding that NZO had in fact demonstrated reasonable efforts to obtain state protection to the best of her ability. The Federal Court criticized the IRB's failure to consider the claimant's testimony that her refusal to file a police complaint after one incident of domestic violence was because the male police officer, who was a native Kazak (the claimant was part of an ethnic Russian minority), wanted her to go to the police station at night to file a complaint.⁸⁶⁷ The reviewing Federal Court judge sent the case back for redetermination also because of the IRB's failure to consider Battered Woman Syndrome in its analysis,⁸⁶⁸ as recommended by the Gender Guidelines.⁸⁶⁹

In contrast, other decision-makers drew negative inferences about claimant credibility despite evidence that claimants from some national or cultural circumstances had adopted certain patterns of behaviour or expectations in the context of their culture. Some claimants demonstrate non-candor with authorities as a method of survival,⁸⁷⁰ either by not being truthful to those in power or by avoiding giving any information to them.) One of the most troubling examples of the failure to consider claimant circumstances was the 2008 *GOV* case,⁸⁷¹ concerning a 17-year-old woman from Mexico fleeing domestic violence. The Federal Court found as reasonable the IRB's determination that the claimant lacked subjective fear because

⁸⁶⁶ NZO (*ibid*) cited the Supreme Court case of *Lavalee* (*supra* note 752) at para 1 & para 48 & *Griffith* (*supra* note 70) at para 49 to support its decision.

⁸⁶⁷ *Ibid* at paras 35 & 36.

⁸⁶⁸ *Ibid* at para 46.

⁸⁶⁹ Gender Guidelines, *supra* note 5 at D.

⁸⁷⁰ Peter Margulies, in an article comparing the cultural circumstances of Holocaust victims with those of contemporary Haitian refugees argued, "Haitians tend to deny, based on long practice, that they are "political when in fact they are. Deference is an art in Haiti; abandoning deference for candor is a recipe for death. "Switching gears" to practice candor once one encounters "impartial" asylum decision-makers is a difficult move." Peter Margulies, "Difference and Distrust in Asylum law: Haitian and Holocaust Refugee Narratives" (1993-1994) 6 St Thomas L Rev 135 at 139.

⁸⁷¹ *GOV v Canada (Ministry of Citizenship and Immigration)*, 2008 FC 1347.

she returned to her parent's house to escape the abuse and that it was implausible that her 17-year-old boyfriend would use his police contacts to find her elsewhere in Mexico.⁸⁷²

Two cases, reaching opposite conclusions on judicial review, turned on whether it was reasonable for the claimant to avoid seeking police protection because they were either known to be corrupt or had been unhelpful in the past. In the *JCG* case,⁸⁷³ the IRB rejected the claimant's argument that she had not gone to the police regarding her experience of domestic violence because they had not helped her when she had gone to them after a robbery.⁸⁷⁴ The Federal Court found it was reasonable for the IRB to conclude that the claimant had failed to make sufficient efforts to seek state protection before fleeing the country. The 2006 *FPE* case⁸⁷⁵ involved a Mexican domestic violence claim in which the claimant testified that she thought it pointless to seek the protection of a corrupt and ineffective police force.⁸⁷⁶ The Federal Court set aside the IRB determination and chided the IRB decision-maker for not considering the claimant's personal situation in the evaluation of her realistic ability to seek state protection.⁸⁷⁷

6.5 Chapter Conclusion

This chapter demonstrates how women with gender-related claims are constructed as a gendered, victimized Other by some decision-makers. Too often, these constructions are accepted as reasonable by the reviewing Federal Court. The Gender Guidelines aim to ensure that decision-makers consider the realities of women refugee claimants with gender-related

⁸⁷² *Ibid* at para 22.

⁸⁷³ *JCG*, *supra* note 660.

⁸⁷⁴ *Ibid* at para 9.

⁸⁷⁵ *FPE v Canada (Ministry of Citizenship and Immigration)*, 2006 FC 425.

⁸⁷⁶ *Ibid* at para 5.

⁸⁷⁷ *Ibid* at para 16.

claims when deciding on issues of credibility and state protection. A thorough analysis of the case examples revealed inconsistencies in evidence assessment in four areas:

1. The intersection between a gender-related claim and claimant mental health;
2. The influence of a claimant's contextual circumstances, particularly those related to culture and politics, on how a claimant's behaviour during persecution should be analyzed;
3. The persistent influence of myths about the nature of domestic violence, particularly with regard to timing of flight from persecution and re-availment; and,
4. The influence of claimant wealth and sophistication on credibility, plausibility, and IFA analyses.

While decision-makers are permitted to compare a specific claimant's situation to a generalized "other" in order to analyze a claim, this technique is problematic when it relies on erroneous stereotypes to legitimize generalizations.

