UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

LITIGATING REFUGEES:
AN EMPIRICAL EXAMINATION OF TRENDS IN CANADIAN FEDERAL COURT JURISPRUDENCE PRIOR TO REFUGEE REFORM
AND
LEGAL ANALYSIS OF COMMON ISSUES AGAINST INTERNATIONAL NORMS

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November 2013, Ottawa

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EXECUTIVE SUMMARY:

This paper undertakes a quantitative analysis of select refugee and PRRA cases before the Federal Court of Canada from January 2010 to August 2012 (prior to the implementation of a new refugee determination system in the country), and provides a qualitative assessment of Canadian jurisprudence compared to international norms, for the most common issues which arose.

Among the results within the empirical component, the paper determines that 60% of decisions before the Federal Court are upheld, the top countries of origin were Mexico, China, and Colombia, and that among the issues examined, credibility, state protection and internal flight alternative (IFA) emerged as common themes. Data is also disaggregated to show rates of remittance among the most common countries of origin, and within the common issues which arose, and also cross-references the most common issues within various countries of interest.

In the qualitative section of the paper, international norms surrounding the issues of credibility, state protection and IFA, were compared to Canadian jurisprudential approaches both generally, and within the timeframe under examination. Among its findings with respect to credibility, the report holds that while Canadian legislation and case law have generally employed best practices, there is room for improvement in mandating an oral review at first instance (for PRRAs), and differentiating between implausibilities and inconsistencies in a claimant's evidence in terms of affording the benefit of the doubt to oral evidence. On the issue of state protection, the report canvasses the extensive jurisprudence and advocates for a "no-well founded fear" approach, so that the emphasis of state protection analyses is on the risk to the refugee. With respect to IFA, while the approach of Canadian jurisprudence is generally in line with international norms, the report suggests that an examination of whether an area is accessible should be done under the first prong of the IFA analysis, and posits that the question of an IFA's availability and reasonableness should not require an individualized risk in order to negate it (rather, that the availability of basic and fundamental human rights in the IFA should be canvassed).

ACKNOWLEDGEMENTS:

As with all things in life, this could not have been done alone.

Sincere gratitude is owed to Furio DeAngelis, UNHCR Representative in Canada, for his ambition in this project, and guidance to its author. UNHCR Canada's incredible team of Legal Officers have also provided valuable input and encouragement, namely, Nadia Williamson (who also assisted with organizing student efforts), Rana Khan and Denis Otis.

UNHCR student interns were instrumental in the ambitious task of data collection. Without them, the review of Federal Court cases could not have been completed within the requisite timelines. Unfortunately, interns were unable to review the report prior to publication. Some of them had previously consented to being individually acknowledged in spite of this however. As such, the hard work, dedication and persistence of Anna DuVent, Michelle Carlesimo, Erkan Ates, Jose Montes, Ahrum Lee, Cesar Quinza, and Rana Ismail, is noted, and the author expresses her sincere thanks.

Finally, sincere thanks to Areesha Zubair, who assisted in updating relevant case law and other cited authorities, since the paper's initial completion in early 2013.

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I. BACKGROUND AND CONTEXT OF STUDY

Since first acceding to the Refugee Convention in 1969,[1] the discourse between Canada's judiciary and Parliament, vis-à-vis case law and legislation, has created a sophisticated domestic understanding of the Convention's substantive provisions.[2] With the passing and implementation of wide-scale reform last year,[3] the country's refugee protection system is in the throws of further change and development. Its already extensive body of case law seems very likely to be further expanded as advocates, decision makers and government agencies seek judicial clarification on the four corners of the new legislation. Within this context, this study aims to take a tally of Canadian jurisprudential trends at the Federal Court,[4] and offer insight into whether the most common issues which arise are in line with international norms.

The contents of this report are split into two main parts.[5] The first outlines the statistical results of an empirical compilation from Federal Court cases (dating from January 2010 to August 2012, prior to when reform took place). It outlines trends such as countries of origin, outcomes, issues, and judicial findings on particular issues in relation to the interpretation of underlying decision makers. The second assesses some common issues which arose in the empirical compilation for consistency with international norms and best practices enunciated by the UNHCR, and attempts to offer some general insight into jurisprudential trends at the Federal Court. While the first part offers a quantitative snapshot, the second hopes to complement this with a more qualitative assessment of the major issues.

It is hoped that this report can be useful in three ways. First, it hopes to offer a tool to facilitate UNHCR's monitoring activities pursuant to Article 35 of the 1951 Convention, and more importantly, its constructive discourse with relevant government agencies in fulfilment of its mandate.[6] Second, it hopes to offer some insight on trending topics contained in the case law, so that areas of future litigation can be anticipated. With a better understanding of this, agencies such as UNHCR can assess and decide on their potential involvement as interveners, and prepare by allocating and managing resources and/or directing study to particular issues. Third, by offering a clearer picture of popular issues and tensions within Canada's jurisprudence and comparing these to international norms, it is hoped that this report can offer some direction for advocating approaches which are more in line with international norms and best practices.[7]

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[1] Convention relating to the Status of Refugees, Canada, 4 June 1969 (accession), 189 U.N.T.S. 137, online: <http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSONLINE&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en> [Refugee Convention].

[2] The country boasts a highly specialized tribunal of well-trained decision makers (the Immigration and Refugee Board of Canada (IRB),) affords claimants with extensive procedural rights at first instance, and has developed an extensive body of jurisprudence on interpreting the provisions of the Convention, which is cited internationally. See for example: Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (New York: Oxford University Press, 2007) [Goodwin-Gill].

[3] Bill C-31, *The Protecting Canada's Immigration System Act*, 1st Sess., 41st Parl., 2012 (as passed by the House of Commons on 11 June 2012). See also: Bill C-43, *The Faster Removal of Foreign Criminals Act*, 1st Sess., 41st Parl., 2012 (as passed by the House of Commons on 6 February 2013).

[4] Prior to the implementation of the new legislation.

[5] Although it bears noting that a third, more administrative matter precedes the other two. Namely, an outline of the parameters for the empirical analysis.

[6] Refugee Convention, *supra* note 1 at Art. 35. The UNHCR branch office in Canada already undertakes first-hand monitoring of various procedures in the Canadian asylum system. This report hopes to supplement these existing monitoring activities.

[7] Both in Canada and internationally (as other states might be able to draw from Canadian approaches).

II. PARAMETERS AND METHODOLOGY OF STUDY

The general structure, methodology and reasoning behind the empirical compilation warrants some explanation prior to reviewing specific findings of interest. This section aims to offer such context by outlining: how cases were pulled, which cases were pulled, what cases were of interest to the substantive compilation, and what information was collected from these cases. It also provides some background on the compendium of issues which were flagged.

1. Compilation of Empirical Data Set:

The compilation of empirical data was undertaken with the generous assistance of 8 UNHCR student interns. A systematic effort was made to review their work as thoroughly as possible.[8] Students were instrumental in pulling cases, reading those of relevance to the study, and compiling the relevant data.

2. Overview of All the Cases Examined at the Federal Court:

The study examined cases at the Federal Court from January 2010 to August 2012 (a total of 32 months).

In each of these months, the first 40 immigration cases were pulled. This encompassed cases involving the Minister of Citizenship and Immigration, and/or the Minister of Public Safety and Emergency Preparedness where an immigration application was being reviewed (versus non-immigration related matters, such as the transfer of prisoners between correctional facilities, or search and seizures at ports of entry).[9] A figure of 40 cases was chosen as it reflected what was estimated to be roughly half the number of immigration cases reviewed each month (namely 80 cases or so). The goal of the study was to examine at least half of the average number of cases for the months under review.

Final tabulations reveal that 40 cases reflects slightly more than half the average number of cases for the months examined. Figure 1 below, sets out the number of immigration cases in each of the respective months.[10] In total, 2,393 immigration cases were counted for the 32 month period under review, with an average of about 75 cases per month. Half of this average would be about 38 cases, which is slightly below the actual figure of 40 cases examined per month.[11]

It bears noting that in the interest of compiling an objective sample for study, the first 40 cases from the Federal Court website were pulled for review (versus cherry picking cases from the list or another manner of selecting them).

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[8] Given the large amount of data, it was not possible to review all entries. However, each of the students' first monthly submission (equally spaced apart in the timeline), was carefully reviewed and every case double checked. Subsequent submissions were reviewed and cases read, consumerate with the quality of individual students' submission and abilities, or where new issues or concerns were raised by individual students. In addition to this, the consultant undertook to do empirical compilations herself, completing at least three full months herself. (In all but one case, these interns were law students.)

[9] Hereinafter, the term "immigration cases" refers to cases tabulated according to this definition.

[10] These figures were counted by UNHCR interns who assisted with the empirical compilation.

[11] All figures in this report have been rounded up to the closest whole number.

Figure 1: Total Number of Immigration Cases Per Month from Jan 2010 to Aug 2012

Year	*Month*	*Total # of Immigration Cases*
2010	Jan	59
	Feb	81
	March	73
	April	90
	May	65
	June	75
	July	37
	August	41
	Sept	63
	Oct	50
	Nov	77
	Dec	61
2011	Jan	70
	Feb	79
	March	114
	April	60
	May	83
	June	117
	July	96
	August	37
	Sept	55
	Oct	71
	Nov	93
	Dec	78
2012	Jan	78
	Feb	121
	March	56
	April	52
	May	115
	June	120
	July	68
	August	58
Total:		2,393

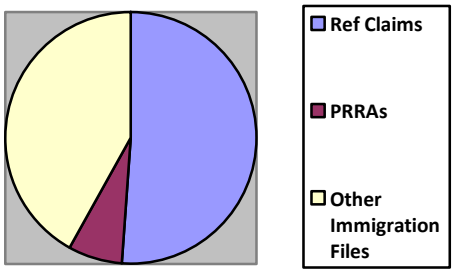
In total, the study pulled 1,274 cases for examination within the 32 month period. As detailed in Figure 1 above, July 2010 and August 2011 had fewer than 40 immigration cases listed, so a sample less than 40 would have been taken for said months.

3. <u>Cases of Interest</u>:

The study compiled detailed data for all cases where Pre-Removal Risk Assessments (PRRAs) and refuge claims (both inland and overseas applications), were being reviewed by the Federal Court.[12] These two types of underlying applications comprised the cases of interest for the purposes of this study. Other immigration related cases were noted, but detailed data was not collected on them.[13]

Of the 1,274 cases examined in total, 740 were cases of interest.[14] In other words, 58% of all the immigration cases pulled from the Federal Court, related to refugee hearings and PRRAs. The majority of cases concerned refugee hearings, both within the total immigration cases pulled and within the sample cases of interest. Only 88 cases reviewed PRRAs whereas 652 reviewed refugee hearings. Of all the immigration cases pulled, more than half (51%) were refugee claims.

Figure 2: Types of Files Contained with the 1274 Sample Cases Pulled[15]



Perhaps more important to note in reading through and assessing the results outlined below, is the fact that 88% of the cases of interest reviewed refugee claims, while only 12% reviewed PRRAs. Both types of underlying applications essentially make the same determination; namely, whether a person is a refugee or a person in need of protection as described in sections 96 and 97 of the Immigration and Refugee Protection Act (IRPA), and/or Article 1(2) of the Refugee Convention.[16]

However, the two applications are different in important ways which bears noting when reading through these results. A PRRA is essentially a paper application where submissions and evidence are given in

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[12] Although it should be noted that overseas applications were relatively few compared to claims made inland and determined before the Immigration and Refugee Board (IRB).

[13] The month and year, style of cause, citation and type of application were noted without any further information being kept.

[14] Annex E provides a full listing of the 740 cases of interest pulled for this study.

[15] The term "other immigration files" refers to those files pulled but not included in the sample cases of interest. Some examples include: sponsorships, admissibility hearings, danger opinions, detention reviews, skilled workers, citizenships, permanent resident, and investor applications. Refugee related applications such as motions to reopen refugee claims and cessation hearings would also be reflected in this figure as they did not comprise the cases of interest for the purposes of this study.

[16] Although both types of applications are making a determination on whether a person is a refugee or a person in need of protection, this paper uses the terms "refugee decision," "refugee application," and/or "refugee determination" in relation to refugee hearings. Refugee Convention, *supra* note 1 at Art. 1(2); and *Immigration and Refugee Protection Act (IRPA)*, S.C. C. 2001, c.27, s.113(b), online at: <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/> [IRPA].

writing.[17] A refugee hearing on the other hand, provides an applicant with the opportunity to provide oral testimony and submissions in person, and affords the decision maker with the opportunity to put issues directly to the applicant and collect information first hand. Further, during the time period under examination, the Immigration and Refugee Board (IRB) was composed of Governor in Council Appointees, while PRRA officers are essentially government bureaucrats employed by Citizenship and Immigration Canada (CIC).[18] Differences such as these may have a bearing on how the Federal Court assesses such issues as credibility, subjective fear, and allegations of bias, to name a few. It may also have a bearing on the amount of deference that is given to the underlying decision maker.[19]

One should also note that there will be some issues specific to the type of application, such as the need for an oral hearing in the case of a PRRA or issues related to postponement or adjournment in the case of refugee hearings.

4. <u>Information Gathered</u>:

The data compiled from the cases of interest included: the name, citation, type of underlying application,[20] data on the nationality of the claimant, the applicant in the judicial review,[21] the outcome of the hearing,[22] the issues at bar, and whether the court agreed or disagreed with the underlying application's analysis of a particular issue.

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[17] Although PRRAs do allow for an oral hearing where issues of credibility are directly implicated and certain criteria related to this credibility assessment are met, the vast majority make a determination based on a written application. (See below at pages 31-33 which discusses the statutory requirements for an oral PRRA hearing.) Moreover, in almost all the Federal Court decisions reviewing PRRA applications, read by the author, paper PRRA application were being reviewed. Only one concerned an oral PRRA hearing which had taken place. It should be noted however, that not all PRRA reviews were read systematically by the author herself.

[18] Immigration and Refugee Board of Canada (IRB), "Governor in Council Members," online: <http://www.irb-cisr.gc.ca/eng/brdcom/empl/memcom/Pages/index.aspx>; and Citizenship and Immigration Canada (CIC), *Instruments of Designation and Delegation: Immigration and Refugee Protection Act and Regulations*, 27 October 2012, at pg. 23, online at: <http://www.cic.gc.ca/english/resources/manuals/il/il3-eng-2012-10-27.pdf>. It should be noted however that with the new changes to Canada's refugee determination system, first level decision makers at the IRB will no longer be Governor in Council Appointees, and the position will be akin to government bureaucrats. This change would not have taken effect in the Federal Court sample under review.

[19] Implicit or otherwise. In *Dunsmuir v. New Brunswick* the Supreme Court of Canada affirmed that there were only two standards of review: (i.) reasonableness which: "…is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"; and (ii.) correctness, where, "…a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct." See: *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para 47 and 50 [Dunsmuir].

[20] Namely, whether the decision reviewed a PRRA or refugee hearing.

[21] Namely, whether the Department of Justice or the claimant for protection applied for judicial review of the underlying application, at the Federal Court.

[22] Namely, whether the underlying decision was upheld or if the decision was struck down and sent back for re-determination. It should be noted that the current study's reference to "remittance rates" will differ from those provided by the IRB. More specifically, the current study compared how many case were retuned for redetermination, *from the total number of immigration cases before the Federal Court*, whereas the IRB compares how many cases are returned for redetermination, *from the total number of refugee cases heard by the IRB overall*

5. <u>Issues of Interest</u>:

The crux of the empirical compilation involved identifying legal issues within the cases of interest. All decisions reviewing refugee hearings and PRRA Applications were read to identify the issues discussed by the Federal Court.[23] In many cases, more than one issue was discussed. Where this was the case, all issues were listed.

Issues were disaggregated according to whether the Federal Court agreed or disagreed with the issue's analysis in the underlying application.[24] This was done irrespective of the ultimate outcome in the case as a whole. In other words, not all issues where the court disagreed would have resulted in the matter being remitted back for redetermination. Further, one may have cases where the court agreed with some issues and disagreed with other issues. In all such cases, some may have been sent back for redetermination while others were upheld, depending on whether the court found any errors to be fatal to the ultimate decision. This distinction between the court's agreement or disagreement on a particular issue's analysis versus the ultimate outcome in the case as a whole, is important. The agreement or disagreement on a particular issue's analysis does not necessarily correspond to the outcome of the given case. In the data below, an effort was made to account for this however, information may be simply listed according to whether the court agreed or disagreed with the issue's analysis.

Since the majority of the compilation was undertaken by a number of different student interns, a predetermined listing of issues was compiled in order to facilitate issue spotting and allow for consistent terminology and approaches. Given that one of the goals of the report was to identify how the Canadian approach to the Convention definition measures up against international standards, the elements of the refugee definition was used as the starting point for listing issues.[25] Popular issues of administrative law related to natural justice and procedural fairness were also added to the listing, and students were advised that additional entries could be made if an issue arose which was not on the listing.[26] Annex A provides the consolidated listing of issues.[27]

(including cases which did not seek leave to appeal and cases which failed to get leave). Any reference to these differing "remittance rates" should account for this difference in the comparator group.

[23] Student interns were instrumental in this task. Refer above to section 1 entitled "Compilation of Empirical Data Set" on page 9 and in particular, footnote 9.

[24] It should be explicitly stated that use of the term "disagree" here, includes situations where the court took issue with how some part of an issues' analysis or jurisprudential application was undertaken in the underlying application. While one could argue that in a strict legal sense, disagreement connotes the court's wholesale rejection of a particular issue's analysis such as to warrant a new hearing, this paper takes a broader and more nuanced approach. Issues were flagged as being "disagreed" with, where the court identified a flaw in the underlying analysis, even if said flaw was not found to reach the threshold which would warrant a new hearing.

[25] Namely, whether one "…owing to a 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 to, or owing to such fear, is unwilling to avail himself of the protection of that country." See: Refugee Convention, *supra* note 1, art. 1.

[26] Where students added additional issues, the cases were pulled to: (i.) examine whether an existing issue could characterize the issue at bar, and/or (ii.) consolidate the terminology used by the different students when the addition of a new issue was warranted.

[27] Those issues which arose only once among the cases examined have not been listed in Annex A, they are included in the tables on subsequent Annexes listing the prevalence of issues in the sample.

III. FINDINGS OF INTEREST

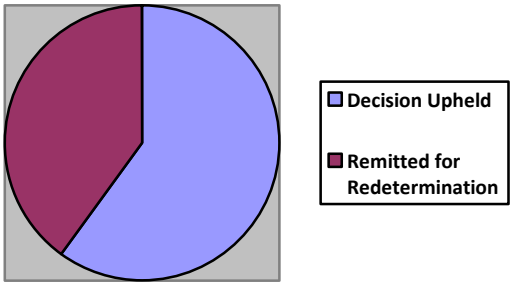
The findings below attempt to outline some general trends in cases concerning refugee hearings and PRRA Applications at the Federal Court. Specifically, they outline statistics concerning: applicants and outcomes, countries of nationality, and common issues. Issues were disaggregated to discern how many analyses the Federal Court agreed or disagreed with, how many of these disagreements required remittance for re-determination, and what issues arose most often among countries of interest.[28]

1. Outcomes and Applicants at the Federal Court:

a.) Outcomes

Of the 740 cases of interest, 60% upheld the previous decision, and 40% overturned the decision and sent the matter back for re-determination (as displayed in the pie graph below).[29]

Figure 3: Federal Court Decisions in the Sample Cases of Interest



These figures are similar if one was to look at refugee hearings and PRRAs separately and disaggregate how often each type of application was either upheld or remitted for redetermination.[30]

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[28] The countries examined in more detail were chosen either owing to their generally high number within the sample, according to their relevance given contemporary domestic and international discourse relating to refugee protection, or where statistics indicated a relatively high rate of remittance.

[29] Specifically, 444 cases were upheld and 297 cases were overturned and remitted for redetermination. The discrepancy in totals is because one case had two applicants with differing outcomes for each. The figures presented here also bear differentiating from IRB statistics on rates of remittance. The IRB reports that less than 1% of all its decisions are remitted back for redetermination. The figures presented in this report, reflect the rates of remittance among those cases which: (i.) applied for leave to appeal from the Federal Court, (ii.) secured leave to appeal from the court, (iii.) perfected the application for leave, and (iv.) were actually heard before the court. The figures presented here, hope to supplement those provided by the IRB, in light of the fact that there is no automatic right to appeal refugee decisions at the Federal Court and as such, not all decisions made by the board would have been fully examined for consistency with Canada's jurisprudence. See: Immigration and Refugee Board of Canada (IRB), "2011-12 Departmental Performance Report (DPR), online: <http://www.irb-cisr.gc.ca/Eng/brdcom/publications/Pages/dpr-rmr1112PartIII.aspx>.

[30] Cases reviewing PRRAs upheld the underlying decision 59% of the time, and called for a new application 41% of the time. Cases reviewing refugee hearings, upheld the underlying decision 60% of the time, and called for a new hearing 40% of the time.

b.) Applicants

Most of the applications before the Federal Court were brought forward by claimants for protection (versus the Minister of Citizenship and Immigration and/or the Minister of Public Safety and Emergency Preparedness). Of the 740 cases of interest in the sample, only 8 were initiated by the Department of Justice. This represents just over 1% of the claims examined.

This leads to a fairly safe assumption that most of the cases under review are negative findings against claimants. Thus, where the Federal Court overturns refugee and PRRA decisions and remits them back for redetermination, it will often be the case that a person was initially found not to require protection but the Federal Court identified some flaw in the decision making, requiring a new hearing or application. This is important as such cases potentially excluded, denied access or incorrectly rejected a person from protection who might otherwise have fallen squarely within the ambit of s.96 or 97 of IRPA and/or Article 1(2) of the Refugee Convention.[31] Absent an assessment of what happened to these cases after the Federal Court delivers its findings however, it is impossible to know for certain if this was the case.

2. Countries of Nationality:

a.) Top Countries of Nationality

The sample examined claims for protection from 97 different nationalities.[32] Figure 4 below provides an outline of the top 10 nationalities, cross-referencing them with outcomes within the particular subset of nationalities. Mexico, China and Colombia were the top three countries, respectively. Mexico held a very clear place at the number 1 spot with more than twice the number of claims than China (the second most popular nationality). Claims from Mexico accounted for about 18% of all the cases of interest. Of the 130 cases from Mexico, roughly 68% upheld the underlying decision while 32% ordered a new determination. Similarly, claims from China were also often upheld (73% of the time, specifically).

Figure 4: Top 10 Countries of Nationality From the 740 Cases of Interest Examined & Outcomes of their Decisions at the Federal Court

No.	*Country of Nationality*	*Number of Cases*	*% Which Upheld Underlying Decision*	*% Remitted for Re-Determination*
1.	Mexico	130	68% (88 cases)	32% (42 cases)
2.	China	60	73% (44 cases)	27% (16 cases)
3.	Colombia	49	53% (26 cases)	47% (23 cases)
4.	Sri Lanka	33	48% (16 cases)	52% (17 cases)
5.	St. Vincent and the Grenadines	31	74% (23 cases)	26% (8 cases)
6.	Haiti	26	73% (19 cases)	27% (7 cases)
7.	Nigeria	23	48% (11 cases)	52% (12 cases)
	Albania	23	39% (9 cases)	61% (14 cases)
8.	El Salvador	21	52% (11 cases)	43% (9 cases)
9.	Pakistan	20	70% (14 cases)	30% (6 cases)

[31] IRPA, supra note 16 at ss.96 and 97; and Refugee Convention, *supra* note 1 at Art. 1(2).

[32] This included 1 stateless Palestinian person. Where an individual had more than one country of nationality, all of them were recorded and counted individually.

10.	Hungary	17	53% (9 cases)	47% (8 cases)
	India	17	65% (11 cases)	35% (6 cases)

b.) Countries With Relatively High Rates of Remittance

Of note, cases concerning Sri Lanka, Nigeria and Albania, were sent back for a re-determination more often than being upheld. Cases from Hungary, El Salvador and Colombia also had relatively high rates of return for re-determination (as compared to the other top 10 countries). Claims from the same country often have similar issues which arise (such as the case of an internal flight alternative or state protection). Thus, the relatively high rates of remittance among these countries may evidence either: (i.) a lack of clarity in the law on a given issue, (ii.) a misunderstanding of the law surrounding a particular issue by first level decision makers, (iii.) an incorrect application of how an issue applies in the circumstances of the given country in question, or (iv.) a high standard of review among the most common issues which arose in relation to the country in question.[33] For this reason, the most common issues which arose within countries with high rates of remittance are outlined below at pages 25-26.[34]

c.) Countries Which May Evidence Trends Among Roma Based Claims

Given the increasing focus and interest in cases involving persons of Roma ethnicity, Figure 5 attempts to break down the prevalence of Roma cases and how often they are remitted back for re-determination.[35] Although cases involving Roma persons was not explicitly flagged in the empirical compilation, cases from Bulgaria, the Czech Republic, Hungary, Romania and the Slovak Republic were pulled in an attempt to discern the number of Roma claims under review.[36] In total, there were 35 claims from said countries representing about 5% of the total number of cases of interest. Of these 35 cases, 57% upheld the decision of the underlying application and 43% were sent back for a re-determination.[37]

[33] Refer above to footnote 20 which provides an overview of the general standards of review.

[34] Namely: Sri Lanka, Nigeria and Albania. Issues within Colombian cases are also outlined as it was the 3rd most popular country overall. Claims from Hungary are also examined in conjunction with those from Bulgaria, the Czech Republic, Romania, and the Slovak Republic, in an attempt to discern what issues arose most often among Roma cases. See the section below entitled "c.) Countries Which May Evidence Trends Among Roma Based Claims."

[35] The number of claims for protection from persons of Roma ethnicity has been greatly referenced by the Minister of Citizenship and Immigration, the Honourable Jason Kenney over the past year or so, and has been widely covered in various media outlets. See for example: Jessica Hume, "Feds want to create list of low-refugee countries in effort to cut down on Roma applications," *Toronto Sun*, 16 October 2012, online at: <http://www.torontosun.com/2012/10/16/feds-want-to-create-list-of-low-refugee-countries-in-effort-to-cut-down-on-roma-applications>; Paul Wells, "Paul Wells explains why policy on Roma refugees hits a flat note," *Macleans*, 28 October 2010, online at: <http://www2.macleans.ca/2012/10/28/our-policy-on-roma-refugees-hits-a-flat-note/>; and Louise Elliott, "CBSA report claims 'serious' criminality among Hungarian Roma," *CBC News*, 17 October 2012, online at: <http://www.cbc.ca/news/politics/story/2012/10/17/roma-hungary-cbsa.html>.

[36] This is since Roma based claims often originate from these countries. It should be noted that in the case of the Slovak Republic and Bulgaria, the two cases were specifically pulled and confirmed to be on the basis of Roma ethnicity. See: *Kopacz v. Canada (Citizenship and Immigration)*, 2010 FC 654 and *Janiak v. Canada (Citizenship and Immigration)*, 2012 FC 778.

[37] Given the particular focus on Hungary within the domestic Canadian discourse, the reader may be interested to know that almost as many claims from Hungary were sent back as upheld.

Figure 5: Number of Claims Under Review from Countries Which May Evidence the Prevalence of Roma Cases & Outcomes of their Decisions at the Federal Court

Country of Nationality	*Number of Cases*	*% Which Upheld the Underlying Decision*	*% Remitted for Re-Determination*
Bulgaria	1	-	100% (1 case)
Czech Republic	14	71% (10 cases)	29% (4 cases)
Hungary	17	53% (9 cases)	47% (8 cases)
Romania	2	50% (1 case)	50% (1 case)
Slovak Republic	1	-	100% (1 case)
Total	35	57% (20 cases)	43% (15 cases)

Pages 25 below, provides a breakdown of the most common issues which arose within this grouping of countries, which may help to shed light on popular issues which arise in Roma based cases.

3. <u>Top Issues</u>:

The data below provides an overview of the top issues which arose within the sample, disaggregates the data according to the Federal Court's findings on the issue's analysis, and cross references this with cases which were remitted for reconsideration. A breakdown of popular issues among countries of interest (as outlined above) is also provided.

Overall, among the various aggregated and disaggregated compilations, the issue of credibility often arose as the most popular issue, followed by state protection. These were followed by either ignoring evidence or internal flight alternative (IFA) as the third most common issue. These issues, it would seem, have been a common thread within the jurisprudence over the 2 ½ years prior to refugee reform. This may evidence (among other things), a lack of clarity in the law, or a misunderstanding of the law surrounding a particular issue by first level decision makers. Part IV. of this report which examines particular issues of interest, may shed some light on why particular issues arose as often as they did.

