Brief Submitted to the Standing Committee on Citizenship & Immigration

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Introduction

I am an Associate Professor at Osgoode Hall Law School, specializing in immigration and refugee law, with a particular focus on empirical research about factors that explain outcomes in the refugee determination process. For over 10 years, I have obtained datasets from the Immigration and Refugee Board (IRB) through Access to Information (ATI) requests and have made that data publicly available.[1] I have also undertaken statistical analysis of this data to discern patterns in outcomes, the results of which have been published in several peer reviewed journals.[2]

In CIMM's study of the IRB's appointment process, training and complaints, I encourage the Committee to focus on two key features of the refugee determination process.

First, extensive research on refugee adjudication demonstrates that outcomes in the process – at the Refugee Protection Division (RPD), the Refugee Appeal Division (RAD), and the Federal Court – all too often hinge on arbitrary factors related to who is assigned to decide the case. That is, one's chances of success in a refugee claim come down, in part, to the luck of the draw.

Second, refugee adjudication literally involves life and death stakes. If we get refugee decisions wrong, and if those mistakes are not corrected, people may be deported to face persecution, torture or even death.

In this brief, I describe the problem of subjectivity in refugee adjudication, drawing on quantitative data. I then suggest that this subjectivity must be understood in the context of the extremely high stakes involved in refugee adjudication. Finally, I make several recommendations about what steps should be taken and what steps should not be taken that I think flow from these two points.

Note that, due to the topic of the CIMM's study, in this brief I focus on subjective decision-making. However, my research also suggests that other troubling extra-legal factors influence outcomes in refugee adjudication. These include, for example, concerns related to access to counsel[3] and quality of counsel,[4] which are, in my view, matters that CIMM would do well to study.

Inconsistent decision-making: An extreme example

From 2008 to 2010, one RPD decision-maker, D. McBean, denied all of the 172 refugee claims that he heard. He also made no credible basis declarations in 40.7% of these claims, which meant that the claimants did not benefit from an automatic stay pending judicial review of their refugee determinations, and thus that they could be deported without Federal Court oversight. During the same period, the overall recognition rate for all RPD decision-makers was 51.9% -- with only 2.0% of cases being subject to no credible basis declarations.

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[1] The data is available here: http://ccrweb.ca/en/2017-refugee-claim-data.
[2] For further details, please see: https://www.osgoode.yorku.ca/faculty-and-staff/rehaag-sean.
[3] Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall Law Journal 71, available online: https://ssrn.com/abstract=1873999.
[4] Sean Rehaag, Julianna Beaudoin & Jennifer Danch, "No Refuge: Hungarian Romani Refugee Claimants in Canada" (2016) 52:3 Osgoode Hall Law Journal 705, available online: https://ssrn.com/abstract=2588058.

While some of these differences can be explained by factors such as country of origin, according to analysis that I have undertaken, and that has resulted in a law journal article, these factors do not fully explain the differences. Rather, it appears that this decision-maker approached cases differently than his colleagues.

To understand what was going on in these cases – why this decision-maker was so much more likely to deny claims than his colleagues – I obtained all of his decisions during this period through ATI requests. In 66.7% of the cases, the claimants were found not to be credible – that is, they were found to be lying. In 21.3% of the cases, the claims were denied on other grounds, but the written reasons took care to say that this did not necessarily mean that the claimants were telling the truth. In 11.5% of the cases, the claims were denied without any mention of credibility. And in only one case (0.6% of the cases), the written reasons explicitly indicated that the decision-maker believed the claimant, though the claim was denied on other grounds. Interestingly, in this last case, the decision-maker decided the claim sitting on a panel with two other decision-makers, whereas normally claims are decided by a single decision-maker.

One passage recurred regularly in the decisions I reviewed by this decision-maker: "*I simply do not believe*, on a balance of probabilities, that any of the significant events that the claimant alleged happened [...] actually happened." [5]

RPD decision-making in 2017

The above example of a decision-maker who "simply does not believe" refugee claimants is admittedly both exceptional and several years out of date – and the entire refugee determination system has since been overhauled. Nonetheless, troubling variations in outcomes across decision-makers continue to be a central feature of refugee adjudication.