One solution to these issues is for decision-makers to instead use generalizations that are flexible and open to the diverse experiences and reactions of women who survive violence and abuse, and that consider the context impacting their behavior to escape persecution.⁸⁷⁸ Unfortunately, the study cases reveal that even when the IRB determinations reflects outdated and simplistic understandings of domestic violence come before the Federal Court, the reviewing judges often do not address the problem or, if they do address it, nevertheless find the determination to be overall reasonable. The success of cases with clear misunderstandings about the nature of domestic violence demonstrate that the Gender Guidelines are not being substantively applied in a way that ensures procedural fairness to all women with gender-related claims.

⁸⁷⁸ Donna Martinson, Marilyn MacCrimmon, Isabel Grant, & Christine Boyle, "A Forum on *Lavallée v R*: Women and self-defence" (1991) 25 UBC L Rev 23 at 45.

CHAPTER SEVEN: CONCLUSIONS AND RECOMMENDATIONS

7.1 Summary of Findings

This thesis set out to explore and problematize how gender-related refugee claims were reviewed by the Federal Court in the decade leading up to the 2012 changes to the *Immigration and Refugee Protection Act*. Through a case-based qualitative and quantitative review of Federal Court judicial reviews of gender-related refugee determinations over the past decade, I have argued that there has been inconsistency in substantive application of the Gender Guidelines in IRB determinations and in Federal Court judicial reviews of these decisions. I have also argued that neither the IRB decision-makers nor Federal Court judges share a consistent approach and understanding of the Gender Guidelines' role in the evaluation of gender-related claims. As a result, claimants with gender-related claims cannot be assured an even-handed and systematic evaluation of their refugee claims.

This thesis has also called into question the IRB's and Federal Court's understandings of other aspects of the claimant's identity besides gender, such as economic status or education, and how these influence the decision-maker or judge's analysis of credibility, plausibility, state protection, and IFA. The study revealed that the claims of women who were seen by IRB decision-makers and Federal Court judges as sophisticated, educated, or wealthy were less likely to be accepted than claims without these identity markers. It also demonstrated that neither the IRB nor the Federal Court had consistent approaches toward the analysis of domestic violence claims or towards claims in which the claimant's mental state was relevant to the analysis.

The empirical contribution of this work is an analysis of whether and how IRB decision-makers consider gender-based claims assessed from the perspective of the Federal

Court that reviews their work. It has demonstrated an institutional failure to consistently assess gender-related claims in a full and fair manner. A more comprehensive approach toward gender-related claim assessment that includes intersectional understandings of race, class, and culture is needed in order to comprehensively assess the institutional treatment of gender-related persecution claims.

7.2 Reflections on the Study Findings

This last chapter offers some final reflections and discussion on how the work undertaken in this thesis meshes with wider discourse and practice in refugee law. It also puts forward four specific recommendations as to how the regulatory schema governing gender-related claim determination and judicial review could be improved to provide consistent substantive analysis and better procedural fairness for women claimants with gender-related claims.

Problems with Credibility and Plausibility

The case study undertaken as part of this thesis found problematic inconsistencies in the Federal Court's understanding of the role of the Gender Guidelines in the Board's assessments of a claimant's credibility and plausibility. In a significant number of cases included in the study, the Federal Court judge accepted the IRB decision-maker's treatment of positive credibility assessment as a condition precedent to the consideration of the Gender Guidelines. In these cases, the judge would generally let stand an IRB determination in which the decision-maker decided the Gender Guidelines were irrelevant to the claim analysis because of his or her determination that the claimant was not credible.

In other cases included in the study, the Federal Court judge held that the Gender Guidelines are immediately engaged to inform the process of credibility assessment in gender-related claims. These cases also tended to directly draw on specific sections of the Gender

Guidelines, such as those discussing the possible influence of cultural norms on a female claimant's behaviour. The IRB and Federal Court's treatment of claim plausibility was also incoherent. In most Federal Court judicial reviews, the reviewing judge did not identify as problematic determinations where the decision-maker's determination on the plausibility of the claim (whether the facts were possible at all) was lumped together with the credibility analysis (whether the claimant's story of her personal experience was true).

Problems with State Protection and IFA

Similarly, neither the Federal Court nor the IRB appear to have a consistent approach towards the role of the Gender Guidelines to assessments of state protection or availability of IFA in gender-related claims. Furthermore, decision-makers' determinations on these issues sometimes failed to heed the Gender Guidelines' advice on contextual consideration of the reality of women's lives, such as how age or culture can change the options reasonably open to a claimant. The case study found a weak correlation between success rate and discussion of Section C and Section D of the Gender Guidelines in cases where IFA and/or availability of state protection were determining issues.

