

Credibility assessment in Refugee Status Decision-making

Hilary Evans Cameron
Lincoln Alexander School of Law



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How should refugee status decision-makers decide whether a refugee claimant is telling the truth?

What legal principles should guide this process of credibility assessment?



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Part One

Credibility assessment in refugee status determination under International law

- the law of fact-finding: which mistake is worse?
- International refugee law's preference for mistaken grants

Part Two

Credibility assessment in Canadian refugee law

- the presumption of credibility
- unreliable credibility inferences
- principles of procedural fairness



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Credibility assessment in refugee status decision-making under international law

“...the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.”

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, rev'd edn (Geneva: Office of the United Nations High Commissioner for Refugees, 1992) at para 189.



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The law of fact-finding: which mistake is worse?

- How certain does the decision-maker need to be before they accept that an allegation is true?
- What should the decision-maker do if they are the fence, if they cannot decide whether they are certain enough?
- What should the decision-maker do if they think that they know ahead of time that certain allegations are very likely to be true or untrue? Should they take these 'prior probabilities' into account?



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the standard of proof will tell them
- What should the decision-maker do if they are the fence, if they cannot decide whether they are certain enough?
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- What should the decision-maker do if they think that they know ahead of time that certain allegations are very likely to be true or untrue? Should they take these 'prior probabilities' into account?
presumptions will tell them



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Which is the wrong kind of mistake in refugee law?

Is it worse to deny a claim that should have been granted or to grant a claim that should have been denied?



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International refugee law's preference for mistaken grants

“...the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.”

1 Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150, art 1C(1), Can TS 1969 No 6 (entered into force 22 April 1954)



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“The purposes of the Refugee Convention call for erring on the side of protection and belief, with full recognition that this means some people will cheat the system. The alternative is to refuse protection to many people who need it and betray the commitment states have made to protect people in danger of persecution.”

Michael Kagan, “Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination” (2003) 17 Georgetown Immigration Law Journal 367 at 414–15.

“If there is doubt about the applicability of the non-refoulement rule it should be applied. When in doubt, abstain from removal! This is the proper meaning of the term ‘benefit of the doubt’ in the asylum context.”

Aleksandra Popovic, “Evidentiary Assessment and Non-Refoulement: Insights from Criminal Procedure” in Gregor Noll, ed, Proof, Evidentiary Assessment and Credibility in Asylum Procedures (Boston: Martinus Nijhoff Publishers, 2005) 27 at 52.



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- “It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.”

UNHCR Handbook, at para 196



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- 196. ...Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.
- 203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.



UNHCR Handbook

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Credibility assessment in refugee status decision-making under Canadian law

The Canadian Federal Court is divided on virtually every question about how fact-finding should operate in refugee status decisions.

Nonetheless, we can find helpful guidance in three areas:

- the presumption of credibility
- unreliable credibility inferences
- principles of procedural fairness



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The presumption of credibility

- “When an applicant [refugee claimant] swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness.”

Maldonado v. Canada (Minister of Employment and Immigration) [1979] F.C.J. No. 248 at para 5

- “The Board would act arbitrarily, in my view, if it chose, without valid reasons, to doubt the credibility of a witness. If an applicant swears to the truth of certain allegations, that, in my view, creates a presumption that those allegations are true unless there be reasons to doubt their truthfulness.”

Villarroel v. Canada (Minister of Employment and Immigration), [1979] F.C.J. No. 210 at footnote 6.



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Unreliable credibility inferences

- Claimants’ trauma symptoms and psychological trouble
- Interpreted evidence
- The claimant’s demeanour
- Issues with memory
- Previous deception
- Delaying in fleeing or in making a refugee claim
- Unreasonable or irrational agents of persecution
- Inferences based on Canadian paradigms



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Trauma symptoms and psychological trouble

- “...many, if not most, refugee claimants are vulnerable and as a result have difficulty testifying effectively.”

Thamotharem v Canada (Minister of Citizenship and Immigration), 2006 FC 16 at para 90

- “...we would expect the legitimate victim of torture to have difficulties testifying” in part because of problems with “memory, consistency and coherence.”