As can be seen in the following table, according to data obtained through ATI requests, recognition rates at the RPD in 2017 varied across decision-makers who decided 30 or more cases, ranging from 97.9% to 22.0%.

OUTCOMES FOR RPD MEMBERS WITH 10 HIGHEST & LOWEST RECOGNITION RATES IN 2017*

Member	Expedited Positive	Positive	Neg. No Cred Basis	Negative	Total	Recognition Rate
JOEL.BOUSFIELD	92	99		4	195	97.9
LARRY.COLLE		158		8	166	95.2
ROMAN.KOTOVYCH	50	98		9	157	94.3
RABINDRANATH.TIWARI	12	69		5	86	94.2
LOIS.FIGG	37	38		6	81	92.6
MELANIE.CHARTIER	2	69		7	78	91.0
GREGORY.KELLY		29		3	32	90.6
FRANCOIS.RAMSAY	67	88		17	172	90.1
CHRISTIAN.BOISSONNEAULT	63	52		15	130	88.5
PAULA.FABER	20	74		13	107	87.9
DANIEL.MCKEOWN		42	1	77	120	35.0
LOVE.SAINT-FLEUR	2	43		86	131	34.4
YONATAN.ROZENSZAJN		46	8	82	136	33.8
NAMIJI.STOCKS	3	26	3	55	87	33.3
DIANE.SOKOLYK		21	3	41	65	32.3
NATALKA.CASSANO		10		23	33	30.3
DONNA.RAMACIERI		22	8	56	86	25.6
MICHAEL.HUYNH		11		36	47	23.4
DANY.DUBE		23	11	66	100	23.0
BRENDA.LLOYD		13		46	59	22.0
TOTAL (ALL RPD MEMBERS)	935	7,151	127	3,808	12,021	67.3

* New system, principal applicant claims, decided on the merits, for RPD Members deciding at least 30 claims

SOURCE: http://ccrweb.ca/en/2017-refugee-claim-data

[5] For further analysis, see Sean Rehaag, "'I Simply Do Not Believe': A Case Study of Credibility Determinations in Canadian Refugee Adjudication" (2017) 38 WLRSI 38, available online at: https://ssrn.com/abstract=2997648.

It should be acknowledged that some of the variation in recognition rates may be due to factors related to case assignment, including, most importantly, country of origin. However, the following table, demonstrates that even when one takes country of origin into consideration, massive variations across decision-makers persist. For example, one decision-maker's recognition rate was 23.8 percentage points higher than would be expected based on country of origin (61.0% predicted, 84.8% actual), while another decision-maker's recognition rate was 46.6 percentage points lower than would be expected based on country of origin (76.9% predicted, 30.3% actual).