There were also a notable number of cases in which both the decision-maker and the reviewing Federal Court judge drew negative credibility conclusions about the claimant from stereotypic understandings about non-gender-related aspects of the claimant's identity. For example, in a string of cases from Haiti, the claimant's age, marital status, perceived wealth, or her education level was used as indicators that the alleged mistreatment did not occur.⁸⁷⁹

The study's findings, while significant indicators of problems in the operational interpretation of the Gender Guidelines, only represent a sample of all Federal Court judicial

⁸⁷⁹ See, for example, *IGI*, *supra* note 702 at para 35.

reviews. Therefore, my findings must be understood in the context of their limitations. They do not reflect the recent regulatory and legislative changes nor do they give an unfettered view of first-level decisions. However, the conclusions on evidence evaluation prior to 2012 signal how altered structures, evidentiary starting points, and timelines under the new system may exacerbate pre-existing procedural gaps, thereby impacting how evidence is evaluated in gender-related cases. Further study is needed to expand and verify the findings in this limited, qualitative sample. This further study could be in the form of an in-depth quantitative analysis of Federal Court judicial reviews and a similar analysis of IRB determinations.

7.3 Recommendations for Policy makers, Judges, and Decision-makers

Refugee determinations, as administrative proceedings, represent an uneasy blend of immigration policy-making, enforcement, and adjudication.⁸⁸⁰ As such, any reforms to address procedural gaps must also speak to these three aspects in order to be effective. The following suggested reforms address the shared influence of the legislature, the judiciary, and the executive branch on solving the problems identified in this study and their roles in helping to ensure procedural fairness for refugees with gender-related claims.

RECOMMENDATION #1: Change the law to make the Refugee Appeal Division (RAD) available to all failed refugee claimants:

The study highlighted the inconsistent understanding of deference in Federal Court judicial reviews to the discretion of IRB decision-makers, a situation exacerbated by the lack of substantive review of those IRB determinations through appeal. The lack of an appeal mechanism remains the case for classes of refugee claimants who are part of a group of DFN

⁸⁸⁰ Won Kidane, “Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons From The Department of Labour Rules of Evidence” (2007-2008) 57 Cath U L Rev 93 at 94-95.

or those claimants who arrived to Canada through a land border with the USA (pursuant to the “Safe Third Country Agreement”).⁸⁸¹

RECOMMENDATION #2: *Dunsmuir* standard of review for administrative decisions should be clarified by the courts and a lower standard of review adopted for federal court judicial reviews of gender-related refugee claim determinations

The highly deferential Federal Court standard of review and the variable interpretation of that standard in gender-related claim determinations had a substantial impact on the assessment of procedural fairness in these types of claims during the period of study. The modified *Dunsmuir*⁸⁸² standard of review, developed over the last five years by subsequent decisions, tolerates “a range of reasonable outcomes” to withstand judicial review. In general, these subsequent decisions have taken a very conservative stance on judicial intervention in first level decisions.

While not specifically aimed at judicial reviews of refugee determinations, this attitude of deference extends to judicial reviews of IRB decision-makers’ consideration of the Gender Guidelines, wherein determinations that either ignore or go against the advice of the Gender Guidelines are allowed to stand, presumably because these errors did not render the determination unreasonable. While *Dunsmuir* and *Newfoundland Nurses* suggest an attitude of deference towards decisions that are “rationally supported by the governing legislation,”⁸⁸³ judicial review of determinations that do not substantively discuss applicable guidance documents such as the Gender Guidelines should not be viewed as falling within the range of reasonable outcomes.

⁸⁸¹ *Safe Third Country Agreement*, *supra* note 198.

⁸⁸² *Dunsmuir*, *supra* note 211.

⁸⁸³ Woolley & Fluker, *supra* note 294 at 1034.

RECOMMENDATION #3: Implement Mandatory pre-hearing case conferencing for all refugee claims

The study identified that decision-makers and reviewing Federal Court judges made rulings on gender-related cases without identifying them as such or identifying the Gender Guidelines as pertinent to their fair adjudication. Among those cases identified as gender-related, some decision-makers and judges narrowly construed the gender aspect of the claim as only applicable to one part of the claim.

Furthermore, shortened timelines will likely put a heavier burden on women with gender-related claims to swiftly and effectively identify their claims as gender-related. As the 2010 and 2012 legislative changes were being rolled out, the government often cited the multi-year case backlog as a motivation for the implementation of a faster, more efficient system for determinations. This reasoning led to the institution of time-sensitive deadlines for each step leading up to the hearing and case determination for refugee claimants. However, practitioners and academics alike have raised concerns about these shortened timelines and their potential impact on procedural fairness.