In compiling data on issues which arose within various countries of interest, the most common issues did not always reflect the overall rankings found within the aggregated data (as outlined in the paragraph above). In most cases, those familiar with the countries examined, popular grounds for claiming refugee status from those countries, and hurdles which often arise in fitting said claims within the Convention definition, will not be surprised with how the issues ranked. This is not always the case however, and attempts to discern why certain issues arose so often, are offered.

a.) Top Issues Overall

Among all the cases of interest, irrespective of the Federal Court's holding and/or their agreement or disagreement with the underlying decision's analysis, the top 5 issues were: credibility, state protection, internal flight alternative (IFA), ignored evidence, and subjective fear, respectively. Credibility was overwhelmingly the number one issue at the Federal Court within the sample cases examined. The issue arose almost 100 times more often than the number two issue of state protection. Figure 6 provides a more detailed breakdown of the top 10 issues and their relative ranking, and Annex B (following this report) provides a detailed breakdown for all the issues identified according to their ranking.

Figure 6: Top 10 Issues Among All Cases of Interest

No.	*Issue*	*Number of Cases*
1.	Credibility[38]	342
2.	State Protection	238
3.	Internal Flight Alternative (IFA)	100
4.	Ignored Evidence	81
5.	Subjective Fear[39]	75
6.	Generalized Risk	53
7.	s.97	49
8.	Cumulative Discrimination[40]	35
9.	Particular Social Group (PSG)[41]	28
10.	PSG – Gender	27

b.) Top Issues Disaggregated by the Federal Court's Agreement or Disagreement with the Underlying Decision's Analysis

(i.) Agreement with Underlying Decision's Analysis:

Among all the issues identified where the Federal Court agreed with the underlying application's analysis, the top issues which emerged were: credibility, state protection, internal flight alternative (IFA), ignored evidence, and subjective fear, respectively. Figure 7 provides a detailed listing for the top 10 issues and Annex C provides the listing for all issues which arose.

Figure 7: ***Top 10 Issues Where the Federal Court Agreed with the Underlying Decision's Analysis***[42]

No.	*Issue*	*Number of Cases*
1.	Credibility	219
2.	State Protection	134
3.	Internal Flight Alternative (IFA)	68
4.	Subjective Fear[43]	52

[38] Of these, 3 were specifically flagged to relate to issues surrounding identity. Since the students weren't asked to specifically flag issues of identity, there may be others which weren't explicitly flagged.

[39] Of these, 11 identified "safe third-county" as an issue.

[40] More specifically, this refers to cumulative discrimination amounting to persecution. It has been abbreviated as cumulative discrimination for the purposes of listing issues in a succinct form.

[41] Students were asked to flag gender, family and sexual orientation separately. As such, the figures cited here do not reflect these sub-categories. Those sub-categories are cited as separate entries. If one was to include these three sub-categories within the larger category of PSG, the figure would be 63. The 28 cases cited here reflect a combination of those groups who were sub-categorized as "other" (numbering 18 in total), or whose sub-categories were unidentified (numbering 10 in total). Further, it may be worth noting that of the 28 cases noted here, 6 were specifically identified as Roma based claims, 2 related to blood feuds and 1 identified 'young men' as the group in question. As the students weren't asked to specifically flag these three groups, the figure within the sample may actually be higher (as some students may not have flagged these specific sub-categories).

[42] For the definition of "disagreement" in this context, please see above at footnote 24.

5.	Generalized Risk	35
6.	Ignored Evidence	33
7.	s.97	32
8.	Cumulative Discrimination	21
9.	Objective Fear	19
	Exclusion	19
10.	Particular Social Group (PSG)[44]	17

(ii.) Disagreement with Underlying Decision's Analysis:

Among all the issues identified where the Federal Court disagreed with the underlying application's analysis, the top issues which emerged were: credibility, state protection, ignored evidence, internal flight alternative (IFA), and subjective fear, respectively. Figure 8 provides a detailed listing for the top 10 issues and Annex D provides the listing for all issues which arose.

Figure 8: ***Top 10 Issues Where the Federal Court Disagreed with the Underlying Decision's Analysis***[45]

No.	*Issue*	*Number of Cases*
1.	Credibility[46]	123
2.	State Protection	104
3.	Ignored Evidence	48
4.	Internal Flight Alternative (IFA)	32
5.	Subjective Fear	23
6.	Generalized Risk	18
7.	Adequacy of Reasons	17
	s.97	17
8.	Cumulative Discrimination	14
9.	Particular Social Group (PSG)[47]	11
	PSG – Gender	11
10.	Religion	10
	Political Opinion	10

[43] Of these, 8 identified "safe third country" as an issue.

[44] Refer to caveats in footnote 42 above. If one was to include the figures for gender, family and sexual orientation (subsets of the PSG category which students flagged separately), this figure would be 38. The 17 cases cited here include those who were sub-categorized as: "other" (9 in total), or whose sub-categories were unidentified (8 in total). Of the 17 cases noted here, 3 were specifically identified as Roma based claims, and 1 identified 'young men' as the group in question.

[45] For the definition of "disagreement" in this context, please see above at footnote 24.

[46] Of these, 3 were specifically flagged as related to issues surrounding identity. As the students weren't asked to specifically flag issues of identity, there may be others which weren't explicitly flagged.

[47] Refer to caveats in footnote 42 above. If one was to include the figures for gender, family and sexual orientation (subsets of the PSG category which students flagged separately), this figure would be 25. The 11 cases cited here include those who were sub-categorized as: "other" (9 in total), or whose sub-categories were unidentified (2 in total). Of the 11 cases noted here, 3 were specifically identified as Roma based claims, and 2 related to blood feuds.

c.) Top Issues of Disagreement Within Overturned Decisions:

In addition to breaking down issues of disagreement among all cases of interest, it is useful to perform a similar breakdown among just those cases that were remitted for re-determination. While the top 10 issues remain the same, the figures vary. The variation provides insight on the number of issues that were analyzed incorrectly in the underlying application, but were non-fatal to the overall decision such as to warrant a re-determination. Further, while the top 10 are ranked the same, there are subtle changes in the rankings that follow. As such, Figure 9 provides a more comprehensive listing for comparison with Annex D.[48]

One should note that the issues cited may not necessarily be the reason why a particular case was remitted back. That is, not all the instances in Figure 9 represent fatal errors. Many cases discussed more than one issue, and it may be that some issues which were incorrectly undertaken were not the fatal error resulting the in the Federal Court's decision to send the matter back for re-determination. Nevertheless, and absent a more comprehensive analysis of the given cases (and issues) individually, the fact that the analysis surrounding these issues was disagreed with by the Federal Court, coupled with the fact that these cases were overturned, provides a relatively good picture of the issues which were problematic enough so as to give rise to a new application or hearing.

As such, the issues noted in Figure 9 provide some insight into common issues where refugee and PRRA decisions may not have be undertaken in accordance with the requirements of Canadian Law (to the extent of requiring a new hearing). To gain a clearer picture of how prevalent this may be, these figures have been compared to the total number of times that the issue was raised overall, and a percentage has been calculated. This figure represents how often an issue's analysis was disagreed with in cases calling for a redetermination, as a percentage of how often the issue was raised overall in the sample.[49] So for example, of all the cases where "credibility" arose as an issue, the court disagreed with the issue's analysis and ultimately sent the application back for redetermination 33% of the times.

Three issues which warrant particular mention in this later tabulation are: the adequacy of reasons, incompetent counsel and ignoring evidence. In 94%, 71% and 58% of the times where these issues came up at the Federal Court respectively, the court disagreed with how the underlying application handled the issue and ultimately sent the decision back for re-determination.[50]

[48] The table provides the top 14 issues. Those issues where only 1 or 2 instances appeared have not been reproduced.

[49] This is to be distinguished from how often the issue's analysis itself warranted a redetermination as a percentage of the overall number of times the issue was discussed.

[50] It should be noted that in the case of "incompetent counsel", the issue was only raised 7 times and as such, the sample may not be large enough to offer a complete picture. Further, as these issues engage issues of natural justice and/or procedural fairness, they generally have a higher standard of review which may be the reason why they were remitted so often.

Figure 9: Top 10 Issues Among Overturned Decisions, Where the Federal Court Disagreed with the Underlying Decision's Analysis[51]

Rank	*Issue*	*Number of Cases*	*As a % of the total times the issue was raised overall among all cases of interest*
1.	Credibility	113	33%
2.	State Protection	98	41%
3.	Ignored Evidence	47	58%
4.	Internal Flight Alternative (IFA)	29	29%
5.	Subjective Fear[52]	21	28%
6.	Generalized Risk	17	32%
7.	Adequacy of Reasons	16	94%
	s.97	16	33%
8.	Cumulative Discrimination	13	37%
9.	Particular Social Group (PSG) [53]	11	39%
	PSG – Gender	11	41%
10.	Religion	10	43%
	Political Opinion	10	50%
11.	Vulnerable Person	7	35%
12.	Change of Country Conditions	6	33%
	Exclusion	6	23%
13.	Sur Place Claim	5	33%
	Objective Fear	5	20%
	Incompetent Counsel	5	71%
14.	Adjournment / Postponement	4	50%

The top ranked issues within this listing and their prevalence in being remitted for reconsideration can offer some valuable insight for stakeholders. At a time of austerity, dwindling resources and in light of the expected increase in litigation, the data in table 9 present an opportunity for cost savings in the system as a whole. The litigation of matters within the Federal Court (and above) presents significant costs for the government and refugees alike. An emphasis on ensuring good quality first level decisions, addressing systemic problems in the system, and providing clarity in the law, would go a long way towards creating a more efficient system. By identifying areas on which to focus these efforts, Figure 9 offers some insight on how scarce resources might be best managed to maximize their impact.

First, among those issues which arose often or were remitted frequently, an opportunity may lie for additional learning and development (or even, simple reminders and information), so that a better decision can be made the first time around. In this spirit, it may be worthwhile for the respective

[51] The cases were not necessarily remitted back owing to the issues cited here, as the error may have been non-fatal, but another issue arose in the determination which was fatal to the decision.

[52] Of these, 3 flagged safe third country as an issue.

[53] Refer caveats in footnote 42 above. If one was to include the figures for gender, family and sexual orientation (subsets of the PSG category which students flagged separately), the figure would be 24 (11 relating to gender, 1 to family and 1 to sexual orientation).

government agencies,[54] advocates and other organizations such as the UNHCR, to assist decision makers with re-familiarizing themselves on the law surrounding such issues. The assessment of such issues as: the proper consideration of the evidence in written decisions (which arose 3rd most often and was remitted back 58% of the time), state protection (which arose 2nd most often and was remitted back 41% of the time), tools for assessing credibility (which arose most often among all issues), and the adequacy of reasons (which arose 7th most often but was remitted back 94% of the times), may present ideal areas of focus according to the data (reflected in table 9).

Second, where issues were disagreed with and the matter remitted for reconsideration roughly half of the times that it was raised as a whole (somewhere between 40-60% of the times), the law may be in need of some clarification from higher courts. The fact that matters raising similar issues may be almost as likely to be upheld as remitted back, may evidence contradictory understandings of how to interpret or apply the law on the given issues. State protection seems to be one such issue, along with the application of various grounds of protection (namely, particular social group, gender, religion and political opinion).[55] Where there is ambiguity in the law, it is proposed that international norms may offer valuable insight on how to best interpret and apply the principles of the Refugee Convention.[56]

Third, it bears noting that some of the issues identified in Figure 9, may present systemic problems which can be most appropriately dealt with via changes in policies; namely, the competence of counsel, and the adjournment or postponement of matters. Although these issues did not arise as often as others, they were very often handled inappropriately enough in the underlying application so as to require remittance to a new determination. Policies surrounding representatives in refugee hearings and PRRA applications, complaint mechanisms against representatives, and ensuring appropriate action against incompetent counsel where necessary, could for example, warrant some review and reconsideration of policies.

d.) Top Issues Among Countries of Interest:

Among the 97 different nationalities in the sample cases of interest, breakdowns are provided below for: Mexico, China and Colombia, as they were the most popular countries of nationality under review; Bulgaria, the Czech Republic, Hungary, Romania and the Slovak Republic (consolidated together), given the increasing focus on Roma based cases;[57] and Sri Lanka, Nigeria and Albania as over 50% of the cases relating to these countries were sent back for re-determination (as referenced in Figure 4).

As noted above, when breaking down common issues according to various countries of interest, the issues which emerge in the top few rankings can be different from those which appeared in the previous aggregated charts.

[54] Namely, the Immigration and Refugee Board (IRB), Citizenship and Immigration Canada (CIC), and the Canada Border Services Agency (CBSA).

[55] The issues of adjournment/postponement and ignored evidence were disagreed with and remitted for reconsideration 50% and 58% of the time, respectively. These have not been listed here however, as they may be more appropriately addressed via policy changes and training/development.

[56] See for example, the discussion below examining Canadian approaches to state protection, starting at page 48.

[57] Although it should be noted here again that not all cases within Bulgaria, the Czech Republic, Hungary, Romania & the Slovak Republic necessarily concern Roma persons. Refer above to footnote 36.

(i.) Mexico:

Of the 130 claims from Mexico, 88 upheld the underlying decision, whereas 42 called for a re-determination. The top 3 issues at the Federal Court, for claims originating from Mexico were: state protection, credibility and IFA, respectively.

Figure 10: Top 3 Issues for Claims for Protection From Mexico

No.	*Issue*	*Number of Cases which raised the issue in total*	*% of Cases where court disagreed with analysis & file remitted*
1.	State Protection	78	29% (23 cases)
2.	Credibility	59	22% (13 cases)
3.	Internal Flight Alternative (IFA)	36	22% (8 cases)

(ii.) China:

Of the 60 claims from China, 44 upheld the underlying decision whereas 16 called for a re-determination. The top 3 issues at the Federal Court, for claims originating from China were: credibility, religion and *sur place* claims, respectively. Not only was credibility overwhelmingly the number one issue, it arose in 83% of all Chinese claims for protection.[58]

Figure 11: Top 3 Issues for Claims for Protection From China

No.	*Issue*	*Number of Cases which raised the issue in total*	*% of Cases where court disagreed with analysis & file remitted*
1.	Credibility	52	25% (13 cases)
2.	Religion	10	10% (1 case)
3.	Sur Place Claims	7	0% (0 cases)

On the surface it seems troubling that the credibility of the claimant, namely, their believability, would arise that often. The issue arose almost twice as often as in the larger sample group (where only 46% of all claims raised credibility as an issue).[59] Although only 25% of these cases involved disagreement with the underlying analysis warranting reconsideration, it is perplexing why the issue of credibility would arise so much more often for Chinese claimants than those from other countries overall.[60]

[58] Credibility arose 50 times among the 60 cases from China examined.

[59] In the larger population, credibility appeared 342 times among the 740 cases of interest.

[60] This may reflect an issue with the sample. Namely, the figures do not reflect all refugee or PRRA claims from China writ large. They simply reflect those claims which applied for and got leave to the Federal Court. One cannot assume that the leave was granted on the basis of the stated issue either. It may be the case that leave was granted on the basis of another issue which was raised. However, this would have been the case for all the cases from all the other countries examined as well.

In the absence of more information on claims for protection from China, or a more careful consideration of each of the cases considered in the empirical analysis, it is impossible to say with any amount of certainty why these rates are so high.[61]

The figures may indicate an issue with Chinese claimants being perceived as being untruthful, owing to translation considerations or cultural/country specific considerations (such as, inaccessibility to adequate supporting personal documents owing to China's closed, dictatorial government). It may also be owing to the particular demographics of Chinese related claimants, insofar as class, education, or other considerations impacting the ability of claimants to tell their stories and relay evidence.[62] The figures may also evidence a lack of adequate, complete and/or accurate country of origin information.[63] Even with any of these explanations however, the trend is troubling and the figures may warrant additional analysis to ensure that Chinese claimants are being given a fair and adequate opportunity to present their claims for protection.

(iii.) Colombia:

Of the 49 claims from Colombia, 26 upheld the underlying decision whereas 23 called for a re-determination. This is a 47% rate of remittance. The top 3 issues at the Federal Court, for claims originating from Colombia were: credibility, state protection and internal flight alternative (IFA).[64]

Figure 12: Top 3 Issues for Claims for Protection From Colombia

No.	*Issue*	*Number of Cases which raised the issue in total*	*% of Cases where court disagreed with analysis & file remitted*
1.	Credibility	22	50% (11 cases)
2.	State Protection	14	57% (8 cases)
3.	IFA	13	46% (6 cases)

Of note, 50% of the times that credibility was raised, and 57% of the times that state protection was raised in Colombian cases, the court disagreed with the analysis and remitted the matter back for redetermination. Although these are relatively high rates of remittance, it bears noting that the sample of 22 and 14 Colombian cases that reviewed the issues of credibility and state protection respectively, might not be significantly large enough samples to draw a clear and concrete conclusion on the possible mis-adjudication of Colombian cases.

[61] Although this is outside the scope of this paper, it would make an excellent topic for further analysis.

[62] For example, if many claims are based on China's one child policy, involving claimants from rural, more isolated, or more impoverished areas, class or educational differences may be manifesting themselves in these numbers, in terms of implicating the ability of claimants to effectively answer questions put to them, or producing the requisite evidence required before an administrative tribunal.

[63] The other explanation of course is that Chinese claimants are just more untruthful than those from other countries. Offering this as a possible explanation would be a wide-scale assumption based solely on nationality however, which, in the absence of concrete anthropological or other social science evidence, has been discounted as a possible explanation in this report. The author would warn against drawing such conclusions.

[64] This was followed closely by 'subjective fear' at 12 cases and 'ignored evidence' at 7 cases.

(iv.) Bulgaria, the Czech Republic, Hungary, Romania and the Slovak Republic:

Of the 35 claims from Bulgaria, the Czech Republic, Hungary, Romania and the Slovak Republic, (which have been chosen as they may evidence trends among Roma claimants), 20 cases upheld the underlying decision whereas 15 called for a re-determination. The top 3 issues at the Federal Court were: state protection, credibility and cumulative discrimination.

Figure 13: Top 3 Issues for Claims for Protection From Bulgaria, the Czech Republic, Hungary, Romania & the Slovak Republic

No.	*Issue*	*Number of Cases which raised the issue in total*	*% of Cases where court disagreed with analysis & file remitted*
1.	State Protection	25	28% (7 cases)
2.	Credibility	11	27% (3 cases)
3.	Cumulative Discrimination	9	56% (5 cases)

Of note, 56% of all cases which examined the issue of cumulative discrimination, disagreed with the issue's analysis and remitted the matter back for redetermination. While the sample of 9 cases may be too small to draw any large scale conclusions, it may offer some insight into how such issues are being interpreted and applied by lower level decision makers as it concerns Roma cases. Overall, the data would seem to indicate that cases are generally refused on the basis of state protection. The issue arose in almost 71% of all cases.

(v.) Sri Lanka:

As noted earlier, among the 33 cases from Sri Lanka in the sample, 52% remitted the matter back for another hearing. In this respect, it is interesting to note that among all cases from Sri Lanka, the top issues were credibility, change of country conditions and IFA.[65] Credibility was raised in just over 51% of all Sri Lankan claims. Unlike China, this figure does not stray far from the general average of 46% for all countries in the compilation. In looking to those issues where the court disagreed and remitted the case for redetermination, no large scale trends appear.

Figure 14: Top 3 Issues for Claims for Protection From Sri Lanka

No.	*Issue*	*Number of Cases which raised the issue in total*	*% of Cases where court disagreed with analysis & file remitted*
1.	Credibility	17	41% (7 cases)
2.	Change of Country Conditions[66]	6	33% (2 cases)
3.	IFA	5	40% (2 cases)

[65] This was followed closely by: 'cumulative discrimination,' 'subjective fear,' and 's.97' at 4 cases each.
[66] Change of country conditions is most often raised in the context of PRRA determinations.

(vi.) Nigeria:

Among the 23 cases from Nigeria, 52% remitted the matter back for re-determination. The top issues were: internal flight alternative, credibility, and gender as a particular social group. Each of these issues had a 40-50% remittance rate, although the samples may be too small to draw any large scale conclusions.

Figure 15: Top 3 Issues for Claims for Protection From Nigeria

No.	*Issue*	*Number of Cases which raised the issue in total*	*% of Cases where court disagreed with analysis & file remitted*
1.	IFA	10	40% (4 cases)
2.	Credibility	10	40% (4 cases)
3.	Particular Social Group – Gender	4	50% (2 cases)

(vii.) Albania:

Among the 23 case from Albania, 61% remitted the matter back for re-determination. The top issue was tied between credibility and state protection among all Albanian cases. This was followed by internal flight alterative, and particular social group.

Each of these top issues had remittance rates over 50%. The samples for internal flight alternative (IFA) and particular social group may be too small to draw any widespread conclusions. Although the number of Albanian cases which examined the issues of credibility and state protection are not very large samples, they are sizable enough to point out the 62% and 54% rates of remittance, respectively. Absent a more comprehensive analysis of these cases however, it is impossible to say with any certainty why the rates of remittance are so high.

Figure 16: Top 3 Issues for Claims for Protection From Albania

No.	*Issue*	*Number of Cases which raised the issue in total*	*% of Cases where court disagreed with analysis & file remitted*
1.	Credibility	13	62% (8 cases)
	State Protection	13	54% (7 cases)
2.	IFA	4	50% (2 cases)
3.	Particular Social Group	2	100% (2 cases)

4. Summary Conclusions on Prevalence of Issues:

The issues of credibility and state protection seemed to come up as the first and second most popular issue among all the cases examined, respectively. This was the case for all issues overall, but also, when the data was disaggregated to reflect: agreement or disagreement with the underlying analysis of issues, or where the court disagreed with the analysis and sent the matter back for a new determination.

Although third and fourth place often alternated between internal flight alternative (IFA) and ignored evidence, the overall listing of all issues placed IFA above ignoring evidence.[67]

Among all the countries of interest which were examined, state protection or credibility arose as the top issue (with the exception of Nigeria, where IFA topped the list). Although second place was not always occupied by state protection or credibility, both issues fell within the top 3, with the exception of China Nigeria, and Sri Lanka, (where state protection was not listed among the top 3 issues). In a similar vein, the issue of internal flight alternative arose in the top 3 issues among all countries examined, with the exception of China and those countries grouped together to evidence Roma claims. Ignored evidence was only raised within the top 3 among those countries group to evidence Roma claims.

Given this data, the issues of credibility, state protection, and internal flight alternative seemed to be most prevalent among the various organizations of data sets. Where countries were not disaggregated, this was followed closely by ignored evidence.

IV. A Comparison of Canadian Approaches & Recent Federal Court Jurisprudence Against International Norms Respecting Credibility, State Protection & Internal Flight Alternative

Having quantified some general trends in Federal Court cases in the 2 ½ years or so prior to refugee reform, the second half of this report endeavours to undertake a more qualitative analysis of the three most common issues which arose in the empirical analysis; namely, credibility, state protection and internal flight alternative (IFA).[68] Each of these issues will compare Canadian approaches with international norms too see how authoritative jurisprudence, cases at the Federal Court, and first instance decisions line up against international norms and best practices (as applicable).

Each section is preceded by a brief reiteration of some key findings from the empirical analysis for the particular issue being examined. A breakdown of the most common countries of nationality which cited the issue is also provided. In many cases, the country breakdown per issue reflects the overall prevalence of certain countries in the 740 cases overall.[69] The information has however, been included in an attempt to provide an overview of the context in which the Federal Court is wrestling with the given issue.

After outlining and reiterating some key findings from the empirical compilation, each section begins with a general overlay of applicable international norms and best practices enunciated by the UNHCR. This is then compared to authoritative Canadian jurisprudence, most notably from the Federal Court of Appeal and the Supreme Court of Canada. Finally, Federal Court cases from the period under examination (namely, January 2010 to August 2012) were examined, to offer insight on common issues and themes that decision makers were wrestling with prior to the implementation of refugee reform.

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[67] The issues of subjective fear and generalized risk ranked at 3rd and 4th place above ignored evidence, among those issues where the Federal Court Agreed. Refer to Figure 7 at pg. 18.

[68] Although the proper consideration of evidence was also often a top issue, it has been omitted from discussion as it deals with an issue of procedural fairness versus a component of the refugee definition per say. This should not be taken to imply that the issue is any less important or serious. Indeed, the courts review this issue on a standard of correctness. (See for example: *Cuningham v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 636.) It is simply that international law and norms are likely to have less to contribute on such procedural topics versus the substantive interpretation of the definition's provisions.

[69] As such, the author warns against giving this breakdown too much attention.

In choosing cases to examine from this Federal Court jurisprudence, an attempt was made to pull cases from the 740 cases of interest which made up the empirical compilation. This was done either from cases being flagged previously as they were read or reviewed by the author, or via a search on CanLii to identify cases which wrestled with the particular international norm being examined.[70] In some instances, cases which fell within the requisite 32 month period under examination, but which did not fall within the 740 cases of interest are referenced, as they most clearly and/or concisely articulated jurisprudential trends prior to refugee reform, or the court's interpretation of a particular international norm or principle. Wherever this jurisprudence is discussed however, the citation specifically notes if the case was part of the empirical study.

1. <u>Credibility</u>:

It should be recalled that the issue of credibility arose most often among all the cases examined. Of the 740 cases of interest, the issue was raised 342 times. Of the 342 times that it was raised, the Federal Court agreed with the underlying application's analysis 64% of the time and disagreed 36% of the time.[71] Figure 17 below, offers some additional insight on the particular national contexts in which the issue was examined.

Figure 17: Top 10 Countries Where the Issue of Credibility Was Raised Overall

No.	*Country*	*Number of Cases*
1.	Mexico	59
2.	China	52
3.	Colombia	22
4.	Sri Lanka	17
5.	Albania	13
6.	St. Vincent and the Grenadines	11
	Iran	11
7.	Pakistan	10
	Nigeria	10
8.	India	9
9.	DRC	8
10.	Haiti	7

[70] While all the cases of interest have not been read in a systematic manner, it bears mentioning that a large number of cases were read covering a variety of issues throughout the time period under analysis. Refer above to footnote 8. Cases were flagged where they offered a good articulation of a particular theme or sub-issue that constantly emerged, on a point which international norms could offer elucidation, or where the analysis was particularly interesting.

[71] Of the 342 times that credibility was raised, the court agreed with the underlying analysis 219 times and disagreed 123 times. Further, of the 123 times that it disagreed, the court remitted the matter back for redetermination 113 times. See figures 6-9 above. Credibility was also among the top issues for all the countries of interest outlined in the empirical analysis (above), particularly in the case of China. See figures 10-16 above.

It is not that surprising that the issue of credibility has fairly consistently emerged as the top issue at the Federal Court, among the various data sets. At the heart of all refugee determinations is an assessment of an applicant's credibility. Often, issues of credibility are linked to subjective fear: does this person have a fear (that is well-founded)? However, whether the decision maker believes the claimant's narrative, (that is, whether the claimant is seen as credible), will have a bearing on all aspects of the definition and the ultimate decision to extend protection or not. If the decision maker does not believe that the persecutory events described really happened, that a claimant has a genuine link to one of the 5 grounds, or believes that a person is taking liberties in describing how they did (or why they did not) seek help from appropriate authorities, then a claim is likely to fail.

a.) Opportunity to Present One's Case Orally & its Importance in the Credibility Assessment

(i.) International Norms & Best Practices:

Although the 1951 *Refugee Convention* is silent on procedures for implementing refugee protection or assessing individual claims, it is in part owing to the importance and centrality of the credibility assessment that international norms call for an in-person component to the first level determination. In fact, UNHCR's Executive Committee (ExCom), to which Canada is a founding member, has affirmed that: "…in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status."[72]

UNHCR's *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*[73] reiterates this, using strong language to reject the validity of first level paper applications:

> All Principal Applicants must have the opportunity to present their claims in person in an RSD interview with a qualified Eligibility Officer. Under no circumstances should a refugee claim be determined in the first instance on the basis of a paper review alone. [Emphasis added.][74]

Neither the ExCom nor UNHCR's RSD Manual call for access to a formal judicial appearance at first instance, or a formal hearing for that matter. What is important is that a person be given the opportunity to present their claim in person before a decision maker qualified to hear and make determinations on

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[72] While ExCom Conclusion No. 8 which first (and arguably most explicitly) dealt with the issue of refugee status determination procedures did not expressly mandate the need for an oral hearing or interview, it did note that: "[t]he applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. [Emphasis added.]" The proposition that an applicant should have an opportunity to present her case orally, is supported more clearly in ExCom Conclusion No. 30 (from which the excerpt cited above in the text of the paper, is taken). Although ExCom Conclusion 30 addresses cases of manifestly unfounded claims, the provision cited which calls for a personal interview is addressed "in the case of all requests for the determination of refugee status or the grant of asylum." See: The Executive Committee of UNHCR, *Conclusion No. 30 (XXXIV): The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, (Geneva: ExCom, 1983), at (e)(i.), online at: <http://www.unhcr.org/3d4ab3ff2.html> [ExCom Conclusion 30]; and The Executive Committee of UNHCR, *Conclusion No. 8 (XXVII): Determination of Refugee Status*, (Geneva: ExCom, 1977), online at: <http://www.unhcr.org/3d4ab3ff2.html>.