OUTCOMES FOR RPD MEMBERS WITH 10 HIGHEST & LOWEST NOMINAL VARIANCE IN RECOGNITION RATES IN 2017*

Member	Expedited Positive	Positive	Neg. No Cred Basis	Negative	Total	Recognition Rate	Predicted Recognition Rate (Country Averages)	Nominal Variance (Actual - Predicted Recognition Rate)
JOSE.TSHISUNGU		28		5	33	84.8	61.0	23.8
MELANIE.CHARTIER	2	69		7	78	91.0	69.2	21.8
BERZOOR.POPATIA		69	1	13	83	83.1	61.4	21.7
VIRGINIE.FRANCOEUR		57		17	74	77.0	56.2	20.9
ROBERT.BAFARO		80		19	99	80.8	60.9	19.9
JULAINE.EBERHARD		106		25	131	80.9	63.7	17.2
HAROLD.SHEPHERD	13	96		20	129	84.5	67.4	17.1
DOROTHY.FOX		47		15	62	75.8	59.9	16.0
MICHELLE.DOOKUN		65	2	12	79	82.3	66.8	15.5
MICHAEL.SOMERS		88	3	10	101	87.1	71.8	15.3
DANY.DUBE		23	11	66	100	23.0	44.4	-21.4
JEAN-PIERRE.BEAUQUIER		14		19	33	42.4	64.7	-22.2
DANIEL.MCKEOWN		42	1	77	120	35.0	59.8	-24.8
MEREDITH.ROSE		24		35	59	40.7	67.0	-26.3
NAMIJI.STOCKS	3	26	3	55	87	33.3	61.4	-28.1
JAMES.RAILTON	2	27		45	74	39.2	69.4	-30.2
ALYSHA.MCCOLL		30	2	50	82	36.6	68.8	-32.2
MICHAEL.HUYNH		11		36	47	23.4	56.8	-33.4
BRENDA.LLOYD		13		46	59	22.0	59.6	-37.6
NATALKA.CASSANO		10		23	33	30.3	76.9	-46.6
TOTAL (ALL RPD MEMBERS)	935	7,151	127	3,808	12,021	67.3	67.3	0.0

* New system, principal applicant claims, decided on the merits, for RPD Members deciding at least 30 claims

SOURCE: http://ccrweb.ca/en/2017-refugee-claim-data

While this unexplained level of variation is troubling – and suggests that there is a problem in terms of subjectivity in decision-making at the RPD – it is worth noting that over the past 5 years, in Canada's new refugee determination system, no decision-makers who have decided more than 20 cases in any given year denied every single case that they heard. This is in contrast to the old refugee determination system, where this occurred several times (e.g. S. Roy in 2013: 0.0%, 23 decisions; D. McSweeney in 2011: 0.0%, 127 decisions; D. McBean in 2010: 0.0%, 62 decisions; D. McBean in 2009: 0.0%, 72 decisions).

What not to do: (1) Remove decision-making from the independent IRB

While I have raised concerns about various aspects of Canada's refugee determination process over several years, I recognize that there are some aspects of that process that work very well compared to many refugee determination systems around the world. One is that Canada locates first instance decision-making in an independent specialized quasi-judicial administrative tribunal. This increases the quality of first instance decision-making and provides some level of insulation from political interference in the process – a real problem in this area because of the potential for refugee adjudication to get mixed up with foreign relations and international trade, as well as with domestic political considerations.

In my view, it would be a serious mistake for any first instance refugee decision-making to be taken away from the IRB. I also think that this would not likely address concerns regarding subjective decision-making. My research shows that this subjectivity exists across institutional frameworks (e.g. old refugee determination system with Governor in Council decision-makers, new refugee determination system with civil servant decision-makers, the new Refugee Appeal Division, and Federal Court decision-making).[6] There is also extensive research demonstrating problematic subjectivity in refugee decision-making across institutional contexts in other countries.[7]

What not to do: (2) Quotas / directions on countries

A second important feature of Canada's refugee determination system is that decisions are made individually. In other words, the system aspires to be responsive to the individual circumstances that claimants face.

It would be a mistake to try to reduce subjectivity in refugee adjudication through mechanisms that would set up formal or informal quotas for decision-makers – such as by articulating expectations that adjudicators be within a certain range of variance relative to their colleagues. Any such system would result in adjudicators deciding whether to grant refugee protection to a claimant based in part on arbitrary factors related to patterns in outcomes in prior cases, rather than based on the individual circumstances involved.

It would also be a mistake to attempt to reduce subjectivity by establishing directions on decision-making for particular countries. So, for example, it would be problematic for the IRB or any other body to purport to tell decision-makers that all claims from a particular country must be denied because there is state protection against persecution in that country. Similarly, it would be problematic to purport to tell decision-makers that there is no persecution against particular groups in particular countries. Such directions would undermine the independence of decision-makers and risk politicizing the refugee determination process. And it would necessarily involve making decisions based on generalizations and stereotypes about circumstances faced by people in particular countries, rather than adjudicating cases individually. Indeed, it is for this reason that the Federal Court has held that parts of the Designated Country of Origin regime in Canada's new refugee determination system are unconstitutional due to discrimination.[8] In my view, replacing subjectivity in refugee adjudication with discriminatory but consistent decision-making is not a viable option.