While the current RPD rules allow for an early stage meeting between the claimant and a RPD staff member, these meetings are non-mandatory and infrequent. The institutionalization of case conferencing would help identify cases as gender-related at an early stage and would also be an opportunity for the claimant to flag any procedural accommodation well in advance of the hearing to facilitate full and fair consideration of evidence at the hearing.

As noted above, the RPD rules currently allow decision-makers the option of requiring the claimant's participation in a pre-determination case conference⁸⁸⁴ prior to the hearing although these conferences form part of the record, unlike under the mediation or arbitration

⁸⁸⁴ *Refugee Protection Division Rules* SOR/2012-256, s. 24.

model of case conferencing. According to the Rules, the parties participating in a conference may “discuss issues, relevant facts and any other matter to make the proceedings fairer and more efficient.”⁸⁸⁵ While these optional conferences are not used in every case, they are more common in complex cases or ones involving children. Under the Guideline for Children Refugee Claimants, a pre-hearing conference is standard in cases of a refugee claimant who is an unaccompanied minor.⁸⁸⁶ According to the Government, the use of case conferences in RPD proceedings has been so successful in encouraging a fair and efficient process that the new rules governing RAD procedure adopted the use of case conferencing within their own rules.⁸⁸⁷

The Refugee Determination Rules could be revised to make case conferences a mandatory pre-hearing element for all refugee claim determination. One of the objectives of these mandatory fora could be the proper identification of gender-related cases meriting reliance on the Gender Guidelines to inform procedure and evidentiary evaluation in each case. Similarly, if the circumstances of a case indicated the need to refer to more than one set of Chairperson’s Guidelines (such as those for particularly vulnerable claimants or those on child claimants), the case conference could highlight for the decision-maker which of the elements of each document would be pertinent. The case conference could also note any case-specific procedural hurdles to full rendering of evidence, such as additional time needed to secure translation of documents, and find solutions as appropriate. Finally, mandatory case conferencing would also help alleviate some of the possible drawbacks of the accelerated timelines for claim determination. It would help correct these drawbacks by facilitating the

⁸⁸⁵ *Ibid* at s 24(1).

⁸⁸⁶ Child Refugee Guideline, *supra* note 63.

⁸⁸⁷ Government of Canada, “Regulatory Impact Analysis Statement,” online: Canada Gazette <www.gazette.gc.ca/rp-pr/p1/2012/2012-08-11/html/reg1-eng.html>.

submission of all key evidence by, for example, giving additional time for submission of further documentation or witness affidavits.

This new, mandatory-version of case conferencing, in order to be effective, should be centered on the principles of neutral and confidential identification of issues and special circumstances. In his article on the use of Alternative Dispute Resolution (ADR) in US asylum cases, Daniel Forman envisions a system of “early neutral evaluation” of asylum cases that would incorporate measures to address, “cross-cultural concerns, potential trauma affecting the asylum-seeker, and institutional interactions.”⁸⁸⁸ Thus, one of the primary roles of such a neutral evaluation officer would be to vet whether procedural accommodations are warranted in order to facilitate claimant testimony rather than to be another forum in which to gather evidence for or against the claim.

RECOMMENDATION #4: REVISE THE GENDER GUIDELINES

The empirical study undertaken as part of this dissertation indicates that the Gender Guidelines do not reflect the complexity of gender-related claims or the recent procedural changes to determinations and the negative impact these may have on the fair consideration of evidence.

To better reflect the operational realities of claim determinations, the Gender Guidelines, last revised in 2008, should be revised in three substantive areas. First, their provisions should be adjusted to incorporate the 2010 and 2012 changes to the regulatory schema for refugee determinations, some of which alter procedural and evidence norms in claim evaluation. Specifically, the Gender Guidelines should be revised to speak to the application of the Guidelines’ procedural and evidentiary protections to situations wherein the claimant is from a DCO or is a DFN and thereby subject to expedited determination

⁸⁸⁸ Daniel Forman, “Improving Asylum-Seeker Credibility Determinations: Introducing Appropriate Dispute Resolution Techniques into the Process” (2008) 16 Cardozo J Int’l & Comp. L 207 at 232.

proceedings and the higher likelihood of adversarial evidence being submitted by the Minister's representative at the determination.

Second, the description of the scope and definition of gender-related claims should be amended to address confusion in the areas of credibility assessment and how to consider evidence on claimant mental health. The "Framework for Analysis" section should clearly state the expectation that the Guidelines should apply to the evaluation of all elements of a gender-related claim, including the consideration of a claimant's credibility and the plausibility of her claim. The Guidelines should also include a more robust discussion of how evidence introduced by the claimant on her mental health can intersect with the Guidelines procedural and substantive provisions. Section D should be expanded to include more discussion of mental health issues beyond PTSD and its procedural accommodations should be framed as mandatory provisions unless there are compelling circumstances merit otherwise.