Wardi v Canada (Minister of Citizenship and Immigration), 2012 FC 1509 at para 15

- Women given evidence about gender-based violence may have trouble testifying in part because of “difficulty in concentrating and loss of memory.”³¹

Mayeke v Canada (Minister of Citizenship and Immigration) (1999) at para 14



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“..while members of the Refugee Protection Division [of the Board] have expertise in the adjudication of refugee claims, they are not qualified psychiatrists, and bring no specialized expertise to the question of the mental condition of refugee claimants.”

Pulido v Canada (Minister of Citizenship and Immigration), 2007 FC 209 at para 28



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Interpreted evidence

- Judging interpreted evidence is “fraught with the possibility of innocent misunderstanding.”
 - *Owusu-Ansah v Canada (Minister of Employment and Immigration)* (1989), 98 NR 312 (CA)



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The claimant's demeanour

- “Individuals vary greatly as to the degree of emotion they show when describing such events.”
 - *Shaker v Canada (Minister of Citizenship and Immigration)*, (1999) 89 ACWS (3d) 1016 at para 10.



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Issues with memory

“It is clear that disturbing events. . . can reasonably alter an individual’s recollection.”

- Zhang v Canada (Minister of Citizenship and Immigration), 2014 FC 713 at paras 32, 36 (available on QL), de Montigny J

Claimants may have trouble remembering and recounting “peripheral details of a traumatic event.”

- Wardi v Canada (Minister of Citizenship and Immigration), 2012 FC 1509 at para 28 (available on QL), Rennie J

The claimant’s failure to remember the specific dates even of important events “bears a tenuous connection” to their credibility.

- Adegbola v Canada (Minister of Citizenship and Immigration), 2007 FC 511 at para 55, 157 ACWS (3d) 616, O’Keefe J



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“A refugee claim should not be determined on the basis of a memory test.”

Sheikh v Canada (Minister of Citizenship and Immigration) (2000), 190 FTR 225 at para 28



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- “I have mentioned the Board's zeal to find instances of contradiction in the applicant's testimony. While the Board's task is a difficult one, it should not be over-vigilant in its microscopic examination of the evidence of persons who, like the present applicant, testify through an interpreter and tell tales of horror in whose objective reality there is reason to believe.”

Attakora v Canada (Minister of Employment and Immigration) (FCA), [1989] FCJ No 444

- “Alleged discrepancies or inconsistencies must be rationally related to the applicant's credibility...’where a tribunal dwells on details and not on the substance of the claim [this] leads to misconstruction of the evidence. Any such inconsistencies should be major and not minor and sufficient by itself to call into question the applicant's credibility.”

Fatih v Canada (Minister of Citizenship and Immigration), [2012] FCJ No 924



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Previous deception

- “Can it be seriously suggested that any but the most naive applicant for a visitor's visa would indicate to the visa officer that the purpose of going to Canada was not to visit but to seek asylum?”

Fajardo v Canada (Minister of Employment and Immigration) (1993),
157 NR 392 at para 5 (CA)

- “... a refugee claimant may need to lie in order to obtain a Canadian visa.”
JRN v Canada (Minister of Citizenship and Immigration), 2005 FC 1606
at para 13



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Delaying in fleeing or in making a refugee claim

“It is never particularly persuasive to say that an action is implausible simpl[y] because it may be dangerous for a politically committed person.”

Samani v Canada (Minister of Citizenship and Immigration), 82 ACWS (3d) 547 at para 4

Re: “forum shopping”:

“...someone who actually fears persecution would want to go to a country where their claim has the best chance of success, since the price of failure is a return to the persecution they fear.”

Nel v Canada (Minister of Citizenship and Immigration), 2014 FC 842 at para 55



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Unreasonable or irrational agents of persecution

- It is an error of law “to require an applicant to prove that agents of persecution act rationally or justifiably.”
Taboada v Canada (Minister of Citizenship and Immigration), [2008] FCJ No 1395
- “...terrorists groups often act irrationally.”
Yoosuff v Canada (Minister of Citizenship and Immigration), [2005] FCJ No 1394
- “One cannot understand how the tribunal expects the applicant to explain logically the illogical actions of the authorities.”
 - Valtchev v Canada (Minister of Citizenship and Immigration), [2001] FCJ No 1131



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Inferences based on Canadian paradigms

- “...actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant’s milieu.”
Chen v Canada (Minister of Citizenship and Immigration), 2014 FC 749 at para 54



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Principles of procedural fairness

- The right to know the case to be met
- The right to be heard
- The right to an independent and impartial decision-maker



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The right to know the case to be met

“...a refugee claimant enjoys the benefit of the principles of natural justice in hearings before the Refugee Division. A basic and well-established component of the right to be heard includes notice of the case to be met.”