[73] Herinafter, "RSD Manual."

[74] UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 November 2003, at 4.3.1, online at: <http://www.unhcr.org/refworld/pdfid/42d66dd84.pdf> [RSD Manual].

refugee status. This is owing to the difficult task of assessing credibility,[75] and in light of "…the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees."[76]

(ii.) Canadian Jurisprudence:

Canadian law arguably provides a model of best practice on this requirement.[77] The seminal decision of *Singh v. Canada (Minister of Employment & Immigration)* at the Supreme Court of Canada affirmed that persons eligible to make a refugee claim in Canada have a right to an oral hearing.[78] The decision led to the creation of the modern Immigration and Refugee Board (IRB). The IRB notes that an integral part of their job in determining refugee status is "…to decide whether they believe the claimant's evidence and how much weight to give to that evidence. In determining this, members must assess the credibility of the claimant, other witnesses and the documentary evidence."[79]

In the case of a Pre-Removal Risk Assessment (PRRA), which is a paper application, the situation is somewhat different. The purpose and objective of a PRRA is described by the Canada Border Services Agency (CBSA), as follows:

> The policy basis for assessing risk prior to removal is found in Canada's domestic and international commitments to the principle of *non-refoulement*. This principle holds that persons should not be removed from Canada to a country where they would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment. Such commitments require that risk be reviewed prior to removal.[80]

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[75] In its training materials to refugee status determination officers, UNHCR's training manual on "Interviewing Applicants for Refugee Status" notes that "[a]s an essential part of the decision-making process you must assess the applicant's story and credibility in connection with the principles and criteria for determination of refugee status. This requires that the applicant's story be carefully documented and cross-checked.... Assessing the credibility of an applicant is one of the most important, and most difficult, aspects of your work as an interviewer. [Emphasis added.]" UNHCR, *Interviewing Applicants for Refugee Status (RLD 4)*, (Geneva: UNHCR, 1995), online at: <http://www.unhcr.org/refworld/pdfid/3ccea3304.pdf> [RLD 4].

[76] ExCom Conclusion 30, *supra* note 72, at (e.).

[77] "Arguably," because only those deemed eligible to make a refugee claim are afforded the opportunity to have their claims reviewed on the merits before the IRB. See: IRPA, *supra* note 16, at ss.100 and 101. UNHCR has long maintained that the inclusion criteria for refugee protection should be examined prior to any exclusion or inadmissibility criteria. See: UNHCR, *Submissions on Bill C-31 'Protecting Canada's Immigration System Act'*, May 2012, at para 37, online at: <http://www.unhcr.ca/news/2012-05-08-e.pdf> [UNHCR C-31 Submissions]; UNHCR, *Comments on Bill C-11 'An Act Respecting Immigration to Canada and the Granting of Refugee Protection to Persons who are Displaced, Persecuted or in Danger',* 5 March 2001, at para 40 et seq, online at: <http://ccrweb.ca/c11hcr.PDF>; UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, (04 September 2003) HCR/GIP/03/05, online at: <http://www.unhcr.org/3f7d48514.html>; and UNHCR, *Carnegie Endowment for International Peace* , and *Luso-American Foundation for Development* , *Lisbon Expert Roundtable: Global Consultations on International Protection: Summary Conclusions – Exclusion From Refugee Status*, (3-4 May 2001) EC/GC/01/2Track/1, at para 15, online at: <http://www.unhcr.org/3b38938a4.pdf>.

[78] *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177.

[79] IRB Legal Services, Assessment of Credibility in Claims for Refugee Protection, 31 January 2004, online at: <http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/Pages/credib.aspx>.

[80] Citizenship and Immigration Canada (CIC), *Operational Manual PP3: Pre-Removal Risk Assessment (PRRA)*, 24 July 2009, online at: <http://www.cic.gc.ca/english/resources/manuals/pp/pp03-eng.pdf> [PRRA Manual]. The

Thus, the policy aims, legal assessment and practical results of a PRRA are similar to that of refugee status determination at a refugee hearing before the IRB.[81]

The application is however, one conducted on paper, with some limited exceptions. The Immigration and Refugee Protection Act (IRPA) and its corresponding Regulations provides for the Minister's discretion to hold an oral hearing in a PRRA application, with regard to the prescribed factors of:

> (*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;
>
> (*b*) whether the evidence is central to the decision with respect to the application for protection; and
>
> (*c*) whether the evidence, if accepted, would justify allowing the application for protection.[82]

Thus, where an applicant's credibility is a serious issue which is central to the decision such that protection would be granted but for a negative credibility finding, a PRRA officer can exercise discretion to have a hearing. Implicit in these criteria is an acknowledgement of the important role that oral evidence plays in matters concerning credibility.

Absent in this listing of prescribed factors however, is a consideration of whether the PRRA application being considered is the first assessment of risk. While CBSA's guidelines on assessing PRRAs provides some guidance on the appropriateness of calling a hearing when a person has already had a refugee claim before the IRB, it is silent on situations where no previous refugee status determination was made and/or hearing conducted.[83] While it may be true that many current PRRA assessments follow a hearing before the IRB, this is not always the case. Moreover, with legislative changes implementing shorter timelines for the refugee determination system and foreseeably higher rates of abandonment at the RPD level, it will be particularly important to account for whether an individual has had a previous assessment of risk, and

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manual goes on the state that, "PRRA has the same protection objectives as the refugee determination process at the Immigration and Refugee Board of Canada (IRB). It is based on the same grounds and confers the same degree of refugee protection, except in cases described in A112(3). PRRA responds to Federal Court jurisprudence, which requires that an assessment be made for persons who allege risk upon removal. It also responds to Supreme Court jurisprudence, which suggests that everyone, including serious criminals and persons who pose a threat to national security, are entitled to a risk assessment."

[81] Persons who fall within the ambit of s.112(3) of IRPA do not get refugee or protected person status (but do get protection against refoulement. See: IRPA, *supra* note 16 at s.112(3).

[82] *Immigration and Refugee Protection Regulations (IRPR)*, SOR C. 2002, at s.167, online at: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/index.html> [Regs]. It bears noting that s. 113(b) of the Immigration and Refugee Protection Act (IRPA) to which this section corresponds, says: "a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required". See: IRPA, supra note 16 at s.113(b).

[83] Specifically, it notes that "[w]here the applicant has had a claim for refugee protection that was considered by the IRB and the IRB has made a determination on the credibility of the applicant, the officer will not, in normal circumstances, need to conduct a separate hearing with respect to credibility. However, a hearing may be contemplated where the IRB has either determined that the applicant was credible, or did not make any conclusion on the credibility of the applicant, but the officer is confronted with evidence that leads the officer to believe the applicant is not credible; equally, the officer may require an oral hearing if new evidence would appear to contradict the IRB's finding that the applicant was not credible." PRRA Manual, *supra* note 80, at 14.2.

to provide an applicant with the appropriate forum to present the well-foundedness of her fear at first instance.[84]

Moreover, the Regulations do not automatically mandate an oral hearing if the criteria stated above in are met. In fact, the only case within the empirical sample which overturned the underlying PRRA decision citing "oral review" as the reason,[85] explicitly stated that the failure to call an oral hearing was not the reviewable error per say, but the PRRA Officer's failure to turn her mind to the issue of whether an oral hearing was warranted.[86] In other words, where an issue of credibility is central to the PRRA decision, an officer does not automatically have to call an oral hearing even where the prescribed factors are met. He or she simply has to *consider* whether or not to grant an oral hearing.

This clearly runs counter to international norms as described above. Ideally, the provisions of the Regulations should be amended to provide an applicant with an opportunity to adduce oral evidence where no previous assessment of risk has been made. This is particularly important where an issue of credibility has been explicitly raised or implicated. Absent a Regulatory change however, PRRA officers should be advised of the appropriateness of conducting a first level assessment in person, in the respective Operating Manual.

b.) Assessing a Claimant's Oral Testimony In Light of the Documentary Evidence

(i.) International Norms & Best Practices:

The evidence adduced during an asylum seeker's oral review is an integral part of assessing her credibility. These generally consist of a claimant's oral testimony and documentary evidence (including personal documents advanced by the claimant and/or country of origin information).[87] UNHCR's *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*[88] lays out important general principles for assessing *viva voce* and documentary evidence together, as part of a credibility assessment. At paragraphs 196-198, it states:

> Often… 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

[84] For commentary on these points, see: UNHCR C-31 Submissions, *supra* note 77 at pgs. 14-15 and 18-19. Following the example of Professor Hathaway in his seminal work *The Law of Refugee Status*, feminine pronouns will be used hereinafter, in recognition of the number and plight of refugee women and girls. In 2011, UNHCR estimated that 48% of refugees and those in refugee like situations were women and girls, who moreover, "[s]tripped of the protection of their homes, their government and often their family structure… are often particularly vulnerable. They face the rigours of long journeys into exile, official harassment or indifference and frequent sexual abuse - even after reaching an apparent place of safety." See: James C. Hathaway, *The Law of Refugee Status* (Markham: Lexis Nexis Butterworths, 1991), at pg. v, footnote 1 [Hathaway]; UNHCR, *A Year of Crises: UNHCR Global Trends 2011*, 18 June 2012, at Annex 13 and 14, online at <http://unhcr.org/4fd9e6266.html>; and UNHCR, *Refugee Women*, online at: <http://www.unhcr.org/pages/49c3646c1d9.html>.

[85] Of the decisions reviewing PRRAs 7 cited "oral review" as an issue.

[86] *Zemo v. Canada (Citizenship and Immigration)*, 2010 FC 800, at paras 18-19.

[87] Such evidence is vital in assessing both the internal consistency of the claim (the coherence of the statement) and the external consistency of the claim (agreement with known facts). These are the two main dimensions of a credibility assessment. See: RLD 4, *supra* note 75.

[88] Hereinafter, "UNHCR Handbook."

> 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. 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.
>
> The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.
>
> A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case. [Emphasis added.][89]

This is further supplemented by paragraphs 203 and 204 which follow:

> 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.
>
> The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.[90]

In sum, these principles can be succinctly noted as follows:

(1.) it may be difficult for refugees to obtain supporting evidence and it will almost always be impossible to support all statements made;

(2.) provided that a claimant's oral testimony is coherent and plausible, does not run counter to generally known facts, or unless there are good reasons to believe otherwise, she should be given the benefit of the doubt , even in the absence of supporting documentary evidence;[91]

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[89] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, January 1992, at paras 196-198, online at: <www.unhcr.org/3d58e13b4.html> [UNHCR Handbook].

[90] UNHCR Handbook, *Ibid.* at paras 203 and 204.

[91] This is pursuant to the text of paragraphs 196, 203 and 204 of the UNHCR Handbook. *Ibid.* at paras 196, 203 and 204.

(3.) unsupported inconsistencies in the claimant's story can go towards an assessment of a claimant's credibility; and

(4.) regard should be had for the context and experiences of the claimant which may lead her to feel apprehensive towards all governing "authorities," leading to an improper account of her story.

These four principles form the basic international norms for assessing evidence during refugee status determination.

(ii.) Canadian Jurisprudence:

The Supreme Court of Canada has recognized and reinforced the importance of interpreting refugee law in accordance with the UNHCR Handbook.[92] As such, it is not surprising that the passages from the Handbook quoted above, are often cited and their principles relied upon in Canadian jurisprudence. Generally speaking, Canadian law reinforces the application of the 4 propositions stated above, with albeit, slight nuances. Each is examined in turn below.

(1.) Recognizing Difficulties with Adducing Evidence:

Canadian legislation has built flexibility into the system in recognition of the difficulty that refugee claimants may have in adducing evidence. Section 170 of IRPA states that the Refugee Protection Division (RPD):

(*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;

(*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.[93]

Rule 11 (formerly Rule 7) of the RPD Rules gives force to s.170 of IRPA, and articulates more precisely the evidentiary burden and requirements for adducing evidence at refugee hearings. It states that,

> [t]he claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.[94]

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[92] *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689, at pgs. 713-714 [Ward]. The Supreme Court's dicta in *Chan v. Canada (Minister of Employment and Immigration)* elaborated on this, and is worth reproducing here: "[a]s I noted in *Ward*, while not formally binding upon signatory states such as Canada, the UNHCR Handbook has been formed from the cumulative knowledge available concerning the refugee admission procedures and criteria of signatory states. This much-cited guide has been endorsed by the Executive Committee of the UNHCR, including Canada, and has been relied upon for guidance by the courts of signatory nations. Accordingly, the UNHCR Handbook must be treated as a highly relevant authority in considering refugee admission practices. This, of course, applies not only to the Board but also to a reviewing court. [Emphasis added. Citations omitted.]" See: *Chan v. Canada (Minister of Employment and Immigration)*, 1995 CanLII 71 (SCC), [1995] 3 SCR 593, at para 46 [Chan].

[93] IRPA, *supra* note 16, at s.170(g)(h)(i).

Although some have tried to argue that this provision of the RPD Rules does not afford enough flexibility, the Federal Court has ruled that the qualifier contained in the rule, which affords applicants with the opportunity to explain why corroborating documents were not forthcoming, does not make it overly onerous or difficult to meet. In the case of *Uppal v. Canada (Minister of Citizenship and Immigration)*, for example, Justice Pinard states:

> …it is my opinion that Rule 7 [which is now Rule 11] does not prescribe an unfair procedure. Rule 7 emphasizes the importance of establishing the claimant's identity and claim. It does not impose any absolute requirement upon a claimant to furnish such documents but it requires a claimant who does not furnish documents establishing identity and other elements of the claim to explain why they were not able to obtain them. Contrary to the applicant's suggestion, this is a burden that any claimant can meet.[95]

Thus, under Canadian law, a refugee claimant is responsible for furnishing documents to support the elements of her claim; however, where this is not possible she has an opportunity to explain why and outline what steps were taken.

The approach implicit in Rule 11 is slightly different from that contained in the UNHCR Handbook. Specifically, Rule 11 requires all elements of the claim to be supported as a starting point. The UNHCR Handbook on the other hand, acknowledges that given the context of persecution and flight from persecution, it will be the exception and not the rule when all statements are supported with corroborating documents. This distinction, while subtle, may have the effect of raising the evidentiary threshold as it relates to the assessment of credibility.[96]

Jurisprudence from the Federal Court evidences this risk. On the one hand, the court has recognised that what is reasonable will depend on the circumstances of the case and that in some situations it may be unreasonable to expect a claimant to furnish corroborating documents from her country of origin.[97] On the other hand, the court has also characterized the need for corroborating documents as a matter of common sense:

> The Applicants complain that there was no basis for requiring corroborative evidence since there is a presumption of veracity in favour of the Applicants. This submission is simply startling. The requirement for corroboration is only a matter of common sense. In *The Law of Evidence in Canada*, the matter is succinctly put at page 973:

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[94] *Refugee Protection Division Rules*, SOR/2012-256, at r.11, online at: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-228/index.html> [RPD Rules]. Under the former version of the RPD rules (which preceded the implementation of refugee reform), said rule existed verbatim but was numbered Rule 7. Many references to this rule in the cited jurisprudence in the paper, reference "Rule 7", however for the sake of clarity, this paper references it with the more current numbering of Rule 11 in the text of the paper itself.

[95] *Uppal v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1142, at para 14.

[96] Certainly, the Handbook does not espouse that it will always or even often be the case that no documents are tendered. However, the starting point of the Handbook is that not all statements will be supported. This is in contrast to Rule 7 that implies that as a starting point all statements should be supported.

[97] *Owusu-Ansah v. Canada (Minister of Employment and Immigration)*, (1989), 8 Imm. L.R. (2d) 106 FC) [*Owusu-Ansah*].

> The general rule is that the testimony of a single witness, if believed to the requisite degree of certainty, is sufficient to found a conviction or civil judgment. Because there may be concerns about the reliability of a witness' testimony -- perhaps the witness has a financial interest in the outcome of the proceedings or he or she is an accomplice -- the trier of fact may search for supporting evidence to confirm that witness' testimony. This search for confirmatory evidence is a matter of common sense. [Emphasis added; citation omitted.][98]

The danger of this reasoning is that it threatens to import more strictly conceptualized evidentiary requirements from civil or criminal matters into refugee status determination, and may not afford the requisite flexibility mandated in the UNHCR Handbook or as arguably foreseen in s.170(e) of IRPA, given the inherent obstacles that flight from persecution entails.

More recent jurisprudence from the Federal Court, evidences varying approaches to Rule 11. For example, in the case of *Lopez Aguilera v. Canada (Citizenship and Immigration)*,[99] the determinative issue was whether the applicant took appropriate steps to obtain the documents to support his claim. The court overturned the IRB's negative determination, holding that the claimant had satisfied Rule 11:

> Mr. Aguilera testified that he had asked his mother, who is still in Mexico, to obtain the documents for him, but she was unable to do so. The presiding member criticized Mr. Aguilera for not personally requesting these documents from the Mexican authorities, from Canada. The reasons do not indicate the reason why Mr. Aguilera, thousands of kilometres from Mexico, would be in a better position than his mother to obtain these documents.
>
> It is unreasonable to expect that Mr. Aguilera would personally take steps to obtain these documents rather than using an agent. No investigation was initiated to ascertain what steps his mother took and whether those steps were reasonable.[100]

Such an approach to Rule 11 is consistent with the UNHCR Handbook, which recognizes the inherent difficulties that refugees face in adducing supporting evidence. The use of an agent affords sufficient flexibility to overcome the complications of producing documents when one is already overseas. This is in keeping with the spirit and intent of the UNHCR Handbook.

The case of *Peter v. Canada (Citizenship and Immigration)*[101] offers a somewhat contrasting example. The case involved an applicant who did not tender documents to support her miscarriage following a particularly violent incident of domestic violence. In its decision, the Board rejected the applicant's explanation that she didn't think the hearing would happen so quickly, pointing out that she was advised

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[98] *Ortiz Juarez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 288, at para 7.

[99] *Lopez Aguilera v. Canada (Citizenship and Immigration)*, 2012 FC 173 [Lopez Aguilera]. This case was not part of the empirical sample.

[100] Lopez Aguilera, *ibid.* at paras 10-11.

[101] *Peter v. Canada (Citizenship and Immigration)*, 2011 FC 778 [Peter]. This case was contained within the empirical sample.

of the date roughly two months in advance.[102] Further, the Board found it implausible that the clinic would refuse to issue a report, and held that it was unreasonable that the applicant did not write to the clinic herself.[103] In its decision upholding the underlying determination, the Federal Court did not directly address either of these two points. Rather, it cited Rule 11 and stated:

> The Board reasonably found that the applicant had not provided any documentary evidence or sufficiently explained why that was the case. The applicant's response to the Board's question of why she herself did not attempt to secure a medical report from the clinic was "I have no reason" (tribunal record, page 176). It was reasonable for the Board to consider this to be an insufficient explanation for the lack of evidence supporting her claim. [Emphasis added.][104]

One important distinction between *Lopez Aguilera* and *Peter* however, is that while the former did not largely raise issues of credibility outside the lack of documents, the latter cited various inconsistencies and implausibilities in the oral testimony.[105] As outlined in the section following (on extending the benefit of the doubt to oral testimony), the courts have acknowledged that the general credibility of the applicant is an important factor in weighing the lack of adequate supporting documentation.

In weighing an applicant's justifications for not tending documentary evidence, it is proposed that the court and first level decision makers keep the reasoning behind paragraph 196 of the UNHCR Handbook foremost in mind. Namely, in the context of persecution and flight from persecution, individuals may not have the time, opportunity or wherewithal to keep, request, gather, and/or travel with documents evidencing the elements of their refugee claim. With respect to inquiries on why documents could not be gathered after safety sought, decision makers should keep in mind both the psychological, and practical difficulties that may be inherent to refugee claimants, and make inquiries to that effect, even when no explanation is forthcoming.[106] How easy is it to secure documents from the police, hospitals, or other pertinent agencies in the country of origin? How long does it take? How might the psychological impact of the persecution endured, affect the claimant's willingness (and in some cases, ability) to revisit the events, people, places, and situations, which gave rise to the persecution, even after finding safety? In all cases, an individual assessment should be made. With shorter times for filing evidence before the IRB,

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[102] Peter, *ibid.* at para 3.

[103] Although not explicitly stated, the Federal Court seems to imply a set of facts similar to that in *Lopez Aguilera* (discussed directly above). Namely, it appears that while the applicant did not personally write to the clinic, she had someone inquire on her behalf and they were told that the hospital does not issue such documents. Specifically, the court states that: "[t]he Board found it unreasonable that the applicant did not personally take steps to secure medical documentation by writing to the clinic. The Board found it implausible that the medical clinic would refuse to issue a report about a serious medical issue such as a miscarriage. [Emphasis added.]" Peter, *supra* note 101 at para 3. See also: Lopez Aguilera, *supra* note 99.

[104] Peter, *supra* note 101 at paras 38-39.

[105] In *Lopez Aguilera v. Canada*, the court noted that: "the presiding member found him not credible because he had not submitted documents to corroborate the facts alleged in his claim… [He] found no inconsistency in Mr. Aguilera's testimony other than where he testified at the hearing that he had told a lawyer about everything he had experienced, a fact that he had not initially revealed. However, I have not found any specific finding that Mr. Aguilera was not credible on the basis of his testimony." Lopez Aguilera, *supra* note 99. In *Peter* however, the court pointed to one omission and two implausibility findings as a basis for a negative credibility determination. Refer to page 36 below which discusses these findings further. See: Peter, *supra* note 101 at para 14.

[106] Such inquiries may produce additional insights in a case of long standing domestic violence, such as that found in *Peter* for example.

such context and questions will be even more important as decision makers and refugee claimants alike, grapple with meeting the evidentiary requirements contained in Rule 11.[107]

(2.) Extending the Benefit of the Doubt to Oral Testimony

Canadian law is relatively consistent with respect to the Handbook's proposition that claimants should be given the benefit of the doubt in the absence of documentary evidence, or unless there are good reasons to believe otherwise. Several cases have affirmed that a claimant's testimony is presumed to be truthful and moreover, that the Board cannot disbelieve a claimant's oral testimony simply because there is a lack of documentary evidence to support it.[108] For example, in the case of *Miral v. Canada (Minister of Citizenship and Immigration)*, the Federal Court examined the case of a Sri Lankan national who was arrested and/or detained 9 times owing to her husband's suspected involvement in the LTTE. In its decision, the court notes the implicit difficulty of adducing documentary evidence to corroborate the applicant's testimony:

> The panel states in its reasons that the lack of corroborating evidence regarding the applicant's detention is a significant factor in the negative determination of her claim. While a failure to offer documentation is a correct finding of fact, it cannot be linked to the applicant's credibility, in the absence of evidence to contradict the allegations. It is not open to the CRDD to require documentary evidence to support the applicant's uncontradicted testimony regarding her arrests and detentions. What would the tribunal have the applicant do? Get a note from the police? [Citations omitted; emphasis added.][109]

Further to this, the Federal Court of Appeal has held that where the Board rejects a claimant's testimonial evidence in favour of documentary evidence, it must give clear reasons why it did so. The court states that: "[s]ince there is a presumption as to the truth of the appellant's testimony, the Board was bound to state in clear and unmistakable terms why it preferred the documentary evidence over the appellant's testimonial evidence."[110] However, where a claimant's allegations run contrary to the available evidence and generally known facts, the Supreme Court has held that it may not be appropriate to extend the benefit of the doubt, as supported by paragraph 204 of the UNHCR Handbook.[111]

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[107] Refugee claimants currently have 28 days to submit the initial Personal Information Form (PIF) and roughly 19 months before a hearing, during which they can gather relevant evidence for their appearance before the IRB. Under the new system, persons making a claim at a port of entry will have 15 days to submit their initial Basis of Claim form (BOC) and persons making an inland claim will have to submit their BOC at the time of their initial eligibility interview. Further, the government plans to initiate refugee hearings within 30 days for inland claimants from Designated Countries of Origin (DCOs), 45 days for port of entry claimants from DCOs, and within 60 days for all other claimants. See: Citizenship and Immigration Canada, *Backgrounder - Summary of Changes to Canada's Refugee System in the 'Protecting Canada's Immigration System Act'*, online: <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16f.asp>.

[108] See especially: *Ahortor v. Canada (Minister of Employment and Immigration)*, (1993) 65 F.T.R. 137 [Ahortor]; and *Miral* v. *Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 254 (QL) (T.D.) [Miral].

[109] Miral, *ibid.* at para 23.

[110] *Okyere-Akosah v. Canada (Minister of Employment & Immigration)*, [1992] F.C.J. No. 411 (C.A.).

[111] The majority and minority decisions of the court differed on what were "the generally known facts" in this case, however it bears mentioning that the majority of the court did not approve of what it perceived to be an extension of the 'benefit of the doubt' principle by the minority decision, to individual pieces of evidence, stating: "[t]his approach handicaps a refugee determination Board from performing its task of drawing reasonable conclusions on the basis of the evidence which is presented. This approach is also fundamentally incompatible with the concept of

More recent cases at the Federal Court during the period under examination, seem to fairly consistently restrict the application of 'the benefit of the doubt' principle where there are inconsistencies, contradictions and/or implausibilities in an applicant's story. For example, in the case of *Lopez Aguilera* (discussed above), the court points out that Board's negative credibility determination was largely owing to the lack of corroborating documents, and affirms that, "[i]t is wrong in law to draw a negative inference about an applicant's credibility from the mere fact that no documents were submitted to support the refugee claim."[112]

The case of *Wokwera v. Canada (Citizenship and Immigration)*[113] offers a good example of the dangers of applying the requirement for corroborating documents too stringently. In that case, the applicant fled Uganda after being threatened, harassed, fired, and finally attacked, owing to his treatment of gay persons in his medical practice. Credibility was not at issue in the case. "The Board found that the applicant had been straightforward with his answers at the hearing and [held] that there were no major omissions, contradictions or inconsistencies between the applicant's testimony and documentary evidence."[114] Despite this however, the IRB denied the claim citing the lack of documents to evidence the applicant's involvement and assistance of Uganda's secret gay community. The Federal Court upheld the decision stating that "…it is reasonable for the Board to demand corroborating evidence where the applicant can be reasonably expected to have such evidence available to them."[115]

It is unclear what documents could have been "reasonably expected" from the claimant however. The Board seemed to accept the applicant's contention that he was careful to ensure no documents linked him or his activities with the gay community while in Uganda owing to his fear of being found out. However, it held that once he was safely in Canada, he was free to seek affidavits or letters of support from those he treated.[116] The Federal Court rejected the applicant's contention that such documents would necessarily put others at risk who were still in Uganda, noting that his PIF already named two gay individuals he was affiliated with.[117] It is unclear from the facts whether the applicant had any family or friends in Canada who could attest to his activities in Uganda. Absent such a situation, it is difficult to

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"benefit of the doubt" as it is expounded in [paragraph 204 of] the UNHCR Handbook… [citation omitted]." See: Chan, *supra* note 92, at para 191.

[112] Lopez Aguilera, *supra* note 99 at paras 12. To see some other recent examples which also cite and make use of this principle, the reader may refer to: *Higbogun v. Canada (Citizenship and Immigration)*, 2010 FC 445, at para 43 [Higbogun]*; Karadeniz v. Canada (Citizenship and Immigration)*, 2010 FC 1246 at para 32; and *Osorio Mejia v. Canada (Citizenship and Immigration)*, 2011 FC 851, at para 12. Whereas *Higbogun* was contained in the empirical sample, *Karadeniz* and *Osorio Mejia* were not.