Third, the Gender Guidelines should be reconceived by the IRB as a mandatory instrument to aid decision-makers in rendering their determinations. In other words, the Gender Guidelines should move away from being "guidelines" and instead be incorporated into the tribunals' processes in a way that mirrors the structure of the Refugee Determination Rules and immigration officer manuals. If the Gender Guidelines were better incorporated by the RPD as an integrated part of decision-making on gender-related claims, Federal Court reviewing judges would then be able to consistently review for the decision-maker's adherence to their principles. As a consequence, a decision-maker's substantive adherence to the Guidelines as a matter of law would be reviewed by the Court on a standard of correctness rather than the current reasonableness standard.

Fourth, the Chairperson should issue clarification to decision-makers on how to implement multiple guidelines when more than one guideline is applicable to the case circumstances. I would advocate for an expectation that the decision-maker demonstrate that he or she took into consideration all applicable guidelines and, in the case of guidelines containing procedural accommodations, adopt the highest appropriate standard. For example, if a female child has a gender-related claim, the stronger procedural accommodations of the Child Refugee Guidelines should prevail over the discretionary accommodations in the Gender Guidelines but the Gender Guidelines could still be referenced to examine the evidence.

7.4 Final Remarks

The opening chapter of this thesis considered the debate between scholars on how best to ensure signatories to the *Refugee Convention* substantively include gender-related refugee claims in their domestic determination systems. While several signatory countries have followed Canada's lead and implemented some form of Gender Guidelines, my study has demonstrated that this method of integration does not ensure that first-level decision-makers fully and fairly evaluate the gender-related claims that come before them. While I agree with those who say that the *Refugee Convention* should not be formally revised, it is clear that only augmenting the standard refugee definition with gender guidelines is not sufficient to address the gaps identified 20 years ago by the UNHCR. Canada and other signatory countries must do more to substantive integrate gender-related claims into their domestic legislation by establishing a stand-alone gender category option under which claimants can seek refugee protection. Integration of gender-related refugee grounds by the legislature supplemented by revised training and guidance documents for tribunal members would represent significant

steps towards correcting the current protection gaps faced by women refugee claimants seeking Canada's protection.

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APPENDIX B: CASE CHART FOR THE STUDY DATA SET

The 165 cases that form the basis of the analysis are listed here sequentially by their citations. To protect identities, the case names have been replaced by an abbreviation based on the initials of the named party or parties. “Word count” columns quantify the total number of words in the case (“Case”) and for the Gender Guidelines discussion (“GG”). “NOGG” indicates there was no discussion of the Gender Guidelines at all.

Cite	ID	Country	Grounds	Decision	Word count	
					Case	GG
2003 FCT 116	RLU	India	Political and Sikh woman	Yes	3859	NOGG
2003 FCT 147	GSE	Iran	Politically active women; Domestic violence	No	3695	NOGG
2003 FCT 210	AEL	Albania	Sexual Assault; Politically active woman	Yes	2277	184
2003 FCT 274	VMU	Azerbaijan	Domestic violence	Yes	783	159
2003 FCT 386	EAD	Nigeria	Forced Marriage	No	998	NOGG
2003 FCT 636	SZE	Albania	Women family in blood feud	No	3426	88
2003 FCT 673	TRA	Sri Lanka	Political; Sexual Assault	Yes	7786	126
2004 FC 1190	SKM	Bangladesh	Sexual Assault	No	1955	37
2004 FC 1261	MNA	Estonia	Forced Prostitution; Gang	No	3619	153
2004 FC 1279	FRA	Iran	Sexual Orientation; Sexual Assault; Political	No	1424	70
2004 FC 1411	AAY	Pakistan	Political and Muslim persecution of active women	No	2661	253
2004 FC 1460	PRO	St. Vincent	Sexual Assault; Domestic Abuse by Neighbour	Yes	2511	NOGG
2004 FC 1662	SIN	Rwanda	Sexual Assault	No	1089	426
2004 FC 416	AKA	Kyrgyzstan	Forced Marriage; Ethnic and Religious	Yes	2298	NOGG
2004 FC 432	JWN	Kenya	Forced Marriage; FGM	Yes	2789	NOGG
2004 FC 603	MCA	Costa Rica	Domestic violence	No	1541	NOGG
2004 FC 638	JEB	Morocco	Domestic violence	No	721	NOGG
2004 FC 66	LVV	Ukraine	Domestic violence	Yes	1563	125
2004 FC 677	AQU	Mexico	Domestic violence	Yes	3295	431
2004 FC 902	TGI	Zimbabwe	Forced Marriage	Yes	2514	NOGG
2005 FC 1119	JGY	Romania / Hungary	Domestic violence; Sexual Orientation	No	2340	770
2005 FC 1168	CKI	S. Korea	Sexual Assault	No	1136	375
2005 FC 147	MSM	Haiti	Political; Sexual Assault	No	1326	17
2005 FC 1653	ASE	Ghana	Domestic violence	No	917	NOGG
2005 FC 255	BEF	Nigeria	Forced Marriage; Domestic violence	No	1743	283
2005 FC 300	KKA	Sri Lanka	Tamil Women from Jaffna	Yes	4180	NOGG
2005 FC 379	HSY	Mali	FGM	No	2013	683
2005 FC 56	SBK	Ethiopia	Nationality; Domestic violence	Yes	1964	737
2005 FC 58	GUB	Sri Lanka	Political; Sexual Assault	Yes	1941	124