What not to do: (3) Revise the IRB complaints procedure

A third possibility is to try to address subjectivity in adjudication, through a revised complaints procedure at the IRB, a possibility that CIMM is currently studying.

While an effective complaints mechanism is a key feature of any well-functioning adjudicative body, I am doubtful that complaints will ever resolve the problem of subjectivity. Case law makes it very difficult to establish that there is a reasonable apprehension of bias, even for extreme outlier decision-makers who regularly disbelieve claimants at much higher frequencies than their colleagues.[9]

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[6] Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39 Ottawa Law Review 335, available online: https://ssrn.com/abstract=1468717; Angus Grant & Sean Rehaag, "Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System" (2016) 49:1 UBCLR 203, available online: https://ssrn.com/abstract=2647638; Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's Law Journal 1, available online: https://ssrn.com/abstract=2027517 [Rehaag, "Luck"].

[7] See e.g., Jaya Ramji-Nogales, Andrew Schoenholtz & Philip Schrag, *Refugee Roulette* (New York: New York University Press, 2009).

[8] *YZ v Canada (Citizenship and Immigration)*, 2015 FC 892.

[9] See e.g., *IPP v Canada (Citizenship and Immigration)*, 2018 FC 123.

At any rate, the IRB created a new complaints process in December 2017 after extensive consultations with stakeholders. There are, in my view, ways that process could be improved. For example, I would favour giving some of the powers currently accorded to the Chair of the IRB instead to the the Director of the Office of Integrity.

And I would also like to see added precision to the annual reporting requirements. Nonetheless, the new process is a dramatic improvement over the old process, and, in my view, it is premature to consider additional revisions at this stage. Instead, I think the best approach would be to allow the process to work for some time and then assess the new process through an evidence-based study.

What to do: (1) Depoliticize appointments

While there is still quite a bit of subjectivity in RPD refugee adjudication under the new refugee determination system, the variations are not as extreme as they were under the prior system. In my view, part of the reason for this is because the new cohort of RPD civil servant decision-makers were selected through a merits-based process in which political actors did not play a role. In my view, efforts should be made to further de-politicize the remaining GIC appointments at the IRB by minimizing the role of politicians in the appointment process.

What to do: (2) Ensure that all unsuccessful refugee claimants can access the RAD

According to data obtained through ATI requests, in the 1,474 appeals decided on the merits at the RAD in 2017, 33.2% were allowed.[10] This is much higher than the rate at which the Federal Court historically overturned negative refugee determinations on judicial review, which offers more restrictive oversight of refugee adjudication than is available at the RAD. For example, only 6.4% of applications for leave for judicial review resulted in RPD decisions being overturned by the Federal Court from 2005-2010.[11]

Given the stakes involved in refugee adjudication, the way that outcomes at the RPD appear to hinge partly on the luck of the draw, and the fact that the RAD offers more robust oversight of RPD decision-making than is available in the Federal Court, it is essential that all claimants who are unsuccessful at the RPD have access to the RAD.

Currently there are several groups that do not have access to the RAD, and who also do not benefit from automatic stays of removal pending judicial review. This includes claimants whose claims have been declared to have no credible basis or to be manifestly unfounded. It also includes claimants who arrived in Canada through an exception to the Canada-US Safe Third Country Agreement. Each of these groups should be provided access to the RAD – but the group that most urgently requires access is the Safe-Third Country exception claimants because this is by far the largest group of claimants currently barred from the RAD. For example, in 2013 fewer than 200 claims were subject to no credible basis or manifestly unfounded claim declarations, whereas over 2,000 claimants came to Canada that year via an exception to the Safe-Third Country Agreement.[12]