[113] *Wokwera v. Canada (Citizenship and Immigration)*, 2012 FC 132 [Wokwera]. This case was not part of the empirical sample.

[114] Wokwera, *ibid.* at para 12.

[115] Wokwera, *supra* note 114 at para 39.

[116] Wokwera, *supra* note 114 at paras 40-41.

[117] While the applicant argued that it was unreasonable "…to expect him to provide evidence of his treatment of homosexuals as that would necessitate the identification of individuals who could face legal consequences and physical danger in Uganda," the court concluded that it was, "…reasonable for the Board to assume that there are other sources from which the highly educated applicant could acquire corroborating evidence in the form of affidavits or letters other than from individuals who would be put in danger. This is equally applicable for corroborating evidence that would support the applicant's subjective fear of persecution on a Convention ground and objective fear as a physician who has provided treatment to homosexuals in Uganda." Wokwera, *supra* note 114 at paras 43-44.

imagine that the Board or the court would expect written statements (from persons in Uganda), given that they accepted his own reluctance to produce such documents while he was still in the country. Given that the applicant was found to be credible, it seems entirely reasonable and well within the circumstances envisaged in the UNHCR Handbook to have extended the benefit of the doubt principle here.

Much less straightforward are cases where the applicant's credibility is at issue owing to contradictions, inconsistencies, and/or implausibilities in the applicant's testimony. While inconsistencies and contradictions would almost certainly seem to qualify as "good reasons to believe the contrary," citing implausibilities or improbabilities to restrict the application of the 'benefit of the doubt' principle, is much more problematic.[118] Certainly, the Handbook notes that the testimony "must be coherent and plausible, and not run counter to generally known facts. [Emphasis added.]"[119] Where an adverse credibility determination based on implausibility (or improbability) with reference to generally known facts, this would be consistent with the Handbook. However, citing the unlikeliness of a particular set of events, actions, or reactions, unfolding the way they are outlined in a claimant's oral testimony, where there is no explicit evidence to suggest otherwise, or where they are not counter to generally known facts, would not be in the spirit or text of the UNHCR Handbook. While this would be most problematic in cases citing only implausibilities, it can still be problematic where implausibilities are used to reinforce minor inconsistencies or where explanations are given for any inconsistencies.

In canvassing the cases at the Federal Court during the period under examination, the distinction is often not drawn clearly in the court's analysis. For example, in the case of *Hidalgo Carranza v. Canada (Citizenship and Immigration)*,[120] the applicant feared for her safety after she denounced the government's protection of criminal elements as part of her work with a human rights organization. The Board determined that the whole story was fabricated.[121] Whereas the court seems to accept that the particular implausibilities in this case may have run against generally known facts, the court's dicta seems to imply that even where this is not the case, improbabilities on their own could serve to restrict the benefit of the doubt principle.[122] Caution should be exercised in employing such reasoning. It would restrict the application of the benefit of the doubt principle much further than that envisioned in the UNHCR Handbook.

The case of *Peter v. Canada (Citizenship and Immigration)* discussed above, offers another good example. In its decision, the court notes that there were both implausibilities and inconsistencies in the claimant's

[118] There is jurisprudence which supports this distinction. See for example, the case of *Leung v. Canada (Minister of Employment and Immigration)* where the court outlined that the Board had a clear duty to justify credibility findings with specific reference to the evidence where the decision is based on perceived implausibilities. *Leung v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 774, 81 F.T.R. 303 (F.C.T.D.).

[119] UNHCR Handbook, *supra* note 89, at para 204.

[120] *Hidalgo Carranza v. Canada (Citizenship and Immigration)*, 2010 FC 914, at para 19 [Hidalgo Carranza]. This case was contained in the empirical sample.

[121] This was since: there was no evidence to support the existence of the human rights centre she worked at, the applicant failed to mention the destruction of the centre in her PIF, there were no newspapers or human rights organizations who could attest to the existence or destruction of the centre, and the applicant didn't know the names of any human rights organizations . Hidalgo Carranza, *ibid.* at para 19.

[122] In upholding the decision, the Federal Court states that "[w]here an applicant's allegations run counter to the available evidence and generally known facts, it is not appropriate to apply the benefit of the doubt. Thus, the [benefit of the doubt] principle does not apply where the RPD determines that a story is improbable. [Citation omitted; emphasis added.]" Hidalgo Carranza, *supra* note 120 at para 22.

testimony.[123] However, the court cites only one omission and two implausibility findings in its review of the main issues for the Board: the applicant failed to mention a scar from a past incident of abuse, it was unlikely that the applicant's mother would have noted her contact with the applicant's abuser only after she submitted her PIF, and it was unlikely that the applicant's mother would fail to mention the applicant's history of abuse in her letter because she didn't know about it.[124] Cases of domestic violence (particularly when they occur over a long period of time), can be difficult to assess where one relies primarily on implausibility findings. In this case for example, there were some indications that the applicant suffered from psychological implications, and the lack of information exchanged between the applicant and her mother, may have been in part owing to these psychological considerations.[125]

When seeking to ascertain whether or not to extend the benefit of the doubt to the applicant's testimony, it is submitted that decision makers should have regard to whether general credibility determinations are based on inconsistencies or improbabilities/implausibilities. Where inconsistencies are implicated, this would be a good reason not to extend the benefit of the doubt, in line with the text of the UNHCR Handbook. Where improbabilities or implausibilities are implicated however, regard should be had to whether these run counter to generally known facts, as outlined in the UNHCR Handbook.

(3.) Unsupported Inconsistencies & the Opportunity to Explain:

With respect to the principle that unsupported inconsistencies can go towards the assessment of a claimant's credibility, Canadian courts have employed best practices. It is trite law that inconsistencies can go towards an assessment of credibility. However, Canadian courts have outlined that while a decision maker can examine inconsistencies in a claimant's story, he/she should give the claimant an opportunity to explain the inconsistencies.[126] Moreover, where a claim is rejected owing to contradictions in the evidence, the Federal Court of Appeal has held that examples of these must be explicitly stated in the decision.[127] Further, the Federal Court of Appeal has outlined that in order to justify a negative determination based on contradictions, the contradictions in question must be sufficiently serious and material to the claim to support a negative determination.[128] The evidence must be inconsistent, not just

[123] "The Board made a negative credibility finding based on several implausibilities or inconsistencies between the applicant's PIF and her oral testimony, as well as the lack of corroborating evidence. [Emphais added.]" Peter, *supra* note 101 at para 36.

[124] Peter, *supra* note 101 at para 14.

[125] The Board assigned little weight to the psychological report and this was upheld by the court. No analysis seems to have been done on whether the report could have offered any insight on the actions of the applicant and the implausibility allegations. Peter, *supra* note 101 at para 40.

[126] In the case of Shanmugarajah v. Canada for example, the Federal Court of Appeal held that the Board had erred in failing to consider the applicant's reasons for re-availment, namely, the illness of his mother. *Shanmugarajah v. Canada (Minister of Employment & Immigration)*, [1992] F.C.J. No. 583. See also: *Djama v. Canada (Minister of Employment & Immigration)*, [1992] F.C.J. No. 531 (C.A.) [Djama]; *Veres v. Canada (Minister of Citizenship and Immigration)* [2000], F.C.J. No. 1913; *Grewal v. Canada (Minister of Employment & Immigration)*, [1993] F.C.J. No. 59 (Q.L.); *Gracielome v. Canada (Minister of Employment & Immigration)*, [1989] F.C.J. No. 463 (Q.L.); and *Armson v. Canada (Minister of Employment & Immigration)*, [1989] F.C.J. No. 800 (Q.L.).

[127] *Hilo v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 228 (C.A.).

[128] The court stated that "…the members of the panel clearly exaggerated the import of a few apparent contradictions, hesitations or vague statements which they succeeded in detecting in the comments of the claimant, and they could not on that basis alone treat his testimony as a whole as being the testimony of a liar. It seems to us that their fixation on the details of what he stated to be his history caused them to forget the substance of the facts on which he based his claim." Djama, *supra* note 126.

vague in nature.[129] This jurisprudence is not only consistent with the spirit, intent and text of the Handbook, it is in line with best practices which elaborate on the assessment of inconsistencies.[130]

Many of the Federal Court cases pulled for the empirical analysis, reviewed underlying applications that cited inconsistencies as a reason for questioning the claimant's credibility, ultimately refusing the claim.[131] Where this was the case however, the Federal Court often gave the Board significant deference, provided that the Board's gave clear reasons, the applicant's explanation was insufficient, and the contradictions were serious and material to the claim.[132]

For example, in the case of *Higbogun v. Canada (Citizenship and Immigration)*[133] the applicant, a dual national, feared reprisals from her abusive husband in Italy and her father in Nigeria owing to her extra-marital pregnancy. The Board disbelieved her story, citing "serious inconsistencies, discrepancies, omissions and other problems with respect to major issues."[134] In its decision, the Federal Court takes care to outline the many discrepancies identified by the Board and the applicant's explanations which were rejected by the Member.[135] Further to its rejection of the applicant's explanations for the various discrepancies, the Board noted that she was evasive in much of her testimony and required questions to be repeated before answering.[136] The Federal Court rejected the applicant's argument that the Board was "microscopic" in its examination of the evidence and that it misconstrued or ignored cogent evidence, stating that sufficient examples of such conduct had not been cited by the applicant "[i]n the face of what is an almost overwhelming negative finding on credibility."[137] The approach and reasoning in this case, is in line with the UNHCR Handbook which permits an adverse credibility finding where inconsistencies are not sufficiently supported.

The case of *Mendez Lopera v. Canada (Citizenship and Immigration)*[138] offers another interesting example.[139] In its reasons, the Board found a lack of subjective fear since the family remained in Colombia

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[129] Djama, *supra* note 126.

[130] Goodwin-Gill, *supra* note 2, at pg. 549, and RSD Manual, *supra* note 74, at 4.3.6.

[131] See for example: *Perez v. Canada (Citizenship and Immigration)*, 2010 FC 345 [Perez]; *Lin v. Canada (Citizenship and Immigration)*, 2010 FC 1020 [Lin]; and *Ngalle v. Canada (Citizenship and Immigration)*, 2010 FC 840. All three of these cases were contained in the empirical compilation.

[132] Section (c.) below discusses the importance of this deference in reviewing issues of credibility.

[133] Higbogun, *supra* note 112.

[134] Higbogun, *supra* note 112 at para 16.

[135] Among the many other discrepancies cited were the fact that: the applicant admitted that much of what she told the officer at the port of entry was false, citing fear of removal; she failed to mention her husband's links to the mafia in her PIF or PIF amendments, explaining that she told her counsel and assumed it was mentioned; she failed to claim refugee status until she was detained for some time at the port of entry, explaining that her friend told her not to declare refugee status at the airport; she failed to mention the serious injuries she endured at the hands of her husband and his children in her PIF; she was initially unable to recall the last name of the friend who arranged for her to come to Canada; and she provided a "suspicious" letter from her father which (among other things) began with a friendly tone and degenerated into death threats. Higbogun, *supra* note 112 at paras 6-16.

[136] Higbogun, *supra* note 112 at para 7.

[137] Higbogun, *supra* note 112 at para 51.

[138] *Mendez Lopera v. Canada (Citizenship and Immigration)*, 2011 FC 653 [Mendez Lopera]. This case was not part of the empirical sample.

[139] In that case, the applicant fled Colombia after FARC took action against his family, owing to their involvement in a foundation which provided health care services in a rural region of the country. The applicant's mother and sister helped to found the organization. FARC kidnapped his sister as they wanted medical services for

for so long following FARC's initial actions, and since the applicant's parents continued to reside there in spite of the second set of threats more than two years later. The Federal Court held that:

> …the Board failed to consider the whole of the evidence which explains why the applicant and his parents remained in Columbia. In particular, the Court finds that the Board ought to have considered that the applicant's parents remained in Colombia to care for his very sick sister, who was in a medical centre and medically unable to travel by airplane. The Board also failed to consider that the applicant's family remained in hiding for two years, or ultimately fled their hometown, both of which showed a subjective fear of persecution. Also the Board failed to recognize that the applicant was only 12 years old in 2004, and not in a position to leave his parents. [Emphasis added.][140]

In spite of this finding however, the court determined that the error was not fatal to the decision since the determinative issue in the underlying determination was whether the applicant himself was targeted by FARC, and whether the second set of events were fabricated.[141] Where a decision maker is relying on inconsistencies to make a negative credibility determination, it is always the best practice to allow an applicant with an opportunity to explain herself and/or provide adequate support for her statements. Such explanations should be considered in the underlying decision at first instance.

(4.) Sensitivity to Applicant's Experience, Background & Possible Apprehension Towards Authorities

Canadian law and jurisprudence is attune with the general norm that a claimant's experiences should be accounted for in anticipating possible apprehensions towards governing authorities (which may possibly affect the claimant's testimony). The case of *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, provides a good and succinct reference on the relevant considerations:

> …the Board should not be quick to apply North American logic and reasoning to the claimant's behaviour: consideration should be given to the claimant's age, education, cultural background, previous social experiences and psychological condition. Therefore, in evaluating the claimant's first encounters with Canadian immigration authorities or referring to the claimant's POE [port of entry notes], the Board should be mindful of the fact that most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority. [Emphasis added.] [142]

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their own guerrillas, however, she was subsequently rescued by the army. After spending considerable time hiding in Bogota, the applicant and his family returned and his mother reopened the organization. FARC again raided the offices, demanded monthly payments and when the applicant's family attempted to move to Bogota again, their apartment was ransacked and a condolence card left naming each of the family member's names on it. Mendez Lopera, *ibid.*

[140] Mendez Lopera, *supra* note 138 at para 27.

[141] Mendez Lopera, *supra* note 138 at para 28. The decision is somewhat problematic as the veracity of the second set of threats is largely challenged on the basis that there were no corroborating documents.

[142] *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, [2003] FC 772, [2003] F.C.J. No. 586, at para 22 [Mohacsi].

It is incumbent on the Board to consider these factors in its assessment of credibility. The failure to do so was a reviewable error in *Mohacsi*.[143]

Jurisprudence has been particularly clear on the imperative of considering psychological or medical reports which identify mental disorders such as post-traumatic stress disorder (PTSD), particularly when they impact a claimant's ability to testify.[144] Further to this, "…the Federal Court has frequently made reference to the need to be extremely cautious when making credibility findings when using an interpreter, and the importance of not examining the evidence microscopically."[145] This is very much in line with paragraph 198 of the Handbook and accounts for the particular issues which can flow from refugee-hood.

While too few of the cases from the empirical study examined this issue so as to make any firm conclusions on jurisprudential trends, the cases do evidence varying approaches to this principle. In the case of *Gaymes v. Canada (Citizenship and Immigration)*[146] for example, the applicant submitted that the lack of reference to the psychological report in the Board's decision rendered it flawed. The court disagreed, finding that the record made it clear that the Board explicitly considered the Applicant's medical condition both at the hearing and in the decision, and the applicant's testimony was clearly not affected by her condition (in form or substance); she just simply had not made out her case.[147]

In the case of *Bors v. Canada (Citizenship and Immigration)*, and *Kovacs v. Canada (Citizenship and Immigration)*[148] on the other hand, the court took great pains to review the documentary evidence in the

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[143] In sending the case back for re-determination, the court noted that the applicant had a grade 6 education, was hardly literate, filled out his PIF in French with the help of an interpreter over the phone, and that he expressly stated at his hearing that: "…he was afraid that if he said or wrote negative comments about the State of Hungary, Canada would send him back to Hungary, and that if his country found out what he had said, the situation would be even worse than before: 'they will bring us at home. . . . and after, if I come back, they will punish me because I accuse Hungary' [Citation omitted.]" See: Mohacsi, *ibid.* at para 28.

[144] See: *Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)*, [1998] F.C.J. No. 1425 (T.D.) [*Cepeda-Gutierrez*]; *Javaid v. Canada (Minister of Citizenship & Immigration)*, [1998] F.C.J. No. 1730 (T.D.); *Khawaja v. Canada (Minister of Citizenship & Immigration)*, F.C.J. No. 1213 (T.D.); *Singh v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 963 (F.C.T.D.); *L. (R.K.) v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 162; and Mohacsi, *supra* note 142.

[145] Owusu-Ansah, *supra note 97;* and *Attakora v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 444 (C.A.). See also: Lorne Waldman, *Immigration Law Practice*, (Toronto: Lexis Nexis Canada, 1 January 2005 (with recent updates), at 8.59 [Waldman].

[146] *Gaymes v. Canada (Citizenship and Immigration)*, 2010 FC 801, [Gaymes]. This case was part of the empirical study.

[147] The Court notes that: "[t]he Applicant's testimony was coherent and she did not have any memory problems. Moreover, the Applicant never relied on her medical condition to explain why she waited 15 months before leaving St-Vincent, why she waited two months after her arrival in Canada before claiming asylum and why she did not mention the incident at the point of entry. She gave straightforward explanations: she waited 15 months before leaving because that is the time that it took her to save the money she needed to buy a plane ticket; she did not mention the rape at the point of entry because 'she was not ready to talk about it because it was still fresh in her memory'; and she waited two months before claiming asylum because she did not know about the refugee process. The Board considered the Applicant's evidence, including her medical condition, and concluded that the alleged incident had not been proven." Gaymes, *ibid.* at para 24.

[148] *Kovacs v. Canada (Citizenship and Immigration)*, 2010 FC 1003 [Kovacs]; and *Bors v. Canada (Citizenship and Immigration)*, 2010 FC 1004 [Bors]. Whereas the former was contained within the empirical study, the latter was not.

decisions and referenced the precarious relationship of trust between the applicant's particular social group (namely, Roma persons from Hungary) and state authorities. Citing paragraph 198 of the UNHCR Handbook, the court went on to outline how important the distrust of authorities can be, and used the passage to inform the analysis on state protection.[149]

Although the analysis will vary according to the circumstances of each case, it is important that decision makers turn their minds to the possibility that an applicant's experiences and background may lead to an apprehension towards governing authorities. This may affect her interactions with relevant government agents in Canada or her testimony before the Board. Sensitivity to this consideration may also offer insight into other elements of an applicant's claim (as was the case in *Kovacs* and *Bors*).

c.) Deference Owed to Finders of Fact

The fact that the Federal Court agreed with the underlying application's credibility analysis so often in the empirical analysis (64% of the time to be specific), reflects the general approach of reviewing courts. Namely, determinations of credibility are best left to first level decision makers who have the benefit of questioning the claimant and gathering evidence first hand. The Federal Court of Appeal made this clear in the case of *Aguebor v. Canada (Minister of Employment and Immigration)*:

> 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? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. [Emphasis added.][150]

Canadian jurisprudence has repeatedly stated that it is not their role to review the evidence at judicial review or to substitute their opinion for that of the Board.[151] The dicta of the Federal Court of Appeal warrants reproduction, for emphasis on this point:

> It is unfortunate that the [Federal Court] Judge did not address the primary finding of the Board regarding the lack of credibility of the respondent. Had he done that, it might not have been necessary for him to address the alternative and secondary ground on which the Board rested its decision. The litigation would have ended there and scarce judicial resources would have been

[149] Or more specifically, the claimants' unwillingness to seek state protection. In its decision, the court states: "…[a]s discussed above, the documentary evidence shows how precarious the relationship of trust is between the police authorities and the Romani communities. As explained in the Handbook, fear of authorities may cause a lack of faith in the state apparatus as a result of past experiences that affected the individuals concerned. [Citation omitted.]" See: Bors *ibid.* at para 68 and Kovacs *ibid.* at para 71.

[150] *Aguebor v. Canada (Minister of Employment and Immigration)*, (1993) 160 N.R. 315, at pgs. 316-317 [Aguebor].

[151] "When…a tribunal's impugned finding relates to the credibility of a witness, the Court will be reluctant to interfere with that finding, given the tribunal's opportunity and ability to assess the witness, her demeanour, frankness, readiness to answer, coherence and consistency, in oral testimony before it." *Sommariva v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 25 (F.C.T.D.), at 27. See also: Aguebor, *ibid.*; and *Abdurahaman v. Canada (Minister of Employment and Immigration)* (1983), 50 N.R. 315 (F.C.A.). Several other examples exist in the jurisprudence to support this approach.

> spared…. In view of the substantial deference required to be given to credibility findings, the Judge should have dealt with this issue first. [Emphasis added.][152]

Indeed, in canvassing recent jurisprudence it is often the case that a credibility finding is determinative of the outcome, such that other issues raised in the appeal, never are or have to be dealt with.[153] The court regularly extends a high level of deference to first level decision makers on matters of credibility.[154]

Generally, at the judicial review stage, matters implicating credibility are reviewed on a standard of reasonableness, which is:

> …concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[155]

Thus, so long as determinations of a refugee's credibility fall within a range of acceptable outcomes with appropriate reasoning provided in the decision, the courts will generally not endeavour to overturn the first level decision maker's determination.[156]

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[152] It should be noted however, that in that case, state protection was identified as a subsidiary ground in the RPD decision with credibility being the main factor. See: *Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, at paras 14-15 [Flores Carrillo].

[153] See for example: *Lopez Alfaro v. Canada (Citizenship and Immigration)*, 2011 FC 894; *Audanna Nanton v. Canada (Citizenship and Immigration)*, 2011 FC 266 (CanLII); and *Miranda Ramos v. Canada (Citizenship and Immigration)*, 2011 FC 298 (CanLII).

[154] To cite but two examples, the court in *Perez v. Canada (Citizenship and Immigration)* held that while the Board may have misunderstood the evidence and the claimant's explanations, the Board's finding was not unreasonable since "…[the] Board is in the best position to assess the explanations provided by the applicant with respect to the perceived inconsistencies and it is not up to the Court to substitute its judgment for the findings of fact drawn by the Board." In the case of *Lin v. Canada (Citizenship and Immigration)*, the court rejected the applicant's argument that he provided a sufficient explanation to the inconsistencies in his evidence, holding that "[t]he RPD may make decisions about an Applicant's credibility based on inconsistencies in the claimant's story, as well as on inconsistencies between the claimant's story and other evidence before the RPD. The Court must be careful not to substitute its own decision for that of the Tribunal, especially where the decision is based on an assessment of credibility. [Citation omitted.]" Statements such as these are found throughout the Federal Court's jurisprudence and evidences the reluctance of reviewing courts to disturb a credibility determination. Perez *supra* note 131 at para 28; and Lin, *supra* note 131 at para 17.

[155] Dunsmuir, *supra* note 19. See also, accompanying text in footnote 19.

[156] It should be noted that in the more recent case of *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, dated 15 December 2011 (and which post-dates the majority of cases in the empirical study), the Supreme Court appears to give specialized Tribunals even more discretion where the standard of review is "reasonableness." In calling for decisions with "justification, transparency and intelligibility", in the reasonableness standard, the court elaborates that:

> [r]easons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion. In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met. [Citation omitted.]

Certainly, formal courts undertaking judicial review may not be in the best position to make findings on matters of credibility. However, that is not to say that initial determinations on credibility are always right or that mistakes are not made. Credibility determinations are notoriously difficult.[157] In light of the significant deference allotted to first level decision makers, it is thus potentially problematic that 33% of all the cases citing credibility in the empirical study, disagreed with the underlying application's analysis and sent the matter back for re-determination. Albeit, this is not a high rate of remittance compared to some of the other issues examined in the study. Nevertheless, the statistic needs to be appropriately viewed in light of the high threshold of "reasonableness" for overturning first level determinations on credibility.

In this context, it is both important to note and commend the introduction of the Refugee Appeals Division (RAD) within the IRB.[158] As part of its functions, the RAD will be reviewing failed claims on their merits and will thus, provide an invaluable safety check for initial determinations on credibility.[159] It is hoped that with the implementation of RAD, such errors can be avoided or at least, mitigated.

2. <u>State Protection</u>:

It should be recalled that the issue of state protection arose second most often among all cases in the empirical compilation, (as well as among issues where the court agreed and where the court disagreed). Of the 740 cases of interest, the issue arose 238 times overall. The issue was also the most frequently cited amongst Mexican claims and from those countries which may evidence Roma based claims. Figure 18 below offers some additional insight into which countries most frequently raised the issue of state protection at judicial review (during the time period under examination).

The question of how *Newfoundland Nurses* will impact the judicial review of credibility decisions going forward, and its appropriateness, remains outside the scope of this paper. However, it is hoped that reviewing courts (and tribunals), strike an appropriate balance between showing deference to underlying decisions makers' first hand review of the evidence, alongside the important role they play in ensuring that first level decisions makers are adhering to the law and principals of procedural fairness, and that any errors in the underlying analysis are caught. See: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at para 16.

[157] For example, Goodwin-Gill and McAdam note that: "[r]esearch shows that errors in testimony increase dramatically in response to specific questions (25-33% more errors), by comparison with spontaneous testimony given in the form of a free report, which nevertheless can be more time-consuming." For this reason, both Goodwin-Gill and McAdam, as well as the UNHCR promote the use of open ended questions during refugee status determinations. Whereas open ended questions solicit views, opinions, thoughts and feelings (often grounded in personal experiences), closed ended question can be answered with a simple yes or no, or statement of fact. UNHCR recommends the use of alternating open and closed questions during RSD stating: "[t]his will help to reduce tension as the applicant will be able to express him or herself more freely during the interview. It will also help avoid making the applicant feel that you are deliberately pursuing confusing or contradictory points." Proper use of this technique can be invaluable in making a deliberate and skilled assessment of credibility based on well-established scientific evidence and practical considerations in a first level hearing. See: Goodwin-Gill, *supra* note 2, at pg. 550; and RLD 4, *supra* note 75.

[158] The Refugee Appeals Division went into force on 15 December 2012.

[159] Although s.110(2)(c) of IRPA precludes an appeal where the RPD cites a no credible basis determination, such findings need to be explicitly made and are relatively few under Canada's current system. Moreover, where credibility is raised as an issue more generally in refugee decisions, the RAD will have the authority to review the RPD's initial findings, and thus, act as a safety check. See: IRPA, *supra* note 16 at s.110(2)(c).

Figure 18: Top 10 Countries Where the Issue of State Protection Was Raised Overall

No.	*Country*	*Number of Cases*
1.	Mexico	78
2.	St. Vincent and the Grenadines	17
3.	Colombia	14
4.	Albania	13
	Hungary	13
5.	Czech Republic	11
6.	South Korea	8
7.	St. Lucia	6
8.	El Salvador	5
9.	Pakistan	4
	Guyana	4
	Jamaica	4
10.	Jordan	3
	Venezuela	3
	Russia	3
	China	3
	Nigeria	3

Of note, the Federal Court disagreed with the analysis and sent the decision back for redetermination, in 41% of the cases where the issue was raised. As noted above, the fact that cases citing state protection are almost as likely to be remitted for reconsideration as to be upheld would seem to evidence a lack of clarity in the law or how to apply the law by first level decision makers. An examination of the jurisprudence seems to lend weight to these conclusions.

In order to qualify as a refugee, the Convention requires a person to be "…unable or, owing to [his] fear… unwilling to avail himself of the protection of [his] country".[160] Out of this text arises the issue of state protection. Simply stated: is the claimant's country able to provide protection from the feared persecution, and if so, are there reasons one is unable to take advantage of such protection, or reasons linked to one's fear which would justify refusal of such protection?

The issue of state protection has a second, more implicit source as well. Refugee protection is surrogate protection; it is meant to act as a substitute and not as a supplement to national protection.[161] As such, if a state is able to provide protection to its nationals, then in accordance with the principles of state sovereignty, there is no need for the international community to step in and extend protection to another state's nationals.[162] As Professor James C. Hathaway notes:

[160] Refugee Convention, *supra* note 1 at Art. 1(2).

[161] Hathaway, *supra* note 84 at pg. 135.

[162] The question is more complicated in the case of stateless individuals but the two UN Statelessness Conventions fill in any gap that may be found here.