Cite	ID	Country	Grounds	Decision	Word count	
					Case	GG
2005 FC 64	MPA	Argentina	Domestic violence	Yes	6989	NOGG
2005 FC 67	ZBE	Ethiopia	Political; Sexual Assault	No	3506	140
2005 FC 689	MKB	Chad	Sexual Assault; Forced Marriage	No	3437	279
2005 FC 820	RSZ	Hungary	Domestic Abuse by Father	No	1523	52
2005 FC 89 & 2006 FC 1273	OCM	Mexico	Domestic violence; Sexual Orientation	Yes	1512	NOGG
2006 FC 1066	MKA	India	Family Status; Sexual Assault	Yes	2705	NOGG
2006 FC 1205	JAK	Bangladesh	Sexual Assault	Yes	2291	27
2006 FC 1365	LOR	Mexico	Domestic violence	No	5923	253
2006 FC 1416	TPR	Indonesia	Religion; Domestic violence (former spouse)	No	2405	334
2006 FC 161	FNA	Burundi	Sexual Abuse; Political	Yes	3037	62
2006 FC 393	SKA	Sri Lanka	Tamil women without male partners; Sexual Assault	Yes	2092	63
2006 FC 405	SJO	St. Vincent	Domestic violence	Yes	5101	670
2006 FC 425	FPE	Mexico	Domestic violence	Yes	1822	349
2006 FC 739	ADC	St. Vincent	Domestic violence	Yes	3504	316
2006 FC 839	RKH	Pakistan	Domestic violence	No	4210	15
2006 FC 871	RMY	St. Vincent	Domestic violence	Yes	5693	1523
2006 FC 908	MHA	Ethiopia	Political; Sexual Assault	Yes	1351	62
2006 FC 99	DRI	Guyana / St. Lucia	Domestic violence	Yes	4822	816
2007 FC 1009	JRI	St. Vincent	Domestic Abuse by stepfather	No	1564	NOGG
2007 FC 1359	JHO	St. Vincent	Domestic violence	Yes	3482	NOGG
2007 FC 182	CMU	Zimbabwe	Political; Sexual Assault	Yes	3864	137
2007 FC 256	CVL	Mexico	Domestic violence	Yes	5330	265
2007 FC 263	MVZ	Mexico	Domestic violence	Yes	1315	485
2007 FC 359	SCL	Peru	Domestic violence	No	2977	164
2007 FC 430	GKS	India	Political; Sexual Assault	Yes	2359	37
2007 FC 86	NSK	Sri Lanka	Tamil women; Domestic violence	Yes	4651	307
2007 FC 883	CED	Nigeria	Domestic violence; FGM	Yes	3047	213
2008 FC 1044	MRR	Mexico	Domestic violence	No	1613	194
2008 FC 1110	MDE	India	Widow with Land entitlement	No	1648	NOGG
2008 FC 1132	EVL	Mexico	Sexual Assault; Forced Abortion	No	1944	27
2008 FC 1177	SEH	Lebanon	Religion; Domestic violence	Yes	1961	NOGG
2008 FC 1214	LRR	Mexico	Domestic violence	No	2413	299
2008 FC 127	MAT	Nigeria	Forced Marriage; FGM	No	2314	28
2008 FC 128	JCG	Mexico	Domestic violence	No	4125	360
2008 FC 1329	JQG	Colombia	Political; Sexual Assault	Yes	3273	NOGG
2008 FC 1347	GOV	Mexico	Domestic violence	No	1952	327
2008 FC 149	IIS	Armenia	Forced Prostitution	Yes	7220	1263