Thirunavukkarasu v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 589 (F.C.A.) para 10



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- “The Member found that because of apparent contradictions there was reason to doubt the Applicants' truthfulness... However at no time in respect of any of these incidents were the so-called contradictions put to the Applicants so that they could offer an explanation, if any; or clarify the matter. The Member simply lay in the weeds, waited till the hearing is over, then pulled out apparent contradictions and used them as the basis for disbelieving the Applicants' claim.”

Kumara v Canada (Minister of Citizenship and Immigration) 2010 FC 1172 at para 3

- “Although the RPD is not required to raise all concerns with an applicant... procedural fairness does require that an applicant be afforded an opportunity to address issues arising from the credibility, accuracy or genuine nature of information submitted.”

Shaiq v. Canada (Minister of Citizenship and Immigration), 2009 FC 149 at para 77



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The right to be heard

- The right to a competent interpreter
- The right to procedural accommodations



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- A refugee claimant has a right under the *Canadian Charter of Rights and Freedoms* to interpretation that is “continuous, precise, competent, impartial and contemporaneous.”

Mohammadian v Canada (Minister of Citizenship and Immigration),
2001 FCA 191 at para 4 (in obiter).



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- 4.2 The IRB has a broad discretion to tailor procedures to meet the particular needs of a vulnerable person, and, where appropriate and permitted by law, the IRB may accommodate a person's vulnerability by various means, including:
 - 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
 - h. allowing any other procedural accommodations that may be reasonable in the circumstances.

Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons
Appearing Before the IRB



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The right to an independent and impartial decision-maker

- The right to a decision-maker who is functionally independent from the government
- The right to a decision-maker who is free from any personal biases that would cause them to treat the claimant unfairly



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The right to an independent decision-maker

- “The Board itself is not responsible for policy evolution. The purpose of the Convention...is clearly not the management of flows of people, but rather the conferral of minimum human rights’ protection. The context in which the adjudicative function takes place is not a "polycentric" one of give-and-take between different groups, but rather the vindication of a set of relatively static human rights and ensuring that those who fall within the prescribed categories are protected.”

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



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The right to an unbiased decision-maker

Gender-based violence: stereotypes and myths that adjudicators must avoid, from the Refugee Board’s *Guideline 4 on Gender-based Claims*:

- Survivors of sexual assault can be expected to behave in a particular manner, such as resisting the perpetrator, and pursuing a criminal complaint.
- “Genuine” victims of sexual assault report the incident at the earliest opportunity and a person’s credibility is negatively affected by their delay in disclosure, whether in Canada or in the country of origin.



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- A person in an abusive relationship will seek to leave at the first opportunity, will not return to the abuser, and will not associate with the perpetrator after a traumatic event.
- Once in Canada, a person who has experienced gender-based violence will automatically seek out counselling or assistance in overcoming trauma.
- Well-educated women, women with well-paying jobs or professional designations, or women who show a capacity for self-sufficiency or the capacity to independently care for children, are less likely to experience gender-based violence.
- Sexual assault would result in pregnancy, or a woman would seek an abortion if impregnated due to an assault.



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Sexual orientation and identity: stereotypes and myths that adjudicators must avoid, from the Refugee Board's *Guideline 9 on claims based on Sexual Orientation, Gender Identity and Expression and Sexual Characteristics (SOGIESC)*

- SOGIESC individuals have feminized or masculinized appearances or mannerisms
- An individual's SOGIESC can be determined by an individual's occupation
- SOGIESC individuals would not have had heterosexual sexual experiences or relations



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- SOGIESC individuals would not voluntarily enter a heterosexual marriage or have children
- SOGIESC individuals are promiscuous or sexually active and do not engage in exclusive relationships
- SOGIESC individuals do not participate in cultural or religious customs or traditions
- Transgender individuals will seek to have surgical treatment
- Transgender individuals will seek to express their gender identity in accordance with their self-identified gender



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Thank you

h.evanscameron@torontomu.ca



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