> Insofar as it is established that meaningful national protection is available to the claimant, a fear of persecution cannot be said to exist. This rule derives from the primary status accorded to the municipal relationship between an individual and her state, and the principle that international human rights law is appropriately invoked only when a state will not or cannot comply with its classical duty to defend the interests of its citizenry.[163]

In this respect, the question of state protection is central to the concept of refugee protection, and indeed, to the fact of having a well-founded fear of persecution itself. A person is not a refugee if her state can provide protection against the harm feared. However, where a state is either unable or unwilling to provide protection, it is appropriate to invoke surrogate international protection.
It is important to note these two different sources for the concept of state protection. A proper reflection of these two sources is helpful in wading through the jurisprudence and appreciating its implications in comparing domestic approaches to international norms. Further, it is helpful in understanding how the question of a person's unwillingness or inability to *seek* state protection (as outlined in the Convention), can lead to questions over their state's unwillingness or inability to *provide* protection (as elaborated in the jurisprudence).

a.) Inability vs. Unwillingness to Seek State Protection:

(i.) International Norms & Best Practices:

Paragraphs 98-100 of the UNHCR Handbook, offers some insight on the circumstances which would give rise to a person's "inability" or "unwillingness" to seek protection. It states:

> Being unable to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.
>
> What constitutes a refusal of protection must be determined according to the circumstances of the case. If it appears that the applicant has been denied services (e.g., refusal of a national passport or extension of its validity, or denial of admittance to the home territory) normally accorded to his co-nationals, this may constitute a refusal of protection within the definition.
>
> The term unwilling refers to refugees who refuse to accept the protection of the Government of the country of their nationality. It is qualified by the phrase "owing to such fear". Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country "owing to well-founded fear of persecution". Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee. [Citation omitted; emphasis added.] [164]

[163] Hathaway, *supra* note 84 at pg. 125.
[164] UNHCR Handbook, supra note 89 at paras 98-100.

Thus, inability to seek protection is tied to circumstances beyond the claimant's control, either on account of the situation in their given country of nationality or where protection is refused by the given state itself, (as determined in the circumstances of each case). Unwillingness on the other hand, implies that state protection exists but that a person can justifiably refuse it when the reasons for doing so are grounded in the well-founded fear of persecution.

(ii.) Canadian Jurisprudence:

It is perhaps most appropriate to begin any discussion of the state protection principle under Canadian law with an examination of the Supreme Court of Canada's decision in *(Attorney General) v. Ward*.[165] In rendering its decision, the court examined what the terms "inability" and "unwillingness" mean with respect to the refugee definition. The court specifically referenced paragraphs 98-100 of the Handbook (reproduced above), and concluded that the line distinguishing the two terms had become "blurred." Since a person's inability includes not only physical inability, but situations where effective protection is not simply not forthcoming, the court found that there was little to distinguish inability from unwillingness. In other words, "…ineffective state protection is encompassed within the concept of 'unable' and 'unwilling'."[166]

Thus, the essential question under the reasoning of Canadian law is not so much what justifies a person's inability or unwillingness to seek protection, but what constitutes a state's inability or unwillingness to provide protection.

b.) Inability vs. Unwillingness to Provide Protection:

(i.) International Norms & Best Practices:

The concept of state protection and moreover, what constitutes adequate state protection, is not specifically canvassed in the UNHCR Handbook. UNHCR's *Guidelines on International Protection No. 4* does however, offer some insight in lieu.[167] The Guidelines, "…. complement and update the Handbook and should be read in combination with it."[168] As such, it is quite proper to turn to the Guidelines to

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[165] Hereinafter, "Ward." The case concerned an Irish National who belonged to the INLA. When two hostages he was guarding were ordered executed, Ward relented and set them free. The INLA discovered from the police that an insider helped with the escape. Ward was suspected, confined, tortured, and convicted to death in a "kangaroo court." When he sought help from the police, they arrested him for his involvement in the hostage situation. They also went to check on Ward's family (at his request) and discovered that they had been taken hostage by the INLA, in order to keep him quiet. Having served his time and fearing death, Ward escaped to Canada. See: Ward, *supra* note 92.

[166] The court stated: "I would agree with the court below that 'unable' and 'unwilling' have different meanings, which are fairly apparent on their face… This would, at first sight, seem to be a clear distinction, but as we shall see it has become somewhat blurred…. With respect to 'unable,' it would appear that physical or literal impossibility is one means of triggering the definition, but it is not the only way. Thus ineffective state protection is encompassed within the concept of "unable" and "unwilling", and I am left with the conclusion that the appellant here could have pursued his claim under either category. [Emphasis in original.]" See: Ward, *supra* note 92.

[167] 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 1967 Protocol Relating to the Status of Refugees*, (23 July 2003) HCR/GIP/03/04, available at: <http://www.unhcr.org/refworld/docid/3f2791a44.html> [IFA Guidelines].

[168] In its latest printing of the Handbook, UNHCR has annexed its *Guidelines on International Protection* (numbering 8 in total). This statement was taken out of the preface authored by Volker Turk, which also offers some

clarify any omissions (or ambiguities) in the Handbook. Although Guideline No. 4 was written to clarify the concept of the "Internal Flight or Relocation Alternative" (IFA), the concept of an IFA is a subset of the state protection principle (as outlined and canvassed more thoroughly, below). As such, the Guideline provides valuable insight in the present inquiry. It states:

> Where the claimant fears persecution by a non-State agent of persecution, the main inquiries should include an assessment of ….the protection available to the claimant in that area from State authorities. As with questions involving State protection generally, [this] involves an evaluation of the ability and willingness of the State to protect the claimant from the harm feared. A State may, for instance, have lost effective control over its territory and thus not be able to protect. Laws and mechanisms for the claimant to obtain protection from the State may reflect the State's willingness, but, unless they are given effect in practice, they are not of themselves indicative of the availability of protection. [Emphasis added.][169]

Although these statements are made with specific reference to IFAs, general principles regarding a state's ability to protect its citizens can still be gleaned. A state's *inability* to protect includes, but is not limited to, situations where control of its territory has been lost. A state's *unwillingness* to protect can be evidenced by the lack of laws or mechanisms to procure protection. However, even when such laws and mechanism do exist, they do not evidence the availability of protection unless they "are given effect in practice." Thus, a state's willingness to protect does not always result in actual protection.

Jurisprudence in Canada and around the world, has generally taken one of two approaches to the question of what constitutes effective state protection. First, the "due-diligence approach" outlines "….that refugee status should be denied if the applicant's home state is both able and willing to protect. The focus of concern should be whether the *fear* of being persecuted has ceased to be well-founded as a result of its efforts [Underline added; italics in original]."[170] Second, the "no well-founded fear" approach, "...posits simply that whatever efforts are being made must bring the *risk* of being persecuted below the level of a 'well-founded fear.' [Underline added; italics in original]"[171]

Penelope Matthew, James C. Hathaway and Michelle Foster argue that the "no well-founded fear approach" is more consistent with the aims and spirit of the Convention.

> Because the Refugee Convention is not concerned with formalities but rather with the reality of risk, the only relevant protection is protection that obviates the risk which would otherwise presumptively entitle an individual to surrogate protection. There may still be some degree of

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insight on what the Guidelines are: "[i]n addition to the Handbook and in response to the varying legal interpretations of Article 1 of the 1951 Convention in national jurisdictions, UNHCR has continued to issue legal positions on specific questions of international refugee law. In this connection, UNHCR has gazetted 'Guidelines on International Protection', as envisaged under the Agenda for Protection following the 50th anniversary events in 2001-2002. These Guidelines complement and update the Handbook and should be read in combination with it." Refer to the latest re-print in hard copy: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva: UNHCR, December 2011 re-print), at pgs. 1-2.

[169] IFA Guidelines, *supra* note 167 at para 15.

[170] Penelope Mathew, James C. Hathaway & Michelle Foster, "The Role of State Protection in Refugee Analysis" (2003) 15 Int. J. Ref. Law, at pg. 449 [Mathew et. al.].

[171] Matthew et. al., *ibid.* at pg. 448.

> risk, but it falls below the level of a 'real chance', 'a serious possibility', or a 'reasonable likelihood'.[172]

In contrast, they posit that the due-diligence approach: (i.) is more appropriately employed in examining a state's culpability or liability versus whether international protection is warranted, (ii.) undermines the growing consensus that a state need not be actively or even passively involved in the persecutory acts, and (iii.) tends to focus attention on a state's willingness to protect, while neglecting the question of its ability to protect.[173]

Canadian jurisprudence has generally taken the "due-diligence" path. This approach however, has sometimes come at the expense of a more centrally focused examination of risk to the claimant herself, or a direct inquiry into the practical availability of protection on the ground as required under international norms. The due-diligence approach is generally not favoured by academics, tends to run afoul of the approach promoted by UNHCR, and tends to assign a more restricted application of the refugee definition, which is not in line with the objects and purposes of the Convention (namely, protection from well-founded fear of persecution).[174]

(ii.) Canadian Jurisprudence:

Canadian jurisprudence on the concept of state protection and what qualifies as adequate state protection, is extensive and can be somewhat dizzying.[175] It is appropriate to start with an examination of the Supreme Court's analysis. In the case of *Ward*, the issue of state protection was irrelevant since the country of nationality admitted their inability to provide protection to the claimant. The Supreme Court took note however that:

> [w]here such an admission is not available… clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as

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[172] Matthew et. al., *supra* note 170 at pg. 448.

[173] Matthew et. al., supra note 170 at pgs. 450-453.

[174] In speaking of the approach advocated by UNHCR, both Guideline No. 4 (discussed above), and the *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* (discussed below), should be considered. See: IFA Guidelines, *supra* note 167; and UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, online at: <http://www.unhcr.org/refworld/pdfid/4bb21fa02.pdf> [Guidance on Gangs].

[175] To some extent, this is owing to the weaknesses in the due-diligence approach identified by Mathew, Hathaway and Foster. As outlined in figure 9 above, 41.18% of the cases which raised the issue of state protection, disagreed with the underlying analysis and remitted the matter back for re-determination, evidencing some ambiguity in the jurisprudence itself. For this reason, a more systematic and focused approach has been undertaken to canvass the case law. Each section begins with an examination of the Supreme Court's analysis in *Canada (Attorney General) v. Ward* (which canvassed the issue most thoroughly). This then follows with relevant jurisprudence from the Federal Court of Appeal which was released after *Ward*. Where pre-Ward decisions are canvassed, or the approach of lower level decision makers examined, this is specifically noted. However, in the interests of maintaining efficiency and clarity neither of these bodies of law are canvassed in any great depth. The goal is to offer a more focused examination of the most relevant jurisprudence to compare alongside international norms. See: Matthew et. al., supra note 170.

> that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant. [Emphasis added.][176]

The court went on to acknowledge that although this presumption created an increased burden on the claimant, it was in accordance with the notion of refugee protection as surrogate protection "coming into play where no alternative remains to the claimant."[177]

What constitutes clear and convincing evidence to overcome the presumption of state protection, has been elaborated upon by the Federal Court of Appeal. In the decision of *Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*, the court clarified that the standard of proof applicable to such evidence is not more than a balance of probabilities.[178] Further, the evidence tendered, has to be reliable and probative of the fact that state protection is inadequate.[179] In the case of *Kadenko v. Canada (Minister of Citizenship and Immigration)*, the court clarified that a deficiency in protection had to be institutional in nature to show the lack of state protection; the refusal of certain police officers to take action may not be in and of itself sufficient to rebut the presumption.[180]

Moreover, in *Kadenko* the court went on to say that the evidence required by a claimant to rebut the presumption of protection, directly correlates to the democratic institutions of the given country of origin.

> When the state in question is a democratic state, as in the case at bar, the claimant must do more than simply show that he or she went to see some members of the police force, and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's

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[176] Ward, *supra* note 92.

[177] Ward, *supra* note 92.

[178] This is to be distinguished from the burden of proof in refugee claims more generally which is more than a mere possibility. (See: Chan, *supra* note 92.) The case of *Carrillo* concerned a victim of domestic abuse from Mexico, who, after a particularly brutal beating, filed a police report, left her spouse, and hid at a friend's house. Her spouse discovered the complaint and was able to track her down with the help of his brother, who was a federal judicial police officer. Flores Carrillo, *supra* note 152.

[179] The lower level decision at the Federal Court formulated the evidentiary requirement in a much less stringent way, stating: "[t]he presumption that Justice La Forest had in mind was clearly a legal presumption, not a factual one. There was no underlying fact, proof of which would give rise to the presumption of state protection…. In my view, Justice La Forest contemplated a burden merely to adduce reliable evidence on the point." The Federal Court of Appeal reversed this, stating: "[i]n my respectful view, it is not sufficient that the evidence adduced be reliable. It must have probative value…. [I]t must also have sufficient probative value to meet the applicable standard of proof. The evidence will have sufficient probative value if it convinces the trier of fact that the state protection is inadequate. In other words, a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate." See: Flores Carrillo, *supra* note 152 at para 30; and *Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 320.

[180] "Once it is assumed that the state (Israel in this case) has political and judicial institutions capable of protection its citizens, it is clear that the refusal of certain police officers to take action cannot in itself make the state incapable of doing so. The answer might have been different if the question had related, for example, to the refusal by the police as an institution or to a more or less general refusal by the police force to provide the protection conferred by the country's political and judicial institutions." *Kadenko v. Canada (Minister of Citizenship and Immigration)*, (1996) 143 D.L.R. (4th) 532, at para 3 [Kadenko].

> institutions, the more the claimant must have done to exhaust all the courses of action open to him or her. [Emphasis added.][181]

In effect, the presumption is stronger the more democratic the institutions of the country, and the evidence required to rebut the presumption, will have to be more clear, convincing, reliable and probative, than that required in other non-democratic, or less-democratic states.[182] *Kadenko* has to be read in line with *Ward* however, where the Supreme Court outlined that claimants will have an obligation to actually seek sate protection in certain cases:

> Does the plaintiff first have to seek the protection of the state, when he is claiming under the "unwilling" branch in cases of state inability to protect?
>
> …
>
> Most states would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively. Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.
>
> Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection "might reasonably have been forthcoming", will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state. [Emphasis added.][183]

Thus, the higher burden of proof for claimants coming from democratic countries will often require that they have sought state protection if it was not objectively unreasonable to have done so. Moreover, the efforts undertaken to seek protection may require several attempts, or even, that the applicant has exhausted all available courses of action (to be determined in direct relation to the level of democracy in the given country).

In addition to all these cases, one other at the Federal Court of Appeal warrants mentioning. In *(Minister of Employment and Immigration) v. Villafranca*, the court implied that where a state has full control of its territory and institutions, evidence of its efforts to provide protection may be sufficient to establish the availability of state protection. This is the case even when such efforts are not always successful. More specifically, the court stated that,

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[181] Kadenko, *ibid.* at para 5. The Court reiterated this in *Carrillo* when it stated, "[i]t is more difficult in some cases than others to rebut the presumption. But this in no way alters the standard of proof. In this respect, I fully agree with the finding of the Judge that La Forest J. in *Ward* was referring to the quality of the evidence necessary to rebut the presumption and not to a higher standard of proof." See: Flores Carrillo, *supra* note 152 at para 26.

[182] So much can be said in critiquing the jurisprudential focus on democratic institutions. It is outside the purview of this paper to elaborate on all of them. However, two points bear mentioning in passing particular. First, it bears noting that one of the worst examples of systematically organized persecution in human history, Adolf Hitler's Germany, was the result of a democratically elected government. Many other historical and contemporary examples can also be tendered to refute the court's underlying assumption that democratic states are unlikely to persecute. Second, this approach is insensitive to fact that democracies can function as tyrannies of the majority, even if not explicitly, implicitly (as in the case of cumulative discrimination amounting to persecution for example).

[183] Ward, *supra* note 92.

> …where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection.[184]

It bears noting that *Villafranca* pre-dates *Ward* and there is some question on whether or not its reasoning still applies in light of the Supreme Court's subsequent (and more authoritative) ruling in *Ward*.[185] Nevertheless, the case remains frequently cited.[186] *Villafranca*'s finding that serious efforts to adduce protection may be sufficient to establish protection, when coupled with the subsequent ruling in *Kadenko* that claimants from democratic countries carry a higher burden of proof, creates a particularly difficult barrier of state protection for some claimants to overcome.

Such reasoning underlies Matthew, Hathaway and Foster's criticism of the due diligence approach. Namely, it can unduly focus the analysis on a state's willingness versus ability to provide protection, and that it is more appropriate for examining a state's culpability or liability versus whether international protection is forthcoming for the purposes of the Refugee Convention.[187] The Convention remains concerned with the "well-founded *fear* of persecution," and a proper determination on this point requires more than just an examination of the institutions available to provide protection or the state's efforts to extend protection. It requires an examination into the practical effectiveness of such institutions and efforts.

(iii.) Sample of More Recent Cases at the Federal Court (During the Period Under Analysis):

An examination of the more recent jurisprudence at the Federal Court evidences some of the inherent difficulties and weaknesses of applying a strictly due-diligence approach. Among the many cases examining the issue of state protection at the Federal Court, four have been chosen to evidence the application of the various principles, in different countries, contexts, and by various Judges. It is hoped that they provide a diverse flavour to jurisprudential developments during the period under examination.

In the case of *Rocque v. Canada (Minister of Citizenship & Immigration)*[188] the minor applicant was raped and assaulted by a well-known gang member and drug dealer. A police complaint resulted in charges and arrest however, threats ensued. Although the threats were reported to the police and prosecutor, the family continued to be intimidated. At trial, the applicant refused to give evidence and the case was dismissed. Among its reasons for refusing protection, the Board held that:

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[184] *Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189, [1992] A.C.F. no 1189, 99 D.L.R. (4th) 334, 150 N.R. 232, 18 Imm. L.R. (2d) 130, 37 A.C.W.S. (3d) 1259 [Villafranca].

[185] Waldman, *supra* note 145 at 8.440.

[186] See for example: *Arias v. Canada (Citizenship and Immigration)*, 2011 FC 228, *Cortes Martinez v. Canada (Citizenship and Immigration)*, 2010 FC 1200, and *Lakatos v. Canada (Citizenship and Immigration)*, 2012 FC 1070.

[187] Mathew, Hathaway and Foster point out that "[f]undamentally, 'due-diligence' is a concept best suited to determining whether punishment or penalty is warranted, with no obvious relevance to the prevention inquiry at the heart of refugee status determination. The quite different nature of the two inquiries should not be confused…. [F]or example, an abusive husband, intent on killing his wife, might be punished following her death, does not respond to the question of whether she had a well-founded fear of being persecuted that is counteracted by sufficient state protection." Mathew et. al., *supra* note 170 at 451-452.

[188] *Rocque v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 802 [Rocque]. This case was contained within the empirical sample.

> …Saint-Vincent is a parliamentary democracy with a functioning judiciary. There are very clear laws to protect individuals such as the principal claimant and members of his family against assaults. The protection need not be perfect, and even if the claimants had difficulty with respect to one police authority in one police station, it does not mean that the entire police department nationwide is corrupt. Given that the panel has already determined [there] to be a lack of credibility with respect to the documentation produced and the documentation not produced, it does not believe that the claimants have rebutted, with clear and convincing evidence, an absence of state protection.[189]

Justice Bédard upheld the underlying decision, finding that it applied the correct approach to the state protection analysis. She elaborated that the finding of adequate state protection,

> ….was based on the evidence, among which were included the Saint Vincent and the Grenadines National Documentation Package and the Country Reports on Human Rights Practices for 2008. Having read all the documentary evidence presented to the Board regarding the country conditions, I am of the view that the Board's finding was not unreasonable and that it did not make this finding without regard to the evidence.[190]

However, in focusing on the documentary evidence, the Board and the Federal Court fail to account for the ineffectiveness of protection when the claimants did report to the police. Further, it remains unclear how reporting to other police authorities, may have resulted in more adequate protection. The applicant's initial report did result in arrest after all.

It is interesting to compare this reasoning to that in the case of *Park v. Canada (Citizenship and Immigration)*.[191] The decision concerned a long standing victim of domestic abuse from South Korea who never approached the police. In her testimony, the applicant stated that she did not think protection would be forthcoming, based on the many news reports of abusers killing their spouses. In support of her application, the applicant submitted: (i.) an expert report outlining the availability of protection before and after 1997/98 when domestic violence legislation was passed, (ii.) an NGO's news release outlining 70 domestic violence related deaths, and critiquing of the light sentences imposed, (iii.) a letter from a South Korean domestic violence lawyer, who attested to passive police reactions in the absence of medical or other proof, and (iv.) five affidavits from similarly situated Korean women, whose claims for protection on the grounds of insufficient state protection, had been previously accepted by the Board.[192] The Board dismissed the claim, noting that South Korea was a long standing democracy, and rejected the applicant's evidence in favour of the South Korean National Documentary Package, since "this information is current and is provided by unbiased, independent sources with no vested interest in the outcome of any particular refugee claim."[193]

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[189] Rocque, *ibid.* at para 10.

[190] Rocque, *supra* note 188 at para 19.

[191] *Park v. Canada (Citizenship and Immigration)*, 2011 FC 353 [Park]. This case was contained within the empirical sample.

[192] Park, *ibid.* at para 13.

[193] Park, *supra* note 191 at para 14

Justice Lemieux struck down the decision and ordered a new hearing on account that the Applicant had discharged her evidentiary burden.[194] He found that the Board made serious errors in analyzing the evidence.[195] Whereas the expert report was initially discounted as relying on out-dated data, the court pointed out that the report cited both old and new data to evidence what the situation was like before and after relevant legislation was passed. Further, the 5 affidavits were never considered in the Board's reasons, and this was held to be a material error since they constituted relevant and probative evidence.

Unlike the case of *Rocque*, *Park* offers a more nuanced understanding of state protection and the evidence required to rebut it. Where evidence is tendered which speaks directly to the protection which would be available to the claimant at bar, (be it *viva voce*, expert reports, letters or affidavits), it should be considered relevant and probative in the determination of state protection. While it may still be important to consult objective country of origin information, evidence which speaks to the specific circumstances of the claimant, will be essential in providing a complete picture of the effectiveness of protection available to the specific claimant(s). Both country documentation and personal evidence should be consulted together.

The case of *Barajas v. Canada (Citizenship and Immigration)*[196] offers clear insight from the Federal Court on the importance of looking past strict legal concepts to examine the actual viability of protection for the person concerned. The applicant, a Mexican truck driver, was approached by the Commander of the Judicial Police of Guadalajara to transport illegal drugs. He refused and was threatened with death. After trying to file a police complaint, he was thrown out of the station, subsequently assaulted by police officers (on more than one occasion), held at gunpoint, and specifically told that "he should not have gone to the police."[197] When the applicant tried to file a report at another station elsewhere in Mexico, he was "called a liar and told to leave."[198] In its decision, "[t]he Board noted that Mexico is a democracy with a relatively free and impartial judiciary", and that the applicant had many other recourses available.[199] It held that the serious efforts were being made to address problems of criminality and corruption, and that adequate state protection was available to the claimant.[200]

In his decision, Justice Russell noted that in light of the facts of the case, it was unreasonable for the Board to have expected the claimant to seek redress through other agencies or avenues. His decision offers a clear, succinct and pointed commentary on how an overly technical application of state protection principles, can lead to a situation where the actual risk faced by the claimant is not thoroughly canvassed.

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[194] Park, *supra* note 191 at para 36.

[195] Park, *supra* note 191 at para 36.

[196] *Barajas v. Canada (Citizenship and Immigration)*, 2010 FC 21. This case was not part of the empirical analysis but did fall within the 32 month time period under consideration [Barajas].

[197] Barajas, *ibid.* at para 2.

[198] Barajas, *supra* note 196 at para 3.

[199] "[S]tate and municipal security forces contain more than 500,000 officers [and are]…. hierarchical, which allows for redress to a higher level if anyone is dissatisfied with services. Moreover, a number of authorities exist to assist members of the public who encounter a corrupt official or are otherwise unsatisfied with the security forces. …Mexico had also created laws to address corruption and bribery for convicted officials. The Board noted the existence of the Deputy Attorney General's Officer of Special Investigations into Organized Crime which works closely with the United States to control organized crime in Mexico." See: Barajas, *supra* note 196 at para 9-11.

[200] Barajas, *supra* note 196 at para 12.

> Rather than deal with the immediate threat faced by the Applicant, the Board confined itself to the usual formulations about the presumption of state protection and the fact that Mexico is a democracy. As cases in this Court have shown, Mexico's ability to protect its own citizens is not invariably accepted. Much depends upon the facts and the evidence adduced in each case. In the present case, in my view, the Board did not engage with the primary issue, which was the immediate threat faced by the Applicant. In the face of such an immediate and deadly threat, I do not think that accessing alternative institutions was a reasonable possibility. [Emphasis added.][201]

As pointed out by Justice Russell, a state protection analysis will often be fact driven. Legal concepts should assist in focusing the analysis to the relevant facts evidencing a well-founded fear of persecution. They should not detract from this central component of the Convention definition.

Justice O'Keef's statements in another recent case, also offers a concise critique. In *Kadah v. Canada (Citizenship and Immigration)*,[202] the applicant was a gay Muslim of Arab ethnicity and Israeli citizenship, who detailed incidents of assault, harassment, attempted rape, and other instances of being targeted on account of his sexual orientation. The applicant approached the police once after being assaulted, and was told "to shut up and sleep."[203] He stated that he did not feel safe going to the police. The Board held that "one incident of mistreatment by the police was [an] insufficient reason to refuse to seek protection from the authorities," and cited serious efforts being made by Israel to address the discrimination against Arabs.[204] In remitting the determination back for a new hearing, the court noted:

> …democracy alone does not ensure adequate state protection and the Board must consider the quality of the institutions providing that protection…. [T]he Board is also required to 'address the practical adequacy of state protection when a threat to the life or safety of a refugee applicant is accepted'. This includes reviewing evidence of operational inadequacies of state protection and of similarly situated individuals who have been unable to access state protection. [Citations omitted.]

This analysis is very much in keeping with international norms espoused by UNHCR: unless a state's efforts are given effect in practice, they will not be indicative of the availability of state protection. This requires a proper canvassing of all the available evidence. Absent an assessment of the actual effectiveness of state protection, it is difficult to properly address whether a person would be subject to persecution (as required under the Refugee Convention).

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[201] Barajas, *supra* note 196 at para 68. See also: *Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 (CanLII), 2008 FC 491, [2008] F.C.J. No. 625.

[202] *Kadah v. Canada (Citizenship and Immigration)*, 2010 FC 1223 [Kadah]. This case was contained within the empirical sample.

[203] Kadah, *ibid.* at para 10.

[204] Kadah, *supra* note 202 at paras 16-17.

c.) State Protection & Organized Gangs

(i.) International Norms & Best Practices:

The issue of state protection is most relevant in cases where non-state actors are the agents of persecution.[205] Indeed, "[a]ctive persecution by the state is the very reverse of protection."[206] When the persecutor is a non-state agent however, the question of state protection becomes relevant. Such non-state actors can include: guerrilla, paramilitary or other revolutionary factions, perpetrators of spousal or familial abuse, criminal elements such as gangs or mafias, or stated more broadly, "sections of the population that do not respect the standards established by the laws of the country concerned."[207]

Of all these actors, the case of organized gangs warrants particular examination. UNHCR has noted the growing prevalence of gang related claims of persecution in Canada and elsewhere in the world:

> As organized gangs have become increasingly common in various parts of the world, asylum claims connected with their activities have multiplied in regions as far apart as Europe and Central America. During recent years, an increasing number of claims have been made especially in Canada, Mexico, and the United States of America, notably by young people from Central America who fear persecution at the hands of violent gangs in their countries of origin. [Citation omitted.][208]

The data in the empirical compilation would seem to reinforce this. Of the 238 times that the issue was raised, 108 cases concerned Central American countries and Mexico.[209] This means that roughly 43% of all cases which examined the issue of state protection, did so in the context of countries which are known to have high rates of gang related claims. Thus, it seems that a growing body of jurisprudence on state protection at the Federal Court, relates to gang violence.

UNHCR has studied this trend and provides valuable insight on handling such cases. In its *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, the organization clarified how lack of state protection can manifest itself in relation to gang violence:

> After determining whether the harm feared can be considered persecution in the sense of the 1951 Convention, it is necessary to establish whether the State is *unwilling* or *unable* to provide protection to victims of gang-related violence. The authorities may be unwilling to protect a particular individual, for instance, because of their own financial interest in the gang activities or because they consider the person associated with or targeted by the gangs unworthy of

[205] I say "most" often since the involvement of a state in the persecutory acts in question, is not always black and white. Certainly, a state can be complicit in varying shades of grey.

[206] *Horvath v. Secretary of State for the Home Department*, [2000] H.L.J. No. 28 at para 63.

[207] UNHCR Handbook, *supra* note 89 at para 65.