Cite	ID	Country	Grounds	Decision	Word count	
					Case	GG
2008 FC 224	KMI	Albania	Domestic violence	No	2427	57
2008 FC 427	LRS	Guyana	Sexual Assault	Yes	2639	503
2008 FC 571	STA	Mexico	Domestic violence	Yes	3224	166
2008 FC 746	BVA	Sri Lanka	Ethnicity and wife of Tamil Political	No	5098	28
2008 FC 774	BAR	Albania	Domestic violence	No	5531	289
2008 FC 982	EBA	Haiti	Sexual Assault	Yes	993	NOGG
2009 FC 1163	MRM	Mexico	Domestic violence	No	4545	34
2009 FC 1284	MDB	Guinea	Sexual Orientation	No	2690	NOGG
2009 FC 140	JSO	India	Wife of Muslim Militant	Yes	3689	197
2009 FC 29	SSE	Haiti	Family Status	No	2833	363
2009 FC 397	SAL	Mexico	Domestic violence	No	1291	50
2009 FC 451	MBE	Mexico	Domestic violence	No	2036	171
2009 FC 465	CSA	Colombia	Wife of Political; Sexual assault	No	2822	192
2009 FC 687	NKU	Burundi	Sexual Assault	Yes	1314	261
2009 FC 76	IMP	Mexico	Domestic violence; Sexual Assault	Yes	1835	90
2009 FC 793	JJW	St. Vincent	Abuse Stepfather	No	2114	58
2009 FC 798	EMA	Mexico	Domestic violence	No	1916	229
2009 FC 966	AHA	Pakistan	Forced Marriage	No	1360	14
2010 FC 1077	RCY	Haiti	Fear of Sexual Assault as Haiti Woman	No	1214	52
2010 FC 1080	ARO	Pakistan	Muslim extremist persecution of professional woman	Yes	7016	NOGG
2010 FC 1269	IPA	S. Korea	Domestic violence	Yes	4369	140
2010 FC 129	RTP	Colombia	Political boyfriend	No	1600	NOGG
2010 FC 1313	ACA	St. Vincent	Domestic violence	Yes	1804	28
2010 FC 168	LSO	Serbia	Ethnic Hungarian; Rape	No	2173	41
2010 FC 216	APA	Mexico	Domestic violence	Yes	3141	129
2010 FC 232	SMU	Bangladesh	Domestic Abuse by father	Yes	5587	NOGG
2010 FC 259	IMP	Mexico	Sexual Assault	No	3265	291
2010 FC 445	MHI	Italy/Nigeria	Domestic violence	No	6666	2722
2010 FC 462	MCR	Mexico	Domestic violence	No	2493	NOGG
2010 FC 559	EDE	Haiti	Sexual Assault	Yes	4634	312
2010 FC 812	SMG	Mexico	Domestic violence	Yes	6396	894
2010 FC 890	JCJ	Mexico	Domestic violence	No	5660	1216
2010 FC 928	BTO	Malaysia	Sexual Orientation	No	1637	211
2010 FC 998	RPL	Haiti	Sexual Assault	No	9357	1773
2011 FC 10	MBG	Pakistan	Elderly widow fear of death at hands of religious militant	No	6858	NOGG
2011 FC 1025	ZPI	Pakistan	Muslim extremist persecution of woman social worker	Yes	6198	NOGG
2011 FC 1086	CJA	St. Vincent	Sexual Abuse	No	2981	242