During my testimony, a member of the Committee asked me about statistics regarding the frequency with which claims that have been declared to have no credible basis have been overturned on judicial review. This certainly does happen.[13] In reviewing data that I have amassed through ATI requests, however, I cannot confidently provide the requested information to the Committee within the timeline available to me for submitting this brief. However, government witnesses should be able to provide this information. I recommend that in requesting information from such witnesses, the Committee should be as specific as possible. For example, the Committee could ask for the following information:

[10] The data is available here: http://ccrweb.ca/en/2017-refugee-claim-data.
[11] Rehaag, "Luck", supra note 6 at 23.
[12] For further discussion, see Grant & Rehaag, supra note 6.
[13] For some recent examples, see e.g., *Liu v Canada (Citizenship and Immigration)*, 2018 FC 253; *Mohamud v Canada (Citizenship and Immigration)*, 2018 FC 170; *Hassan v Canada (Citizenship and Immigration)*, 2017 FC 507.

The number of applications for judicial review, and the rate of success in the Federal Court for those applications, by claimants from each of the following categories whose claims were denied by the RPD, broken down by year since 2013:

a. Claims declared to have no credible basis
b. Claims declared to be manifestly unfounded
c. Claims brought by applicants who are not able to access the RAD because they came to Canada via an exception to the Safe Third Country Agreement

While I think this information will be of interest to the Committee, I would note that the information must be interpreted with care because there are many factors that can influence whether applications succeed before the Federal Court, including the fact that claimants can be deported while their applications are pending, as well as factors related to the availability of legal aid for claimants who are not eligible for the RAD. I would also emphasize that just because the Federal Court upholds an RPD decision does not mean that this decision would have been upheld at the RAD because the grounds for overturning a decision on judicial review are narrower than the grounds for overturning decisions at the RAD.

What to do: (3) Create guidelines on credibility and provide additional training

In my view, another step that should be taken to try to address subjectivity in refugee adjudication, one that could be taken without the need for legislative or regulatory reform, is for the IRB to develop guidelines to assist adjudicators making credibility assessments.

In my view, differing approaches to credibility – does the decision-maker generally believe claimants or are they generally skeptical of claimants – are the main cause of large recognition rate variation. Credibility assessments are also the aspect of refugee adjudication that is most difficult to correct through oversight processes, both at the RAD and in Federal Court, because of deference generally shown to first instance decision-makers in this area. And they are the most difficult part of a refugee adjudicator's job.

In crafting credibility guidelines, extensive consultations should be undertaken with stakeholders. The guidelines should also be evidence-based, engaging with the best and most up-to-date social scientific literature on truth detection currently available. The focus of the credibility guidelines should not be current case law. That is, the guideline should not aim to provide a recipe for how to make credibility assessments that will be upheld by the RAD and the Federal Court. Rather, the aim should be to improve decision-making.

Credibility guidelines could do this by encouraging self-reflection among decision-makers and reminding them that credibility assessments are inevitably not only about the facts of the case but are also about the decision-makers themselves – their experiences, their identities, their predilections. The guidelines should emphasize that social scientific research in this area demonstrates that credibility assessments are unreliable in the best of circumstances, and they are especially unreliable in the circumstances confronted by refugee adjudications (communication across cultures, communication through interpreters, communication with people suffering from mental health challenges related to trauma, communication with people who are stressed, etc). And the guidelines should highlight that, due to the unreliability and subjectivity of credibility assessments, combined with the stakes involved in refugee adjudication, adjudicators should approach negative credibility assessments with caution.

With new guidelines in place, evidence-based training should be provided to decision-makers. This should include an experiential learning component. Decision-makers should participate in experiments that highlight ways in which their credibility assessments are unreliable and often based on unconscious and arbitrary factors.

My hope is that, between guidelines and training, decision-makers would come to realize that they should exercise caution with negative credibility determinations – and that they should only make those determinations where not only do they not believe the claimant, but where they are also confident that all of their colleagues would also

reasonably disbelieve the claimant. This would, I think, go some way towards addressing the problem of the luck of the draw and decision-makers who “simply do not believe”.