[208] Guidance on Gangs, *supra* note 174 at para 2.

[209] Specifically, 78 instances for Mexico, 14 for Colombia, 5 for El Salvador, 2 for Guatemala, and 1 each for Uruguay, Ecuador, and Honduras. It is impossible to tell whether all these claims implicate gang violence without pulling them individually, however absent such an exercise, this grouping of countries offers some insight on the prevalence of gang related claims.

> protection. The State could prove unable to provide effective protection, especially when certain gangs, such as the Maras, yield considerable power and capacity to evade law enforcement or when the corruption is pervasive.
>
> The State may in certain circumstances be considered the agent of persecution in gang-related claims. This may be the case, for instance, where individual State agents collaborate with gang members or direct gangs to engage in violence and other criminal activities while acting outside the scope of their official duties or as part of unlawful measures to combat gang-related violence. A State's responsibility is engaged where groups or individuals, even if formally separated from the government structures, act at the instigation, or with the consent of, the government. [Citations omitted; italics in original; emphasis added.][210]

Thus, both a state's willingness and ability to provide protection should be examined, and the analysis should be alert to circumstances where the state or its agents are either direct or indirect collaborators.

The Guidance Note also offers practical insight on how to assess the availability of state protection in gang related cases:

> An assessment of the availability of State protection will require detailed and reliable country of origin information, including information about existing programmes, to address the gang phenomenon and their effectiveness. As with all other elements of refugee status determination, it is important to analyse the individual circumstances of each case. A State is not expected to guarantee the highest possible standard of protection to all its citizens all the time, but protection needs to be real and effective. [Citation omitted.][211]

In other words, both documentary evidence which highlights programs and their effectiveness, along with the individual circumstances of each case, should be accounted for in making a state protection finding.

(ii.) Canadian Jurisprudence:

Although all of the jurisprudence at the Supreme Court and the Federal Court of Appeal (as outlined above) applies in the case of gang-related claims, two principles seem most pertinent in the court's analyses of gang related claims. First, is the finding in *Ward* that an asylum seeker is obliged to actually seek protection where it is objectively unreasonable not to.[212] Second, is the finding in *Kadenko* that claimants from democratic countries have a higher evidentiary burden.[213] As outlined above, these two propositions often require that an applicant make several attempts to avail herself of state protection. Two recent cases from the period under examination, are canvassed below as examples of best practices at the Federal Court. Both apply the content of UNHCR's technical and practical guidance for gang related claims.

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[210] Guidance on Gangs, *supra* note 174 at paras 25-26.
[211] Guidance on Gangs, *supra* note 174 at para 27.
[212] Ward, *supra* note 92. Refer above to page 49-50 for a discussion on this point
[213] Kadenko, *supra* note 180. Refer above for a discussion on this point

First, is the case of *Valencia v. Canada (Citizenship and Immigration)*.[214] In said case, the principal applicant's brother-in-law, who was a police officer, had been murdered after repeatedly refusing to cooperate with the Los Zetas gang and in spite of his attempt to escape their influence by transferring to another district. The applicant reported the murder to the police but was ignored. She started to get death threats and was the victim of an attempted kidnapping. She did not report the kidnapping incident to the police, believing that they would not take action. In refusing the application on the grounds of state protection, the Board referenced two country of origin documents and stated that alternate recourses were available to the claimant and that Mexico was making serious efforts to address the issue of police corruption.

Justice Mandamin overturned the decision and ordered a new hearing. He pointed out that whereas the Board cited a 2007 article evidencing the availability of state protection vis-à-vis the Agendcia Federal de Investigaciones (AFI), a more recent article from 2010 outlined that by the time of the RPD hearing, the agency was in the midst of "dissolution."[215]

> It is clear to me that the RPD misinterpreted the country documents it relied upon in its state protection analysis [and] in its IFA analysis. The very country documents cited by the RPD support the Applicants' fears rather than the RPD's assurances of the availability of state protection.[216]

As directed by UNHCR's Guidance Note, a proper assessment of state protection requires a careful review of the available documentary evidence. Such evidence should be reliable, timely and indicate not only information about existing programs and policies, but their ultimate effectiveness. The analysis of Justice Mandamin in *Valencia*, is in line with these international norms.

The second case is interesting to compare to *Valencia*. In *Lezama v. Canada (Citizenship and Immigration)*,[217] the principal applicant discovered that one of the suppliers in his wholesale fruit and vegetable business, was trafficking drugs. When the applicant confronted the supplier, the trafficking activities were confirmed, along with the police's knowledge of the activities. The applicant was invited to join the operations. He refused, and was subsequently threatened, assaulted, followed to another city, and had his truck set on fire. Among the reasons for refusal, the Board stated:

> While criminality and corruption continue to be problems in Mexico I am not persuaded, on a balance of probabilities, that the state is not willing or able to provide adequate, although not perfect protection. The claimants did not make effort [*sic*] to exhaust reasonably available recourse to state protection when that protection is likely to have been forthcoming.[218]

Justice Russell upheld the decision, noting that:

> Mexico is a particularly difficult country to assess. Much depends upon the specifics of each case and the evidence cited. However, I cannot say that the RPD's conclusions in this instance were

[214] *Valencia v. Canada (Citizenship and Immigration)*, 2011 FC 939 [Valencia]. This case was contained within the empirical sample.

[215] Valencia, *ibid.* at para 45.

[216] Valencia, *supra* note 214 at para 46.

[217] *Lezama v. Canada (Citizenship and Immigration)*, 2011 FC 986 [Lezama]. This case was contained within the empirical sample.

[218] Lezama, *ibid.* at para 68.

> reached without a review of the necessary context and of what Mexico is actually doing or that the RPD's conclusions fall outside of the *Dunsmuir* range.[219]

In light of the Board's extensive review of the documentary evidence, and the facts and circumstances in the case at bar, Justice Russell felt that the decision was not unreasonable and should stand. In addition to canvassing the country of origin information, the underlying decision examined allegations of police complicity and found that the supplier did not have "the kind of connections that would justify the Applicants not approaching the police."[220]

Although the ultimate decision in *Lezama* was the opposite of that in *Valencia*, both serve as good examples for incorporating international norms. The Federal Court focused on the Board's consideration of the most pertinent, relevant, and up to date country of origin information, and the specific facts and circumstances of the particular case. Further, both decisions canvass the potential involvement of the police, and the implications of that involvement in the claimant's decision (or the court's requirement) to seek state protection.

3. <u>Internal Flight Alternative (IFA)</u>:

In the empirical compilation, internal flight alternative (IFA) was the third most popular issue in the consolidated listing of all case. Of the 740 cases of interest, the issue was raised 100 times. Where the issue was raised, the court disagreed with the underlying analysis and sent the matter back for re-determination 29% of the time. The issue still ranked third however, in the listing of all issues where the Federal Court disagreed with the underlying decision's analysis. This was also the case among issues where the Federal Court agreed. Figure 19 below, provides a breakdown for the top 5 nationalities within the empirical sample, where the issue of IFA arose.

Figure 19: Top 5 Countries Where the Issue of Internal Flight Alternative (IFA) Was Raised Overall

No.	*Country*	*Number of Cases*
1.	Mexico	36
2.	Colombia	13
3.	Nigeria	10
4.	India	7
5.	Sri Lanka	5
	Pakistan	5

An internal flight alternative can be understood as "…a specific area of the county where there is no risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the

[219] Lezama, *supra* note 217 at paras 69-70.

[220] Of note, Justice Russell takes great pains in *Lezama* to outline jurisprudential developments on cases involving gang violence in Mexico. He concludes with sound insight and advice: "<u>I think the jurisprudence in this Court concerning the availability of state protection in Mexico ultimately boils down to the specific facts and the treatment of the available evidence in each case</u>. As Justice Phelan said in C.J.H., above, it 'depends on the facts in each case whether [the presumption of state protection] is rebutted in respect of that individual or group or in respect of the offending actions alleged.' <u>As long as the RPD addresses the full context, the Court will be reluctant to interfere</u>. [Emphasis added.]" See: Lezama, *supra* note 217 at paras 74 and 96.

individual could reasonably be expected to establish him/herself and live a normal life."[221] As noted by UNHCR: "[t]he concept of an internal flight or relocation alternative is not a stand-alone principle of refugee law, nor is it an independent test in the determination of refugee status."[222] In other words, the source of the IFA principle cannot be succinctly and clearly pinpointed within the definition per say.[223] Notwithstanding, since refugee protection serves as surrogate protection, it follows that international safeguards need not be invoked if an individual has access to meaningful safety within the borders of her state. The UNHCR Handbook does however, caution against the liberal application of IFA-style logic:

> The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so. [Italics in original; emphasis added.][224]

While Professor Hathaway points out that the intent of this text was to "deter states from excluding persons from refugee status 'merely' because they could have sought internal refuge…," the text does imply that persons may be justifiably excluded from protection where a "reasonable" alternative exists. [225]

a.) General Norm & Procedural Standard for IFA Examinations

(i.) International Norms & Best Practices:

UNHCR's issuance of International Guidelines on the IFA principle, offers valuable direction on how the principle should be applied in accordance with international norms.[226] As a starting point, it establishes that:

> International law does not require threatened individuals to exhaust all options within their own country first before seeking asylum; that is, it does not consider asylum to be the last resort. The concept of [an] internal flight or relocation alternative should therefore not be invoked in a manner that would undermine important human rights tenets underlying the international protection regime, namely the right to leave one's country, the right to seek asylum and protection against *refoulement*. [Emphasis added.][227]

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[221] IFA Guidelines, supra note 167 at para 6.

[222] IFA Guidelines, supra note 167 at para 2.

[223] In fact, some states have grounded it in the "well-founded fear" clause and others in the protection clause (the "unwilling… or unable… to avail himself of protection" clause). See IFA Guidelines, supra note 167, at para 3; and James C. Hathaway and Michelle Foster, "International protection/relocation/flight alternative as an aspect of refugee status determination," in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Cambridge: Cambridge University Press, 2003), at pg. 365 [UNHCR Global Consultations].

[224] UNHCR Handbook, *supra* note 89 at para 91.

[225] UNHCR Global Consultations, *supra* note 223 at pgs. 361-362.

[226] IFA Guidelines, supra note 167.

[227] IFA Guidelines, supra note 167 at para 4.

Moreover, where an IFA is invoked, the Guidelines are clear on the procedural standards which should inform the analysis:

> The 1951 Convention does not require or even suggest that the fear of being persecuted need always extend to the *whole* territory of the refugee's country of origin. The concept of an internal flight or relocation alternative therefore refers to a specific area of the country where there is no risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him/herself and live a normal life. Consequently, <u>if internal flight or relocation is to be considered in the context of refugee status determination, a particular area must be identified and the claimant provided with an adequate opportunity to respond</u>. [Citations omitted; emphasis added.][228]

Thus, the basic tenants of an IFA analysis under international norms includes: the principle that one need not have actually sought out the IFA prior to taking refuge in another country, that it is incumbent on the decision maker to identify the particular area of an IFA, and that the claimant should be provided with an adequate opportunity to respond.

(ii.) <u>Canadian Jurisprudence</u>:

Canadian Jurisprudence maintains all three of these standards and strives to enforce transgressions against lower level decision makers. First, the Federal Court has affirmed that an applicant does not have to actually live or travel to the IFA identified, in order to negate its existence. Two cases within the sample reinforce this. In *Lugo v. Canada (Minister of Citizenship and Immigration)*[229] the underlying decision maker stated:

> 'I am of the view that the claimants had an obligation to at least try to find a safe haven in their own country before abandoning it altogether and unless it were patently unreasonable for them to do so, their failure to at least try will be fatal to their claims.'[230]

This reasoning was identified as a reviewable error by the Federal Court. In rendering its decision, the court stated:

> The Board must not only state the correct test but it must also apply the correct test. Adding an additional requirement in the application of the test will cause the Board to run afoul of the reasonableness standard. Adding the requirement that the applicants must have tried living in another, safer region of the country demonstrates a misunderstanding of the legal test for an IFA. As noted above, this was an error.[231]

Similarly, in the case of *Ramirez Martinez v. Canada (Citizenship and Immigration)*,[232] the court cast doubt on the IRB's correct understanding and application of the IFA requirements. Although the decision

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[228] IFA Guidelines, supra note 167 at para 6.

[229] *Lugo v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 170 (F.C.), at para 32 [Lugo]. This case was contained in the empirical sample.

[230] Lugo, *ibid.* at para 32.

[231] Lugo, *supra* note 229 at para 36.

[232] *Ramirez Martinez v. Canada (Citizenship and Immigration)*, 2010 FC 600 [Ramirez Martinez]. This case was contained in the empirical sample.

indicated in some parts that the applicant had no obligation to test the IFA before coming to Canada, certain parts of the decision imposed this requirement. The court reproduced the problematic portions of the decision as follows:

> The following statements in the decision reflect a misapplication of the IFA test:
>
> > I am of the view that the claimants had an obligation to at least try to find a safe haven in their own country before abandoning it altogether and unless it were patently unreasonable for them to do so, their failure to try will be fatal to their claims.
> >
> > I find that the claimants clearly had an obligation to relocate, in this case to Mexico City, and if in the chance they were to have problems with Mr. Ybarra or anyone else, to approach the state before seeking Canada's protection.
> >
> > I find that the claimants had the onus to move to an IFA, in this case specifically in Mexico City, before leaving the country. The claimants have not discharged their responsibility of showing that the risk of harm they fear would be faced in every part of Mexico pursuant to section 97(1)(b) of the IRPA. [Emphasis in original.][233]

In both cases, the IRB's requirement that the claimant actually have sought out the IFA prior to seeking refuge in Canada, was identified as a reviewable error and both matters remitted for reconsideration.

It may be that this overzealousness to apply the IFA principle and incorrectly inquire whether or not it was actually sought, represents a conflation of the state protection principle with that of the IFA, by first level decision makers. Whereas Canadian law may require that an applicant have sought state protection in certain instances, this is not the case for an IFA. To some extent this difference lies in the varying sources for the state protection versus IFA principles. While the refugee definition requires that a person be unwilling or unable to avail herself of state protection, no equivalent requirement exists within the definition to seek out applicable IFAs. Moreover, as noted in the IFA Guidelines themselves, "[international law] does not consider asylum to be the last resort."[234] It may be worthwhile to revisit this distinction with first level decision makers. Although it would seem to make sense to ground the IFA analysis within the context of the state protection analysis, they are distinct concepts and derive legal authority under international norms very differently.

Second, the Federal Court of Appeal has affirmed that where an IFA is at issue, it is incumbent on the Board and not the claimant to specifically identify it, and provide her with an opportunity to respond:

> …a claimant is not to be expected to raise the question of an IFA nor is an allegation that none exists simply to be inferred from the claim itself. The question must be expressly raised at the hearing by the refugee hearing officer or the Board and the claimant afforded the opportunity to address it with evidence and argument.[235]

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[233] Ramirez Martinez, *ibid*.

[234] IFA Guidelines, supra note 167 at para 4.

[235] *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 1256 (C.A.), at para 9 [Rasaratnam].

The Federal Court of Appeal further elaborated (in a subsequent case), that an opportunity to respond means an applicant needs to be given sufficient notice so that she has an adequate opportunity to prepare a response.[236] In addition to this, it is incumbent the Board has to take steps to identify a specific geographic location where the IFA exists, (rather than a general area).[237] Whereas lower level decisions at the Federal Court seem to indicate that the notice requirement is fulfilled when the specific IFA is identified at the hearing itself,[238] the purpose of this notice period should always be the central consideration: did the applicant have an adequate opportunity to prepare a response?[239] As such, first level decision makers and the courts should probe to get at the heart of this central consideration. Was the concept of an IFA explained to the claimant? Were potential IFAs canvassed with the claimant? Is the applicant and/or her counsel prepared to speak to the issue?

Cases pulled for the empirical compilation reinforce this trend and seem to push it further. For example, in *Singh v. Canada (Citizenship and Immigration)*[240] the court held that questioning the claimant on the availability of refuge in Mumbai, at the hearing was sufficient notice.[241] However, in the case of *Ay v. Canada (Citizenship and Immigration)*,[242] the court found that there were many ambiguities during the hearing on whether an IFA was at issue. The court ultimately held that sufficient and clear notice was not given and that the issue was not clearly addressed.[243] To reiterate however, since the claimant does not bear the onus of raising an IFA and since basic notions of procedural fairness includes knowing the case to be met, where the notice period of an IFA is at issue, both underlying decision makers and reviewing courts should turn their minds to ask whether the applicant had an adequate opportunity to prepare a

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[236] "[T]here is an onus on the Minister and the Board to warn the claimant if an IFA is going to be raised. 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. The purpose of this notice is, in turn, to allow a person to prepare an adequate response to that case. This right to notice of the case against the claimant is acutely important where the claimant may be called upon to provide evidence to show that no valid IFA exists in response to an allegation by the Minister. Therefore, neither the Minister nor the Refugee Division may spring the allegation of an IFA upon a complainant without notice that an IFA will be in issue at the hearing." See: *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 [Thirunavukkarasu].

[237] See for example: *Rabbani v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 47, 125 F.T.R. 141 (F.C.T.D.); and *Valdez Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 387.

[238] In *Kaler v. Canada (Minister of Employment and Immigration*), the Federal Court interpreted the reasoning in *Thirunavukkarasu* to imply that when notice was waived at the hearing and counsel was fully capable and did address the IFA at issue, the claimant could not subsequently rely on the lack of prior notice at the hearing. See: *Kaler v. Canada (Minister of Employment and Immigration*, (1994) 73 F.T.R. 217. See also: Thirunavukkarasu, *supra* note 236.

[239] "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. The purpose of this notice is, in turn, to allow a person to prepare an adequate response to that case. This right to notice of the case against the claimant is acutely important where the claimant may be called upon to provide evidence to show that no valid IFA exists in response to an allegation by the Minister. Therefore, neither the Minister nor the Refugee Division may spring the allegation of an IFA upon a complainant without notice that an IFA will be in issue at the hearing. [Citation omitted.]" See: Thirunavukkarasu, supra note 236.

[240] *Singh v. Canada (Citizenship and Immigration)*, 2010 FC 58, at para 13 [Singh]. This case was contained in the empirical sample.

[241] Singh *ibid.* at para 13.

[242] *Ay v. Canada (Citizenship and Immigration)*, 2010 FC 671 [Ay].

[243] Ay, *ibid.* at para 46.

response. The inquiry should not unduly focus on the clarity of the decision maker in raising the issue, at the risk of examining the claimant's opportunity to prepare a response.

With respect to identifying a specific IFA, none of the cases pulled for the empirical analysis cited the lack of such identification as an issue. The case of *Navarro Linares v. Canada (Citizenship and Immigration)*, which falls within the time period of interest however, may offer some insight.[244] The applicant argued that the Board did not identify a specific enough IFA in holding that he had an IFA "…in an area away from San Juanico, Michoacán [and] … areas around Elias' farm."[245] The Federal Court disagreed. It noted that the decision stated that "…the claimant has a viable Internal Flight Alternative in at least one or more of the areas canvassed in the evidence, and almost certainly a number of other areas in Mexico away from Michoachan as well."[246] Since the applicant was specifically questioned about IFAs in Monterrey, the Yucatán, and Mexico City, and the underlying decision referenced the "areas canvassed in the evidence," the Court held that specific locations were identified.[247] If the reasons for identifying the specific IFA is to allow the claimant an opportunity to adequately respond, and if specific IFAs were put to the claimant at the hearing (or before) and both he and his counsel were prepared to address the IFAs at the hearing, then this reasoning is sound. Outlining the specific IFA in the decision itself, bears little relevance to a claimant's right to prepare an adequate response, since the claimant cannot really respond to a decision.[248] The more relevant consideration is whether the IFA was put to the claimant prior to rending the decision itself.

b.) Two Pronged Test for Establishing an IFA:

(i.) <u>International Norms & Best Practices</u>:

The IFA Guidelines outline a two-step analysis for assessing whether a viable IFA exists (or not) in the circumstances of the case at issue.[249] The first is the *relevance analysis*: does the concept of an IFA apply in the circumstances of the case? The second is the *reasonable analysis*: if the IFA does apply, is it reasonable to expect the claimant to avail herself of it? The assessment is forward looking: "…taking into account not only the circumstances that gave rise to the persecution feared, and that prompted flight from the original areas, but also whether the proposed areas provide a meaningful alternative in the future."[250]

(ii.) <u>Canadian Jurisprudence</u>:

The test put forward by the Federal Court of Appeal to perform IFA analyses seems to follow the basic steps outlined in the IFA Guidelines. In *Rasaratnam v. Canada (Minister of E*mployment and Immigration), the court noted that first, "the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists," and that second, "conditions in that part of the country must be such that it would not be

[244] *Navarro Linares v. Canada (Citizenship and Immigration)*, 2010 FC 1250 [Navarro Linares].
[245] Navarro Linares, *ibid.* at para 10.
[246] Navarro Linares, *supra* note 244 at para 39.
[247] Navarro Linares, *supra* note 244 at para 40.
[248] The importance of providing adequate reasons however, may not be accounted for in this reasoning. The issue of adequacy of reasons was not raised in the decision.
[249] IFA Guidelines, supra note 167 at para 7.
[250] IFA Guidelines, supra note 167 at para 8.

unreasonable, in all the circumstances, for the claimant to seek refuge there."[251] It is useful to examine each prong of the test individually, alongside the direction contained in the IFA Guidelines.

c.) The Relevance Analysis:

(i.) International Norms & Best Practices:

The Guidelines compel first level decision makers to examine four main questions, in determining whether an IFA is relevant to the case at hand. Namely:

a) *Is the area of relocation practically, safely, and legally accessible to the individual?* If any of these conditions is not met, consideration of an alternative location within the country would not be relevant.

b) *Is the agent of persecution the State?* National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available.

c) *Is the agent of persecution a non-State agent?* Where there is a risk that the non-State actor will persecute the claimant in the proposed area, then the area will not be an internal flight or relocation alternative. This finding will depend on a determination of whether the persecutor is likely to pursue the claimant to the area and whether State protection from the harm feared is available there.

d) Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation? This would include the original or any new form of persecution or other serious harm in the area of relocation. [Italics in original.][252]

These 4 inquiries should form the basis of the relevance analysis.

(ii.) Canadian Jurisprudence:

(1.) Is the area of relocation practically, safely, and legally accessible to the individual?

With regards to the first inquiry regarding whether or not relocation would be practically, safely, or legally accessible, it is interesting to note that although Canadian jurisprudence mandates the examination of such considerations, there is some ambiguity on whether this is done in the first or second rung of the test (regarding the relevance or reasonableness of the IFA, respectively).[253] While subtle, it is an important distinction. It is proposed that these considerations should be made under the first prong of the test. If an area is practically, safely and/or legally inaccessible, it makes more sense to question whether the area

[251] Rasaratnam, *supra* note 235 at paras 4 and 6-7. The court agreed with the phrasing of the second prong as proposed by the Applicant, but required that there be a threat of persecution (versus the enjoyment of "basic and fundamental human rights").

[252] IFA Guidelines, supra note 167 at para 7.

[253] See for example the reasoning of the Federal Court of Appeal in the case of *Thirunavukkarasu* where it said, "[a]n IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable." Thirunavukkarasu, supra note 236.

warrants consideration at all, not whether it is reasonable to expect a person to travel there to seek refuge.[254] Accordingly, the case law will be canvassed here under the first prong of the test.[255]

The inability to physically or safely access an IFA, will negate its applicability to the case at bar. As stated by the Federal Court of appeal in *Ranganathan*, "[it is] not reasonable to require the claimant to risk life or safety to reach the IFA."[256] Any barriers to accessing the IFA "…should be reasonably surmountable."[257] Although the legal accessibility of an IFA has not been explicitly dealt with by the Federal Court of Appeal, the Federal Court has held that the failure of the IRB to consider that an expensive special permit was required to live in the IFA (outside the economic capacity of the claimants), constituted a reviewable error.[258]

Cases examining the practical, safe or legal accessibility of IFAs over the 32 month period under study were relatively few.[259] The case of *Muhammed v. Canada (Citizenship and Immigration)* offers some insight however.[260] The applicant, a Tamil Muslim, feared persecution against a former employee he fired who, as a Sinhalese national, took exception to the applicant's efforts to expand the local Mosque, in addition to his firing. The Federal Court upheld the IRB's decision to refuse protection. In addressing the issue of whether it was feasible to access the IFA, the Federal Court states:

> It was submitted that it would be unreasonable to have Mr. Peer Muhammed relocate in the east because, although not as ravaged as other parts of the country in the civil war, there are unexploded landmines and the infrastructure leaves much to be desired. However, this is a situation facing millions of Sri Lankans, Sinhalese and Tamils alike, be they Buddhist, Hindu, Christian or Muslim.[261]

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[254] It may be true that framing these considerations under the second rung of the test, leaves room for assessing how they apply in the circumstances of the individual in question (and would be important for example, if a person was travelling with young children, or had a disability). However, assessing the objective accessibility of the IFA under the first rung, does not prohibit a more individualized assessment under the second rung, if it passes the first step of the two-fold test.

[255] Albeit, it warrants stating that many of the analyses were done under the "reasonableness" rung.

[256] *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, F.C.J. No. 2118 (C.A.) [Ranganathan].

[257] Thirunavukkarasu, supra note 236. For example, in the case of *Hashmat v. Canada (Minister of Citizenship and Immigration)* the Federal Court held that the Board Member had "…committed a series of fatal assumptions and unsustainable conclusions." Among the erroneous conclusions, the Board mischaracterized the documentary evidence, and did not address evidence that "…the applicant would have had to cross land mines, battle fields and the separate territories of highly unpredictable, brutal and suspicious warlords who extort bribes and kill with impunity." Further, it failed to address the difficulty of keeping one's political affiliations quiet while travelling over the sparsely populated northerly route via land, and unreasonably assumed that the claimant could access the IFA in Northern Afghanistan through the Uzbekistan border without any reliable documentary proof or regard for removal requirements under IRPA. See: *Hashmat v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5203 (FC) [Hashmat].

[258] *Kandiah v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1269 (T.D.) [Kandiah].

[259] Of those which did, the analysis was framed within the reasonableness analysis and weighed alongside other factors.

[260] This case was not part of the sample pulled for the empirical portion of this paper, however, as a recent case, it offers some insight on general trends. *Muhammed v. Canada (Citizenship and Immigration)*, 2012 FC 226 [Muhammed].

[261] Muhammed, *ibid.* at para 16.

The court's reasoning is flawed however. The risk does not have to be personalized to the claimant in the IFA to render it inaccessible. In fact, the question of whether an IFA is practically, safely or legally accessible will often require a review of the objective documentary evidence which applies to the IFA generally. It may very well be that the IFA identified in this case was accessible. This requires a thorough examination of the evidence however. The question of whether the risk is personalized or general, should not be a factor during this step of the analysis.

(2.) <u>Who is the agent of persecution?</u>

The second and third inquiry relate to the agent of persecution. Where the agent of persecution is the state, the Federal Court of Appeal has given some force to the proposition that a presumption against an IFA should apply. It has stated that,

> "…[o]nce an well-founded fear of persecution at the hands of the national army in a part of the country it controlled had been established, it was not reasonable to expect the respondent to seek refuge in another part of Sri Lanka controlled by the same army. Such a finding would require an evidentiary base which the learned trial judge correctly found to exist."[262]

Where the agent of persecution is a non-state agent, the focus of inquiry is on whether the claimant would be pursued in the IFA or whether state protection from the harm would be forthcoming there.

Three cases from the recent jurisprudence at the Federal Court offer some insight on how the issue is canvassed as it relates to non-state actors. First, in the case of *Lopez Martinez v. Canada (Citizenship and Immigration)*,[263] the Board found that the applicant, who had been raped and targeted for recruitment by the Mara Salvatrucha 13 in Tegucigalpa, could find an IFA in San Pedro Saula (the other major city in Honduras). In rendering its decision, the Federal Court pointed to the Board's faulty reasoning in saying that since there was a general risk of gang violence throughout the country, it was unlikely that the applicant would be specifically targeted in the IFA since she was not a particularly high profile person of interest. This was especially the case since:

> The evidence in the record is that the individual persecutors are members of a national gang, the maras, responsible for violent crime throughout the country. The two key cities for the maras are Tegucigalpa and San Pedro Sula yet the Board does not acknowledge the entrenchment of the gang in San Pedro Sula. In her testimony at the hearing, the applicant stated that maras gang members had been inquiring about her whereabouts as recently as one week prior to the hearing.