Cite	ID	Country	Grounds	Decision	Word count	
					Case	GG
2011 FC 1155	CFO	St. Lucia	Domestic violence	Yes	5409	577
2011 FC 1236	ASA	Iran	Forced Marriage	Yes	5203	NOGG
2011 FC 1239	LSM	Mexico	Domestic violence	No	2506	344
2011 FC 1349	MVL	Mexico	Domestic violence	No	3452	264
2011 FC 1364	EMV	Honduras	Sexual Assault	Yes	1689	79
2011 FC 1378	SLE	St. Vincent	Domestic violence	No	4305	398
2011 FC 1445	KCC	Mexico	Sexual Assault; Political	No	5576	551
2011 FC 193	NZO	Kazakhstan	Domestic violence	Yes	8049	2288
2011 FC 24	AVF	Peru	Domestic violence	No	1789	306
2011 FC 261	ZHA	Trinidad	Domestic violence	No	1545	30
2011 FC 343	VRG	Mexico	Domestic violence	No	2535	102
2011 FC 39	DJO	Haiti	Sexual Assault	Yes	3785	263
2011 FC 456	MLZ	Mexico	Sister-in-law/widow of violent family; Fear of Sexual Assault	No	3837	37
2011 FC 534	FER	Lebanon	Domestic Abuse by Son	Yes	6559	1594
2011 FC 572	LLT	St. Vincent	Domestic violence	No	2559	245
2011 FC 589	MFD	St. Vincent	Sexual Abuse	Yes	1933	953
2011 FC 63	TGS	Brazil	Domestic violence	Yes	1234	268
2011 FC 778	PPE	St. Vincent	Domestic violence	No	3042	61
2011 FC 822	CAN	Nigeria	Forced Marriage; Sexual Assault	No	3082	110
2011 FC 827	AOW	Nigeria	FGM; Woman Family of debtor	Yes	4817	239
2011 FC 927	TME	St. Vincent	Domestic Abuse by Father	Yes	4590	193
2011 FC 933	YSA	Dominican Republic	Forced Abortion; Family Status	Yes	4308	509
2012 FC 1097	VGH	Mexico	Sexual Assault	No	3637	107
2012 FC 1078	DKA	India	Domestic violence	No	6922	1092
2012 FC 1101	RBR	Haiti	Fear of Rape	No	2734	NOGG
2012 FC 1176	SBJ	St. Vincent	Sexual Harassment	Yes	1474	242
2012 FC 1184	NLR	St. Vincent	Sexual Assault	No	243	16
2012 FC 1267	LKA	Namibia	Domestic violence	No	3806	485
2012 FC 1338	AIQ	Pakistan	Honour Killing	No	3674	763
2012 FC 1358	SCG	Mexico	Political; Sexual Assault	No	2845	40
2012 FC 1365	MMB	Mexico	Sexual Assault	No	1711	111
2012 FC 1369	SGE	Kosovo	Domestic Abuse by Father; Forced abortion	Yes	8170	NOGG
2012 FC 1379	PKA	India	Impugned Political Woman	No	4194	590
2012 FC 140	EOW	Nigeria	Domestic violence; Sexual Orientation	Yes	7232	701
2012 FC 1444	DSL	Mexico	Domestic violence	No	1719	175
2012 FC 1501	KRH	St Vincent	Domestic violence	No	2572	38
2012 FC 159	SHK	Bangladesh	Political; Family Status	No	9687	61

Cite	ID	Country	Grounds	Decision	Word count	
					Case	GG
2012 FC 222	FTO	Algeria	Family Status (Single and daughter married Jewish man)	No	2482	27
2012 FC 61	DUW	Burundi	Forced Marriage; Sexual Assault	No	3101	333
2012 FC 62	GMM	DRC	Sexual Orientation; Political	No	2778	51
2012 FC 659	LKH	Stateless Palestinian	Fear of Family Abuse for violation of traditional norms	No	1702	62
2012 FC 664	FSC	Mexico	Domestic violence	Yes	3865	22
2012 FC 763	MLU	Albania	Sexual Assault	Yes	6876	991
2012 FC 794	AUW	Burundi	Sexual Assault	No	3022	61
2012 FC 805	ANO	Chad	Forced Marriage; FGM	Yes	4902	1054
2012 FC 930	SJY	S. Korea	Domestic violence	No	1992	47
2012 FC 951	LBT	Mexico	Domestic violence	No	2989	413
2013 FC 1156	NAZ	Guatemala	Gang extortion; Sexual Assault	No	5305	1251
2013 FC 1284	BCA	Peru	Domestic violence	No	3117	645
2013 FC 251	MIM	Botswana	Domestic violence	No	5439	17
2013 FC 376	EPJ	Albania	Domestic Abuse by in-laws	No	3591	174
2013 FC 385	KIS	Botswana	Sexual Harassment; Sexual Assault	Yes	4052	NOGG
2013 FC 416	EGG	Mexico	Domestic violence	No	1501	357
2013 FC 452	END	Namibia	Forced Marriage; Sexual Assault	Yes	1435	84
2013 FC 459	JND	Namibia	Domestic violence	Yes	786	247
2013 FC 483	NHE	Namibia	Forced Marriage	Yes	2262	123
2013 FC 486	EGR	Dominican Republic	Domestic violence	Yes	2858	475
2013 FC 765	AYL	China	Forced Abortion; Sterilization	No	9677	38
2013 FC 771	IGI	Haiti	Sexual Assault	No	3688	NOGG
2013 FC 850	ABU	Zimbabwe	Sexual Orientation; Forced Marriage	Yes	4804	NOGG
2013 FC 893	VJE	St. Lucia	Domestic violence; Sexual Orientation	No	2345	NOGG
2013 FC 930	NKA	Namibia	Domestic Sexual and Physical Abuse	No	2397	26
2013 FC 973	MRE	Hungary	Ethnic Roma; Sexual Assault	Yes	5421	524