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[262] *Minister of Employment and Immigration v. Shaberdeen*, (1994) 167 N.R. 158 [1994], F.C.J. No. 371 (C.A.). See also: Thirunavukkarasu, *supra* note 236; and *Balasubramaniam v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1452 (T.D.) (QL). It is worth noting that the reasoning in *Shaberdeen* has been narrowly applied in some instances. In the case of *Rai v. Canada (Minister of Citizenship and Immigration)*, for example, the Federal Court distinguished the facts from those in *Shaberdeen*, saying that in *Shaberdeen* "…the Court held that once a well-founded fear of persecution at the hands of the national army in a part of the country it controlled had been established, it was not reasonable to expect the applicant to seek refuge in another part of Sri Lanka controlled by the same army. Here, the Board indicated that it was the Punjab police that had persecuted the applicant and that he therefore has an IFA in Delhi or Bombay." See: *Rai v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8259, at para 6.

[263] *Lopez Martinez v. Canada (Citizenship and Immigration)*, 2010 FC 550 [Lopez Martinez]. This case was contained in the empirical sample.

> This suggests that they had sustained interest to obtaining information about her whereabouts for close to a year and is evidence which contradicts the Board's assertion that the maras would not sustain interest in locating her. The applicant also testified that the gang targets those who refuse to join with revenge killings and informed the Board that she had witnessed this kind of revenge violence through the murder of her neighbour who had refused to join the maras. Furthermore, it was the applicant's assertion that the maras would persecute her upon return despite relocation to another city.[264]

The failure to consider the national scope of the Maras, their activities in the proposed IFA, their sustained interest in the applicant one year later, and the evidence of revenge killings against individuals who chose not to join them, was not appropriately canvassed in the underlying decision. The court found that these considerations were important to account for in determining the relevance of the IFA, and remitted the matter back for reconsideration. This analysis by the Federal Court is very much in line with the principles of UNHCR's IFA Guidelines. Namely, where a non-state actor is the agent of persecution, the analysis should focus on the likelihood of the claimant being pursued in the IFA or whether adequate safety can be sought there.

Second, in the case of *Romo Gomez v. Canada (Citizenship and Immigration)*,[265] there applicant identified two possible agents of persecution, who could be responsible for threatening phone calls and a roadside ambush: her husband's former employer against whom a judgement of wrongful dismissal was obtained, or the "Aladro" brothers from the Gulf Cartel against whom her husband had testified against in court. The Federal Court upheld the underlying decision, stating that:

> Ultimately, given the lack of evidence as to the identity of the applicants' alleged persecutors, given the evidence suggesting that the alleged persecutors were localized in the Tampico and Tamaulipas areas, and given the fact that the suggested IFAs are all large centres located at a considerable distance from Tamaulipas, I find that it was reasonable for the Board to conclude that there was no serious possibility of the applicants being persecuted or facing a risk to their lives or a risk of cruel and unusual treatment or punishment in Mexico City, Guadalajara, or Monterrey.[266]

Of note, the court upheld the board's decision not to canvass the reach of the Gulf Cartel or their ability to locate and pursue individuals throughout Mexico, since the agent of persecution was not clearly identified, and since the evidence linking the Gulf Cartel was tenuous.[267] This reasoning should be contrasted with that in the case of *Loya Dominguez v. Canada (Citizenship and Immigration)*.

In *Loya Dominguez v. Canada (Citizenship and Immigration)*[268], the Board held that the applicant could seek refuge in Mexico City, from the high ranking political candidate and affiliated cartels, who threatened his life. The Federal Court rejected the Board's reasoning, holding that too high a standard had been imposed in saying that the applicant bore the burden of showing "definitely," who the agent of

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[264] Lopez Martinez, *ibid.* at para 22.

[265] *Romo Gomez v. Canada (Citizenship and Immigration)*, 2011 FC 612, at para 35 [Romo Gomez]. This case was contained in the empirical sample.

[266] Romo Gomez, *ibid.* at para 35.

[267] Romo Gomez, *supra* note 265.

[268] *Loya Dominguez v. Canada (Citizenship and Immigration)*, 2011 FC 1041 [Loya Dominguez]. This case was not part of the cases pulled for the empirical compilation.

persecution was. Rather, the applicant "merely had to establish, on a balance of probabilities, a serious possibility of being persecuted in Mexico City by that agent of persecution [citation omitted]."[269] The applicant had met the burden and,

> [i]t was unreasonable for the Board to fail to consider this evidence, together with: (i) the alleged links between the police in Mexico City and the La Linea/Los Zetas criminal network; and (ii) the circumstantial evidence that supported Mr. Loya Dominguez's fear of persecution and future torture at the hands of that criminal network on grounds that at least in part related to his political opinions.[270]

In sum, a risk of persecution in the proposed IFA had been established on a balance of probabilities thus rending the IFA not applicable to the case at bar.

Romo Gomez and *Loya Dominguez* evidence the importance of not overly emphasizing the IFA analysis on the agent of persecution. It will often be important to determine the agent of persecution in terms of assessing the risk of persecution overall. It may also be necessary to establish the agent of persecution in determining whether the proposed IFA would offer meaningful safety, or whether the claimant is likely to be pursued in the IFA. However, these are two separate analyses and decision makers should be weary of imposing an overly restrictive threshold for establishing the agent of persecution. Once a risk of persecution is established, the analysis should turn to whether the proposed IFA would offer meaningful safety.[271]

(3.) Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation?

With respect to the last inquiry, regarding whether a person would be exposed to a risk of persecution or "other serious harm upon relocation," the Federal Court of Canada has expressly rejected the denial of "basic and fundamental human rights" as a reason for denying the application of an IFA, opting for a standard of "persecution" instead.[272] This approach however, is not in line with that espoused in the IFA Guidelines. The Guidelines do not restrict the application of this branch of the test to situations of persecution. In fact, they clearly point out the need to examine complementary bases of protection in assessing the risk of other serious harm in the proposed IFA. Paragraph 20 of the Guidelines states that:

> In addition, a person with an established fear of persecution for a 1951 Convention reason in one part of the country cannot be expected to relocate to another area of serious harm. If the claimant would be exposed to a new risk of serious harm, including a serious risk to life, safety, liberty or health, or one of serious discrimination, an internal flight or relocation alternative does not arise, irrespective of whether or not there is a link to one of the Convention grounds. The

[269] Loya Dominguez, *ibid.* at para 22.

[270] Loya Dominguez, *supra* note 268 at para 25.

[271] It bears mentioning that the Convention does not impose specific requirements respecting who the agent of persecution is. Paragraph 65 of the UNHCR Handbook states that "[p]ersecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned." In Ward, the Supreme Court of Canada affirmed that direct state participation or state complicity in the persecution is not necessary; non-state actors can be the agent of persecution. See: UNHCR Handbook, *supra* note 89 at para 65; and Ward, *supra* note 92.

[272] Rasaratnam, *supra* note 235 at para 8.

> assessment of new risks would therefore also need to take into account serious harm generally covered under complementary forms of protection. [Citations omitted; emphasis added.][273]

It is important to account for the harm which might be suffered under complementary bases of protection in an examination of one's risk in the proposed IFA. Violations of basic and fundamental human rights would thus, be relevant considerations. By restricting the analysis to risk of persecution under the Convention refugee definition, the viability and indeed, the very relevance of an IFA may not be appropriately canvassed.[274]

d.) The Reasonableness Analysis:

(i.) International Norms & Best Practices:

The second prong of the test is derived directly from the "reasonableness" requirement imposed in the UNHCR Handbook at paragraph 91.[275] The IFA Guidelines elaborate on the best way to frame the analysis:

> *Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?* If not, it would not be reasonable to expect the person to move there. [Italics in original.][276]

The Guidelines provide further direction on how the concept of "reasonable" should be interpreted:

> It is not an analysis based on what a hypothetical "reasonable person" should be expected to do. The question is what is reasonable, both subjectively and objectively, given the individual claimant and the conditions in the proposed internal flight or relocation alternative.
> …
> In answering this question, it is necessary to assess the applicant's personal circumstances, the existence of past persecution, safety and security, respect for human rights, and possibility for economic survival. [Emphasis added.][277]

Thus, in engaging in the second prong of the IFA inquiry, decision makers should have regard for any undue hardship that may be imposed in seeking the IFA, along with what may be both subjectively and objectively reasonable in light of the circumstances of the claim.

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[273] IFA Guidelines, *supra* note 167 at para 20.

[274] As anticipated by the IFA Guidelines, there is a risk of finding an IFA viable simply because a link to one of the Convention grounds cannot be established in the IFA. A comparison of the *Onyenwe* and *Muhammed* cases examined in the section below, exemplify this. Refer to the following section "d.) The Reasonableness Analysis" and in particular, pages 72-73 which discuss the cases of *Onyenwe* and *Muhammed*.

[275] It states that a person should not be excluded from protection under the IFA principle, "…if under all the circumstances it would not have been reasonable to expect him to do so." Refer above where the full paragraph is reproduced. UNHCR Handbook, *supra* note 89 at para 91.

[276] IFA Guidelines, supra note 167 at para 7.

[277] IFA Guidelines, supra note 167 at para 23.

(ii.) Canadian Jurisprudence:

As outlined above, the Federal Court of Appeal affirmed that IFA examinations had a reasonableness component to the inquiry.[278] The contents of the reasonableness requirement was extensively canvassed by the Court of Appeal in *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*. Their extensive direction bears reproduction here:

> The internal flight alternative… requires a finding that the claimant can reasonably and without undue hardship find, in his own country, a secure substitute home away from the place where he was or may be prosecuted.[279]
>
> This test is a flexible one, that takes into account the particular situation of the claimant and the particular country involved. This is an objective test and the onus of proof rests on the claimant on this issue, just as it does with all the other aspects of a refugee claim. Consequently, if there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselves of it unless they can show that it is objectively unreasonable for them to do so.
>
> Let me elaborate. It is not a question of whether in normal times the refugee claimant would, on balance, choose to move to a different, safer part of the country after balancing the pros and cons of such a move to see if it is reasonable. Nor is it a matter of whether the other, safer part of the country is more or less appealing to the claimant than a new country. Rather, the question is whether, given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere. Stated another way for clarity, the question to be answered is, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?
>
> An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. [Emphasis added.] [280]

The inquiry into any undue hardship that may be suffered in obtaining the particular IFA in question, is very much in line with UNHCR's IFA Guidelines. While the court outlines that the test is an objective standard, it does leave room for subjective analysis in stating that the test is flexible and that it should account for the both the claimant's situation and that of her country of origin. Thus, this objective test which accounts for the subjective context, also appears to be in line with the IFA Guidelines.

The Federal Court has outlined a number of factors for consideration in accounting for the situation of the claimant and the country of origin involved. Among these include: the claimant's age,[281] mental health

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[278] Rasaratnam, *supra* note 235. The Federal Court of Appeal has held that failure to undergo the reasonableness analysis in an IFA examination constitutes a reviewable error. See: Nisamov v. Canada *(Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 805.

[279] Ahmed v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 718 (C.A.).

[280] Thirunavukkarasu, supra note 236.

[281] See the cases of *Elmi v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 336 (T.D.) where the claimant was a child, and *Ramanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8469 (FC) where the claimant was elderly and dependant on his children in Canada.

considerations,[282] languages spoken,[283] employment prospects in the IFA,[284] clan membership,[285] separation from any children,[286] relatives in the IFA,[287] difficulties in travelling to the IFA with children or other vulnerable persons,[288] prior residence in the IFA,[289] difficulty of finding residence in the IFA,[290] geography of the country,[291] the refugee status of any immediate family members in Canada,[292] and other considerations evidencing serious human rights violations.[293] While none of these factors is determinative and an assessment of all considerations should made with relation to the specific facts of each case, the inclusion of such issues in the deliberation of an IFA's reasonableness, are in the spirit and text of the IFA Guidelines.

A recent case among those pulled for the empirical analysis offers some insight on how the courts take account for the assessment of reasonability under the second branch of the IFA test. In the case of *Onyenwe v. Canada (Citizenship and Immigration)*,[294] the Federal Court overturned the underlying refugee decision based on what it identified as a faulty understanding of an IFA's viability. The applicant had tendered evidence to the Board citing the large scale forcible displacement of residents in Abuja (the proposed IFA), and particularly that of "non-indigenes." In its decision, the Federal Court ruled that non-consideration of this evidence amounted to a reviewable error:

> I am troubled by the fact that the Board did not address the significant evidence put forth in the document cited by the applicant. Though I agree with the respondent that the applicant's submissions did not explain how generalized issues of internal displacement due to inter-ethnic violence would affect him personally, the excerpt cited, in my view, points to specific problems facing new arrivals to Abuja, including "violence by heavily-armed security agents". The existence of such violence could have the potential to meet the high threshold set out in *Ranganathan,* given that it could "jeopardize the life and safety" of the applicant. I find that this evidence was pertinent to the consideration of whether it would be objectively reasonable for the applicant to

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[282] Cepeda-Gutierrez, *supra* note 144; *Carragena v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 18; and *Omekam v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 401, 2006 FC 331 (F.C.).

[283] *Abubakar v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 887 (T.D.) [Abubakar].

[284] Abubakar, *ibid*.

[285] Abubakar, *supra* note 283.

[286] *Sooriyakumaran v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1402 (T.D.) [Sooriyakumaran]; *Calderon v. Canada (Minister of Citizenship and Immigration)*, [2010] F.C.J. No. 297; and *Ramachanthran v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 878.

[287] This issue was examined by the Federal Court of Appeal and while they did outline that the lack of family was a consideration, they noted that it was not determinative and reiterated that the threshold of hardship for the purposes of this test, was a high one. See: Ranganathan, *supra* note 256.

[288] Sooriyakumaran, *supra* note 286; and Hashmat, *supra* note 257.

[289] *Tharmalingam v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 411 (T.D.).

[290] Abubakar, *supra* note 283. This includes the legal grounds to reside there. Per: Kandiah, *supra* note 257.

[291] See the case of *Annan v. Canada (Minsiter of Citizenship and Immigration)*, [1995] F.C.J. No. 1038 (T.D.) for example where the small size of the country was seen as being a factor in the unviability of the IFA.

[292] Sooriyakumaran, *supra* note 286.

[293] For example, extortions, arbitrary arrest, and the requirement to register with state authorities have been deemed to constitute important considerations in assessing the reasonableness of the IFA. See: *Sinnasamy v. Canada (Minister of Citizenship and Immigration*, [2008] F.C.J. No. 77; and Thirunavukkarasu, supra note 236.

[294] *Onyenwe v. Canada (Citizenship and Immigration)*, 2011 FC 604 [Onyenwe]. This case was contained in the empirical compilation.

attempt to move to Abuja, and that it was sufficiently contradictory to the Board's conclusion regarding the conditions in Abuja that the Board should have mentioned why it did not find this evidence to be persuasive. The decision on the second branch of the test was therefore unreasonable. [Citation omitted.]"[295]

The court's reasoning above is important for two reasons. First, it demonstrates and highlights the importance of keeping undue hardship the central focus of the analysis. Second, it emphasizes the importance for decision makers to reference all factors under consideration in both their assessment and their decisions.

It is interesting to compare the reasoning in *Onyenwe* with that in *Muhammed*, referenced above.[296] In *Muhammed* the court determined that even though the IFA was affected by the civil war in Sri Lanka, had unexploded landmines and infrastructure issues, the dangers were generalized in nature affecting "millions of Sri Lankans, Sinhalese and Tamils alike, be they Buddhist, Hindu, Christian or Muslim." In *Onyenwe,* the court acknowledged that while the generalized risk of internal displacement was not specific to the applicant himself, a move to the IFA could potentially jeopardize his life and safety, and was thus, an important consideration in determining whether it was objectively reasonable to expect him to move there. Indeed, UNHCR's IFA Guidelines affirm that the question of reasonableness should be "both subjectively and objectively" undertaken. Further, while the question of persecution requires an individualized risk, it is submitted that the question of an IFA's reasonableness need not establish an individualized risk. This is supported by paragraph 20 of the IFA Guidelines quoted above, which explicitly provides that where a claimant would be exposed to a risk of serious harm, "an internal flight or relocation alternative does not arise, irrespective of whether or not there is a link to one of the Convention grounds. [Emphasis added.]"[297]

V. CONCLUSION:

This paper has been an ambitious foray into jurisprudential developments at the Federal Court. It has not purported to offer a comprehensive picture of developments or directions, but rather of snapshot of trends prior to the implementation of refugee reform, to be compared to international norms more broadly. There is still much that warrants further inquiry and analysis. While this paper focused on the most common issues which arose among the cases of interest in the empirical compilation, it would be worthwhile to examine cases citing the adequacy of reasons, incompetent counsel, and ignored evidence, particularly at the stage of first instance decision making, in light of the high rates of remittance by the Federal Court. Further to this, it would be interesting to canvass Canadian approaches to such issues as generalized risk, in light of the growing discussion at the international level.[298] Also, specific trends discovered in the empirical compilation could form interesting areas for further analysis. The high incidence of credibility related issues among Chinese claimants, the high rates of remittance for claims involving Albanian, Nigerian and Sri Lankan nationals, the high rates of remittance on the issue of cumulative discrimination as it pertains to Roma cases, and/or the frequency with which state protection

[295] Onyenwe, *ibid.* at para 18.
[296] Muhammed, supra note 260.
[297] IFA Guidelines, *supra* note 167 at para 20.
[298] See for example: UNHCR, *Roundtable on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence*, 13 and 14 September 2012, online at: <http://www.unhcr.org/refworld/pdfid/50d32e5e2.pdf>.

arises in Roma based cases, could all form interesting areas for further analysis.[299] Even among the specific issues which were canvassed here (namely, credibility, state protection, and internal flight alternative), it may be interesting to more systematically review all the cases which wrestled with these issues within a given time frame, to more specifically and clearly identify potential points of contention in underlying decisions, and weigh specific sub-issues alongside international approaches.

It seems likely that Canadian jurisprudence surrounding refugee protection will be expanded in the coming years. Existing approaches and principles may have to be reassessed in light of wholesale changes to Canada's refugee protection system. Assessments of credibility for example, will have to account for shorter preparation timelines and a potentially higher incidence of unrepresented claimants. The expansion of jurisprudence also offers an opportunity to clarify Canadian approaches and more clearly bring them in line with international norms. Canadian approaches to state protection for example, may be able to gain insights from other jurisdictions and international normative developments.

As Canada moves forward to the next chapter of its refugee determination system, the stage is set for Canadian courts, first level decision makers, and the Refugee Appeals Division (RAD) to give force to legislative directives. Such interpretations should however, keep Canada's obligations under the Refugee Convention foremost in mind.

[299] To be clear, the study did not find this in Roma cases per say, but among countries which were likely to evidence Roma based claims.

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ANNEX A: Listing of Issues Which Were Flagged in the Empirical Compilation

The compiled listing of issues is as follows (noted in bullet points):

Well Founded Fear:

- Subjective Fear
    - Safe Third Country[300]
- Objective Fear

Of Being Persecuted:

- Cumulative Discrimination
- Punishment[301]
- Agent of Persecution
- Generalized Risk
- Economic Migrant[302]

For Reasons of… (Nexus Element):

- Race
- Religion
- Nationality
- Political Opinion
- Particular Social Group (PSG)
    - Gender
    - Sexual Orientation
    - Family
    - Other

Is Outside the Country of Nationality…. [or] Former Habitual Residence:

- Stateless Person[303]
- Dual/Multiple Nationality

[300] Students were asked to flag cases where transit through a "safe third country" (STC) was specifically raised however, they were advised that there may be other reasons why a subjective fear is not believed to exist.

[301] That is, prosecution versus persecution.

[302] Although this was noted as an issue by the consultant, only one case flagged "economic migrant" as an issue.

[303] Although statelessness was not identified as an issue in any of the cases examined in the sample, it is listed here to highlight the fact that cases were read with the issue of statelessness in mind. One of the cases examined did however, concern a 'stateless' Palestinian individual.

Unable or Unwilling to Avail Oneself of the Protection of his Country:

- State Protection
- Internal Flight Alternative (IFA)

Other Elements of the Definition:

- Sur Place Claims
- Credibility[304]
- Exclusion
- Cessation[305]
- Change of Country Conditions
- Vulnerable Person[306]
- s.97[307]

Other Common Administrative Legal Issues Related to Procedural Fairness: [308]

- Incompetent Counsel
- Adequacy of Reasons
- Ignored Evidence
- Bias
- Adjournment /Postponement

PRRA Specific Issues:[309]

- Oral Review
- New Evidence

[304] This term encompassed issues with the establishment of identity and/or (over)reliance on port of entry notes.

[305] Although cessation hearings was not examined per say, the issue of cessation did come up in a few of the cases examined.

[306] This term was used to flag issues related to being a "vulnerable person", such as the nomination of a designated representative and/or use of the IRB Chairperson's Guidelines.

[307] While s.97 does not find its origins within the Refugee Convention per say (but rather, the UN Convention Against Torture), it is an important part of the consolidated definition within Canadian law and international approaches to protection. Section 97(1) of IRPA reads as follows: "[a] person in need of protection is a person in Canada whose removal to their country… of nationality… 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…." IRPA, *supra* note 16 at s.97.

[308] It bears noting that all of the issues under this heading were added after the empirical compilation had started (versus at the beginning), and although an effort was made to review all entries with an eye to consistently flagging these issues, some may have slipped through the cracks.

[309] Similar to the footnote above, these topics were added after the empirical compilation had started.

Other Common Issues Identified by Students While Compiling Data:[310]

- Compelling Reasons[311]
- Lack of Nexus
- Mootness
- Best Interests of the Child
- Specialized Knowledge
- Document Disclosure

NOTE: Although other issues were identified and cited in the compilation, they have not been listed above if the issue came up in only one case.[312]

[310] These issues were noted by the students themselves as they were working at compiling the data, as distinct from the other issues on the listing. The listing of these issues was not shared with the other students in a comprehensive way (in light of the timelines for completion), and an effort was not made to review all cases to ensure that these issues were consistently flagged (in a manner noted above for the two other headings). The cases where these issues were flagged have been reviewed however, to ensure that the terms have been used most appropriately to describe the issues in the case. The reader should also note that where a non-listed issue was identified but did not come up more than once, it has not been noted on this listing. (These have been flagged in the compiled listing of issues in the Annexes to this report.)

[311] This refers to the ground articulated in s.108(4) of the Immigration and Refugee Protection Act (IRPA) which reads: "[p]aragraph (1)(*e*) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment." IRPA, *supra* note 16 at s.108(4).

[312] As stated in the footnotes above however, these issues have been noted in the comprehensive tables listing the prevalence of issues in the Annexes to this report.

ANNEX B: Issues Which Appeared Overall in Refugee and PRRA Decisions

Rank	Issues Which Appeared Overall	Total Figure
1.	Credibility[313]	342
2.	State Protection	238
3.	Internal Flight Alternative (IFA)	100
4.	Ignored Evidence	81
5.	Subjective Fear[314]	75
6.	Generalized Risk	53
7.	s.97	49
8.	Cumulative Discrimination	35
9.	Particular Social Group (PSG)[315]	28
10.	PSG – Gender	27
11.	Exclusion	26
12.	Objective Fear	25
13.	Religion	23
14.	Political Opinion	20
	Vulnerable Person	20
15.	Change of Country Conditions	18
16.	Adequacy of Reasons	17
17.	Sur Place Claim	15
18.	Race	10
19.	Agent of Persecution	8
	Punishment	8
	Adjournment / Postponement	8
20.	Incompetent Counsel	7
	Oral Hearing	7
21.	Bias	6
	Dual/Multiple Nationality	6
	New Evidence	6
22.	No Nexus	5

[313] Of these, 3 were specifically flagged to relate to issues surrounding identity. Since the students weren't asked to specifically flag issues of identity, there may be others which weren't explicitly flagged.

[314] Of these, 11 identified safe third county as an issue.

[315] Students were asked to flag gender, family and sexual orientation separately. As such, the figures cited here do not reflect these sub-categories. Those sub-categories are cited as separate entries. If one was to include these three sub-categories within the larger category of PSG, the figure would be 63. The 28 cases cited here reflect a combination of those groups who were sub-categorized as "other" (numbering 18 in total), or whose sub-categories were unidentified (numbering 10 in total). Further, it may be worth noting that of the 28 cases noted here, 6 were specifically identified as Roma based claims, 2 related to blood feuds and 1 identified 'young men' as the group in question. As the students weren't asked to specifically flag these three groups, the figure within the sample may actually be higher (as some students may not have flagged these specific sub-categories).

Rank	Issues Which Appeared Overall	Total Figure
	PSG – Family	5
	Compelling Reasons[316]	5
23.	PSG – Sexual Orientation	3
	Specialized Knowledge	3
	Best Interests of the Child	3
	Cessation	3
	Mootness	3
	Adequacy of Reasons	3
	Document Disclosure	3
24.	Postponement	2
25.	Insufficient Evidence	1
	Delay (in processing application)	1
	Inadmissibility	1
	Economic Migrant	1
	New Issues[317]	1
	Nationality[318]	1
	Certification of Question	1
	Burden of Proof	1
	Surrogate Citizenship in Third Country	1
	Due Process (submission of documents after hearing)	1
	Joining of Claims	1
	Interpretation	1
	Previous Refugee Status	1
	Country of Asylum Class	1
	Faulty Reasoning	1

[316] This refers to the ground articulated in s.108(4) of the Immigration and Refugee Protection Act (IRPA) which reads: "[p]aragraph (1)(*e*) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment." IRPA, *supra* note 16 at s.108(4).

[317] This case concerned an issue of procedural fairness in asking whether the Board Member erred in basing its findings on an issue not identified at the hearing. See: *Velez v. Canada (Minister of Citizenship & Immigration)* 2010 FC 923.

[318] Nationality, as it relates to the nexus portion of the definition.

ANNEX C: Top Issues Where the Federal Court AGREED with the Underlying Application's Analysis[319]

Rank	Issues Where Agreed	Total Figure
1.	Credibility	219
2.	State Protection	134
3.	Internal Flight Alternative (IFA)	68
4.	Subjective Fear[320]	52
5.	Generalized Risk	35
6.	Ignored Evidence	33
7.	s.97	32
8.	Cumulative Discrimination	21
9.	Objective Fear	19
	Exclusion	19
10.	Particular Social Group (PSG)[321]	17
11.	PSG – Gender	16
12.	Vulnerable Person	13
	Religion	13
13.	Change of Country Conditions	12
14.	Sur Place Claim	10
	Political Opinion	10
15.	Race	8
16.	Punishment	7
17.	Agent of Persecution	6
18.	Dual/Multiple Nationality	5
	Oral Hearing	5
	Compelling Reasons[322]	5
19.	PSG – Family	4
	New Evidence	4

[319] For the definition of "disagreement" in this context, please see above at footnote 24.

[320] Of these, 8 identified safe third country as an issue.

[321] Students were asked to flag gender, family and sexual orientation separately. As such, the figures cited here do not reflect these sub-categories. Those sub-categories are cited as separate entries. If one was to include these three sub-categories within the larger category of PSG, this figure would be 38. The 17 cases cited here reflect a combination of those groups who were sub-categorized as "other" (numbering 9 in total), or whose sub-categories were unidentified (numbering 8 in total). Further, it may be worth noting that of the 17 cases noted here, 3 were specifically identified as Roma based claims, and 1 identified 'young men' as the group in question. As the students weren't asked to specifically flag these two groups, the figure within the sample may actually be higher (as some students may not have flagged these specific sub-categories).

[322] This refers to the ground articulated in s.108(4) of the Immigration and Refugee Protection Act (IRPA) which reads: "[p]aragraph (1)(*e*) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment." IRPA, *supra* note 16 at s.108(4).

Rank	Issues Where Agreed	Total Figure
	Bias	4
	No Nexus	4
	Adjournment / Postponement	4
20.	Mootness	3
	Adequacy of Reasons	3
21.	Best Interests of the Child	2
	Incompetent Counsel	2
	Specialized Knowledge	2
22.	PSG – Sexual Orientation	1
	Cessation	1
	Insufficient Evidence	1
	Delay (in processing application)	1
	Inadmissibility	1
	Economic Migrant	1
	Document Disclosure	1
	New Issues[323]	1

[323] This case concerned an issue of procedural fairness in asking whether the Board Member erred in basing its findings on an issue not identified at the hearing. See: *Velez v. Canada (Minister of Citizenship & Immigration)* 2010 FC 923.

Annex D: Top Issues Where the Federal Court DISAGREED with the Underlying Application's Analysis[324]

Rank	Issues Where Disagreed	Total Figure
1.	Credibility[325]	123
2.	State Protection	104
3.	Ignored Evidence	48
4.	Internal Flight Alternative (IFA)	32
5.	Subjective Fear[326]	23
6.	Generalized Risk	18
7.	Adequacy of Reasons	17
	s.97	17
8.	Cumulative Discrimination	14
9.	Particular Social Group (PSG)[327]	11
	PSG – Gender	11
10.	Religion	10
	Political Opinion	10
11.	Exclusion	7
	Vulnerable Person	7
12.	Objective Fear	6
	Change of Country Conditions	6
13.	Sur Place Claim	5
	Incompetent Counsel	5
14.	Adjournment / Postponement	4
15.	PSG – Sexual Orientation	2
	Bias	2
	Cessation	2
	Agent of Persecution	2
	Race	2
	New Evidence	2
	Oral Hearing	2

[324] For the definition of "disagreement" in this context, please see above at footnote 24.

[325] Of these, 3 were specifically flagged as related to issues surrounding identity. As the students weren't asked to specifically flag issues of identity, there may be others which weren't explicitly flagged.

[326] Of these, 3 specifically identified issues related to safe third county.

[327] Students were asked to flag gender, family and sexual orientation separately. As such, the figures cited here do not reflect these sub-categories. Those sub-categories are cited as separate entries. If one was to include these three sub-categories within the larger category of PSG, this figure would be 25. The 11 cases cited here reflect a combination of those groups who were sub-categorized as "other" (numbering 9 in total), or whose sub-categories were unidentified (numbering 2 in total). Further, it may be worth noting that of the 11 cases noted here, 3 were specifically identified as Roma based claims, and 2 related to blood feuds. As the students weren't asked to specifically flag these two groups, the figure within the sample may actually be higher (as some students may not have flagged these specific sub-categories).

Rank	Issues Where Disagreed	Total Figure
	Document Disclosure	2
16.	PSG – Family	1
	Dual/Multiple Nationality	1
	Nationality[328]	1
	Punishment	1
	No Nexus	1
	Specialized Knowledge	1
	Certification of Question	1
	Burden of Proof	1
	Best Interests of the Child	1
	Surrogate Citizenship in Third Country	1
	Due Process (submission of documents after hearing)	1
	Joining of Claims	1
	Interpretation	1
	Previous Refugee Status	1
	Country of Asylum Class	1
	Faulty Reasoning	1

[328] Nationality, as it relates to the nexus portion of the definition.

Annex E: Compendium of Cases: 740 Cases of Interest Examined in the Empirical Compilation

Dt	Case Name	Citation
01/2010	Service v. Canada (Citizenship and Immigration)	2010 FC 47
01/2010	Dong v. Canada (Citizenship and Immigration)	2010 FC 55
01/2010	Gjelaj v. Canada (Citizenship and Immigration)	2010 FC 37
01/2010	Ampong v. Canada (Citizenship and Immigration)	2010 FC 35
01/2010	Malik v. Canada (Citizenship and Immigration)	2010 FC 60
01/2010	Madoui v. Canada (Citizenship and Immigration)	2010 FC 106
01/2010	Byaje v. Canada (Citzenship and Immigration)	2010 FC 90
01/2010	Sanchez Focil v. Canada (Citizenship and Immigration)	2010 FC 50
01/2010	Fernando v. Canada (Citizenship and Immigration)	2010 FC 76
01/2010	Vazquez Cardona v. Canada (Citizenship and Immigration)	2010 FC 57
01/2010	Ndabambarire v. Canada (Citizenship and Immigration)	2010 FC 1
01/2010	Islam v. Canada (Citizenship and Immigration)	2010 FC 71
01/2010	Singh v. Canada (Citizenship and Immigration)	2010 FC 58
01/2010	Butt v. Canada (Citizenship and Immigration)	2010 FC 28
01/2010	Pozos Martinex v. Canada (Citizenship and Immigration)	2010 FC 31
01/2010	Rana v. Canada (Citizenship and Immigration)	2010 FC 36
01/2010	Kaur v. Canada (Citizenship and Immigration)	2010 FC 59
01/2010	Canada (Public Safety and Emergency Preparedness) v. Baraniroobasingam	2010 FC 92
01/2010	Girmaeyesus v. Canada (Citizenship and Immigration)	2010 FC 53
02/2010	Kumarasamy v. Canada (Citizenship and Immigration)	2010 FC 203
02/2010	Nagaratnam v. Canada (Citizenship and Immigration)	2010 FC 204
02/2010	Dena Hernandez v. Canada (Citizenship and Immigration)	2010 FC 179
02/2010	Musleameen v. Canada (Citizenship and Immigration)	2010 FC 232
02/2010	Estrada Lugo v. Canada (Citizenship and Immigration)	2010 FC 170
02/2010	Duhanaj v. Canada (Citizenship and Immigration)	2010 FC 199
02/2010	Chernyak v. Canada (Citizenship and Immigration)	2010 FC 187
02/2010	Zaahtreh v. Canada (Citizenship and Immigration)	2010 FC 211
02/2010	Pereyra Aguilar v. Canada (Citizenship and Immigration)	2010 FC 216
02/2010	Caesar v. Canada (Citizenship and Immigration)	2010 FC 215
02/2010	Liv. v. Canada (Citizenship and Immigration)	2010 FC 205
02/2010	Barrera-Martinez v. Canada (Citizenship and Immigration)	2010 FC 185
02/2010	Mai v. Canada (Citizenship and Immigration)	2010 FC 192
02/2010	Perez Rocha v. Canada (Citizenship and Immigration)	2010 FC 195
02/2010	Anfalov. v. Canada (Citizenship and Immigration)	2010 FC 191
02/2010	Lin v. Canada (Citizenship and Immigration)	2010 FC 183
02/2010	Jiang v. Canada (Citizenship and Immigration)	2010 FC 222
02/2010	Frederic v. Canada (Citizenship and Immigration)	2010 FC 220
02/2010	Malik v. Canada (Citizenship and Immigration)	2010 FC 229
02/2010	Tran v. Canada (Public Safety and Emergency Preparedness)	2010 FC 175

Dt	Case Name	Citation
02/2010	Zhou v. Canada (Citizenship and Immigration)	2010 FC 186
02/2010	Katwaru v. Canada (Citizenship and Immigration)	2010 FC 196
02/2010	Emamgongo v. Canada (Citizenship and Immigration)	2010 FC 208
02/2010	Martinez Menendez v. Canada (Citizenship and Immigration)	2010 FC 221
02/2010	Marquez Alvarez v. Canada (Citizenship and Immigration)	2010 FC 197
03/2010	Bakandasi v. Canada (Citizenship and Immigration)	2010 FC 338
03/2010	Mata Diaz v. Canada (Citizenship and Immigration)	2010 FC 319
03/2010	Rigg v. Canada (Citizenship and Immigration)	2010 FC 341
03/2010	Sivapatham v. Canada (Citizenship and Immigration)	2010 FC 314
03/2010	Mercado v. Canada (Citizenship and Immigration)	2010 FC 289
03/2010	Wehbe v. Canada (Citizenship and Immigration)	2010 FC 312
03/2010	Chen v. Canada (Citizenship and Immigration)	2010 FC 282
03/2010	Kransiqi v. Canada (Citizenship and Immigration)	2010 FC 350
03/2010	Perez v. Canada (Citizenship and Immigration)	2010 FC 345
03/2010	Cao v. Canada (Citizenship and Immigration)	2010 FC 349
03/2010	Yu v. Canada (Citizenship and Immigration)	2010 FC 310
03/2010	Mekuria v. Canada (Citizenship and Immigration)	2010 FC 304
03/2010	Baptiste v. Canada (Citizenship and Immigration)	2010 FC 275
03/2010	Adel v. Canada (Citizenship and Immigration)	2010 FC 344
03/2010	James v. Canada (Citizenship and Immigration)	2010 FC 318
03/2010	Johnson v. Canada (Citizenship and Immigration)	2010 FC 311
04/2010	Yang v. Canada (Citizenship and Immigration	2010 FC 468
04/2010	Sarkarizi v. Canada (Citizenship and Immigration	2010 FC 484
04/2010	Kedelashvili v. Canada (Citizenship and Immigration	2010 FC 465
04/2010	Arevalo Pineda v. Canada (Citizenship and Immigration	2010 FC 454
04/2010	Damte v. Canada (Citizenship and Immigration	2010 FC 456
04/2010	Miramontes-Hernandez v. Canada (Citizenship and Immigration	2010 FC 469
04/2010	Klochek v. Canada (Citizenship and Immigration	2010 FC 474
04/2010	Precectaj v. Canada (Citizenship and Immigration	2010 FC 485
04/2010	Rivas Montanez v. Canada (Citizenship and Immigration	2010 FC 460
04/2010	Lopez Puerta v. Canada (Citizenship and Immigration	2010 FC 464
04/2010	Padilla Gamez v. Canada (Citizenship and Immigration	2010 FC 461
04/2010	Feng v. Canada (Citizenship and Immigration	2010 FC 476
04/2010	Hevia v. Canada (Citizenship and Immigration	2010 FC 472
04/2010	Gjuraj v. Canada (Citizenship and Immigration	2010 FC 483
04/2010	Igbinoba v. Canada (Citizenship and Immigration	2010 FC 446
04/2010	Higbogun v. Canada (Citizenship and Immigration	2010 FC 445
04/2010	Mukasi v. Canada (Citizenship and Immigration	2010 FC 463
04/2010	Guirguis v. Canada (Citizenship and Immigration)	2010 FC 431
04/2010	Gjoka v. Canada (Citizenship and Immigration)	2010 FC 426
04/2010	Shakil v. Canada (Citizenship and Immigration	2010 FC 473

Dt	Case Name	Citation
04/2010	Gonzalo Vallenilla v. Canada (Citizenship and Immigration)	2010 FC 433
04/2010	Gebre-Hiwet v. Canada (Citizenship and Immigration	2010 FC 482
04/2010	Nicolas v. Canada (Citizenship and Immigration	2010 FC 452
04/2010	Dunova v. Canada (Citizenship and Immigration	2010 FC 438
04/2010	Hernandez Fuentes v. Canada (Citizenship and Immigration	2010 FC 457
04/2010	Canto Rodriguez v. Canada (Citizenship and Immigration	2010 FC 462
05/2010	Prifti v. Canada (Citizenship and Immigration)	2010 FC 533
05/2010	Ram v. Canada (Citizenship and Immigration)	2010 FC 548
05/2010	Saifee v. Canada (Citizenship and Immigration)	2010 FC 589
05/2010	Dezameau v. Canada (Citizenship and Immigration)	2010 FC 559
05/2010	Awolope v. Canada (Citizenship and Immigration)	2010 FC 541
06/2010	Banya v. Canada (Citizenship and Immigration)	2010 FC 686
06/2010	Meneses Gonzalez v. Canada (Citizenship and Immigration)	2010 FC 691
06/2010	Ay v. Canada (Citizenship and Immigration)	2010 FC 671
06/2010	Saavedra Talavera v. Canada (Citizenship and Immigration)	2010 FC 670
06/2010	Ramirez Martin v. Canada (Citizenship and Immigration)	2010 FC 664
06/2010	Wei v. Canada (Citizenship and Immigration)	2010 FC 694
06/2010	Banda v. Canada (Citizenship and Immigration)	2010 FC 678
06/2010	Okafor v. Canada (Citizenship and Immigration)	2010 FC 651
06/2010	Ndoci v. Canada (Citizenship and Immigration)	2010 FC 698
06/2010	Perera v. Canada (Citizenship and Immigration)	2010 FC 699
06/2010	Kim v. Canada (Citizenship and Immigration)	2010 FC 720
06/2010	Jean v. Canada (Citizenship and Immigration)	2010 FC 674
06/2010	Padilla Ochoa v. Canada (Citizenship and Immigration)	2010 FC 683
06/2010	Taterski v. Canada (Citizenship and Immigration)(	2010 FC 660
06/2010	Nyayieka v. Canada (Citizenship and Immigration)	2010 FC 690
06/2010	Haque v. Canada (Citizenship and Immigration)	2010 FC 703
07/2010	Ayala Alvarez v. Canada (Minister of Citizenship & Immigration)	2010 FC 792
07/2010	Ezokola c. Canada (Citoyenneté et Immigration)	2010 CF 725
07/2010	Moreno Hernandez v. Canada (Minister of Citizenship & Immigration)	2010 FC 772
07/2010	Beltran Espinoza v. Canada (Minister of Citizenship & Immigration)	2010 FC 763
07/2010	Duitama Gomez v. Canada (Public Safety and Emergency Preparedness)	2010 FC 765
07/2010	Tranquino v. Canada (Minister of Citizenship & Immigration)	2010 FC 793
07/2010	Jimenez c. Canada (Ministre de la Citoyenneté & de l'Immigration)	2010 FC 727
07/2010	Perez Granados c. Canada (Ministre de la Citoyenneté & de l'Immigration)	2010 FC 732
07/2010	Durrant v. Canada (Citizenship and Immigration)	2010 FC 776
07/2010	Corzas Monjaras v. Canada (Minister of Citizenship & Immigration)	2010 FC 771
07/2010	Kallai c. Canada (Ministre de la Citoyenneté & de l'Immigration)	2010 FC 729
07/2010	Nam v. Canada (Minister of Citizenship & Immigration)	2010 FC 783
07/2010	Alvarez Cortes v. Canada (Minister of Citizenship & Immigration)	2010 FC 770
08/2010	Bukuru v. Canada (Minister of Citizenship & Immigration)	2010 FC 817

Dt	Case Name	Citation
08/2010	Lexine v. Canada (Minister of Citizenship & Immigration)	2010 FC 855
08/2010	Marzana Garcia v. Canada (Minister of Citizenship & Immigration)	2010 FC 812
08/2010	Zemo v. Canada (Citizenship and Immigration)	2010 FC 800
08/2010	Clermont v. Canada (Minister of Citizenship & Immigration)	2010 FC 848
08/2010	Persaud v. Canada (Minister of Citizenship & Immigration)	2010 FC 850
08/2010	Packinathan v. Canada (Minister of Citizenship & Immigration)	2010 FC 834
08/2010	Garcia Rivadeneyra v. Canada (Minister of Citizenship & Immigration)	2010 FC 845
08/2010	Hettige v. Canada (Minister of Citizenship & Immigration)	2010 FC 849
08/2010	Avila Diaz v. Canada (Minister of Citizenship & Immigration)	2010 FC 797
08/2010	Elimby Ngalle v. Canada (Minister of Citizenship & Immigration)	2010 FC 840
08/2010	Sayed v. Canada (Minister of Citizenship & Immigration)	2010 FC 796
08/2010	Rocque v. Canada (Minister of Citizenship & Immigration)	2010 FC 802
08/2010	Baykus v. Canada (Minister of Citizenship & Immigration)	2010 FC 851
08/2010	Gaymes v. Canada (Minister of Citizenship & Immigration)	2010 FC 801
08/2010	Sanchez c. Canada (Ministre de la Citoyenneté & de l'Immigration)	2010 CF 846
08/2010	Wang v. Canada (Minister of Citizenship & Immigration)	2010 FC 799
08/2010	Luc v. Canada (Minister of Citizenship & Immigration)	2010 FC 826
08/2010	Perez v. Canada (Minister of Citizenship & Immigration)	2010 FC 833
08/2010	Okito v. Canada (Minister of Citizenship & Immigration)	2010 FC 843
08/2010	Flores Campos v. Canada (Ministre de la Citoyenneté & de l'Immigration)	2010 FC 842
08/2010	Liu v. Canada (Minister of Citizenship & Immigration)	2010 FC 819
08/2010	Garcia Garcia v. Canada (Ministre de la Citoyenneté & de l'Immigration)	2010 FC 847
08/2010	Ortiz Garcia c. Canada (Ministre de la Citoyenneté & de l'Immigration)	2010 FC 804
09/2010	Cifuentes Bonilla v. Canada (Citizenship and Immigration)	2010 FC 889
09/2010	Lushnjani v. Canada (Citizenship and Immigration)	2010 FC 945
09/2010	Garcia Osorio v. Canada (Minister of Citizenship & Immigration)	2010 FC 907
09/2010	Aguirre v. Canada (Minister of Citizenship & Immigration)	2010 FC 916
09/2010	Serkhane c. Canada (Ministre de la Citoyenneté & de l'Immigration)	2010 FC 913
09/2010	Khakimov. v. Canada (Minister of Citizenship & Immigration)	2010 FC 909
09/2010	Ahmed v. Canada (Minister of Citizenship & Immigration)	2010 FC 908
09/2010	Ntone Sona v. Canada (Minister of Citizenship & Immigration)	2010 FC 961
09/2010	Tjavara v. Canada (Citizenship and Immigration)	2010 FC 960
09/2010	You v. Canada (Minister of Citizenship & Immigration)	2010 FC 936
09/2010	Hidalgo Carranza v. Canada (Ministre de la Citoyenneté & de l'Immigration)	2010 FC 914
09/2010	Ayranjyan v. Canada (Citizenship and Immigration)	2010 FC 902
09/2010	Guzman Hernandez v. Canada (Minister of Citizenship & Immigration)	2010 FC 953
09/2010	Borbon Marte v. Canada (Public Safety and Emergency Preparedness)	2010 FC 930
09/2010	Ting Ooi v. Canada (Minister of Citizenship & Immigration)	2010 FC 928
09/2010	Rudakubana v. Canada (Minister of Citizenship & Immigration)	2010 FC 940
09/2010	Yasmin v. Canada (Minister of Citizenship & Immigration)	2010 FC 946
09/2010	Kim v. Canada (Citizenship and Immigration)	2010 FC 962

Dt	Case Name	Citation
09/2010	Rivera Acosta v. Canada (Minister of Citizenship & Immigration)	2010 FC 976
09/2010	Montagner Perez v. Canada (Minister of Citizenship & Immigration)	2010 FC 947
09/2010	Pino Cruz v. Canada (Minister of Citizenship & Immigration)	2010 FC 929
09/2010	Velez v. Canada (Minister of Citizenship & Immigration)	2010 FC 923
10/2010	Rodriguez Gutierrez v. Canada (Citizenship and Immigration)	2010 FC 1010
10/2010	Ohaka v. Canada (Citizenship and Immigration)	2010 FC 1037
10/2010	Abdul Aziz v. Canada (Citizenship and Immigration)	2010 FC 1062
10/2010	Thiyagarajah v. Canada (Citizenship and Immigration)	2010 FC 1015
10/2010	Bors v. Canada (Citizenship and Immigration)	2010 FC 1004
10/2010	Kovacs v. Canada (Citizenship and Immigration)	2010 FC 1003
10/2010	Assaf v. Canada (Citizneship and Immigration)	2010 FC 1026
10/2010	Ayach v. Canada (Citizenship and Immigration)	2010 FC 1023
10/2010	Ralda Gomez v. Canada (Citizenship and Immigration)	2010 FC 1041
10/2010	Avilez Yanez v. Canada (Citizenship and Immigration)	2010 FC 1059
10/2010	Yoon v. Canada (Citizenship and Immigration)	2010 FC 1017
10/2010	Alfaka Alharazim v. Canada (Citizenship and Immigration)	2010 FC 1044
10/2010	Lemoine v. Canada (Citizenship and Immigration)	2010 FC 1031
10/2010	Kadjo v. Canada (Citizenship and Immigration)	2010 FC 1050
10/2010	Lin v. Canada (Citizenship and Immigration)	2010 FC 1020
10/2010	Ying v. Canada (Citizenship and Immigration)	2010 FC 1033
10/2010	Singh v. Canada (Citizenship and Immigration)	2010 FC 1032
10/2010	Castaneda Escate v. Canada (Citizenship and Immigration)	2010 FC 1052
10/2010	Parasi Aguirre v. Canada (Citizenship and Immigration)	2010 FC 1005
10/2010	Plaisimond v. Canada (Citizenship and Immigration)	2010 FC 998
10/2010	Shmagin v. Canada (Citizenship and Immigration)	2010 FC 1030
10/2010	Guzman Lopez v. Canada (Citizenship and Immigration)	2010 FC 990
10/2010	Plaisimond v. Canada (Citizenship and Immigration)	2010 FC 998
10/2010	Morales Gonzalez v. Canada (Citizenship and Immigration)	2010 FC 991
10/2010	Veles v. Canada (Citizenship and Immigration)	2010 FC 1006
10/2010	Catano v. Canada (Citizenship and Immigration)	2010 FC 1057
10/2010	Ospina v. Canada (Citizenship and Immigration)	2010 FC 1035
10/2010	Garcia Arias v. Canada (Citizenship and Immigration)	2010 FC 1029
10/2010	Jean v. Canada (Citizenship and Immigration)	2010 FC 1014
10/2010	Shpati v. Canada (Public Safety and Emergency Preparedness)	2010 FC 1046
10/2010	Toussaint v. Canada (Citizenship and Immigration)	2010 FC 1034
10/2010	Trejo Amador v. Canada (Citizeship and Immigration)	2010 FC 1012
10/2010	Kozyreva v. Canada (Citizenship and Immigration)	2010 FC 1013
11/2010	Ananda Kumara v. Canada (Citizenship and Immigration)	2010 FC 1172
11/2010	RAM v. Canada (Citizenship and Immigration)	2010 FC 1151
11/2010	Memari v. Canada (Citizenship and Immigration)	2010 FC 1196
11/2010	Abed v. Canada (Citizenship and Immigration)	2010 FC 1160

Dt	Case Name	Citation
11/2010	Suryanti v. Canada (Citizenship and Immigration)	2010 FC 1164
11/2010	Canada (Citizenship and Immigration) v. Xu	2010 FC 1145
11/2010	Albarahmeh v. Canada (Citizenship and Immigration)	2010 FC 1153
11/2010	Lopez v. Canada (Citizenship and Immigration)	2010 FC 1176
11/2010	Aguilar Soto v. Canada (Citizenship and Immigration)	2010 FC 1183
11/2010	Silva Fuentes v. Canada (Citizenship and Immigration)	2010 FC 1115
11/2010	Velasquez v. Canada (Citizenship and Immigration)	2010 FC 1201
11/2010	Owobowale v. Canada (Citizenship and Immigration)	2010 FC 1150
11/2010	Sefa v. Canada (Citizenship and Immigration)	2010 FC 1190
11/2010	Gabor v. Canada (Citizenship and Immigration)	2010 FC 1162
11/2010	Velez v. Canada (Citizenship and Immigration)	2010 FC 1114
11/2010	Rengifo v. Canada (Citizenship and Immigration)	2010 FC 1177
11/2010	Nava Flores v. Canada (Citizenship and Immigration)	2010 FC 1147
11/2010	Singh v. Canada (Citizenship and Immigration)	2010 FC 1161
11/2010	Cortes Martinez v. Canada (Citizenship and Immigration)	2010 FC 1200
11/2010	Deslandes v. Canada (Citizenship and Immigration)	2010 FC 1171
11/2010	Gomez Nieto v. Canada (Citizenship and Immigration)	2010 FC 1202
11/2010	Ortega Ortega v. Canada (Citizenship and Immigration)	2010 FC 1166
11/2010	Flores Dosantos v. Canada (Citizenship and Immigration)	2010 FC 1174
11/2010	Ngubeni v. Canada (Citizenship and Immigration)	2010 FC 1156
11/2010	Butt v. Canada (Citizenship and Immigration)	2010 FC 1170
11/2010	Baku v. Canada (Citizenship and Immigration)	2010 FC 1163
11/2010	Canada (Citizenship and Immigration) v. Huntley	2010 FC 1175
11/2010	Profete v. Canada (Citizenship and Immigration)	2010 FC 1165
11/2010	M.C.E v. Canada (Citizenship and Immigration)	2010 FC 1140
11/2010	Nelson v. Canada (Citizenship and Immigration)	2010 FC 1167
11/2010	Gilbert v. Canada (Citizenship and Immigration)	2010 FC 1186
12/2010	Khodabakhsh v. Canada (Citizenship and Immigration)	2010 FC 1340
12/2010	Cato v. Canada (Citizenship and Immigration)	2010 FC 1313
12/2010	Garcia Perez v. Canada (Citizenship and Immigration)	2010 FC 1275
12/2010	Han v. Canada (Citizenship and Immigration)	2010 FC 1258
12/2010	Hernandez Hernandez v. Canada (Citizenship and Immigration)	2010 FC 1323
12/2010	Dunkova v. Canada (Citizenship and Immigration)	2010 FC 1322
12/2010	Murati v. Canada (Citizenship and Immigration)	2010 FC 1324
12/2010	Ymeri v. Canada (Citizenship and Immigration)	2010 FC 1316
12/2010	Li v. Canada (Citizenship and Immigration)	2010 FC 1289
12/2010	Deji v. Canada (Citizenship and Immigration)	2010 FC 1298
12/2010	Karayel v. Canada (Citizenship and Immigration)	2010 FC 1305
12/2010	Lipdjio v. Canada (Citizenship and Immigration)	2011 FC 28
12/2010	A.B. v. Canada (Citizenship and Immigration)	2010 FC 1332
12/2010	Da Souza v. Canada (Citizenship and Immigration)	2010 FC 1279

Dt	Case Name	Citation
12/2010	Angel Gonzalez v. Canada (Citizenship and Immigration)	2010 FC 1292
12/2010	Cho v. Canada (Citizenship and Immigration)	2010 FC 1299
12/2010	Ched v. Canada (Citizenship and Immigration)	2010 FC 1338
12/2010	Rodriguez Coronado v. Canada (Citizenship and Immigration)	2010 FC 1334
12/2010	Duran v. Canada (Citizenship and Immigration)	2010 FC 1271
12/2010	Matano v. Canada (Citizenship and Immigration)	2010 FC 1290
12/2010	Dion John v. Canada (Citizenship and Immigration)	2010 FC 1283
12/2010	Rodriguez Moreno v. Canada (Citizenship and Immigration)	2010 FC 1273
12/2010	Park v. Canada (Citizenship and Immigration)	2010 FC 1269
12/2010	Zupko v. Canada (Citizenship and Immigration)	2010 FC 1319
12/2010	Cadena Ramirez v. Canada (Citizenship and Immigration)	2010 FC 1276
12/2010	Cervenakova v. Canada (Citizenship and Immigration)	2010 FC 1281
12/2010	Yang v. Canada (Citizenship and Immigration)	2010 Fc 1274
12/2010	Chavez v. Canada (Citizenship and Immigration)	2010 FC 1280
12/2010	Hernandez Gutierrez v. Canada (Citizenship and Immigration)	2010 FC 1320
12/2010	Seo v. Canada (Citizenship and Immigration)	2010 FC 1262
12/2010	Ochoa Galeano v. Canada (Citizenship and Immigration)	2010 FC 1297
12/2010	Sugiarto v. Canada (Citizenship and Immigration)	2010 FC 1326
12/2010	Robinson v. Canada (Citizenship and Immigration)	2010 FC 1259
01/2011	Gomes Sousa v. Canada (Citizenship and Immigration)	2011 FC 63
01/2011	Malocaj v. Canada (Citizenship and Immigration)	2011 FC80
01/2011	Ishaku v. Canada (Citizenship and Immigration)	2011 FC 44
01/2011	Garcia Ramirez v. Canada (Citizenship and Immigration)	2011 FC95
01/2011	Hippolyte v. Canada (Citizenship and Immigration)	2011 FC 82
01/2011	Gonzalez Leon v. Canada (Citizenship and Immigration)	2011 FC 34
01/2011	Sanchez Rovirosa v. Canada (Citizenship and Immigration)	2011 FC 48
01/2011	Galinkina v. Canada (Citizenship and Immigration)	2011 FC 36
01/2011	Anthonipillai v. Canada (Citizenship and Immigration)	2011 FC 66
01/2011	Umubyeyi v. Canada (Citizenship and Immigration)	2011 FC 69
01/2011	Kumar v. Canada (Citizenship and Immigration)	2011 FC 45
01/2011	Soto v. Canada (Citizenship and Immigration))	2011 FC 98
01/2011	Aguilar Zacarias v. Canada (Citizenship and Immigration)	2011 FC 62
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